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APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR REVISIONS TO 976 TARIFF	§ § §	DOCKET NO. 8030

December 21, 1988

Examiner's Report and Supplemental Examiner's Report adopted as modified, and application granted.

[1] JURISDICTION--GENERAL POWERS
DEREGULATION

The Commission is not required to pervasively regulate every aspect of the services and operation of utilities. (p. 1299)

[2] JURISDICTION--GENERAL POWERS
DEREGULATION

The Commission's broad discretion under PURA includes the power not to regulate operations and services it might regulate, according to its perceptions of the public interest. (p. 1299)

[3] DEREGULATION

PURA requires neither Commission regulation of every detail of a utility's operations and services nor a finding of "non-utility" character to support non-regulation. (p. 1300)

[4] DEREGULATION

Applicant allowed to arrange for provision of billing and collection functions for information delivery services outside the regulatory framework. (p. 1300)

[5] DEREGULATION

Billing and collection for information delivery services is neither a "pure" telecommunications service nor an indispensable service, and may be severed, for regulatory purposes, from the message transport aspect of the service. (p. 1300)

[6] JURISDICTION--GENERAL POWERS
MISCELLANEOUS--OTHER

That a utility and the Commission share common goals does not make the utility's action in pursuit of that goal that of the State. (p. 1305)

[7] JURISDICTION--GENERAL
MISCELLANEOUS--OTHER

Commission found not to have encouraged or coerced utility to deny access to any class of information delivery messages or sponsors. (p. 1305)

[8] JURISDICTION--GENERAL
MISCELLANEOUS--OTHER
DEREGULATION

Allowing utility to choose the content of messages for which it will perform billing and collection function held not to be unconstitutional state action. (p. 1305)

[9] COMPLAINTS AND DISPUTES--TERMINATION OF SERVICE

A telecommunications utility's denial of billing and collection service to an information provider held not a denial of network access. (p. 1312)

[10] COMPLAINTS AND DISPUTES--TERMINATION OF SERVICE

Utility not required to provide nonessential services simply because it can do so less expensively than other providers of same service. (p. 1314)

[11] COMPLAINTS AND DISPUTES--TARIFF INTERPRETATIONS
COMPLAINTS AND DISPUTES--TERMINATION OF SERVICE

Unequal treatment by a utility is not *per se* unreasonably discriminatory (p. 1315)

[12] JURISDICTION--GENERAL
DEREGULATION
COMPLAINTS AND DISPUTES--TARIFF INTERPRETATIONS

The Commission has the discretion to allow utilities to make certain business decisions outside the regulatory process if there are legitimate reasons for the policies and a reasonable basis for any resulting disparity. (p. 1316)

[13] MISCELLANEOUS--OTHER
PROCEDURE--NOTICE--NOTICE BY APPLICANT--ADEQUACY

A service contained in a utility's tariff may not be eliminated unless notice is given that such an outcome may result from the proceeding. (p. 1318)

[14] RATEMAKING--COSTALLOCATION--TELEPHONE--REGULATED/NON-REGULATED ALLOCATIONS
RATEMAKING--RATE DESIGN--TELEPHONE--OTHER SPECIAL TARIFFS AND SERVICES

The incremental cost of billing and collection for information providers is minimal and need not be separated or unbundled from the message transport costs when deregulated. (p. 1322)

DOCKET NO. 8030

APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR REVISIONS TO 976 TARIFF	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Introduction

A. Summary of Case

Southwestern Bell Telephone Company ("Southwestern Bell" or "Bell") requests Commission approval of new tariffs governing its Information Delivery services. The application first seeks amendment of Southwestern Bell's existing DIAL 976[sm] tariff to deregulate the billing and collection the company furnishes to information providers ("providers", or "sponsors"). Southwestern Bell also submits a new service tariff for Special Prefix Information Delivery Service ("SPIDS" or "SPID Service").

The examiner recommends approval of the tariffs as filed with Southwestern Bell's post-hearing brief on August 22, 1988.[1] The recommendation includes a policy determination by the Commission to forgo regulation of the billing and collection services provided by Southwestern Bell to sponsors, but without finding whether the service is a "utility service" and subject to the Commission's jurisdiction.

Bell's impetus for this filing was concern for its "corporate image", in the perception of present and potential shareholders, the general public, and the company's employees. Association with objectionable messages and other controversial aspects, through billing and collection, is adversely affecting that image.

In the examiner's opinion, Southwestern Bell is entitled to deal with information providers as any private business could do in this respect, and to choose not to associate, through billing and collection in its own name, with certain types of messages offered by the providers. The requested tariffs would ensure that the company could exercise its own judgment unhindered and uninfluenced by the Commission.

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1. See Examiner's Exhibit 1 Attached.

A federal appellate court decided a similar case by holding that "[a] private business is free to choose the content of messages with which its name and reputation will be associated."[2]

B. Description of Southwestern Bell's Information Delivery Service Offerings

1. *DIAL 976sm Service*

When it was introduced in 1986, DIAL 976sm represented an innovative step into the "Information Age", giving millions of residential and business telephone users access to information previously available only to and from computers. Bell's technology permitted simultaneous access to a recorded announcement by thousands of callers; messages could be easily and quickly updated by sponsors to provide timely and pertinent information. The anticipated uses included business and stock market information, sports scores, announcements of local events, and recorded prayers, jokes, and advertisements.

The concept is captivatingly simple -- a local call to the provider is completed, the caller receives the information, and Bell's equipment records the call and includes a charge set by the provider on the user's monthly Southwestern Bell statement. These amounts, less Bell's charges for the service, are remitted by Southwestern Bell to the provider, subject to later deduction for uncollected amounts.

Bell's existing and requested tariffs provide that operator-assisted, pay telephone, and certain other calls may not be made to DIAL 976sm numbers. Users may not be disconnected for failure to pay for information delivery, but may be restricted from further 976 access.

When this foray into the Information Age began, several tangential phenomena presented themselves. Many providers contracted for the service, and the expected information became available. Human nature and ingenuity, however, combined to produce many anticipated and a few unexpected diversions from the original vision. Certainly not all the unplanned offerings could be considered "not in the public interest," but innovations ranged from the

2. Carlin Communication, Inc. v. Southern Bell Telephone and Telegraph Co., 802 F.2d 1352, 1361 (11th Cir. 1986).

trivial and nonsensical ("Dial-an-Insult"), to the mundane (soap opera updates), and to the generally offensive.

Federal and state legislatures, the Federal Communications Commission ("FCC"), and state regulatory bodies strove to formulate regulations for the growing service that would allow flexibility and freedom while protecting the public from deception, unfair billing, and the corruption of its youth.

In addition, faced with what came to be known as "Dial-a-Porn", telephone companies tried to maintain their own and community standards through tariff provisions and court action. The profits being realized by information providers, however, guaranteed protracted and expensive litigation. While Bell's efforts to develop workable standards for the service have been stalled in the courts and, to some extent, in the Commission, the number and diversity of 976 programs has shown unchecked growth.

The Commission has received over 23,000 comments regarding the 976 service, more than it has received about any other single issue. The overwhelming majority of those who contacted the Commission favored either the elimination of "Dial-a-Porn", relegation of 976 service to a subscription-only offering, or the elimination of 976 service altogether.

As witnesses for the Commission staff and the company testified, DIAL 976[sm] service as it now exists is neither in the public interest nor acceptable to Southwestern Bell. The number of complaints received by the Commission and by the company has fallen somewhat, but continues to be high. And because the billing and collection for sponsors of controversial programming is done in Southwestern Bell's name, the company's corporate image continues to be hurt. For example, many people blame Southwestern Bell for billing problems or charges for calls not known to be toll calls. Special interest groups are demanding that information delivery service be banned outright or made "subscription only." Southwestern Bell has become embroiled in a multiplicity of expensive state and federal lawsuits, and no simple resolution is seen under present conditions.

Elimination of the service,[3] however, would not eliminate the offensive and controversial aspects; the providers would simply migrate to other

3. As discussed below, elimination of DIAL 976[sm] is not possible in this case.

services, such as AT&T's 900 and 700 services (where billing and collection are provided) or 800 service (with billing by credit card or other means).[4] In addition, the Commission must consider the information providers, who have invested large sums in equipment and programming that would be rendered valueless by a 976 ban.

Moreover, a Commission order relegating the service to subscription-only access would have a similar effect, and the Commission has no authority to deal with the other options available to the providers. The parties also questioned whether many uncontroversial providers would be able to remain in business under a subscription-only system.

The availability of free call restriction[5] has helped, but only about fourteen percent of the lines in the affected service areas are currently blocked[6]. A small percentage of telephones in the market areas cannot be blocked because of technological limitations[7]. There was testimony that some of the smaller interexchange carriers and local exchange companies might not be blocking intra- and interLATA 976 calls, and there are means of making calls via interexchange carriers which originate and terminate in the same LATA, but which use interLATA circuitry. Such calls cannot be blocked at the receiving end by Southwestern Bell because the company's interstate tariff to do so was denied by the FCC. Bell does not have the capability of distinguishing incoming interstate from intrastate interLATA calls.

Bell's main problem with DIAL 976[sm] arises from the fact that the billing and collection element of the service is extremely *associative*; the caller is charged for the call by Southwestern Bell on the monthly telephone bill, and many patrons assume that Southwestern Bell itself is rendering the service. When problems arise from unexpectedly large bills, fraud, deceptive advertising, or unpopular messages, Southwestern Bell is associated with the

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4. General Counsel Exhibit No. 2 at 12; Tr. at 287-289, 296-301.

5. Although the term "restriction" was used by some witnesses as meaning denial of completion at the call's origin, and "blocking" designated the denial of completion of a call at the terminating end, other witnesses did not distinguish between the terms. The words are used interchangeably in this report.

6. Tr. at 158.

7. According to Southwestern Bell witnesses, selective restriction is unavailable in central offices served by electromechanical switches; in those areas, either all subscribers must be restricted or none may be. Bell decided not to restrict access in those areas.

message and, generally, the information provider remains anonymous. The public, it appears, expects Southwestern Bell to eliminate the problems or withdraw the service.

Southwestern Bell now asks the Commission to delete the billing and collection functions from its DIAL 976sm tariff and permit it to provide that service by private contract. The effect of this would be to enable Southwestern Bell to choose what types of messages its name and reputation will be associated with on its own bills, just as any unregulated business may do. Otherwise, there is no substantial change to the DIAL 976sm tariff.

2. *Special Prefix Information Delivery Service*

Southwestern Bell also requests approval of a new service offering. SPIDS will be a subscription-only service without billing and collection, but otherwise very similar to DIAL 976sm service.

There are four major differences between DIAL 976sm and SPIDS:

(1) The service is available to end-users only by presubscription;

(2) Bell will not provide billing and collection service to the information providers; billing information will be made available so the providers may bill and collect their charges directly;

(3) Bell will be unable to offer the same "NXX", or dialing prefix, for SPIDS service in all market areas; and

(4) The proposed per-call "Generic Rate" for SPIDS is $0.15 for the first sixty seconds or less, one cent lower than the DIAL 976sm rate. Billing information will be provided to sponsors at a monthly rate of $150.00.

Initially, all users would be restricted from access to the SPIDS prefixes. For intraLATA calls, Southwestern Bell would be relying on voluntary cooperation of local exchange companies and interexchange carriers throughout the state to implement the blocking[8] for telephones outside the market areas. Bell can also block such calls at the terminating access

8. This is basically a passive process -- the local exchange company or interexchange carrier simply does not "open" the SPIDS exchange for access.

tandem[9] if some interexchange carriers remove the restrictions. Under Southwestern Bell's proposed tariffs, subscribers who have 976 call restriction would not be permitted to subscribe to SPIDS service. Operator-assisted and pay telephone calls would be prohibited by tariff from access to SPIDS.

Approximately five percent of the subscribers in the SPIDS market areas -- those served by electromechanical switch central offices -- would be unable to subscribe to the service because of technical limitations.

The company attempted to design the SPID service with a common prefix or "NXX" in all four market areas; that proved impossible because of present use and reservations of prefixes. As proposed, the service includes a common prefix for the San Antonio and Houston areas and different prefixes in the Fort Worth and Dallas areas.

C. Procedural History

Southwestern Bell filed its application on March 11, 1988. A prehearing conference was held on March 30, 1988, at which Southwestern Bell and the Commission's General Counsel appeared, as did a number of other parties seeking intervention. In deference to an ongoing rulemaking proceeding (proposed P.U.C. SUBST R. 23.69) involving the 976 service, this case was placed in abeyance pending Commission action. Southwestern Bell agreed to extend indefinitely the implementation of its tariffs.

Two information providers intervened. Omniphone's motion to intervene was granted at the original prehearing conference, and at the second such conference its designation was changed, at its own request, to HLD, Inc. ("HLD"). Hollywood Calling, another 976 provider, also intervened.

The "976 Rebels", a citizen group opposed to the service, also intervened, as did American Family Association of Texas ("AFA") and the

9. An "access tandem" is a switch which receives, or gathers, interLATA traffic from interexchange carriers and disperses or disseminates it to the end-user environment.

Williamson County Citizens Against Pornography ("CAP"), who were aligned together pursuant to P.U.C. PROC. R. 21.43.

The Texas Attorney General's Consumer Protection Division's motion to intervene was denied by the ALJ's order of June 9, 1988, which cited a lack of either statutory authority or justiciable interest in these proceedings.

The Commission withdrew proposed Rule 21.69 on April 28, 1988, and issued an order purporting to deregulate the billing and collection functions provided by the telecommunications utilities to information providers in "976" or "Dial-It" services. There followed a flurry of posturing, repositioning, and resistance to discovery in this case, which culminated in Examiner's Order No. 13 defining the scope of the proceeding. Based on that order, the discovery process and the hearing on the merits led to the full development of the issues of billing and collection, the contract proposed by Southwestern Bell with its information providers, and Southwestern Bell's "corporate image" concerns.

The hearing on the merits convened on July 20, 1988, and concluded on July 28, 1988. Southwestern Bell agreed to an effective date of of July 24, 1988, which the ALJ extended to December 21, 1988.

The undersigned examiner was assigned to the case after the hearing, and has read the record.

D. Jurisdiction

The Commission has jurisdiction over this case pursuant to Sections 16(a), 18(b), and 37 of Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988).

II. Analysis and Recommendation

A. The Central Issues

1. The Deregulation of Billing and Collection

a. Is Billing and Collection a "Utility Service"? Southwestern Bell urges the Commission to find that end-user billing and collection for information delivery services is not a "utility service" under PURA § 3(s). The company argues that such a finding would remove the function from Commission jurisdiction. In the examiner's opinion, however, that decision need not -- and should not -- be made in this case for a number of reasons:

(1) Such a determination should be made only after full development in a much broader context, such as a full rate case, because it might have precedential effects far beyond the 976/SPIDS area;

(2) A finding that billing and collection is not a utility service does not necessarily preclude Commission regulatory jurisdiction; and,

(3) Such a ruling is not necessary to the recommended result in this case.

First, although much of the hearing on the merits and the briefs of the parties centered on the issue, the examiner believes that the character of billing and collection in a generic sense was not developed in the broad context of all the services provided by Southwestern Bell and subject to the Commission's jurisdiction. There is evidence that Southwestern Bell provides billing and collection in a number of different ways, each of which involves different uses of the company's specialized equipment.

Some forms of billing and collection service involve the purchase of accounts to be collected by Bell. Other situations involve collection for FCC-regulated services not within the purview of Commission regulation. For example, billing and collection is done for entities and services specifically excluded from Commission jurisdiction by preemption, statute, or rule, while the service is also provided for many companies and services that are extensively regulated. The potential and actual degree of competition and the necessity for regulation should be developed for each area within a much broader framework than this case permits.

Moreover, there are many other aspects of the various billing and collection functions provided by Southwestern Bell that were not brought forth by any party. Without such information it would be unwise to find that billing and collection -- in either the generic or a strictly limited sense -- is not a utility service and therefore not subject to Commission regulation.

Second, the examiner is not persuaded that a non-utility finding would preclude jurisdiction over billing and collection.

Much is made of the definition of "service" found in PURA, and whether billing and collection is included in that term. The examiner notes, however, that Sections 2 and 18(a) of the Act speak in terms of the regulation by the agency of "rates, *operations*, and services" of utilities. Nothing submitted by the parties or Commission staff addressed the issue of whether classification of billing and collection outside of the term "service" would defeat jurisdiction over the function as an "operation" or otherwise.

It is also significant that PURA gives the Commission jurisdiction over the "business and property" of utilities without limitation to utility service connection. The parties did not address the application of the term "business" with respect to non-utility functions performed by Southwestern Bell.

The examiner believes that the legislature may have intended to confer broad jurisdiction over even some non-utility "business" and "operations" when such activities affect rates and quality of service. Billing and collection is an operation bound together with the specialized technology of the communications network and Bell's monopoly services. It might be subject to Commission jurisdiction regardless of its "utility" or "non-utility" character.

The examiner acknowledges that the exclusion of "yellow page" advertising from the definition of "service", rather than from a jurisdictional statement in PURA, would suggest that regulatory jurisdiction attaches only to services, rates for services, and operations incident to the provision of services. However, no party cited any authority that clearly precludes Commission jurisdiction over non-utility functions (or "operations") performed by regulated utilities.

Third, the examiner feels that a determination of whether the Commission *should* regulate billing and collection for DIAL 976[sm] can be made without addressing or deciding the sweeping issue of jurisdiction.

[1] The Commission is not required to pervasively regulate every aspect of the services and operation of utilities. The Commission recognized that fact in its order of April 28, 1988, withdrawing a proposed rule relating to information delivery services. The order stated that 976 billing and collection "is not a utility function over which the Commission should assert regulatory jurisdiction." That wording did not indicate whether the function was "utility" in character, but that the Commission did not intend to regulate it, *regardless* of its character.

The examiner believes that a similar position should be taken in this case, by declining to regulate the function whether or not it falls within the purview of PURA § 3(s).

[2] The Commission's broad discretion under PURA includes the power *not* to regulate operations and services it might regulate. In a 1985 case[10] the Austin Court of Appeals approved a Commission decision not to regulate an exclusionary "business policy" of Southwestern Bell. In that case, although the Court stated that it found the Commission's order lacking findings of basic fact to support the decision to "neither require nor prohibit" Bell from applying its exclusionary policy, it stated clearly that the Commission could "exercise its *discretion*, experience, special knowledge and *administrative judgment*"[11] in resolving the apparent defects.

In the Commission proceeding underlying that case[12], the Commission clearly believed it had the jurisdictional power to evaluate Bell's policy, although the policy was not contained in the "rules and regulations" in the company's tariffs. Moreover, on examination of that policy in a contested case, the Commission did not feel constrained by PURA to require Bell to

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10. Amtel Communications, Inc. v. Public Utility Commission, 687 S.W.2d 95, 101 (Tex. App. -- Austin 1985).

11. Id., 687 S.W.2d at 105 (Emphasis added).

12. Complaint of Amtel Communications, Inc., as to Rates, Charges, and Practices of Southwestern Bell, Docket No. 4521, 8 P.U.C. BULL. 485 (May, 1983).

include the policy in its tariffed regulations. That discretionary authority was not questioned by the Court of Appeals.

In a 1987 case[13], the Court of Appeals again addressed the Commission's discretionary authority to choose *not* to regulate entities Bell alleged were "public utilities" under PURA. In holding that "such matters unquestionably lie within the exclusive jurisdiction of the Commission,"[14] the Court refused to substitute its own determination of PURA's application for that of the Commission, stating that

> [t]he questions themselves manifestly and almost uniquely require the exercise of *administrative discretion* and the special knowledge, experience, and services of the Commission in determining technical and intricate matters of fact.[15]

The Commission clearly has discretion to determine not to regulate entire entities; it follows that it may choose not to regulate services or operations of regulated utilities, "according to *its* perceptions of the public interest."[16]

[3] As interpreted by the courts, PURA requires neither Commission regulation of every detail of a utility's operations and services nor a finding of "non-utility" character to support non-regulation.

[4,5] *b. Should Billing and Collection be Deregulated?* In the examiner's opinion, the Commission should deregulate billing and collection *in the limited context of information delivery service.* Southwestern Bell should be permitted to arrange provision of the function for DIAL 976[sm] sponsors and applicants outside the regulatory framework.

In the simplest sense, the 976 service is no more than telecommunications network access, for which the telephone company bills callers at a rate determined by the provider. The distinction between two elements -- *"access and message transport"* and *"billing and collection"* -- is the central issue in this case.

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13. Southwestern Bell Telephone Co. v. Public Utility Commission, 735 S.W.2d 663 (Tex.App.--Austin 1987).

14. Id, 735 S.W.2d at 668.

15. Id. (Emphasis added).

16. Id. 735 S.W.2d at 672 (Emphasis in the original).

It is not disputed that the Commission should assert its jurisdiction over the network access -- the actual transport of the messages. The conflict involves the nature of the billing and collection service[17]. In discussing the propriety of deregulation, the purposes of regulation and the nature of the function under consideration must be examined.

Public utilities are regulated because of two definitional characteristics: They are government-permitted *monopolies*, and they provide an *indispensable service*. The competition of the normal business marketplace does not exist for public utilities, so government regulation has been adopted as a substitute for its pressure and regulatory effects. The essential purpose of regulation is the achievement of the results of competition: *reasonable rates and opportunity for profits coupled with adequate service.* See PURA § 2.

A number of salient facts distinguish billing and collection from Bell's other services, and support a decision to deregulate:

(1) Billing and collection service is not a "pure" telecommunications service;

(2) Neither the providers nor the services for which the billing is done are subject to Commission regulation;

(3) Providers may obtain billing and collection services from other regulated and unregulated sources;

(4) Billing and collection is not an "indispensable service"; and

(5) Billing and collection associates the telephone company with the provider in the eyes of billed end-users.

Billing and collection service is not a "pure" telecommunications service. Billing and collection, in the DIAL 976^{sm} sense, is not a traditional telecommunications service, nor has it been spawned by technological advancement. It is an incidental function, for which the facilities have long existed but the need has only recently emerged. The technical advancements that generated the information delivery field have created the *market*, not the *capability*, for billing and collection.

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17. The term "billing and collection", as used hereafter, applies specifically to Southwestern Bell's DIAL 976^{sm} billing and collection, unless the context requires otherwise.

The access and message transport element of DIAL 976sm is clearly a monopoly telecommunications service that requires Commission regulation. HLD argues that the billing and collection function is so inextricably bound together with message transport that they must be treated as a unit and regulated accordingly. The examiner is unconvinced.

Billing and collection encompasses the recording and aggregation of the data corresponding to completed telephone calls, the application of the provider's rates to these calls in order to create customer bills, the mailing of bills, the collection of customer payments, the handling of customer inquiries and complaints concerning the bills, and collection efforts and investigations. In short, billing and collection is primarily a financial and administrative service.[18] Billing and collection for DIAL 976sm providers depends on the message transport facilities for its data collection. However, the *message transport* function of DIAL 976sm in no way depends on the billing and collection function for its existence. It appears to the examiner that the billing and collection function can be severed -- for regulatory purposes -- from the "pure" telecommunications function of message transport.

Neither the providers nor the services for which the billing is done are subject to Commission regulation. Unlike many other services for which Southwestern Bell performs billing and collection, information delivery is *not* a utility service, and is not regulated by the Commission. The Commission asserts no jurisdiction over the business, operations, or services of the providers, nor does it have authority over complaints or service problems concerning information providers. Even though many such providers are engaged in interstate commerce, they are not regulated by the FCC.

The providers are not held to any standards of business conduct or quality of service. On the other hand, Southwestern Bell has thus far been forced to associate its name and its corporate stature with the providers solely because of the regulation of billing and collection.

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18. The FCC used similar language in determining that billing and collection for interstate interexchange carriers is not a "communication service." See In the Matter of Detariffing of Billing and Collection Services, 102 F.C.C.2d 1150 (1985) The definition of that term is not the same as "service" under PURA, and no such finding is implied here.

Providers may obtain billing and collection services from other regulated and unregulated sources. A number of options are available to a provider who does not want, or is refused, Southwestern Bell billing and collection.

Credit card companies come to mind first, because providers are already using this method of billing.[19] Although credit card collection may be somewhat more expensive, it has two distinct advantages for the provider: first, it may be used in connection with any service on the network, including inexpensive local business access or nationwide WATS service; second, the credit card company handles the account completely for most purposes, and the provider is paid immediately for his service.

Alternate billing systems, both tariffed and untariffed, are available through the telecommunications network, and include AT&T's 900 and 700 service and offerings from other carriers. These services offer the provider the advantage of a much wider scope of operation and potential customer base than is available with local 976 service.

Moreover, billing and collection service does not involve "the conveyance, transmission, or reception of communications over a telephone system."[20] It cannot, then, be seriously maintained that rendering billing and collection service for an information provider would, without more, subject a business to Commission jurisdiction. Many information providers already use credit card companies for their billing and collection; those companies are not, and will not become, regulated utilities. It is also reasonable to assume that, with the advent of the SPIDS service and its billing information provision, other companies may enter the market offering billing and collection services to the information providers. No party to this case has contended that any of such third party vendors of the service would or should be subjected to regulatory treatment.

This array of actual and potential competitive alternatives, both unregulated and regulated, persuades the examiner that 976 billing and collection is not a monopoly service for regulatory purposes. Competitive

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19. Tr. at 1044.

20. See PURA Section 3(c)(2)(A).

alternatives are available to 976 sponsors to such an extent that Bell cannot control prices or service quality in the information delivery market.

Billing and collection is not an "indispensable" service. One of the functions of Commission regulation is to ensure "adequate and efficient" telecommunications service to "all citizens of the state."[21] The definition of "adequate" service is necessarily fluid, and properly left to the judgment of the Commission. If the Commission considers a service to be essential to adequate service, then it must, under PURA, regulate it and require its provision by public telecommunications utilities.

On the other hand, those ancillary services that are not necessary or indispensable to adequate service may be withdrawn by the utility or deregulated by the Commission. Competition is an important factor in this decision, but a service can be nonessential even in the absence of competition or alternative availability.

Billing and collection in the DIAL 976[sm] context is just such a service. It is not a part of the concept of "universal service." It is neither necessary to, nor wanted by, most telephone customers. The Commission even proposed a rule eliminating information delivery entirely, and received thousands of comments urging adoption of the rule. Both Southwestern Bell and the Commission staff offered testimony that DIAL 976[sm], as it now exists, is not in the public interest. Since billing and collection is the factor distinguishing DIAL 976[sm] from other, "pure telecommunication" offerings, it is clearly nonessential and dispensable.

In light of the position of HLD on the "utility service" issue, perhaps the most penetrating question facing the Commission in this case is: Should a private company be *required* to provide 976 billing and collection services in order to enjoy the privilege of offering regulated telecommunications services in Texas? The examiner finds that, at the present stage of industry development, such a requirement is undesirable.

Billing and collection associates the telephone company with the provider in the eyes of billed end-users. When an end-user dials a 976 number, the

21. PURA Section 18(a).

access is through the local exchange company. The message is played and is carried over "the phone lines." And, when the bill arrives, the return address, the logo on each page, and the payee line on the user's check all read "Southwestern Bell Telephone." If the user is dissatisfied with the quality of the recording, the content of the message, or the cost of the call, Southwestern Bell is seen as responsible. *Southwestern Bell has no control over any of these factors.* If the user wishes to complain, he or she must call Southwestern Bell, for the provider's name is not provided in the advertising, in the message, or on the telephone bill.

It is this uniquely "associative" character of the billing and collection, more than any other factor, which causes the adverse effect of DIAL 976[sm] on Southwestern Bell's corporate image. This association also distinguishes billing and collection from other services offered by the company. It appears patently unfair to require Bell to associate so intimately with partners it has not chosen, when any unregulated business would be free to opt out of such undesired relationships.

The examiner concludes that the billing and collection element of DIAL 976[sm] service is severable, for regulatory purposes, from the network access and message transport function. The Commission may, therefore, deregulate DIAL 976[sm] billing and collection. The examiner further finds that billing and collection is neither a monopoly nor an indispensable function, that competitive alternatives exist, and that the public interest would be served by deregulating the function. Accordingly, deregulation is recommended.

[6,7,8] *2. State Action, Censorship, and Discrimination*

If the Commission determines that billing and collection should be deregulated, consideration must be given to the constitutional issues that have been central to the 976 controversies from the beginning. The First Amendment has been at the heart of virtually every proposed "solution" to the problems with information delivery services, and the free speech issue was again debated at length in this case. The central legal question is whether Southwestern Bell's actions under the requested tariffs will be *unconstitutionally* discriminatory or censorial.

a. State Action. For constitutional limitations to apply, Southwestern Bell's acts must be -- in a legal sense -- those of the State. It is axiomatic in Constitutional jurisprudence that the Constitution protects against conduct of the government, not the citizens. Private conduct is not constitutionally limited, no matter how wrongful or unconscionable. For Bell's actions to violate the First or Fourteenth Amendments or the Civil Rights Act[22], it must act "under color of law."[23]

The examiner is convinced that state action, for legal purposes, will be absent from Southwestern Bell's actions pursuant to Commission deregulation of its billing and collection functions.

A number of tests have been applied by the courts to determine state action or action under color of law. The Supreme Court, however, recently suggested that all such tests may be "simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation."[24]

The "Nexus" Test. A State normally can be held accountable for the conduct of a regulated public utility only when there is shown a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[25]

Such a nexus, or connection, has been found in coercion or significant encouragement by the State, but not through tariff approval or regulatory authorization alone. The Eleventh Circuit Court held that

> because utilities are required to seek approval for many practices that a less regulated business would be free to institute without approval, the mere fact that the practice complained of is authorized by regulation is insufficient to establish state action

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22. 42 U.S.C.A. Section 1983.

23. (The determinations of "state action" and "under color of law" are governed by common tests and reasoning. See, e.g., Blum v. Yaretsky, 102 S.Ct. 2777, 2788, n. 20, 457 U.S. 991, 1009, 73 L.Ed.2d 534 (1982)).

24. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982).

25. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477 (1974).

unless the regulating authority has 'put its own weight on the side of the proposed practice by ordering it.'"[26]

The Supreme Court, too, has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[27]

The Commission has watched the 976 issue closely. That scrutiny, however, cannot be seen as placing the imprimatur of State action on Bell's dealings with its sponsors. The Commission has, in a progression of 976 cases, tried to determine its duties, authority, and limitations within the logical union of the law and its legislative mandate to seek and serve the public interest. The Commission has carefully eschewed unconstitutional interference or coercion in these cases, and has scrupulously avoided curtailing protected speech. Although tariff language concerning "sexually explicit" messages was ordered in Docket Nos. 6521[28] and 6689[29], the later examiner's report in Docket No. 7423[30] deleted all provisions referring to "adult programming", finding that constitutional limits might be overstepped by such references.

Nor can it be said that previous state interest in "Dial-a-Porn" or other types of programming forecloses for all time Southwestern Bell's right to exercise otherwise lawful independent business judgment outside the regulatory process. After some cautious attempts at message regulation within constitutional bounds, the Commission has, in recent cases, forgone all attempts to control message content. Approval of this report would finalize the Commission's complete break with content regulation of DIAL 976[sm] messages.

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26. Carlin, 802 F.2d at 1358 (citing Jackson).

27. Blum v. Yaretsky, 102 S.Ct. at 2786.

28. Application of General Telephone Company of the Southwest for New Tariff Offering 976 Service, Docket No. 6521, 11 P.U.C. BULL 678 (June 1986).

29. Application of Southwestern Bell Telephone Company for a New Tariff Offering Dial 976 Service, Docket No. 6689, 14 P.U.C. BULL 2 (June 1986).

30. Application of Southwestern Bell Telephone Company for Amendment of Its Information Delivery Service - DIAL 976[sm] Tariff, Docket No. 7423, ___ P.U.C. BULL ___ (September 1987).

The Ninth Circuit Court of Appeals found unconstitutional state action in a Mountain States Telephone and Telegraph Company disconnection of an information provider's salacious message. That action, the Court held, had been in response to a letter from a prosecuting attorney threatening prosecution for carrying the message. The Court went on, however, to hold that

> [i]t does not follow . . . that Mountain Bell may never thereafter decide independently to exclude Carlin's messages from its 976 network. It only follows that the *state* may never *induce* Mountain Bell to do so. The question is whether state action also inhered in Mountain Bell's decision to adopt a policy excluding all "adult entertainment" from the 976 network.[31]

Thus even if it were found that state action had been present in previous Commission action, that would not automatically bring Southwestern Bell's present request under that constitutional umbrella.

Southwestern Bell offered the expected evidence about its "corporate image" concerns. Its witness Springfield voiced concern about "anything that affects negatively on [sic] how the Company is perceived by its customers or potential customers and its investors and how it is perceived by its employees as a good place to work."[32] If they stood alone, such self-serving protestations would be scant proof indeed of Bell's motives. They are corroborated, however, by ample evidence.

HLD contends that the Commission has somehow "coerced" Southwestern Bell into filing the present application, and it questions the company's "corporate image" concern. HLD argued that such concern is but a sham, contrived to mask the state action as the company yields to an impermissible Commission mandate. It tried to show that Southwestern Bell was aware of, but callously untroubled by, the adverse effects of information delivery service during the early stages of 976 evolution, and filed this case only to appease the Commission.

HLD's evidence, however, makes the company's point rather than its own. The internal memoranda and records of Southwestern Bell management discussions

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31. Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co., 827 F.2d 1291, 1296 (9th Cir. 1987), cert. denied 108 S.Ct. 1586 (1988).

32. Tr. at 216.

adduced by the intervenor are uncontroverted proof of Bell's ongoing and sincere concern. The exhibits demonstrate clearly, and the examiner finds, that Southwestern Bell's concern with its corporate image and its quest for solutions predate *all* Commission activity in the 976 arena. That Southwestern Bell was mistaken in its predictions of protest, or that it underestimated the impact of some programming on its corporate image, indicates its lack of prescience, not its indifference.

The Commission staff witness, Mr. Featherston, testified that in the early stages of the initial 976 approval process, he contacted commissions in other states about their experiences with the service. Information delivery was then in its infancy, and he does not believe "a lot of the problems that we have today were as prevalent then."[33]

HLD's argument that Southwestern Bell has changed its corporate mind about the effects of 976 reaction on its image is, however, secondary to the question of whether any legal weight should be given to such a change. Does Southwestern Bell's existence as a regulated utility mandate that it choose, and then forever embrace, a particular marketing strategy or corporate position on any service offering? Again, the examiner finds that Southwestern Bell may have failed to anticipate the outcry, and has merely responded to lessons it learned in the marketplace. In any event, the propriety of Bell's change of position -- even if it is "hypocritical", as Mr. Selby testified[34] -- is irrelevant to the question of whether the present application and the tariffs' implementation will constitute state action.

HLD also makes much of Southwestern Bell's concern with revenue flow, and argues that the decision to offer DIAL 976[sm] was made after consideration of profits, without concern for the company's corporate image.

Southwestern Bell has repeatedly stated that it has no objection to the elimination of 976 service by the Commission, and it in fact recommends that action if approval is not granted in this case. Southwestern Bell states flatly that it is not interested in continuing to offer Information Delivery

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33. Tr. at 762.

34. HLD Exhibit 35 at 22.

without the relief it now requests. In view of this uncontroverted position, it simply cannot be seriously maintained that the threat of a ban of the service provides the impetus for Southwestern Bell's filing in this case.

It would strain credibility to hold that Southwestern Bell filed the tariffs presently being considered at the behest of or under coercion by the Commission. Neither the Commission's concern with the same public reactions that affect Southwestern Bell's corporate image, its approval of the requested tariffs, nor its ongoing scrutiny of the public interest with respect to 976 service, suffices to establish Southwestern Bell's actions in requesting and implementing these tariffs as the acts of the State. As the Eleventh Circuit ruled in the 1982 *Carlin* decision involving 976 service, "mere approval of, or acquiescence in, the initiatives of a private party is not sufficient to establish state action."[35]

It is true that some previously expressed concerns of the Commission, as well as "the public interest", may be incidentally served by Bell's implementation of the proposed tariffs. If Southwestern Bell is sincere in its "corporate image" protestations, the company can be expected to react to public complaints. If a message, or its provider, generates complaints to Southwestern Bell that indicate an adverse impact on its corporate image, Southwestern Bell will, it may be presumed, react by withdrawing its billing and collection services. However, the fact that Southwestern Bell and the Commission share common goals in this respect does not make Southwestern Bell's action that of the State.

In *Jackson*, Justice Rehnquist stated that the *nexus* establishing the state action must be between the State and the *specific, challenged action* of the regulated entity.[36] In the present case, the "challenged action" would likely be Southwestern Bell's decision to deny its billing and collection services for a particular message. The required nexus simply would not exist.

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35. Carlin, 802 F.2d at 1357.

36. 95 S.Ct. at 453.

Although the Commission has in the past expressed concern over some types of programming available on DIAL 976[sm], it has never unconstitutionally encouraged or coerced the company to deny access to any class of messages or sponsors. At each stage in the evolution of 976 information delivery, the Commission has, as delicately and gracefully as possible, danced the fine line between its statutory duties and its constitutional limitations. Each time the policies of the Commission, as reflected in the tariffs approved for Southwestern Bell and other companies, have changed, the Commission has been responding to judicial or legislative guidance or to a request by the company. The Commission has never encouraged Southwestern Bell to take any specific action with respect to the programming offered, nor would it do so now.

Southwestern Bell has demonstrated its concern over certain types of programming since the very inception of DIAL 976[sm] service. Less than one month after the service began, Southwestern Bell sent a termination notice to a provider of sexually suggestive messages. A Texas court found that Southwestern Bell, only two months after its institution of DIAL 976[sm] service, was attempting to disconnect information providers who were violating the tariffs by providing live programming.[37]

It must be clear, even to HLD, that under the recommended order Southwestern Bell will be absolutely free to extend its billing and collection services to *any and all* message providers or to *none at all*, without Commission interference, coercion, or encouragement.[38] Therefore, any decision to grant or deny Bell's services for a particular message or sponsor will ultimately be made by the telephone company according to its own corporate judgment, without influence by the Commission.

The "Public Function" Test. Nor can it be said that Southwestern Bell would be performing a "public function" in applying its requested tariffs as it chooses. If, in fact, the goal of Southwestern Bell in this case is censorship, as HLD argues, that could not be considered a public function.

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37. Omniphone, Inc. v. Southwestern Bell Telephone Company, 742 S.W.2d 523 (Tex.App.--Austin 1987).

38. See Carlin, 827 F.2d at 1297.

Because the U.S. Constitution's proscription of censorship restricts the government, there is no governmental, or "public", function of censorship. Censorship is not a function "traditionally *exclusively* reserved to the government"[39] -- it is, instead, the *exclusive* domain of private persons and businesses. Newspapers, television and radio stations, and other private businesses perform censorship functions on a daily basis, without liability or fault; the *State* is virtually forbidden to engage in any such actions.[40] Thus it is clear that when Southwestern Bell, acting in a private capacity, performs an action that might be interpreted as censorship, it is not, *ipso facto*, performing a "public function."

The Eleventh Circuit has held that "[a] private business is free to choose the content of messages with which its name and reputation will be associated and such a choice is not the exercise of a public function.[41]" It would be unreasonable to assume that Bell's actions in the implementation of its proposed tariffs would, standing alone, be state action.

The examiner concludes that Southwestern Bell's independent implementation of those tariffs does not involve "state action" under the First or Fourteenth Amendments or the federal Civil Rights Act.

[9] *b. Censorship.* Censorship implies the denial or constitutionally significant restriction of access to the network. In this case, Southwestern Bell is neither seeking nor capable of achieving censorship of the sponsors' messages. As Mr. Springfield testified at length, the providers who are refused Southwestern Bell's DIAL 976[sm] billing and collection services have a number of acceptable options for their messages. Further, as Mr. Springfield stated in his rebuttal testimony, "As a regulated utility, the Company cannot be the ultimate judge of what can or cannot be transmitted on its network; that is the job for the courts and public officials."[42] The examiner agrees, and the recommended order complies with that statement.

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39. Jackson, 419 U.S. at 352

40. Carlin, 802 F.2d at 1361.

41. Carlin, 802 F.2d at 1361.

42. Applicant Exhibit No. 49 at 4.

If freedom of speech and promulgation of the sponsors' messages are the goals, local access lines and toll calling are available. If the goal is remuneration for the announcement, available technology permits interactive access without operator intervention; callers can be required to enter either a billing code or a credit card number before hearing the announcement, so information providers are able to charge for their messages without using Bell's DIAL 976sm. As the testimony indicates, billing and collection similar to DIAL 976sm service is available with AT&T's 900 and other services.[43]

Southwestern Bell's denial of billing and collection service to an information provider is not a denial, or even a substantial restriction, of network access. As developed above, the network access by the sponsors through DIAL 976sm is no different from that of any other business customer; *billing and collection* is the distinguishing feature of the service. This principle was recognized by the Commission in the first 976 case it was presented[44], and it remains true today. Information providers may freely ply their trade and provide their information on Southwestern Bell's network, without DIAL 976sm service. From a "censorship" or freedom of speech point of view, the only denial of access to the network will be the denial of a specific "NXX", the 976 prefix. Such denial does not rise to the level of censorship.

If Southwestern Bell or the Commission were engaged in censorship, or in restricting the dissemination of protected speech, such efforts would be directed at eliminating the providers or restricting their ability to purvey their messages.[45] That is not the case here. As discussed above, there are numerous channels of dissemination available to the providers that are unrestricted as to lawful content. The only significant difference between those avenues and DIAL 976sm service is Southwestern Bell's billing and collection service. There is no constitutionally protected right to that service.

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43. Tr. at 287-289, 296-301.

44. Application of General Telephone Company of the Southwest for New Tariff Offering 976 Service, Docket No. 6521, 11 P.U.C. BULL 678 (June 1986).

45. See Young v. American Mini Theatres, Inc., 96 S.Ct. 2440 at 2458, n. 4.

The Supreme Court has held that, even if state action were found to exist, a distinction based on message content will be treated as *content neutral* if the "predominate [sic] concerns" of the regulator are "unrelated to the suppression of free expression."[46] Bell's predominant concerns relate to its corporate image. The company has asked the Commission to eliminate its information delivery service if the requested tariffs are denied; because other forums exist, that action would not result in suppression of speech, and nor would the granting of Bell's request. There is no suppression in Southwestern Bell's denial of billing and collection services or the "976" prefix.

[10] HLD also argues that Southwestern Bell's failure to offer billing and collection service to some information providers might render the service unprofitable. HLD would, it seems, have Southwestern Bell forced to perform the function because it would be less expensive than other options open to the providers. *Even if state action were shown*, however, there would be no constitutional infringement of the providers' rights: the Supreme Court has held that

> although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," American Mini Theatres, 427 U.S. at 71, n. 35, 96 S.Ct., at 2453 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, *or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices*. *See* id., at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact").[47]

The examiner believes the courts would adopt a similar view of any economic impact of Bell's denying company-provided billing and collection, even if state action were present. The fact that Southwestern Bell *can* provide billing and collection less expensively does not lead inexorably to the conclusion that it *must* do so. Billing and collection services are not essential to network access or the kind of functions Southwestern Bell should

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46. City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 929 (1986).

47. City of Renton, 106 S.Ct. 932

be required to provide; Similarly, they are not services mandated by economic considerations.

To hold otherwise might permit an information provider to force Bell to enter a possibly illegal or harmful joint venture against its corporate will and judgment. Although no evidence of any findings or allegations of joint venture is before the examiner, the question has been raised in previous cases and is, in the examiner's opinion, a legitimate concern.

It is also possible that Commission denial of Southwestern Bell's right to selectively offer billing and collection for messages would violate the rule established in *Miami Herald Publishing Co. v. Tornillo*[48]. In that case, a Florida law required a newspaper to publish defensive responses by those the newspaper has criticized editorially. The Supreme Court held that to compel speech comes too close to censorship, and that *both* must be forbidden. In this case, requiring Southwestern Bell to endorse, through billing and collection, the speech of others, might be to compel it to identify with that speech. That would, under the Court's holding, amount to censorship of Southwestern Bell.

[11] *c. Discrimination.* HLD argues that Southwestern Bell (and, through "state action", the Commission) will be guilty of impermissible discrimination against those information providers denied Southwestern Bell's billing and collection services if the requested tariffs are approved.

It must be noted that, like censorship, discrimination violates neither the Constitution nor the Civil Rights Act unless it is done by the state, under color of law, or in violation of a statute. Private businesses routinely (and legally) "discriminate" against those with whom they do not wish to associate or do business.

Furthermore, a Texas appellate court has held that "in some circumstances discrimination may be in the public interest and there is, in such circumstances, actually a public policy in favor of discriminatory practices by a public utility regulated under the statute, even with regard to basic

48. 418 U.S. 241 (1974).

utility services."[49] It cannot be said, then, that unequal treatment is *per se unreasonably discriminatory.*

It should be noted again that, within the framework of telecommunications access, there is no functional difference between DIAL 976[sm] and the myriad of options for network connection. HLD was unable to demonstrate any constitutionally protected right to Southwestern Bell's billing and collection functions or the 976 prefix.

[12] The situation faced by the Commission here is legally very similar to that dealt with in the *Amtel* complaint case.[50] A key element in that decision -- i.e., the "practices" Amtel complained of -- was a Southwestern Bell policy of denying installation of customer-owned equipment in its central offices. That resulted in higher rates for connection to customer owned equipment than for connection to equipment leased from Southwestern Bell (and located in the central office). The policy, which severely impeded Amtel's ability to sell its product within Texas, was attacked as anticompetitive and discriminatory.

The Commission declined to regulate Southwestern Bell's policy of excluding customer-provided equipment from its central offices, finding that there were *legitimate reasons* for the refusal and that the policy did not violate Sections 38, 45, or 47 of PURA. Although Bell's requirement that privately owned equipment be located outside the central office caused the rates for connection to be higher, the Commission found that there was a "*reasonable basis*" for the differential, and that Southwestern Bell's practices and rates were not unreasonable, discriminatory, or anti-competitive. The Commission determined to "neither require nor prohibit Southwestern Bell from permitting the location of customer-owned . . . equipment in Southwestern Bell buildings. . . ."

The Court of Appeals upheld the order, stating that "the Commission may make classifications based upon such factors as 'the cost of service, the purpose for which the service or product is received, the quantity or amount received, *the different character* [Emphasis added] of the service furnished,

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49. Amtel, 687 S.W.2d at 101.

50. Amtel, Docket No. 4521, supra.

the time of its use *or any other matter which presents a substantial difference as a ground of distinction*'[Emphasis in original]."[51]

The analogy to the present case is clear: The Commission has the discretion to permit utilities to make certain business decisions *outside the regulatory process*, even if the decisions might result in disparate treatment of customers, provided there are *legitimate reasons* for the policies and a *reasonable basis* for the disparity. If those conditions are met, discrimination can be reasonable. No evidence in this case indicates that Southwestern Bell's desire to make such associative choices is prompted by any design to unlawfully discriminate against any particular providers of information or to circumvent the regulatory process. Southwestern Bell has valid, legitimate reasons for its choices not to associate with particular messages in the context of billing and collection in its own name. Its corporate image concerns are no more important than those of other private corporations, and are subordinate to the public interest. But those concerns should not be outlawed by regulation, especially for non-monopoly, dispensable services such as billing and collection.

If discrimination exists in Southwestern Bell's decisions to offer or deny its billing and collection functions, it is reasonable in light of Bell's legitimate concern for its corporate image and the particularly associative nature of the functions. The Commission's participation in those decisions is, of course, limited to approval of the classification requested by Southwestern Bell -- the 976 rates, applicable to those to whom Southwestern Bell has chosen to offer billing and collection. The classification is authorized under *Amtel*, because it is based on (1) the highly associative and nonessential nature of the billing and collection, (2) the non-utility character of the service for which Bell is billing, and (3) Southwestern Bell's demonstration that its corporate image is being adversely affected by some messages on DIAL 976[sm].

It appears to the examiner, however, that no discrimination is shown by either the proposed tariffs or Southwestern Bell's proposed application of

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51. Amtel, 687 S.W.2d at 109.

their terms. Southwestern Bell asks to be permitted to dissociate itself from certain *messages* carried on its network; there is no evidence that the company intends to withdraw its billing and collection services from any particular *provider*. The examiner finds, based on the evidence of Southwestern Bell's intentions, that *all* providers will be treated exactly the same. The determining factor will be the *message itself*, not the provider. A provider might be permitted to place some messages on DIAL 976[sm], while other messages offered by the same provider will not be accepted by Southwestern Bell. HLD itself indicated that its present messages fall into both "976" and SPIDS categories. There is no discrimination in such treatment.

In a related argument, HLD submits that Bell's application of the tariffs might violate a March 7, 1988, opinion of Judge Green with respect to the modified final judgment ("MFJ")[52]. Any such violation would, if present, be beyond this Commission's authority to investigate. In any event, no evidence was adduced by HLD in support of its allegation. In the examiner's opinion, this case is not the vehicle, nor is the Commission the forum, for determination of that issue, so it will not be addressed further.

B. Tangential Issues

[13] *1. Elimination of DIAL 976[sm] Service*

Southwestern Bell, in its prefiled testimony, indicated that if the requested tariffs are not approved it would prefer that DIAL 976[sm] service be eliminated "in this proceeding." The examiner finds, however, that elimination cannot be done in this case, because the notice given by Southwestern Bell (Examiner's Exhibit 2 attached) did not give interested parties notice of that potentiality.

In the event the Commission determines that the service is no longer in the public interest, elimination may be by inquiry or by rulemaking upon proper notice and procedural compliance with applicable law.

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52. United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C., March 7, 1988), United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

2. Price Cap on DIAL 976sm Calls

The Commission staff recommended that a price cap be established for the sponsor-set charges for DIAL 976sm calls. For two unrelated reasons, the examiner recommends the cap not be set by the Commission.

First, the deregulation of the billing and collection function for the service weighs against such a cap, as it would be a retreat from the deregulation of billing and collection. Southwestern Bell is being permitted to make its own decisions with respect to its billing and collection function; the price for the information provider's message is one aspect of the function. Southwestern Bell should be free to determine the maximum price per message by private contract with the providers.

The second factor is that a price cap would not be appropriate at this point in the development of the DIAL 976sm service. Approval of these tariffs would constitute a major redesign of the service, and a tariffed price cap would unnecessarily inhibit an orderly and self-regulated growth. In the examiner's opinion, a price cap might greatly affect the quality, quantity, and nature of programming on the service. The service as a whole should benefit from having the market driving the prices rather than the price driving the market.

In view of these factors, the examiner recommends that a price cap for DIAL 976sm message provision, if needed at all, be left to the business judgment of Southwestern Bell.

3. Automatic Dial Answering Devices

The Commission staff, in its testimony, and the General Counsel, in its brief, advocate including a tariff provision that would prohibit referrals from Automatic Dial Announcing Devices ("ADADs") to information delivery service numbers. The proposed provision would mirror P.U.C. SUBST R. 23.32(b)(7), and would therefore be redundant. The rule, as it now stands, controls referrals to both DIAL 976sm and SPIDS numbers.

Moreover, the rule is presently being challenged before the Commission and in the courts. With the proposed tariff provision in place, it would be necessary to revise the tariff if the rule were changed or held to be legally defective.

Accordingly, because the existing rule controls the use of ADADs, it should not be duplicated in tariffs.

4. Reduction of Notice of Tariff Violation for DIAL 976sm and SPIDS

Southwestern Bell initially requested that the required notice before disconnection for tariff violations be reduced from twenty days to five days. The company contended that by this time most providers know the tariff and the regulations, and that the longer period simply permitted violations to persist unacceptably. The Commission staff recommended that the notice be changed to ten days. Southwestern Bell did not object, and the last proposed tariffs reflect the 10-day period.

The examiner concurs and finds that the notice required should be 10 days as provided in the tariffs in Examiner's Exhibit 1.

5. Sunset Provision

As it has in previous cases, the staff recommends that DIAL 976sm and SPIDS be automatically terminated after one year, and that Southwestern Bell be required to show cause for continuation of the services.

There is considerable evidence that information providers will be hesitant if not unwilling to invest in sponsoring messages if this provision is ordered. The uncertainty of being permitted to remain in business will cause potential providers to seek other channels of offering their services, and could cause a serious decline in revenues without corresponding decreased costs for Southwestern Bell. The examiner finds that a "sunset" provision would not be advisable, and recommends that it be rejected by the Commission.

The examiner further notes that the notice published by Southwestern Bell does not apprise interested parties of the sunset contingency, and such a provision in this case may therefore be legally insupportable.

6. Other Staff Proposals

a. Separate Bill Page. The Commission staff and General Counsel recommended that end-user billing for DIAL 976sm calls be placed on a separate bill page and that certain information about the service be provided on the

bill. Specifically, they recommended the following statements: (1) the customer is obligated to pay for the 976 calls but that basic local service cannot be disconnected for nonpayment; (2) nonpayment will result in mandatory blocking of 976 service, which carries a $7.00 one-time charge; (3) the account may be turned over to a collection agent by the information provider if not paid.

Southwestern Bell does not object to the staff's recommendations in view of its ongoing corporate image problems; on the other hand, the company feels that this matter should be dealt with outside the scope of the regulatory process in keeping with the deregulation of Southwestern Bell's billing and collection arrangements with its information providers.

The examiner agrees that the Commission should not require a separate bill page for DIAL 976[sm] calls, consistent with the recommended deregulation of billing and collection.

b. 800 Information Number. The staff also recommended (1) that an "800 service" number be established for "comments, questions, and complaints about Information Delivery Service," and for callers to receive additional information about their rights regarding 976 service, and (2) that information about this number be included on the 976 billing page.

At first blush, this would appear unnecessary because local access numbers are provided by Southwestern Bell in all its local exchange service areas for customers with problems or complaints about billing and other services. On reflection, however, the examiner is of the opinion that a centralized number for complaints and comments would simplify the collection and retention of records and information which would benefit the Commission and Southwestern Bell in their continuing evaluation of the information delivery service.

The examiner therefore recommends that the staff's recommendation be implemented. As Southwestern Bell points out in its brief, the 800 number should handle general inquiries and comments about 976 service, but refer billing inquiries to the local Southwestern Bell business office with the caller's account records.

Bell estimates the cost of implementation as approximately $200,000, and the cost of the additional lines of information on the bill at $22,000. No tariff change is necessary, because the recommendation can be implemented administratively.

c. Information Brochure. The staff also recommended, without objection from Southwestern Bell, that the company be required to issue an information brochure, on a semiannual basis, describing the new tariff arrangements, SPID service, the disconnection policy, the possibility of referral to a collection agency, free 976 restriction, mandatory blocking for nonpayment, the 800 number for 976 information, and other related information. Southwestern Bell suggests that the brochure be mailed one time to all customers in the four 976 market areas, and be subsequently incorporated into the telephone directories provided to customers.

The examiner recommends that the staff recommendation and the suggestions of the company be adopted by the Commission. Mailing of the brochure to all customers should be unnecessary after an initial provision, if the information is in the directories and the 800 number is in place.

d. Advertising Guidelines. The staff recommends, and Southwestern Bell has included in the proposed tariffs, a requirement that advertising for SPIDS numbers state that access to the number is available only on a subscription basis. The examiner finds that this requirement will be economically helpful for the growth of the service and provide information in the public interest; the provision's adoption is therefore recommended.

C. Cost and Pricing

[14] *Rates for DIAL 976[sm] Service.* Southwestern Bell has not asked for any change in the rates for DIAL 976[sm] service, and the notice it published does not encompass any such changes. The deregulation of billing and collection, however, raises the issue of whether charges for that service should be detariffed and unbundled from the generic transport rate. The examiner concludes that unbundling is neither necessary nor appropriate at this time.

In Docket No. 6689, the generic cost for a 60 second call was found to be $0.00247. That two and one-half tenths of a cent included an element of "billing costs," but Mr. Springfield testified that Bell's billing of the generic rate to the sponsor was meant, rather than the billing to the end-user for the message.[53] The call-by-call information must be accumulated to bill the sponsor -- whether or not end-users are also billed -- so the cost is always incurred. Moreover, the end-user is being sent a monthly bill whether or not 976 calls have been made, so minimal incremental cost is incurred. The examiner is convinced that the cost of billing and collection, as a part of the overall generic rate for DIAL 976[sm] calls, is minimal and should not be separated or unbundled.

SPIDS Rates. Southwestern Bell's rate request for the SPID Service offering is based largely on the DIAL 976[sm] prices, adjusted to reflect that the company would not perform billing and collection for SPIDS providers. The Commission staff analyzed Bell's request and its methodology, and did not disapprove.[54]

One additional rate component -- the provision of billing information -- is found in the SPIDS tariff request. The information Southwestern Bell would provide its sponsors on request includes (1) Calling Telephone Number, (2) Date of Call, (3) Time of Call, and (4) Billing Name and Address of the callers. Bell proposes to charge sponsors a one-time nonrecurring charge of $500.00 per program to initiate the billing information service, and a monthly rate of $150.00 per program for the information.

Bell submitted a cost study supporting the proposed rates.[55] The costs per program are based on an estimate that ten programs will be offered at the outset. The actual costs per program would vary with the actual number of sponsors requesting the billing information. According to the study, the nonrecurring cost per program of $456.12 would yield a 10% contribution, and the $137.27 monthly cost per program would provide a 9% contribution. As Mr.

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53. Tr. at 246.

54. General Counsel Exhibit 2 at 9.

55. Exhibit to Applicant Exhibit No. 49.

Springfield testified, costs could be recovered with lower rates if more sponsors request billing information. One purpose for offering information delivery service, however, is to generate contribution, so the examiner recommends that the rates be established at the requested levels and adjusted later if necessary.

No cost study was submitted in connection with other SPIDS rates and charges, nor have costs been tracked for DIAL 976sm service. In Southwestern Bell's initial 976 case, Docket No. 6689, that service was priced substantially above cost, and the evidence indicates that a healthy contribution is being returned by the service. In fact, an internal Southwestern Bell memorandum introduced by HLD included the statement that Bell's "per call cost . . . [for DIAL 976sm is] less than 1/2 of 1¢, therefore, virtually all of the generic rate is contribution."[56]

The network configuration for SPIDS is virtually identical to the DIAL 976sm setup, so those costs will be similar. Some additional costs, such as systemwide blocking and handling end-user subscription requests, are not known at this time. On the other hand, Southwestern Bell will not incur the cost of end-user billing or of the time value of the money "advanced" to 976 providers before end-user bills are paid. As the evidence indicated, other presently unknown factors -- such as the number of providers requesting the SPIDS service -- may affect the costs of the service.

Southwestern Bell's proposed nonrecurring, monthly, and per call rates are identical to those for DIAL 976sm, except for the generic rate per call of $0.15. That rate is one cent less than the DIAL 976sm rate to reflect the lower value of the service without the billing and collection function. Both Mr. Springfield and Mr. Featherston testified that the level of contribution was such that SPIDS would recover its costs at the proposed rates.[57] The examiner agrees that the similarity of the services justifies similar rates, and recommends approval of the tariffs as requested.

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56. Exhibit 1 to HLD Exhibit No. 49.

57. Tr. at 682.

Cost Studies. Staff witness Featherston recommended that Southwestern Bell be required to perform cost studies for SPIDS and 976 service, to show that the rates for those services are recovering their costs and generating a contribution. DIAL 976^{sm} has been in operation over two years, and no cost or revenue data has been provided. The examiner agrees with the staff, and recommends that Southwestern Bell be directed to track costs and revenues for DIAL 976^{sm} and SPIDS. The accumulated data should specifically track Bell's costs for each function performed in the provision of the service, and be submitted to the Commission staff on a quarterly basis for the 12 month period immediately following the approval of Southwestern Bell's tariffs.

III. Findings of Fact and Conclusions of Law

The examiner recommends that the Commission adopt the following Findings of Fact and Conclusions of Law:

A. Findings of Fact

1. On March 11, 1988, Southwestern Bell Telephone Company filed an application for Commission approval of new tariffs for its Information Delivery Service.

2. On August 22, 1988, Southwestern Bell filed revisions to its requested tariffs. The revised tariffs are attached to the examiner's report as Examiner's Exhibit 1.

3. DIAL 976^{sm} service is a serving arrangement for sponsor use to provide a recorded announcement or a recorded interactive program service, with a dedicated dialing prefix ("NXX") of 976. A "sponsor" is an information provider whose messages are transported by Southwestern Bell pursuant to the DIAL 976^{sm} tariff. Sponsors are customers of Southwestern Bell.

4. Southwestern Bell bills and collects on behalf of the sponsor for each call from a customer to the sponsor's 976 number.

5. Southwestern Bell's requested modifications to its existing DIAL 976^{sm} tariff included deregulation and detariffing of the billing and collection function it performs in connection with the DIAL 976^{sm} service.

6. In Southwestern Bell's requested DIAL 976^{sm} tariffs, message transport and the billing and collection function are "bundled" for purposes of rates.

7. Southwestern Bell also requested Commission approval of a new service tariff for Special Prefix Information Delivery Service ("SPIDS").

8. DIAL 976^{sm} service is available, presently and under the proposed tariffs, and SPIDS is proposed to be made available, in the Dallas, Fort Worth, Houston, and San Antonio areas of Texas ("the market areas").

9. The proposed SPIDS service is a serving arrangement for sponsor use to provide a recorded or live announcement or a recorded or live interactive program service. Southwestern Bell will transport calls but will not bill callers on sponsors' behalf.

10. All end-user telephones will initially be restricted from access to SPIDS numbers.

11. Approximately five percent of end-users will be unable to subscribe to SPIDS because of technical limitations.

12. SPID Service would be available only to end-users who presubscribe to the service.

13. Bell would not provide billing and collection service to SPIDS sponsors.

14. Billing information would be made available by Southwestern Bell to SPIDS sponsors who request the service.

15. Due to present usage and reservations of prefixes, SPIDS will use different prefixes in different market areas.

16. Individual end-users who call a sponsor's 976 number or SPIDS number are considered customers of the sponsor.

17. Southwestern Bell was ordered to publish notice of the proposed tariffs once a week for four consecutive weeks.

18. On July 18, 1988, Southwestern Bell filed affidavits indicating that it had published the notice attached to the examiner's report as Examiner's Exhibit 2, in newspapers having general circulation in the four market areas, once a week for four consecutive weeks.

19. Southwestern Bell gave notice of this filing by mail to all DIAL 976^{sm} providers.

20. Omniphone, an information provider, intervened, and its designation was later changed, at its own request, to HLD, Inc. ("HLD").

21. Hollywood Calling, another 976 provider, intervened.

22. The "976 Rebels", a citizen group opposed to information delivery service, intervened, as did American Family Association of Texas ("AFA") and the Williamson County Citizens Against Pornography ("CAP"), who were aligned together pursuant to P.U.C. PROC. R. 21.43.

23. The Texas Attorney General's Consumer Protection Division's motion to intervene was denied by the ALJ's order of June 9, 1988.

24. The hearing on the merits in this case convened on July 20, 1988, and concluded on July 28, 1988.

25. By agreement of Southwestern Bell, the implementation of the proposed tariffs was fixed at July 24, 1988. That date was extended by the Administrative Law Judge to December 21, 1988.

26. The Commmission did not encourage or coerce Southwestern Bell to file the application in this case.

27. The Commission has not encouraged or coerced Southwestern Bell to take any action with respect to any message or sponsor.

28. Southwestern Bell filed the application in this case because it was concerned that its corporate image was being hurt in the perception of its present and potential shareholders, the general public, and the company's employees.

29. The Commission has received over 23,000 comments regarding the 976 service, which is more than it has received over any other single issue. A majority of those comments favored either elimination of objectionable program material from the service, relegation of the service to subscription-only access, or discontinuance of the service.

30. Southwestern Bell has received numerous complaints about its 976 service.

31. Southwestern Bell has been and continues to be engaged in numerous lawsuits in federal and state courts regarding DIAL 976^{sm} service.

32. Controversial aspects of information delivery service include allegations of consumer fraud, deceptive advertising and programming, solicitation of children to make repeated calls to 976 numbers, and offensive programming.

33. Southwestern Bell's corporate image, in the perception of its present and potential shareholders, the general public, and the company's employees, has been and continues to be adversely affected by the controversial aspects of information delivery service.

34. Southwestern Bell's concern over the effects of DIAL 976^{sm} on its corporate image predated all Commission action on information delivery service.

35. Southwestern Bell misjudged its ability to safeguard its corporate image, within the regulatory environment, through tariff enforcement and litigation.

36. Southwestern Bell's efforts to protect and maintain its corporate image within the regulatory environment have met severe resistance in Commission proceedings and the courts.

37. Southwestern Bell's billing for sponsors is by inclusion of a line item on the end-user's monthly Southwestern Bell bill.

38. Southwestern Bell is associated with the DIAL 976[sm] sponsors through the billing and collection it provides in its own name.

39. Southwestern Bell's corporate image has been adversely affected by its association with information providers through the billing and collection function.

40. The Federal Communications Commission has detariffed billing and collection for interstate services.

41. The availability of free call restriction has not eliminated the damage to Southwestern Bell's corporate image.

42. If allowed to associate, through billing and collection, with only those messages it chooses, Southwestern Bell would attempt to protect its corporate image by associating only with messages which did not adversely affect that image.

43. Southwestern Bell's provision of 20 days' notice before disconnection allows sponsors' violations to continue for an unreasonably long time.

44. The adverse impact on Southwestern Bell's corporate image of association with controversial programs on DIAL 976[sm] would be reduced by allowing Southwestern Bell to choose not to provide billing and collection for such programs.

45. Deregulation of billing and collection would permit Southwestern Bell to choose what types of messages its name and reputation will be associated with on its bills.

46. Several alternative means of achieving billing and collection are available to information providers, including credit card billing, use of billing information provided by Southwestern Bell pursuant to SPID Service, and prearranged billing arrangements.

47. Several alternative channels of access to Southwestern Bell's communications network are available to information providers, including local access lines, toll access, interexchange carriers' "700", "800", and "900" service.

48. DIAL 976[sm] has been providing a contribution toward joint and common costs.

49. Southwestern Bell's costs of providing SPIDS will be very similar to those of DIAL 976[sm].

50. Southwestern Bell's proposed SPID Service will recover its costs and a contribution toward joint and common costs.

51. Although DIAL 976[sm] service has been available for over two years, Southwestern Bell has not been required to track, and has not provided to the Commission, information on revenue and costs of that service. Such information would be useful to the Commission in determining whether the service is recovering its costs and providing a contribution.

52. Southwestern Bell agreed to establish an "800 service" number to provide information, answer questions, and receive complaints and comments about information delivery service, in accordance with Commission staff recommendations. Bell agreed that information about this number should be included on all bills that have DIAL 976[sm] calls thereon.

53. Southwestern Bell agreed to issue an information brochure, to be mailed one time to all customers in the four information delivery market areas, detailing the new tariff arrangements, SPID service, the disconnection policy for DIAL 976[sm], restriction, mandatory blocking for nonpayment, the 800 service number for information delivery information, and other related information. The company also agreed to include that information in the telephone directories provided its customers.

B. Conclusions of Law

1. Southwestern Bell Telephone Company is a Local Exchange Company as defined by Section 3(v) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988).

2. Southwestern Bell is a dominant carrier as defined by Section 3(c)(2)(B) of PURA, and is thus a telecommunications utility subject to this Commission's jurisdiction.

3. The Commission has jurisdiction over this case pursuant to Sections 16(a), 18(b), and 37 of PURA.

4. Notice of this application was properly published once each week for four consecutive weeks, pursuant to P.U.C. PROC. R. 21.25(a)(3).

5. The Texas Attorney General's Consumer Protection Division's motion to intervene was not supported by statutory authority or a justiciable interest in the case.

6. The undersigned examiner has read the record in this case and serves as a lawful replacement for the Administrative Law Judge originally assigned to this case, pursuant to Section 15 of the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1988).

7. Because of widespread public dissatisfaction, customer complaints, and a proliferation of litigation, DIAL 976[sm] service as it presently exists is not in the public interest.

8. Southwestern Bell's determination to request approval of the proposed tariffs or in its filing the application herein was not state action.

9. Southwestern Bell's implementation of the proposed tariffs will not be state action.

10. The mere Commission approval of tariffs or regulations for a public utility does not make a company's actions pursuant to those tariffs or regulations state action.

11. The mere fact that Southwestern Bell's corporate image concerns and the Commission's concerns for the public interest may coincide in some matters does not make Southwestern Bell's actions pursuant to its concerns state action.

12. Information providers have no constitutional or statutory right to Southwestern Bell-provided billing and collection.

13. Information providers have no constitutional or statutory right to a specific prefix or telephone number.

14. Billing and collection for DIAL 976[sm] information providers is not an indispensable monopoly service, because numerous competitive alternatives are available for providers billing and collecting from their customers.

15. Southwestern Bell's denial of its DIAL 976[sm] billing and collection services to a message or a provider is not a denial or significant restriction of network access, because numerous alternative channels of communication are available on Southwestern Bell's network.

16. The Commission has discretion to forgo regulation of certain functions or services offered by public utilities, if that action will not

17. The Commission has discretion to allow public utilities to establish unregulated and untariffed business policies, if that action will not conflict with the Commission's duty under PURA § 38 to insure that rates are just and reasonable and not unreasonably preferential, prejudicial, or discriminatory.

18. Southwestern Bell, like any private business, is free to choose the content of messages with which its name and reputation will be associated through billing and collection.

19. Southwestern Bell's desires to protect its corporate image in the eyes of the public at large, its present and potential shareholders, its customers, and its employees constitute legitimate business reasons for Southwestern Bell's policy of not associating, through billing and collection, with DIAL 976[sm] messages which adversely affect that image.

20. Southwestern Bell's choosing not to bill and collect for messages which adversely affect its corporate image will not result in unreasonable discrimination or disparate treatment, as it has a reasonable basis.

21. Deregulation of Southwestern Bell's policy regarding the offer or denial of billing and collection for information providers will not result in rates which are not just and reasonable or which are unreasonably preferential, prejudicial, or discriminatory, and will not, therefore, violate PURA § 38.

22. Continued provision of information delivery service by Southwestern Bell will be in the public interest if complaints about controversial aspects of the service are reduced or eliminated.

23. Because Southwestern Bell will be protecting its corporate image by responding to public opinion, public and customer complaints, and shareholder concerns, and because complaints about controversial aspects of the service will probably be reduced thereby, the public interest will be incidentally served by nonregulation of Southwestern Bell's policies as discussed herein.

24. Since Southwestern Bell no longer wishes to offer information delivery service if the tariffs requested in this case are denied, the public interest will be served by Commission approval.

25. The Commission should forgo regulation of Southwestern Bell's policy of not billing and collecting for messages which would adversely affect its corporate image.

26. The Commission should not unbundle DIAL 976[sm] access and message transport rates from DIAL 976[sm] billing and collection at this time.

27. Southwestern Bell has met its burden of proof under PURA § 40, and the rates for SPID Service and for provision of billing information to SPIDS sponsors are just and reasonable and not unreasonably preferential, prejudicial, or discriminatory, within the meaning and intent of PURA § 38.

28. Approval of the modification Southwestern Bell's DIAL 976[sm] service tariff as provided in the examiner's report is in the public interest.

29. Approval of Southwestern Bell's SPIDS service tariff as provided in the examiner's report is in the public interest.

30. Southwestern Bell should be required to track in detail all revenue and costs for DIAL 976[sm] and SPIDS service for a 12 month period, and to provide that information to the Commission staff on a quarterly basis.

31. The time period for Southwestern Bell's notice of violation to its providers prior to disconnection should be shortened to 10 days, because a 20 day period permits violations to persist for an unreasonable time.

32. To facilitate the collection and retention of records on complaints and comments on Southwestern Bell's information delivery services, Southwestern Bell should establish an "800 service number" dedicated to callers about information deliver service, and information about this number should be included on all Southwestern Bell bills that have DIAL

976[sm] charges thereon. This number should handle general inquiries and comments about DIAL 976[sm] service, but should refer billing inquiries to the local Southwestern Bell business office that has the caller's account records.

33. Southwestern Bell should be required to issue an information brochure, which should be mailed one time to all Southwestern Bell customers in the four information delivery market areas, detailing the new tariff arrangements, SPID service, the disconnection policy for DIAL 976[sm], the possibility of referral to a collection agency, free DIAL 976[sm] restriction, mandatory blocking for nonpayment, the 800 service number for information delivery information, and other related information. Such information should subsequently be incorporated into the telephone directories Southwestern Bell provides to its customers.

Respectfully submitted,

J. SCOTT HENDERSON
HEARINGS EXAMINER

APPROVED on this the 22nd day of November 1988.

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

jsh

EXAMINER'S EXHIBIT NO. 1

PROPOSED TARIFFS

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: Index 1
Revision: 1st
Replacing: Original

INFORMATION DELIVERY SERVICE

INDEX

President-Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 1
Revision: 2nd
Replacing: 1st

INFORMATION DELIVERY SERVICE

1. General

1.1 Information Delivery Service consists of a serving arrangement which enables persons or entities, herein designated as sponsors, to provide program service to sponsors' clients. Sponsors are Southwestern Bell Telephone Company's (the Company) customers for the Information Delivery Service offering. Each caller to an Information Delivery Service number is a "client" of the sponsor. A charge designated by the sponsor will apply to the client for each call to an Information Delivery Service number which is assigned to the sponsor by the Telephone Company. Program sponsors applying for service under this tariff will, at the Company's option, be provided either DIAL 976 Service or given the option to subscribe to Special Prefix Information Delivery Service. Those sponsors who meet the terms and conditions of a billing and collection contract for Information Delivery Service (the Contract) will be provided DIAL 976 (sm) service. Those sponsors who do not meet the terms and conditions of the Contract will be given the option to subscribe to Special Prefix Information Delivery Service. (T) (T)

1.2 DIAL 976 (sm) service is Information Delivery Service for which the Company will provide billing of sponsors' charges to the client of the sponsor. DIAL 976 (sm) service consists of a serving arrangement which enables sponsors to provide recorded announcements or recorded interactive (1) program service to sponsors' clients. (M)

1.3 Special Prefix Information Delivery Service (SPIDS) is designated for those Information Delivery Service programs for which the Company will not provide billing of sponsors charges to the sponsors clients. SPIDS consists of a serving arrangement which enables sponsors to provide recorded or live announcement or recorded or live interactive (2) program service. Sponsors are Southwestern Bell Telephone Company's (the Company) customers for the SPIDS offering. A charge designated by the sponsor may apply to the client for each call to an SPIDS number, however, the Company will not bill this charge on behalf of the sponsor.

Access to Special Prefix Information Delivery Service (SPIDS) numbers will be provided only to end user customers local exchange lines which are located in the SPIDS market area and for which the end user customer has subscribed to SPIDS Access Service as specified in paragraph 7 following. (M)

DIAL 976 (sm)

2. DIAL 976 (sm) Rules and Regulations

2.1 The following rules, regulations, rates and charges are in addition to those established for all associated services, as well as, other regulations as stated in this tariff.

2.2 DIAL 976 (sm) service will be provided under the following conditions.

2.2.1 The provision of access to the 976 Network by the Company for the transmission of recorded announcement or recorded interactive program services is subject to the terms and conditions of the Contract, the availability of facilities and to the requirements of the local exchange and toll network. The Telephone Company's liability, if any, for its gross negligence or willful misconduct is not limited by this tariff. With respect to any other claim or suit the Company shall not be liable for any loses or damages of any kind resulting from the unavailability or failure of its equipment or facilities in connection with this service. The Company shall not be responsible for calls that cannot be completed as a result of repair or maintenance difficulties in Company facilities or in equipment owned by the customer.

(1) A recorded interactive DIAL 976 (sm) service program is a program whereby a sponsor's client through the use of a touch tone pad or similar device can communicate with the sponsor's equipment for the purpose of selecting a particular recorded announcement.
(2) A recorded interactive program for SPIDS is a program whereby a sponsor's client through the use of a touch tone pad or similar device can communicate with the sponsor's equipment for the purpose of selecting a particular recorded or live program. (M) (M)

President-Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 2
Revision: 3rd
Replacing: 2nd

INFORMATION DELIVERY SERVICE

2. DIAL 976 (sm) Rules and Regulations - (Continued)

2.2 (Continued)

2.2.2 Noncompliance with the rules and regulations in this tariff could result in disconnection of the sponsor's DIAL 976 (sm) service after proper notice. The notice shall state the basis for the non-compliance, shall cite the specific tariff provision(s) upon which the Company is relying and shall indicate that disconnection will occur 10 days after receipt of notice unless compliance with the tariff is accomplished. The notice, properly postpaid and addressed, shall be sent by certified mail, return receipt requested, and concurrently by first-class mail. The notice sent by first-class mail shall be presumed to be received on the third day after posting. The receipt of notice date will be the date reflected on the signed certified mail receipt returned to the Company, or, if not returned, the presumed date of receipt of the first-class mailing. (M) (C) (M)

Subsequent violation, within a six month period, of tariff rules or regulations for which the sponsor has been previously noticed, for disconnection, shall result in immediate disconnection of service. (M) (M)

2.2.3 The location of the central office(s) providing DIAL 976 (sm) service in any exchange is entirely the selection of the Company. In the event the sponsor locates service outside the designated serving office area, the Rates and Charges found in the Private Line Service Tariff will apply. (M)

2.2.4 Sponsorship of any particular recorded announcement or recorded interactive program service shall not preclude another sponsor from providing the same or a similar recorded announcement or recorded interactive program service. (D) (D)

2.2.5 In order to assure satisfactory service to parties calling DIAL 976 (sm) announcements or interactive programs and to protect the telecommunication network for use of the general public, sponsors are required to order sufficient facilities that in the judgment of the Company will insure a standard grade of transmission of service levels at all times. A written notice will be sent to any sponsor following oral notification when his service unreasonably interferes with or impairs services rendered to the public by the Company or other sponsors of DIAL 976 (sm) Service. If after notification the sponsor makes no modification in method of operation or refuses to subscribe to sufficient facilities offered in this tariff, or alternative facility arrangements that are deemed service-protective by the Company, the Company shall have the right to discontinue such service without further notification to the sponsor. The sponsor shall be liable for payment of all costs incurred with the development and provision of alternative facility arrangements. The Company reserves the right to discontinue service without advance notice in an emergency situation. (T) (T)

2.2.6 The Telephone Company's liability, if any, for its gross negligence or willful misconduct is not limited by this tariff. With respect to any other claim or suit, the sponsor shall indemnify, protect, defend and save harmless the Company against all suits, actions, claims, demands and judgments and for all costs, expenses and counsel fees incurred on account thereof arising out of and resulting directly or indirectly from the material transmitted and from any act or omission of the sponsor in connection with the service provided by the Telephone Company, including but not limited to any loss, damage, expense or liability resulting from an infringement or claim of infringement of any patents, trademarks, or copyrights, or resulting from any claim of libel or slander. (T)

2.2.7 One directory listing is furnished per DIAL 976 (sm) service number without additional charge in the alphabetical section of the serving exchange's directory. Rates and regulations as identified in the Directory Listings section of this Tariff will also apply. (T)

2.2.8 Calls will not be permitted from the following types of services: (T)

— 4 Party service
— Services with Selective Class of Call Screening
— Southwestern Bell Telephone Coin/Coinless and Private Coin Service
— Operator Handled calls
— Services with 976 Call Restriction as defined in 3.2.4 following.

2.2.9 The message length for each recorded announcement or recorded interactive program shall not exceed 60 seconds unless otherwise stated and agreed upon by both the sponsor and the Company. The total length of a message may be increased by 30 second increments subject to the availability of facilities as covered in 2.2.1 preceding. The sponsor must notify the Company 30 days in advance whenever the message length is to be increased or decreased. (T) (M)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 3
Revision: 2nd
Replacing: 1st

INFORMATION DELIVERY SERVICE

2. DIAL 976 (sm) Rules and Regulations - (Continued)

2.2 (Continued)

2.2.10 The sponsor is required to include a statement on the program of what the per call charge is for a local call to the Dial 976 (sm) number. If the price advisement is at the end of the message, it shall commence not longer than one second after the end of the message. If there is a cross-promotion, including a cross-promotion with a parental admonition at the end of the message, the price advisement shall occur before the cross-promotion and no longer than one second after the end of the message. (C)

2.2.11 All 976 programs which can be reasonably assumed to be directed exclusively toward minors and which contain an inducement or "teaser" to call back shall include an admonition to seek permission of a parent or legal guardian before calling back and shall indicate charges are involved in making the call.

All 976 programs containing a cross-promotion to another 976 program shall include an announcement of the price of the cross-promoted DIAL 976 (sm) call.

2.2.12 The Company reserves the right to provide a member of the general public the sponsor's name, business address, business telephone number, and if known, contact person. (D)

2.2.13 The sponsor has no property right in any number or central office designation assigned by the Company in the furnishing of DIAL 976 (sm) service. (D) (T) (M)

Upon termination of DIAL 976 (sm) service by the sponsor, Southwestern Bell immediately may reassign the number, at its sole discretion.

Upon termination of DIAL 976 (sm) service by the Company, Southwestern Bell may immediately reassign the DIAL 976 number at its sole discretion, if the sponsor has not instituted Commission or judicial proceedings on or before the 10th day following termination. If a sponsor initiates any such proceedings, Southwestern Bell may not reassign the number until a final decision is made following exhaustion of any and all legal remedies.

2.2.14 Temporary Suspension of Service is not applicable to DIAL 976 (sm) service. (T)

2.2.15 DIAL 976 (sm) service is offered for use in conjunction with the delivery of recorded messages. DIAL 976 (sm) service is not to be used in conjunction with the delivery of non-recorded messages. (T)

2.3 DIAL 976 (sm) Sponsor Obligations

2.3.1 The sponsor has exclusive responsibility, control and liability for the content, quality and characteristics of speech used in the recording. The Company assumes no liability for the quality of, defects in, or contents of the recording.

2.3.2 The sponsor shall include the following statement prominently displayed or specifically verbally stated (radio and television) in <u>all</u> advertising and promotions to ensure that each caller to its DIAL 976 (sm) recorded announcement or recorded interactive program is advised that a charge will be billed to the caller and that this charge will be in addition to usually applicable telephone charges:

(<u>Sponsors's price</u>) + toll, if any

If a sponsor advertises the service, this advertising shall commence by the date service begins or by the implementation date of a sponsor's selected price change.

The sponsor shall prominently display or specifically verbally state (radio and television) in all advertising and promotions which can be reasonably assumed to be directed exclusively toward minors, the statement that the consent of a parent or legal guardian should be obtained before a call is made.

The sponsor shall not mention or refer to Southwestern Bell Telephone in any of its advertising.

2.3.3 The sponsor must notify the Company at least 30 days in advance if the DIAL 976 (sm) message length is to be increased or decreased and such change shall be effective beginning the first day of the next month following the expiration of the 30 day notice. (T) (M)

INFORMATION DELIVERY SERVICE

2. DIAL 976 (sm) Rules and Regulations - (Continued)

2.3 DIAL 976 (sm) Sponsor Obligations - (Continued)

2.3.4 The sponsor assumes all financial responsibility for all costs involved in providing announcement or recorded program services including, but not limited to, the recorder-announcement equipment producing the recordings, advertising and promotional expenses. (M)

2.3.5 The sponsor assumes all financial responsibility for all facilities required to connect the recorder-announcement equipment located on the sponsor's premises to the Central Office which serves the DIAL 976 (sm) service central office code.

2.3.6 DIAL 976 (sm) service can not be used in any unlawful manner.

2.3.7 The sponsor is responsible for obtaining all necessary permission licenses, written consents, waivers and releases and all other rights from all persons whose work statements or performance are used in connection with the service and from all holders of copyrights, trademarks and patents used in connection with said service.

2.3.8 As a condition to providing service under this Tariff, sponsor will be required to submit an application for this service. If appliction for service is made by an agent, the Telephone Company must be provided in writing with satisfactory proof of appointment of the agent by the sponsor.

2.4 DIAL 976 (sm) Company Obligations

2.4.1 The Company report of the number of calls completed to each DIAL 976 (sm) service program will serve as the sole document upon which the generic rate is applied to the sponsor. The Company will not be liable for incorrect counts of completed calls resulting from damaged tapes or programs. (T)

Included with the DIAL 976 (sm) sponsor's monthly bill will be a summary of the number of calls on which the generic rate charged the sponsor is based. (T) (M)

INFORMATION DELIVERY SERVICE

3. DIAL 976 (sm) Rates and Charges (M)

3.1 Applicable to the DIAL 976 (sm) Sponsor:

		Monthly Rate	Nonrecurring Charge	USOC
3.1.1	DIAL 976 (sm) Announcement Lines, per line	$ 32.00	(1)	976
3.1.2	Service Establishment, per announcement or interactive program	----	$ 1,000.00	D4VSB
3.1.3	Sponsor Selected Price/Variable Length Message, per each change in the call charge and/or message length (2)	----	13.00	----
3.1.4	Generic Rate	Per Call		
	(A) 60 seconds or less	$ .16		
	(B) Each additional 30 second increment or fraction thereof	.03		

(1) Refer to the Service Connection Charges section of this Tariff for the appropriate Service charges that apply for installation of this service.
(2) Service Connection Charges do not apply. (M)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 6
Revision: 2nd
Replacing: 1st

INFORMATION DELIVERY SERVICE

3. DIAL 976 (sm) Rate and Charges - (Continued)

3.2 Applicable to the Sponsor's Calling Clients

(D)

(D)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 7
Revision: 3rd
Replacing: 2nd

INFORMATION DELIVERY SERVICE

4. 976 Call Restriction (T) (M)

4.1 976 Call Restriction is a central office service which will restrict certain local and long distance calls to DIAL 976 SERVICES. Directly dialed calls which would be carried from origination to completion on Southwestern Bell Telephone Company's network will be restricted and directed to a central office announcement. Calls which utilized the service of other carriers cannot be restricted. (T)

4.2 This service is offered in conjunction with Residence and Business single party lines/trunks, including lines associated with PLEXAR I. 976 Call Restriction will be provided in conjunction with other PLEXAR services and Centrex providing that all station lines on the system receive the same 976 Call Restriction. (T)

4.3 976 Call Restriction is offered subject to the capability of the central office. (T)

4.4 Mandatory 976 Call Restriction (T)

If DIAL 976 (sm) charges are unpaid by the caller after 60 days (from the bill date), the Company may elect to equip the customer's line with 976 Call Restriction. Regulations governing the payment for 976 Call Restriction Service provided to customers under the provisions of this paragraph are the same, with the exception of disconnection of local exchange service, as those for other services provided by the Company as specified in Section 23 (Rules and Regulations Applying To All Customers' Contracts) of this tariff. (T) (M)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 17
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INFORMATION DELIVERY SERVICE

4. 976 Call Restriction - (Continued) (T) (M)

4.4 Rates and Charges (T)

The nonrecurring charge per line will be waived under the following conditions for residential and business customers including those customers with PLEXAR and CENTREX services for which 976 Call Restriction is established on an individual case basis. (T)

4.4.1 When a residential or business customer initially requests that 976 Call Restriction be established for local exchange service.(1) (T)

4.4.2 When the customer requests that 976 Call Restriction be provided on the same service order as the establishment of new local exchange service. For the purpose of determining the applicability of the nonrecurring charge, transfer of service into a 976 market area (2) from outside the 976 market area will be treated as new service. (T)

4.4.3 When a customer who currently has 976 Call Restriction requests the transfer of service and re-establishment of 976 Call Restriction on the same service order. (T)

	Nonrecurring Charges	USOC
Customer Requested (3) 976 Call Restriction per line/trunk equipped	$ 7.00	RES
Mandatory Application (3) 976 Call Restriction per line/trunk equipped	$ 7.00	RTVXM

(1) This waiver also applies when the provision of 976 Call Restriction is initiated by the Company as specified in 3.2.2 (C).
(2) For the purpose of this tariff, the 976 market area includes all exchanges within the same LATA as the 976 serving office.
(3) The $7.00 charge for 976 Call Restriction will only apply to those customers who order 976 Call Restriction or are provided mandatory 976 Call Restriction after the "free" initial application of the service. (M)

President-Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 9
Revision: 2nd
Replacing: 1st

INFORMATION DELIVERY SERVICE

SPECIAL PREFIX
INFORMATION DELIVERY SERVICE

5. Rules and Regulations (N)

5.1 The following rules, regulations, rates and charges are in addition to those established for all associated services, as well as, other regulations as stated in this tariff.

5.2 Special Prefix Information Delivery Service will be provided under the following conditions:

5.2.1 The provisions of access to the SPIDS Network by the Company for the transmission of recorded or live announcements or recorded or live interactive program services is subject to availability of such facilities and to the requirements of the local exchange and toll network. The Telephone Company's liability, if any, for its gross negligence or willful misconduct is not limited by this tariff. With respect to any other claim or suit the Company shall not be liable for any loses or damages of any kind resulting from the unavailability or failure of its equipment or facilities in connection with this service. The Company shall not be responsible for calls that cannot be completed as a result of repair or maintenance difficulties in Company facilities or in equipment owned by the customer.

5.2.2 Noncompliance with the rules and regulations in this tariff could result in disconnection of the sponsor's SPIDS after proper notice. The notice shall state the basis for the non-compliance, shall cite the specific tariff provision(s) upon which the Company is relying and shall indicate that disconnection will occur 10 days after receipt of notice unless compliance with the tariff is accomplished. The notice, properly postpaid and addressed, shall be sent by certified mail, return receipt requested, and concurrently by first-class mail. The notice sent by first-class mail shall be presumed to be received on the third day after posting. The receipt of notice date will be the date reflected on the signed certified mail receipt returned to the Company, or, if not returned, the presumed date of receipt of the first-class mailing.

Subsequent violation, within a six month period, of tariff rules or regulations for which the sponsor has been previously noticed, shall result in immediate disconnection of service.

5.2.3 The location of the central office(s) providing SPIDS in any exchange is entirely the selection of the Company. In the event the sponsor locates service outside the designated serving office area, the Rates and Charges found in the Private Line Service Tariff will apply.

5.2.4 Sponsorship of any particular recorded or live announcements or recorded or live interactive program service shall not preclude another sponsor from providing the same or a similar recorded or live announcements or recorded or live interactive program services.

5.2.5 The Company report of the number of calls completed to each SPIDS program will serve as the sole document upon which charges will be assessed to the sponsor as shown in 6.1.4 following. The Company will not be liable for incorrect counts of completed calls resulting from damaged tapes on program failures. (N)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 10
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

5. Rules and Regulations - (Continued) (M)

5.2 (Continued)

5.2.6 In order to assure satisfactory service to parties calling SPIDS announcements or interactive programs and to protect the telecommunication network for use of the general public, sponsors are required to order sufficient facilities that in the judgment of the Company will insure a standard grade of transmission of service levels at all times. A written notice will be sent to any sponsor following oral notification when his service unreasonably interferes with or impairs services rendered to the public by the Company or other sponsors of SPIDS. If after notification the sponsor makes no modification in method of operation or refuses to subscribe to sufficient facilities offered in this tariff, or alternative facility arrangements that are deemed service-protective by the Company, the Company shall have the right to discontinue such service without further notification to the sponsor. The sponsor shall be liable for payment of all costs incurred with the development and provision of alternative facility arrangements. The Company reserves the right to discontinue service without advance notice in an emergency situation.

5.2.7 The Telephone Company's liability, if any, for its gross negligence or willful misconduct is not limited by this tariff. With respect to any other claim or suit, the sponsor shall indemnify, protect, defend and save harmless the Company against all suits, actions, claims, demands and judgments and for all costs, expenses and counsel fees incurred on account thereof arising out of and resulting directly or indirectly from the material transmitted and from any act or omission of the sponsor in connection with the service provided by the Telephone Company, including but not limited to any loss, damage, expense or liability resulting from an infringement or claim of infringement of any patents, trademarks, or copyrights, or resulting from any claim of libel or slander.

5.2.8 One directory listing is furnished per SPIDS number without additional charge in the alphabetical section of the serving exchange's directory. Rates and regulations as identified in the Directory Listings section of this Tariff will also apply. (M)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 11
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

5. Rules and Regulations - (Continued)

5.2 (Continued)

5.2.9 The message length for each recorded or live announcements or recorded or live interactive programs shall not exceed 60 seconds unless otherwise stated and agreed upon by both the sponsor and the Company. The total length of a message may be increased by 30 second increments subject to the availability of facilities as covered in 5.2.1 preceding.

5.2.10 The sponsor is required to include a statement on the program of what the per call charge is for a local call to the SPIDS number. If the price advisement is at the end of the message, it shall commence not longer than one second after the end of the message. If there is a cross-promotion, including a cross-promotion with a parental admonition at the end of the message, the price advisement shall occur before the cross-promotion and no longer than one second after the end of the message.

5.2.11 All SPIDS programs which can be reasonably assumed to be directed exclusively toward minors and which contain an inducement or "teaser" to call back shall include an admonition to seek permission of a parent or legal guardian before calling back and shall indicate charges are involved in making the call.

All SPIDS programs containing a cross-promotion to another SPIDS program shall include an announcement of the price of the cross-promoted SPIDS call.

5.2.12 The Company reserves the right to provide a member of the general public the sponsor's name, business address, business telephone number, and if known, contact person. (N)

INFORMATION DELIVERY SERVICE

5. Rules and Regulations - (Continued) (N)

5.2 (Continued)

5.2.13 The sponsor has no property right in any number or central office designation assigned by the Company in the furnishing of SPIDS.

Upon termination of SPIDS by the sponsor, Southwestern Bell immediately may reassign the number, at its sole discretion.

Upon termination of SPIDS by the Company, Southwestern Bell may immediately reassign the SPIDS number at its sole discretion, if the sponsor has not instituted Commission or judicial proceedings on or before the 10th day following termination. If a sponsor initiates any such proceedings, Southwestern Bell may not reassign the number until a final decision is made following exhaustion of any and all legal remedies.

5.2.14 Temporary Suspension of Service is not applicable to SPIDS.

5.3 Special Prefix Information Delivery Service Sponsor Obligations

5.3.1 The sponsor has exclusive responsibility, control and liability for the content, quality and characteristics of speech used in the program. The Company assumes no liability for the quality of, defects in, or contents of the program.

5.3.2 The sponsor shall include the following statement prominently displayed or specifically verbally stated (radio and television) in <u>all</u> advertising and promotions to ensure that each caller to its SPIDS recorded or live announcement or recorded or live interactive program is advised that a charge will be billed to the caller and that this charge will be in addition to usually applicable telephone charges:

(<u>Sponsor's price</u>) + toll, if any

If a sponsor advertises the service, this advertising shall commence by the date service begins or by the implementation date of a sponsor's selected price change.

The sponsor shall prominently display or specifically verbally state (radio and television) in all advertising and promotions which can be reasonably assumed to be directed exclusively toward minors, the statement that the consent of a parent or legal guardian should be obtained before a call is made.

The sponsor shall not mention or refer to Southwestern Bell Telephone in any of its advertising.

5.3.3 The sponsor must notify the Company at least 30 days in advance if the SPIDS message length is to be increased or decreased and such change shall be effective beginning the first day of the next month following the expiration of the 30 day notice.

5.3.4 The sponsor assumes all financial responsibility for all costs involved in providing announcement or recorded or live program services including, but not limited to, the recorder-announcement equipment producing the recordings, advertising and promotional expenses. (N)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 13
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

5. Rules and Regulations - (Continued) (N)

5.3 (Continued)

5.3.5 The sponsor assumes all financial responsibility for all facilities required to connect the recorder-announcement equipment located on the sponsor's premises to the Central Office which serves the SPIDS central office code.

5.3.6 SPIDS can not be used in any unlawful manner.

5.3.7 The sponsor is responsible for obtaining all necessary permission, licenses, written consents, waivers and releases and all other rights from all persons whose work statements or performance are used in connection with the service and from all holders of copyrights, trademarks and patents used in connection with said service.

5.3.8 As a condition to providing service under this tariff, sponsors will be required to submit application for this service. If application for service is made by an agent, the Telephone Company must be provided in writing with satisfactory proof of appointment of the agent by the sponsor. (N)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 14
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

6. Rates and Charges

6.1 Applicable to the Special Prefix Information Delivery Service Sponsor: (N)

		Monthly Rate	Nonrecurring Charge	USOC
6.1.1	Special Prefix Information Delivery Service Announcement Lines, per line	$ 32.00	(1)	
6.1.2	Service Establishment, per recorded, live, or interactive program	----	$ 1,000.00	
6.1.3	Sponsor Selected Variable Length Message, per each change in the message length (2)	----	13.00	----
6.1.4	Generic Rate	Per Call		
	(A) 60 seconds or less	$ .15		
	(B) Each additional 30 second increment or fraction thereof	$ .03		

(N)

(1) Refer to the Service Connection Charges section of this Tariff for the appropriate Service charges that apply for installation of this service.
(2) Service Connection Charges do not apply.

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 15
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

7. Special Prefix Information Delivery Access Service

7.1 Access to SPIDS numbers will be available only to local exchange service lines which are located within Information Delivery Service market areas and for which the end user customer has elected to subscribe to Special Prefix Information Delivery Access Service. (N)

7.2 Special Prefix Information Delivery Access Service provides end user customers the ability to complete local and certain long distance calls which are carried from origination to completion on Southwestern Bell Telephone Company's network to SPIDS numbers.(1)

7.3 Special Prefix Information Delivery Access Service is offered within the Information Delivery Service market areas and is subject to the capability of the Telephone Company's central offices.

7.3.1 From ESS offices, direct dialed local and certain long distance calls which are carried from origination to completion on Southwestern Bell Telephone Company's network to the SPIDS prefix will only be permitted from local exchange lines for which the customer has subscribed to Special Prefix Information Delivery Access Service.

7.3.2 Special Prefix Information Delivery Access Service will not be provided on the following types of services:

— Multi-Party service
— Services with Selective Class of Call Screening
— Southwestern Bell Telephone Coin/Coinless and Private Coin Service
— Operator Handled calls
— Access Lines which are served by other than ESS central offices
— Access Lines which are equipped with 976 Call Restriction

7.4 Rates and Charges

7.4.1 A $7.00 nonrecurring charge will apply per line/trunk for residence and business customers in a particular Information Delivery Service market area who request Special Prefix Information Delivery Access Service.(2)

7.4.2 The $7.00 nonrecurring charge per line will be waived for Special Prefix Information Delivery Access Services under the following conditions.

(1) When a customer initially requests that Special Prefix Information Delivery Access Service be established for local exchange service within an existing Information Delivery Service market area.

(2) When a customer who currently has Special Prefix Information Delivery Access Service requests the transfer of service and re-establishment of Special Prefix Information Delivery Access Service on the same service order.

(3) When a customer initially requests that Special Prefix Information Delivery Access Service be established for local exchange service after the introduction of SPIDS in new market areas.

8. Automatic Number Identification (ANI) or Billing Information For Special Prefix Information Delivery Service

8.1 At the request of a Special Prefix Information Delivery Service sponsor, the Company will develop rates and charges and offer to provide ANI or Billing Information to the sponsor on an Individual Case Basis. (N)

(1) Special Prefix Information Delivery Access Service will be available to customers served by a particular #2ESS or #2BESS office within 120 days after receipt of a request for the service from a customer served by that #2ESS or #2BESS office. (N)

(2) For the purpose of this tariff, the Information Delivery Service market area includes all exchanges within the same LATA as the Information Delivery Service serving office. (N)

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 16
Revision: Original
Replacing:

INFORMATION DELIVERY SERVICE

(N)

8. Provision of Billing Information to SPIDS Sponsors

8.1 At the request of a Special Prefix Information Delivery Service sponsor, the Company will provide billing information which includes (1) Calling Telephone Number, (2) Date of Call, (3) Time of Call, and (4) Billing Name and Address of the callers.

(A) In order for a sponsor to obtain the calling telephone number, the date of call, the time of call, and the billing name and address of the callers as specified in 8.1 preceding, it will be necessary for the sponsor to enter into a contractual agreement with the Company regarding the manner in which such information may be used.

8.2 The following rates will apply per sponsor program for the billing information explained in 8.1 above.

Monthly Rate	Nonrecurring Charge	USOC
$ 150.00	$ 500.00	

(N)

EXAMINER'S EXHIBIT NO. 2

FORM OF PUBLIC NOTICE

DOCKET NO. 8030

APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR REVISIONS TO 976 TARIFF	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS

SUPPLEMENTAL EXAMINER'S REPORT

Correction of Duplication in Proposed Tariffs. Southwestern Bell correctly pointed out in its exceptions to the examiner's report that Section 8 and paragraph 8.1, appearing at the bottom of Page 16 of Examiner's Exhibit No. 1, should be deleted; Section 8 and paragraphs 8.1 and 8.2, appearing on page 17 of Examiner's Exhibit No. 1 reflect the tariff provisions supported by the evidence and the examiner's report. The Index appearing on Page 1 of Examiner's Exhibit No. 1 should be changed to reflect the correct heading for Section 8 and the sheet number on which it appears.

Accordingly, the examiner recommends that Pages a and b of Examiner's Supplemental Exhibit A, which are attached to this supplemental report, be substituted for Pages 1 and 16 of Examiner's Exhibit No. 1 of the original examiner's report.

Addition of Finding of Fact and Conclusion of Law. One finding of fact and a conclusion of law supporting provisions of the tariffs recommended by the examiner were omitted from the original examiner's report, and should be added.

Finding of Fact No. 43A should be added to the report, to read as follows:

43A. Southwestern Bell's inability to disconnect a sponsor without notice for subsequent violations would permit sponsors to violate tariff rules and regulations with impunity, by simply complying with the rule or regulation after receiving notice but prior to expiration of the required notice time.

Conclusion of Law No. 31A should be added, to read as follows:

31A. Southwestern Bell should be permitted to immediately disconnect a sponsor's DIAL 976[sm] or SPIDS service upon the sponsor's violation of any

tariff rule or regulation within six months of notice to the sponsor for a previous violation, to prevent repeated violations by sponsors.

Correction of Printing Error in Report. A printing error caused truncation of Conclusion of Law No. 16 in the original report. Conclusion of Law No. 16 should be amended by adding the words, "conflict with the Commission's duty under PURA § 38 to insure that rates are just and reasonable and not unreasonably preferential, prejudicial, or discriminatory."

Respectfully submitted,

J. SCOTT HENDERSON
HEARINGS EXAMINER

APPROVED on this the 1st day of December 1988.

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

jsh

Public Notice

In accordance with an order from the Public Utility Commission of Texas, Southwestern Bell Telephone Company hereby gives notice that it proposed a revision to the Information Delivery ("DIAL 976") Service Tariff on March 11, 1988.

The proposed revision includes adding a new service called "Special Prefix Information Delivery Service" ("SPIDS"). SPIDS differs from the DIAL 976 serving arrangement in the following respects: (1) Information Providers subscribing to SPIDS will be assigned a telephone number with the unique prefix reserved for SPIDS providers in the four cities where DIAL 976 now operates; (2) Programming provided by SPIDS providers may be either recorded or live; (3) Access to programming offered by SPIDS providers will be by subscription. Initial subscription by callers will be at no charge, and subsequent subscriptions will incur a $7.00 non-recurring charge; (4) Southwestern Bell will not bill the SPIDS providers' charges to callers.

The proposed revision also includes certain changes in the DIAL 976 Service Tariff including: (1) Recognition that DIAL 976 service is provided pursuant to private contract and tariff; (2) Recognition that certain limitations on referral of calls associated with DIAL 976 service shall be addressed by contract; and (3) Reducing from twenty days to five days the required notice to DIAL 976 sponsors to correct tariff violations before disconnection. Further, a DIAL 976 provider violating the same tariff provision twice in six months would be subject to immediate disconnection.

The Public Utility Commission of Texas has assigned this matter to Docket 8030. A hearing on the merits of this docket will be held at 10:00 a.m., July 13, 1988, at the Commission offices at 7800 Shoal Creek Boulevard in Austin, Texas.

Persons who wish to intervene or otherwise participate in these proceedings should notify the Commission within two weeks from the date of this publication, but, in any event, no later than June 28, 1988. A request to intervene, to participate or to obtain further information should be mailed to the Public Utility Commission of Texas, 7800 Shoal Creek Boulevard, Suite 400N, Austin, Texas 78757. Further information may also be obtained by calling the Commission at 512/458-0100, or the Public Utility Commission Consumer Affairs Division at 512/458-0223 or 512/458-0227, or 512/458-0221 for the teletypewriter for the deaf.

Southwestern Bell Telephone

Examiner's Supplemental Exhibit A
Substitute Tariff Sheets

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
Issued:
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GENERAL EXCHANGE TARIFF
Section: 17
Sheet: Index 1
Revision: 1st
Replacing: Original

INFORMATION DELIVERY SERVICE

INDEX

a

President - Texas Division
Southwestern Bell Telephone Company
Dallas, Texas
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Effective:

GENERAL EXCHANGE TARIFF
Section: 37
Sheet: 15
Revision: Original
Replacing:

7. Special Prefix Information Delivery Access Service

7.1 Access to SPIDS numbers will be available only to local exchange service lines which are located within Information Delivery Service market areas and for which the end user customer has elected to subscribe to Special Prefix Information Delivery Access Service. (N)

7.2 Special Prefix Information Delivery Access Service provides end user customers the ability to complete local and certain long distance calls which are carried from origination to completion on Southwestern Bell Telephone Company's network to SPIDS numbers.(1)

7.3 Special Prefix Information Delivery Access Service is offered within the Information Delivery Service market areas and is subject to the capability of the Telephone Company's central offices.

7.3.1 From ESS offices, direct dialed local and certain long distance calls which are carried from origination to completion on Southwestern Bell Telephone Company's network to the SPIDS prefix will only be permitted from local exchange lines for which the customer has subscribed to Special Prefix Information Delivery Access Service.

7.3.2 Special Prefix Information Delivery Access Service will not be provided on the following types of services:

— Multi-Party service
— Services with Selective Class of Call Screening
— Southwestern Bell Telephone Coin/Coinless and Private Coin Service
— Operator Handled calls
— Access Lines which are served by other than ESS central offices
— Access Lines which are equipped with 976 Call Restriction

7.4 Rates and Charges

7.4.1 A $7.00 nonrecurring charge will apply per line/trunk for residence and business customers in a particular Information Delivery Service market area who request Special Prefix Information Delivery Access Service.(2)

7.4.2 The $7.00 nonrecurring charge per line will be waived for Special Prefix Information Delivery Access Services under the following conditions.

(1) When a customer initially requests that Special Prefix Information Delivery Access Service be established for local exchange service within an existing Information Delivery Service market area.

(2) When a customer who currently has Special Prefix Information Delivery Access Service requests the transfer of service and re-establishment of Special Prefix Information Delivery Access Service on the same service order.

(3) When a customer initially requests that Special Prefix Information Delivery Access Service be established for local exchange service after the introduction of SPIDS in new market areas. (N)

(1) Special Prefix Information Delivery Access Service will be available to customers served by a particular #2ESS or #2BESS office within 120 days after receipt of a request for the service from a customer served by that #2ESS or #2BESS office. (N)

(2) For the purpose of this tariff, the Information Delivery Service market area includes all exchanges within the same LATA as the Information Delivery Service serving office. (N)

DOCKET NO. 8030

APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR REVISIONS TO 976 TARIFF	**§ § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER

In a public meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above styled application was processed in accordance with applicable statutes and rules by an examiner who prepared and filed a report and a supplemental report containing Findings of Fact and Conclusions of Law. The examiner's report is **ADOPTED**, as modified by the supplemental report and this Order, and incorporated by reference into this Order. Accordingly, the Commission issues the following Order:

1. The application of Southwestern Bell Telephone Company ("Southwestern Bell") is hereby **GRANTED**, to the extent recommended in the supplemented examiner's report.

2. Southwestern Bell is **ORDERED** to establish an "800 service" number for comments, complaints, and the company's response to questions, and requests for information about its information delivery services. The 800 number and a brief description of its purpose shall appear on the monthly statement of any Southwestern Bell customer being billed for one or more DIAL 976[sm] calls. Southwestern Bell may refer billing inquiries to the local Southwestern Bell business office with the caller's account records.

3. Southwestern Bell is **ORDERED** to issue an information brochure describing the new tariff arrangements, SPID service, the disconnection policy regarding DIAL 976[sm] billings, the possibility of referral to a collection agency, free 976 restriction, mandatory blocking for nonpayment, the 800 number for information delivery information, and other related information. The brochure shall be mailed one time to all customers in the four DIAL 976[sm] market areas, and the information described here shall be subsequently

incorporated into the telephone directories Southwestern Bell provides its customers.

4. Southwestern Bell is **ORDERED** to track and accumulate detailed information on the revenues from its Information Delivery Services and on the costs of each aspect of those services for a 12 month period, and to provide that information to the Commission staff on a quarterly basis.

5. Southwestern Bell is **ORDERED** to add to its proposed tariff a provision requiring that all billing for DIAL 976[sm] calls be placed on a separate billing page, and that the following information shall be printed on that page:

   (a) That the customer is obligated to pay for the DIAL 976[sm] calls but basic local service cannot be disconnected for non-payment of such charges;

   (b) That non-payment will result in mandatory blocking of DIAL 976[sm] service, which carries a $7.00 one-time charge;

   (c) That if the account is not paid, it may be turned over to a collection agent by the information provider;

   (d) The existence and number of the 800 service number ordered herein.

5a. Southwestern Bell shall, within ten (10) days of the signing of this Order, file a revised set of tariff sheets as approved herein. The revised tariff sheets shall be filed in five (5) copies with the Commission filing clerk and shall comply with the requirements of P.U.C. SUBST. R. 23.24. The Commission staff shall have fifteen (15) days from the date of the filing of the revised tariff sheets to review them for approval, modification, or rejection. Within twenty (20) days from the date of filing of the revised tariff sheets, the Hearings Division shall by letter approve, modify, or reject each tariff sheet, effective the date of the letter, based

upon the materials submitted to the Commission under the foregoing procedure. In the absence of written notification by the Hearings Division, the proposed tariff sheets will be deemed approved and will become effective on the twenty-first day after the date of filing. If any sheets are modified or rejected, the Company shall file proposed revisions of those sheets in accordance with the Hearings Division letter no later than 10 days after the date of that letter, with the review procedures set out above again to apply.

6. Motions and requests for relief not granted by the Commission or by examiner's order are **DENIED** for lack of merit.

SIGNED AT AUSTIN, TEXAS on this the 20th day of December 1988.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: Marta Greytok
MARTA GREYTOK

SIGNED: Jo Campbell
JO CAMPBELL

SIGNED: William B Cassin
WILLIAM B. CASSIN

ATTEST:

Phillip A. Holder
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

APPLICATION OF RIO GRANDE ELECTRIC COOPERATIVE, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO INCLUDE A PROPOSED TRANSMISSION LINE WITHIN BREWSTER COUNTY	§	DOCKET NO. 7437

September 8, 1988

Examiner's Report adopted. Application to amend CCN to include proposed transmission line denied.

[1] PROCEDURE--EVIDENCE AND BURDEN OF PROOF

Applicant seeking to amend its CCN to include a new transmission line is seeking affirmative relief. The party seeking affirmative relief has the burden of proof. The applicant must establish every fact asserted by it which is essential to its right of recovery. (p.1369)

[2] CERTIFICATION--TRANSMISSION LINES--SECTION 54 CRITERIA

Utility proposed constructing a transmission line near the entrance to Big Bend National Park. The application was denied because all section 54(c) factors, except the effect of the line on other utilities, weighed against construction of the line. (p.1370)

[3] JURISDICTION--FEDERAL PREEMPTION

Applicant seeking to amend its CCN to include a proposed transmission line asserted that federal actions "established" the environmental soundness of the proposed line. Applicant cooperative received a loan from the Rural Electrification Administration (REA) after the REA, pursuant to its duties under the National Environmental Policies Act of 1969 (NEPA) (42 U.S.C. § 4321), prepared a Finding of No Significant Impact on the environment. Held: Pursuant to section 54(c), the Commission must evaluate the effect of the proposed line on environmental integrity. The NEPA, the Rural Electrification Act (7 U.S.C. § 901), and the policies of the REA do not preempt the Commission from evaluating the environmental effects of the proposed line nor from concluding that the line will have an adverse impact on environmental integrity. (p. 1390)

DOCKET NO. 7437

APPLICATION OF RIO GRANDE ELECTRIC COOPERATIVE, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO INCLUDE A PROPOSED TRANSMISSION LINE WITHIN BREWSTER COUNTY	§	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINERS' REPORT

I. Procedural History

On March 18, 1987, Rio Grande Electric Cooperative, Inc. (Rio Grande or the Cooperative) filed an application requesting an amendment to its certificate of convenience and necessity (CCN or certificate). The amendment would provide for the construction of a new transmission line that would replace a transmission line in Brewster County. The estimated cost of the new line is $5,155,357.

This case was originally co-assigned to a hearings examiner and the undersigned Administrative Law Judge (ALJ). The ALJ presided over the hearing. The hearings examiner was responsible for assisting the ALJ during the pendency of the case and for assisting the preparation of the Examiner's Report. The hearings examiner originally co-assigned to the case and two additional hearings examiners subsequently co-assigned to this case have left the Commission. This caused some delay in the preparation of the Examiner's Report. On March 30, 1988, the case was co-assigned to the undersigned hearings examiner. The transfer was made in accordance with Section 15 of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1988).

On March 20, 1987 and May 8, 1987, Rio Grande provided affidavits establishing that notice has been provided in compliance with P.U.C. PROC. R. 21.24. [Applicant Notice in Licensing Proceedings].

Landowners Susan Combs, A.S. Gage Ranches, Inc., J.B. Love, Jr. and Sally Matthews Buchanan (together referred to as "A.S. Gage") moved to intervene on April 7, 1987. Chihuahuan Desert Research Institute, San Antonio Conservation Society, landowners Mark Bleakley and J.P. Bryan, the National Audubon Society and the El Paso/Trans-Pecos Audubon Society (Audubon Society), Texas Industrial

Energy Consumers (TIEC), and the Lone Star Chapter of the Sierra Club (Sierra Club) subsequently moved to intervene. The landowner intervenors own land at or near the site of the proposed transmission line. With the exception of TIEC, the parties' requests for intervention were not objected to and were granted by the ALJ. Rio Grande objected to TIEC's motion to intervene on the basis that TIEC did not have a justiciable interest. The ALJ found that a member of TIEC, Texaco, Inc., a customer of Rio Grande, had asserted a justiciable interest and therefore granted Texaco, Inc., intervenor status. TIEC was permitted to represent Texaco, Inc. Texas Nature Conservancy, located in San Antonio, participated in this case as a protestant.

A prehearing conference was held on May 5, 1987. Representatives of Rio Grande, the Commission staff, and the parties that had previously filed motions to intervene (A.S. Gage, Chihuahuan Desert Research Institute, San Antonio Conservation Society and Mark Bleakley) were present. The ALJ grouped together the landowner parties (Mark Bleakley and the individuals known as A.S. Gage) for purposes of cross examination at the hearing on the merits. (Another landowner, J.P. Bryan, later moved to intervene. Pursuant to a written order dated July 3, 1987, the ALJ granted him intervenor status and grouped him with A.S. Gage and Mark Bleakley.) The hearing on the merits was set for November 17, 1987.

On July 3, 1987, Chihuahuan Desert Research Institute was granted permission to withdraw its intervention.

The hearing on the merits lasted from November 17 to 20 and from December 7 to 9, 1987.

At the hearing, the grouped landowner parties (A.S. Gage, Mark Bleakley and J.P. Bryan) were grouped together with the Sierra Club and the Audubon Society. This was done because one of A.S. Gage's witnesses was the representative for the Audubon Society. In addition, to a significant degree the landowner testimony focused on the environmental issues which were the Sierra Club's and the Audubon Society's principal concern in this case. All of

these intervenors took the position that these environmental concerns justified denial of Rio Grande's application. Each party was allowed to present its own direct case. However, the grouped parties were not allowed to cross-examine each other's witnesses and were required to designate one representative to cross-examine witnesses for Rio Grande, Texaco and the Commission staff.

The ALJ and the examiner have read the record in this case. Their findings, conclusions, and recommendation are based exclusively on the evidence admitted at the hearing and on materials officially noticed, as required by Section 13(h) of APTRA.

II. Discussion

A. Jurisdiction

Commission authority to consider and grant applications for a CCN arises under Sections 50 and 54 of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988). In order to amend its certificate, a utility must submit to the Commission an application requesting the amendment. §52 of PURA.

B. Description of Proposed Line

Rio Grande does not generate electricity; it purchases power from outside sources and distributes it to its 3,600 members. According to the acting general manager of Rio Grande, Mr. Henry Fuentes, the Cooperative operates 143.5 miles of transmission line. 66 miles of that total is a 115,000 volt (or 115 kV) line running from the City of El Paso to Rio Grande's Del City substation. The remaining 77.5 miles of transmission line is 69 kV.

Rio Grande intends to replace the transmission line that runs from a metering point near Alpine, Texas (where West Texas Utilities (WTU) has a 69 kV line through which it provides power to the Cooperative) to the Cooperative's Altuda substation and south to the Cooperative's Persimmon Gap substation, near the entrance to Big Bend National Park. This line is hereinafter referred to

as "the existing line." This 69 kV transmission line was built in 1953, comprises 564 poles, and is 54 miles long. The area served by the existing line is 6,000 square miles, and consists mostly of ranch land and the national park. Tr. at 830. The line provides service to approximately 1,100 Cooperative members. Power reaches individual members via distribution feeders running off the line. Many members are served by a distribution line that connects the Persimmon Gap substation to the Cities of Study Butte, Terlingua and Lajitas (the Study Butte area). The distribution line runs from the Persimmon Gap substation 66 miles southwest to Study Butte. Tr. at 1093. Rio Grande does not in this application request a CCN to construct a transmission line intended to replace this distribution line.

The existing line utilizes 45 foot tall wooden poles. A transmission conductor (wire) is strung along the top of each pole. Two additional transmission conductors are strung from a cross-arm. Two distribution conductors are strung from a lower cross-arm. The span between poles is 526 feet.

According to its application, Rio Grande intends to replace the existing line with a new transmission line. This new line is hereinafter referred to as "the proposed line." The proposed line is 54 miles in length. The northern 30 miles of the line would run in close proximity to the path of the existing line. However, the southern 24 miles would approach the Persimmon Gap substation along a new path. The new right-of-way would be 100 feet wide. The path of the proposed line would be 40 feet wide.

The proposed line would utilize 92 foot tall steel poles that are approximately three times wider than the existing wooden poles. The poles would be made of weathering steel that over time would turn brown. The span between poles would be 950 feet. Six conductors would run from pole to pole. At the top would be a static wire. Below, three separate davit arms would each support a transmission conductor. Two distribution conductors would run near the pole itself. The conductor size would be 336 MCM. (MCM stands for thousand circular mills, which is a measure of the diameter of the conductor. 336 MCM conductor is substantially larger in diameter than the conductor on the

existing line. The record did not produce a comparison of cable sizes utilizing a common standard of measure. The existing line is "1/0," as classified by a different system of stating conductor size.) The insulators are designed to handle 138 kV operation. Examiners' Attachment A is a copy of Appendix B to Gage Exhibit No. 5. The attachment illustrates the poles used on the existing and proposed lines.

C. The PURA §54 Criteria

The Commission may grant Rio Grande's application only if the Commission finds that a certificate is necessary for the service, accommodation, convenience, or safety of the public. §54(b) of PURA.

[1] The Cooperative is the party who seeks affirmative relief. Therefore, the Cooperative has the burden of proof to establish its entitlement to such relief. Pace Corp. v. Jackson, 155 Tex. 179, 284 S.W.2d 340 (1955); Wiley v. Schorr, 594 S.W.2d 484 (Tex. Civ. App.--San Antonio 1979, writ ref'd n.r.e.). See also, Examiner's Order No. 6, Complaint of Intellicall, Inc. Against Private Coin Phone Rates and Practices of Southwestern Bell Telephone Company, Docket Nos. 7122, 7123, 7124 and 7152, _____ P.U.C. Bull. _____ (1986). The Cooperative must establish every fact asserted by it which is essential to its right of recovery. Texas Employers' Insurance Association v. Olivarez, 694 S.W.2d 92, 93 (Tex. App.--San Antonio 1985, no writ). Accordingly, in reviewing the record in this case, it must be determined, based on all the evidence, whether Rio Grande, as the applicant, has persuaded the Commission by a preponderance of the evidence that it is entitled to a CCN amendment under §54 of PURA.

Section 54(c) of PURA provides:

> Certificates of Convenience and Necessity shall be granted on a nondiscriminatory basis after consideration by the Commission of the adequacy of existing service, the need for additional service, the effect of the granting of a certificate on the recipient of the certificate and on any public utility of the same kind already serving the proximate area, and on such factors as community values, recreational and park areas, historical and aesthetic values, environmental integrity, and the probable improvement of service or

lowering of cost to consumers in such area resulting from the granting of such certificate.

[2] 1. Adequacy of Existing Service

In September, 1983, Rio Grande initiated plans to replace the existing line. Tr. at 650. According to Rio Grande, "it was determined that the existing 69 kV transmission line needed to be replaced based upon the following three criteria:

(1) The deteriorated condition of the existing 69 kV transmission line and resulting excessive electric outages to [members] served by the line.

(2) Excessive energy losses on the existing transmission line.

(3) The existing transmission line had reached its capacity to maintain adequate voltage at the Persimmon Gap substation."

Texaco Exhibit No. 5 at 8.

Between January, 1983 and August, 1987, the existing line suffered twelve service interruptions. Seven interruptions were caused by high winds breaking deteriorated poles or cross-arms. Three interruptions were caused by lightning. The remaining two were due to WTU power supply interruptions. Id. at 9.

Rio Grande conducts repairs on the Alpine to Persimmon Gap line only in circumstances threatening immediate service interruptions, such as when lightning or wind breaks a pole. The Cooperative stopped regular maintenance on the line in 1980. According to Mr. David B. Cohen, Senior Economist of R.J. Stanley and Associates, and witness for intervenor Texaco, Rio Grande's maintenance expenses are approximately "17 times smaller" compared to those of 43 electric cooperatives that should have similar transmission line operation and maintenance expenses. Tr. at 1005.

The preponderance of the evidence indicates that the inadequacies of the existing service are primarily due to the Cooperative's inadequate maintenance of the existing line.

2. Need for Additional Service

The Cooperative argues that the need for the proposed line arises from the above-enumerated existing service inadequacies. Moreover, according to the Cooperative, the proposed line is needed in order to meet increasing load demand on the transmission system.

a. Load Growth Projections in General. Rio Grande projects continued load growth at an annual rate of 4.4 percent. The original application submitted March 18, 1987 stated: "[l]oad growth was not used to justify the rebuilding of existing facilities." However, the Cooperative amended its application on the morning the hearing began, stating that continued load growth in part justifies constructing the proposed line.

The 4.4 percent load growth projection is based on the analysis of Mr. O.W. Schneider, Vice-President of Alexander Utility Engineering (AUE) (the firm contracted to design the proposed line) and witness for Rio Grande. The load projection is the product of a "linear regression forecasting program." Basically, the "program" is the measure of the slope of the line connecting two points on a graph representing Alpine to Persimmon Gap area peak kilowatt load for the years 1976 and 1986. Tr. at 786. Mr. Schneider testified that the "program" was adjusted based upon weather data, electric usage, and historical data but he never actually explained the adjustment of the straight line. Tr. at 784.

Mr. Cohen, the witness for Texaco, predicted that load growth demand on the Alpine to Persimmon Gap line would increase at a rate of 2.24 percent. His prediction was based on the average annual percentage increase in load demand at the Alpine metering point for the years 1982 through 1986. Tr. at 993.

The projection prepared by the Commission staff indicated a 2.9 percent growth rate. Dr. Parviz M. Adib, a planner in the Commission's Electric Division, projected growth for the years 1987 through 2016 (30 years) using a state space model. According to Dr. Adib, the general state space model is an algorithm which has been used in many applications, including forecasting economic indicators such as the consumer price index, interest rates, and the gross national product. The algorithm reviews data and selects the most relevant portions to predict future behavior.

The projection in this instance combines the analysis of two single-variable model calculations. The first calculation was based on total energy purchased from WTU at the Alpine metering point for the years 1956 through 1986. The second calculation used peak kilowatt demand at the Alpine metering point for the years 1975 through 1987. Dr. Adib testified that the model was designed to predict peak kilowatt demand growth at the Persimmon Gap substation. This was done because he anticipates the greatest increase in demand at this substation. Staff Exhibit No. 2 at 8.

Mr. Schneider, the witness for Rio Grande, criticized the staff load growth projection because it did not take into consideration the radial configuration of the Alpine to Persimmon Gap line. Tr. at 797. A transmission line is often connected in a loop with other transmission lines. If the transmission line is overburdened by load demand, remaining portions of the transmission loop may provide the needed extra capacity. If a transmission line that is not a part of a loop (i.e. in a radial configuration) is overburdened, it may fail, leaving all customers connected to the line without any power.

It is understandable that the Cooperative wants to add an extra measure of load capacity to the Alpine to Persimmon Gap line. Because of its radial configuration, the line should have load capacity in excess of expected demand. The added "cushion" prevents the serious consequences leading from an overburdened radial transmission line. But Rio Grande failed to explain how transmission line design affects the accuracy of predictions concerning future customer demand. Further, Mr. Schneider indicated that his 4.4 percent load growth projection relies upon historical, weather and customer demand data. It

is unclear how his own projection takes into consideration the line's radial configuration.

The ALJ and the examiner conclude that of the projections presented in the record, the staff projection best accounts for the multitude of factors that can affect future load growth and best distinguishes between short term and long term growth trends. As discussed subsequently, for this reason and considering additional evidence discussed in the sections which follow, the ALJ and the examiner find that the staff's load growth projection methodology is the most persuasive one presented in the record.

b. Increased Need at Big Bend. The Cooperative's load growth projection was criticized as overstating the need for power at Big Bend National Park. This park is the focus of the local tourist industry. The record reflects the industry's continuing growth will increase load demand. But to the extent Rio Grande's load growth projection is based on its projections of load demand inside the national park, it is overstated. This is so because Rio Grande relied upon incomplete information. Rio Grande did not consult the Park Superintendent prior to formulating its plans for the proposed line. Audubon Exhibit No. 1 at JWC-1. Mr. Schneider never contacted the manager of the National Park Concession. The manager is responsible for construction of new facilities including those that would impact load demand. He could have easily been contacted. In fact, a newspaper article attached to Mr. Schneider's direct testimony listed the manager's address. Tr. at 769.

A letter from the United States Department of the Interior is also attached to Mr. Schneider's direct testimony. Texaco Exhibit No. 1. The letter concerns existing and future electric demand at Big Bend National Park. Mr. Schneider offered it as evidence that load at the park will increase by a substantial amount. Page seven of that letter states that total peak demand will increase from 913 kVA to 1890 kVA, a 107 percent increase. But Mr. James W. Carrico, Superintendant of Big Bend National Park, testified that many of the park development plans prepared in the 1970's and accounted for in the letter have been revised. According to Mr. Carrico, the engineer who prepared the letter was inadvertently not informed that the park's development plans had been scaled-back due to budget restrictions and other reasons. There is no

timetable concerning when load will increase. Had the letter reflected the park's current plans, it would predict a total peak demand increase of 548 kVA (from 913 kVA to 1461 kVA), a 60 percent increase. Tr. at 120.

c. Increased Need at La Linda. Each of the load growth projections was adjusted in some way to reflect future load demands of the largest customer connected to the existing line. That customer, La Dominicia S.A. De C.V. ("La Linda") is a mining operation partly owned by Dow Chemical. Its energy consumption sometimes represents more than 30 percent of the load on the Alpine to Persimmon Gap line. Tr. at 942.

Dr. Adib's testimony indicates that annual load growth at La Linda would be 3.2 percent. Tr. at 1028. Mr. Schneider predicted 11 percent annual growth at La Linda; his projection is based on the fact that the mine consumed 852 kilowatts in 1982 and 1,488 kilowatts in 1987, which represents an 11 percent growth rate.

PURA does not require Rio Grande to provide service to La Linda. Section 58(a) of PURA. The mine is in Mexico, which is, of course, outside the area certified by Rio Grande's CCN.

However, undoubtedly, one of Rio Grande's priorities is to retain its largest customer. Rio Grande and La Linda executed a contract in 1975. Rio Grande promised to provide up to 1,500 kVA. Rio Grande has always met its obligation and La Linda has never exceeded its limit on load demand. But upon 60 days notice the contract may be terminated if, for example, La Linda found a power supplier more capable of meeting its growing energy needs.

Projecting load growth for La Linda is difficult. The prosperity of the mine turns upon market commodity prices. Load demand has increased in sporadic jumps. For example, La Linda increased its load demand 43 percent in 1983. However, the following year load demand increased 8 percent followed by two successive years where load demand decreased. Tr. at 995. The management of La Linda does not have corporate plans extending beyond the end of 1989. Tr. at 960.

Mr. Cohen, the witness for Texaco, was the only person who consulted Mr. Jorge Diaz, the Director General of La Linda and person responsible for making sure the mining facility has an adequate electric supply. Mr. Diaz said La Linda intends to increase load demand beyond the contractual 1,500 kVA limit, up to 1,650 kVA in 1988 and up to 2,100 kVA in 1989. Tr. at 960. This figure is close to the 11 percent load projection of Mr. Schneider; but it is the opinion of Mr. Cohen, based upon his conversation with Mr. Diaz, that this is another sporadic jump in load demand and that La Linda's load demand on a long-range basis will not grow at a rate as high as Dr. Adib's 3.2 percent rate. Tr. at 997.

Mr. Cohen's analysis is the most credible testimony in the record concerning load growth at La Linda. He was the only person who arrived at his conclusions after contacting the person responsible for obtaining for the mine an adequate electric supply. It is noted that the Cooperative's 11 percent load growth projection is intended to predict load growth at the mine for many years but is based on data from only the past six years. The ALJ and examiner conclude that the La Linda load will increase at an annual rate no greater than 3.2 percent.

d. Demographic Data. The parties disagreed concerning the validity of load growth projections without supporting demographic data. Dr. Adib of the staff considered such information important and Mr. Schneider admitted demographic factors can affect a load growth projection so that it would be something other than a straight line. Tr. at 1030. Mr. Schneider said demographic data was not needed in the case of the Alpine to Persimmon Gap line. Asked why, he responded that his 4.4 percent projection should be relied upon to the extent "as is consistent with other electric utilities." Tr. at 779.

Rio Grande did not collect demographic data to quantify load growth. Factors such as population growth, air conditioning saturation and space heating saturation were not considered. No Chamber of Commerce office was

contacted. Tr. at 831. The quality of the information gathered relating to future demand at the national park and La Linda is discussed above.

Considering evidence discussed in this and previous sections, the ALJ and examiner conclude that the staff's 2.9 percent load growth projection for the Alpine to Persimmon Gap area is the most persuasive. This is because it is based on the most reasonable load growth projection methodology presented and because it, unlike the Cooperative's projection, is not influenced by the Cooperative's overestimates of load growth at Big Bend and La Linda. Also, the Cooperative did not collect or rely upon demographic data to support its projection, which is far in excess of the projection prepared by the staff and the projection prepared by an intervenor.

In the next section, the Cooperative's and alternative proposals for meeting this need for additional service are discussed.

e. Long-term Plans to Meet Load Demand. The project summary (Texaco Exhibit No. 5) prepared by Rio Grande compares alternative plans to overcome the inadequacies in the existing transmission system. Alternative I details Rio Grande's present corporate plans, including installation of the proposed line. This Alternative is in four steps. In 1988 Rio Grande will construct the first 24 miles of the proposed Alpine to Persimmon Gap line. In 1990 Rio Grande will construct the remaining 30 miles of the proposed line. In 1992 the Alternative calls for construction of a 69 kV transmission line running 44 miles from Persimmon Gap to a new substation near Study Butte. Finally, in 2007 the Alternative calls for the conversion of the Alpine to Persimmon Gap line from 69 kV to 138 kV operation. This last step will require rebuilding the Altuda and Persimmon Gap substations to accommodate 138 kV. Examiners' Attachment B is a copy of a project summary map that illustrates Alternative I.

The project summary also described Alternatives II-VII. The parties most often compared Alternative I with Alternative II. In 1988 Alternative II calls for installation of all new wooden poles and cross-arms, a new conductor, and an overhead static wire on the existing 54 mile 69 kV Alpine to Persimmon Gap line. In 1989 the Alternative calls for construction of a new 69 kV

metering-line terminal near Alpine and the construction of a 69 kV line, supported by wooden poles, connecting the new Alpine station to a point approximately 20 miles north of Study Butte, running along Highway 118. A Study Butte substation would also be built. And in 2003 the Alternative calls for rebuilding the Alpine to Persimmon Gap line for 138 kV operation, using steel poles and the existing conductor previously installed in 1988. This would require rebuilding the Altuda and Persimmon Gap substations to accommodate 138 kV. Examiners' Attachment C is a copy of a project summary map that illustrates Alternative II.

Alternative I calls for construction of 98 miles of new transmission line while Alternative II calls for construction of 69 miles of new transmission line. Tr. at 738. One might think that this would mean Alternative II is less expensive to implement. But according to Rio Grande, the cost associated with Alternative I discounted to its present value is $11,008,625 and the cost associated with Alternative II discounted to its present value is $12,475,648. Texaco Exhibit No. 5 at 32, 36.

Both Alternatives assume 4.4 percent load growth. Alternative II is more expensive than Alternative I because, compared to Alternative I, Alternative II upgrades the system more than is needed to provide reliable and economical service.

In general, increasing demand requires the upgrading of the system to insure reliability. Transmission systems must also be designed to transport electricity economically. "Line losses" occur when electricity put into the system is lost due to inefficiencies in the system. Line losses necessarily follow when power is transmitted by conductors across a distance. Such losses are part of the cost cooperative members sustain in order to have electric service. But whenever a transmission system is burdened by load in excess of its designed capacity, as load increases, line losses increase exponentially.

Alternative II provides for construction of a transmission line from Alpine directly to Study Butte, running near Highway 118. The Alpine to Study Butte line would use 556 MCM conductor and cost $4,336,650. All other lines under

Alternatives I and II use smaller 336 MCM conductor. The use of the larger conductor increases construction costs $793,000, according to Mr. Schneider. Tr. at 739. A second AUE witness for Rio Grande, Mr. David K. McMillan, said the increase is $1 million. Tr. at 1247. The Commission staff Manager of Transmission Engineering, Mr. Harold L. Hughes, said the increase is $1.1 million. Tr. at 1075.

Using the 556 MCM conductor, the Alpine to Study Butte line's expected life extends to the year 2025. After that year, increasing load growth will overburden the line so that it must be rebuilt. If 336 MCM conductor is used, Rio Grande estimates line overload will occur in 2018. Mr. Schneider admitted that if load growth does not increase at the 4.4 percent rate, then anticipated line losses will exponentially decrease. Tr. at 754. In that instance, the smaller 336 MCM conductor would provide service beyond 2018.

Under Alternative II, the Alpine to Persimmon Gap line is rebuilt in 1988 and rebuilt again in 2003 using steel poles. The 1988 work includes replacing all of the wooden poles and cross-arms. The estimated cost is $2,474,033. The estimated cost to replace only the wooden poles and cross-arms considered "bad" in a recent inspection is $700,000.

Staff witness Hughes testified that load on the existing line is 20 percent at the Altuda substation, 35 percent at the Persimmon Gap substation, and 45 percent in the Study Butte area. Tr. at 1087. If Alternative I plans are carried out then the entire load will remain on one radial line. If Alternative II plans are carried out then the Study Butte area load will be carried by the Alpine to Study Butte line and the Altuda/Persimmon Gap load will be separately carried by the Alpine to Persimmon Gap line. Under Alternative II, line losses will exponentially decrease in 1989 upon completion of the Alpine to Study Butte line and the subsequent division of load.

Both Alternatives provide for the upgrading of the Alpine to Persimmon Gap line from 69 kV operation to 138 kV operation. The upgrading will be expensive due to the necessary rebuilding of the Altuda and Persimmon Gap substations. Obviously, for cost purposes, the longer the upgrading can be postponed, the

better. Alternative I provides for upgrading in 2007 and Alternative II provides for upgrading in 2003. Considering that load is split between two radial lines under Alternative II, the upgrading of the Alpine to Persimmon Gap line should not be planned earlier than under Alternative I.

The ALJ and examiner conclude that, compared to Alternative I, Alternative II as formulated by the Cooperative is excessive in that it calls for using larger conductor, for completely rebuilding lines that will be rebuilt again within 15 years, and for an unnessarily early 138 kV upgrade of the Alpine to Persimmon Gap line. As discussed subsequently, the evidence shows that for a number of reasons, a modified Alternative II would be a better way to meet the need for additional service than would the Cooperative's proposal in this case.

3. Effect of Granting the Application on the Recipient

Rio Grande relied upon the expertise of AUE to review and analyze the performance of the existing 69 kV transmission line and to prepare the two year work plan that contains the proposed transmission line project. The Rio Grande employees who reviewed the AUE analysis are not engineers. Tr. at 1353.

The AUE contract to provide engineering services for the first 24 miles of the proposed transmission line estimates, but is not limited to, an expenditure of $274,000 for transmission facilities. Gage Exhibit No. 13. But the Project Summary (prepared by AUE) lists engineering costs at $10,484 per mile. Therefore, costs for the first 24 miles should be $251,616. Texaco Exhibit No. 5 at exhibit No. 12. When asked why the AUE contract provides for $22,384 additional engineering costs, the acting general manager of Rio Grande, Mr. Fuentes, did not know. Tr. at 1337.

AUE also prepared the financial forecast intended to evidence the Cooperative's ability to pay for the proposed line. The forecast was presented in Rio Grande's most recent rate case, Docket No. 7284, Application of Rio Grande Electric Cooperative, Inc. for Authority to Change Rates, ____ P.U.C. BULL. _____ (June 23, 1987). That forecast was prepared by Ms. Janet Jo Stephenson of AUE. Revenue predictions were based on the rate increase

application submitted by Rio Grande in Docket No. 7284. That application requested a $2.2 million increase. The Commission granted a $1.9 million increase. Tr. at 1422.

The financial forecast did not include many costs related to the Alternative I plans. It includes neither the costs related to constructing the 1992 line nor the costs of constructing the 138 kV substations necessary to upgrade the proposed line to 138 kV operation. Tr. at 1429.

According to Mr. Fuentes, the Cooperative is "always in financial difficulty." Tr. at 1345. Rio Grande intends to obtain loans from the Rural Electrification Administration (REA) in order to finance the proposed transmission line. Currently, Rio Grande owes REA approximately $30 million in principal and additional amounts of interest. Mr. Fuentes did not know the amount of interest owed REA. Tr. at 1345. Rio Grande is presently in technical default on its REA loan commitments. Yet it has obtained REA funding approval for the first 24 miles of the proposed line totalling approximately $2 million. Tr. at 606. Construction of the second 30 mile section of the proposed line will require an additional $3 million loan. Tr. at 1290.

The Commission's final order in Docket No. 7284 suggests the dilemmas the Cooperative faces with respect to this application. That order referred to the necessity of balancing "the competing needs of restoring Rio Grande Electric Cooperative, Inc. to financial health and cushioning its ratepayers from a very large rate increase." The Cooperative's dilemmas arise because it must provide electric service to a large, sparsely populated area while attempting to control an already high cost of service. Given the evidence as a whole, one would expect the cost of the proposed construction to have a significant effect on the Cooperative's financial health.

In reaching an ultimate recommendation in this case, the ALJ and examiner have considered the costs the Cooperative has incurred in an effort to obtain approval of its application, as well as the effect of building the line on the Cooperative's financial health relative to the effect of alternatives.

4. Effect of Granting the CCN on Other Utilities Already Serving Proximate Area

Rio Grande has an exclusive license for most of the area served by the Alpine to Persimmon Gap transmission line. WTU provides electric service to the City of Alpine. The proposed line would have no appreciable effect on WTU or any other utility besides Rio Grande.

5. Community Values

The area served by the existing transmission line is arid and characterized by mountains, open spaces, cacti and the occasional house. Big Bend National Park and the Study Butte area west of the park are served by the transmission line. The Study Butte area is expanding due to increased tourism. Residents of Brewster County include ranchers and park employees. The national park is visited by many campers.

Rio Grande offered the testimony of Ms. Stephenson of AUE concerning the proposed line's impact on community values. The ALJ and examiner found it surprising that Ms. Stephenson would conclude that there is no "community" in Brewster County. Seven persons located in Brewster County intervened or made a protest statement in this docket. The evidence indicates that some of the landowners' families have lived and ranched in the area for generations. They appear to have represented a broad range of community concerns about the proposed line's effect on the county's economy and environment. Tr. at 500. Applicant's Exhibit No. 8 at 16-18.

The Cooperative did not show by a preponderance of the evidence the proposed line would not have a detrimental effect on community values.

6. Recreational and Park Areas

Except where crossing highway and railroad rights-of-way, the proposed line would lie entirely within privately owned ranch land. At its southern end at the Persimmon Gap substation, the proposed line would lie within five miles of

Big Bend National Park and Black Gap Wildlife Management Area. Black Gap is a nature conservancy adjoining the park's north boundary.

The initial impression is that the proposed line will not affect these areas because it does not enter their boundaries. But animals, of course, cross boundaries and could be adversely affected by the proposed line or its construction. Animals within Big Bend are one reason people visit the park. Animals outside Big Bend and Black Gap are an economic and recreational resource. Hunters pay landowners for the right to hunt animals such as the mule deer. (Another possible effect on recreational and park areas, the visibility of the line to park visitors, is discussed in the next section regarding the effect of the proposed line on aesthetic values.)

The ALJ and examiner found Rio Grande's evidence as to the effect of the proposed line on recreational and park areas to be insufficient. Cross-examination at the hearing demonstrated that the list of wildlife in the Borrower's Environmental Report (BER) (Gage Exhibit No. 5) prepared by Ms. Stephenson and submitted to the REA is significantly incomplete and inaccurate. Tr. at 529. She testified that whether an animal was put on the list or left off was <u>not</u> the result of a "conscious decision." Tr. at 532.

7. Historical and Aesthetic Values

A transmission line's aesthetic impact is pronounced where the surroundings are open desert and ranch land. The proposed line would use steel poles three times wider and double the height of the existing wooden poles. Both the existing line and the proposed line parallel Highway 385 at a distance of about 600 feet for approximately 12 miles. But the existing line crosses Highway 385 (that leads to the national park's main entrance) three times; the proposed line crosses that highway only once. And fewer poles would be used because the distance between poles is greater. The proposed line has a 950 foot span length, the existing line 526 feet.

The proposed line's aesthetic impact is important because of its proximity to the national park. Federal legislation establishing the park in 1944 cited

panoramic vistas as an element justifying the creation of the park. The vistas within the park are protected, but those outside the park have remained unobstructed due partly to the isolated location. One witness, Ms. Martha Clifton McNeel, explained her opposition to the proposed line:

> This approach to the Big Bend National Park [Highway 385] is one of the most spectacular scenic vistas in the country. The imposition of steel structures which are more than double the height of the present wood poles, will have a significant negative impact on the viewer's awareness and appreciation of the natural scenic vistas presented by that area. At some of the sites I viewed, the proposed new poles will actually become the predominant feature in the landscape, overwhelming the natural beauty inherent in the broad sweep of land to the distant mountains. The poles will distract and detract from the mountains themselves in a very real sense. The wires that will be draped between the poles will make this interference with the viewshed even worse.

San Antonio Conservation Society Exhibit No. 1 at 5.

The proposed line would have a negative aesthetic impact because of the size of the poles and their impact on the unusually broad vistas the proposed line would cross.

Concerning historical values, Rio Grande contacted the Texas Historical Commission concerning archeological sites located near the path of the proposed line. There are many sites, most having prehistoric artifacts.

Rio Grande asserted that the proposed line will not have an adverse impact on archeological sites because it intends to conduct a thorough study after it is granted a certificate by the Commission. The survey would be conducted after determining the exact path of the proposed line and would identify archeological sites and plan pole placement so as to avoid the sites. Tr. at 318.

Rio Grande employed Mr. Clell Bond of Espey, Huston & Associates to prepare an archeological reconnaissance. Applicant's Exhibit No. 7. That reconnaissance covered 60 percent of the path of the proposed line, consisting of Mr. Bond's employees walking 500 feet apart across the site area. No

subsurface core samples were taken. Tr. at 301. The effort resulted in the identification of 35 archeological sites. The proposed line will necessarily pass through three large sites. The reconnaissance indicates many sites, including the three unavoidable sites, may be eligible for listing in the National Register of Historic Places. There could be many sites that went undetected due to the broad search technique used.

Mr. Bond's position is that this Commission should trust Rio Grande to protect the archeological sites. The manager of Rio Grande told him the Cooperative intends to protect archeological sites. However, that manager subsequently resigned. Mr. Bond did not know whether Rio Grande has budgeted money for additional surveys. Rio Grande has not reached a programmatic agreement with the Texas Historical Commission. Tr. at 300. Finally, he was unaware that machinery used to string cable may be driven from pole to pole, over sites that had been "avoided." Tr. at 308.

The proposed line's detrimental impact on historical values will at a minimum consist of the disturbance of the three unavoidable archeological sites.

8. Environmental Integrity

Rio Grande also relied upon Ms. Stephenson to present evidence concerning the environmental aspects of the proposed line and its construction. She admitted she is not an environmental expert. Tr. at 395. Ms. Stephenson's testimony concerning environmental matters should be accorded little weight. Her qualifications to testify as an environmental expert are not impressive, and on cross-examination her analysis was repeatedly revealed as being incomplete and inaccurate.

In general Ms. Stephenson's testimony suggests that Rio Grande will construct the proposed line in accordance with REA guidelines and later permit nature slowly to reclaim the area. Therefore, she concludes, the environmental impact will be minimized. But the ALJ and examiner are impressed by the fact the fragile desert environment remains scarred due to the 1953 construction of

the existing line. Tr. at 472. The evidence shows that Rio Grande's efforts to improve service to its members, whether by constructing or by repairing transmission lines, will have an adverse impact on the environmental integrity of this environmentally sensitive and important area. The ALJ and examiner therefore reviewed the record to determine whether Rio Grande's proposal would reasonably minimize that impact.

a. Soil and Geological Resources. The impact on soil and geological resources can be minimized through construction equipment utilizing the existing right-of-way and roads. But 24 miles of the path of the proposed line do not run along the path of the existing line; the new right-of-way requires construction of new roads. Ms. Stephenson testified that a person will in the future identify geological resources in the path of the proposed line so that they will not be impacted. Tr. at 449. Mr. Schneider, who is also employed by AUE, testified to the same effect. He stated it is not the responsibility of AUE to recommend erosion control work for transmission line projects. Tr. at 703.

That future research must resolve several issues related to soil and geological resources. The Texas National Heritage Program, a part of the Texas Parks and Wildlife Department, designated the Cabballos Novaculite outcrop a sensitive habitat where rare and endangered species live. Tr. at 449. The outcrop is near the path of the proposed line but the record does not reflect whether it can be avoided. Tr. at 448.

Arroyos are water-carved gullies or channels. Some arroyos near the proposed right-of-way are very wide, making it difficult for construction vehicles to reach the proposed right-of-way. Ms. Stephenson's testimony indicates Rio Grande intends to fill arroyos as necessary at the time of construction. This will require bulldozing not only in the arroyo itself but also in nearby areas to acquire the fill material. It may be possible to shave down the banks of arroyos as an alternative means to traverse them. However, Rio Grande has not yet evaluated this alternative. Tr. at 513.

Soil compaction is a relevant consideration in a desert environment, according to Ms. Stephenson. But this, too, has not yet been evaluated.

Bulldozers that would be used to construct the proposed line typically weigh over 26,000 pounds. Tr. at 453.

b. Vegetation. The effect of the proposed line on vegetation was discussed by several witnesses. During cross-examination, Ms. Stephenson was questioned concerning the effects on vegetation. She stated that the proposed construction will have no impact to the endangered cacti because Rio Grande will employ a biologist at a future date to assist with pole placement. Tr. at 403.

The evidence in the record offered by Rio Grande concerning on-the-ground biological studies consists of one one-page letter signed by Dr. Del Weniger. Dr. Weniger is the Chairman of the Biology Department at Our Lady of the Lake University of San Antonio. Gage Exhibit No. 5 at exhibit E-6A; Tr. at 400. The letter stated that three local endangered species of cactus are not in the proposed right-of-way; but caution should be used during construction because the species are in close proximity to the proposed right-of-way.

The Borrower's Environmental Report (BER) prepared by Ms. Stephenson and submitted to the REA lists 16 non-cactus species of vegetation. Rio Grande has not conducted on-the-ground research concerning the proposed line's effect on non-cactus vegetation. Tr. at 404.

The intervenor Mark Bleakley called Dr. Allan Dale Zimmerman to testify concerning potential effects on vegetation. Dr. Zimmerman is a research botanist at the Desert Botanical Garden in Phoenix, Arizona, and a consultant to the Albuquerque office of the Fish and Wildlife Service, United States Department of Interior. Tr. at 849. Dr. Zimmerman testified that there are three federally protected species of vegetation that have been reported in the vicinity of the proposed line. One species is Lloyd's hedgehog cactus. The other two species are pin cushion cacti that have no universally accepted English name. Their scientific names are Echinocereus davisii and Coryphantha minima. Tr. at 853. There are several other species in the area that are considered rare and are of interest to the Texas National Heritage Program.

Tr. at 853. Dr. Zimmerman named eight such species. Also, he noted that two of the federally protected cactus species are difficult to detect because they are the size of marbles and grow in dense vegetation, so that frequently even specialists overlook them during special searches. Tr. at 857.

Dr. Zimmerman testified that construction vehicles would destroy virtually all species of plants in their direct path. The species would recover by various means and at various rates. Species entirely new to the area, mostly weeds, would colonize the newly disturbed ground. The new species could be carried in on the construction vehicles.

Dr. Zimmerman noted that two of the federally protected cactus species previously mentioned are unique to a small part of the Marathon Basin in Brewster County. Tr. at 860. There are no federally protected species of vegetation near the site of the Alternative II proposed transmission line connecting Alpine and Study Butte via Highway 118. Tr. at 863. He concluded that Rio Grande has not followed the recommendations of the Texas Natural Heritage Program and the U.S. Fish and Wildlife Service which urge further studies. Bleakley Exhibit No. 1 at 4.

A.S. Gage witness Mr. David Riskind, Director of the Statewide Parks Division, Texas Parks and Wildlife Department, testified that, based upon studies in Texas, Arizona, New Mexico, Nevada and northern Mexico, and upon consideration that rainfall is under 12 inches a year along the proposed right-of-way, recovery of the vegetation after construction would not occur for 40 years. Tr. at 914.

The ALJ and examiner conclude that the Cooperative is unprepared reasonably to minimize the effects of the proposed line on vegetation. There has been no research concerning non-cactus vegetation. The research concerning the effects on endangered species of cacti was inadequate. The record developed by the intervenors showed the difficulty of identifying the endangered species of vegetation in the area. The Cooperative's one page report is inadequate to allow the Cooperative to minimize the effect of construction work on these species.

c. Water, Riparian Habitat. Both the existing line and the proposed line cross Maravillas Creek. Due to the xeric nature of the desert environment, this creek provides a very important resource for the wildlife of the area. Many birds use the creek as a corridor during spring and fall migrations. In addition, the creek provides a year round water supply which attracts a high diversity of birds and mammals. The cottonwood trees, desert willows and other riparian vegetation provide important nesting and feeding areas as well as cover. The U.S. Fish and Wildlife Service urged Rio Grande to avoid the area as much as possible, and especially to avoid placing poles in the creek. The proposed right-of-way is in accordance with these recommendations. The present transmission line passes through Maravillas Gap and runs parallel with Maravillas Creek for a number of miles. The proposed transmission line is rerouted so that it moves parallel to Maravillas Creek approximately 1 mile west thereof, but crosses the creek at least twice north of Maravillas Gap. Tr. at 1280.

Rio Grande has made the efforts described above in an effort to minimize the proposed line's impact on riparian habitats. But Rio Grande has not evaluated what effect filling arroyos during construction would have once the fill material is washed away and deposited as sediment in Maravillas Creek. 511-18. The Alternative II proposed line between Alpine and Study Butte could have a much smaller impact on riparian habitats than the proposed line. Ms. Stephenson was unable to discuss this in even the broadest of terms. Tr. at 1417.

d. Birds. The U.S. Fish and Wildlife Service has expressed special concern about the proposed line's effect on birds. A letter addressed to Ms. Stephenson named fourteen bird species that use the existing wooden poles as a nest site, as a perch site to hunt from, or as a roost site during the winter months. Gage Exhibit No. 5 at exhibit E-5.

The testimony in this case concerning birds often related to accidental electrocutions or "line strikes." Minimizing line strikes was not considered during the design of the proposed line. Tr. at 456. When asked whether the

proposed line will be a "death trap" for birds, Ms. Stephenson asserted it would not, based upon the "Raptor Protection Guidelines." Tr. at 544. But those guidelines indicate a need for a 60-inch separation between energized lines and between an energized line and anything that is grounded. Both the existing line and the proposed line have a distribution underbuild that carries electricity from the transmission line to individual customers located along its path. The distribution lines are energized at 14.4 kV. Tr. at 1236. The distribution underbuild on the existing line is near the (non-conducting) wooden pole but the underbuild on the proposed line is only 13 inches from the grounded steel pole. Tr. at 1414. This poses a substantial threat to the many birds in the region that have wingspans in excess of 13 inches.

The American peregrine falcon is an endangered species. A roost site for this breed of falcon exists within five miles of the existing line. The U.S. Fish and Wildlife Service urged Rio Grande to address in the BER possible impacts on the species. The BER subsequently prepared by Ms. Stephenson devotes one paragraph to her speculations on the subject. The black-capped vireo is a candidate for addition to the endangered species list. The REA directed Rio Grande to employ a person competent to identify black-capped vireo nesting habitat along the proposed line. This had not been done as of the time of the hearing. Tr. at 467. There also are two golden eagle nests and several red-tail hawk nests located along the existing line.

e. Examiners' Conclusions About the Effect of the Proposed Line on Environmental Integrity. Notwithstanding the fact that the applicant Rio Grande has the burden of proof in this docket, the hallmark of its testimony concerning environmental integrity is that additional studies will determine how to minimize the proposed line's impact on the environment. The record reflects that Rio Grande is not prepared to minimize the impact of the proposed line on the environment. A contrary conclusion could be based only on the applicant's promises. The cost projections prepared by AUE do not include line-item monies for the additional archeological or cactus surveys. According to Mr. Schneider, the AUE person in charge of preparing the cost estimate, this is because a project budget usually does not detail specific monies for such

surveys. But Mr. Schneider did not know if AUE has ever in the past worked on a project that required such surveys. Tr. at 700.

For reasons discussed in this and preceding sections, the ALJ and examiner conclude that approval of the proposed line would likely result in an unreasonably adverse effect on the environmental integrity of the area.

[3] f. Effect of REA Finding of No Significant Impact. As discussed previously, PURA Section 54(c) requires the Commission, when reaching a decision in this case, to consider among other things "the effect of the granting of a certificate on ... environmental integrity". But authority granted by Texas law is limited by federal law. See Section 37 of PURA.

Rio Grande applied for financial assistance from the REA in order to construct the first portion of the proposed transmission line. This federal agency, created pursuant to the Rural Electrification Act of 1936, 7 U.S.C. §901 et seq. (1980), granted the request for financial assistance after preparing a Finding of No Significant Impact (FONSI) concerning that portion of the proposed line. The FONSI was based upon the conclusion that approval of financial assistance "would not constitute a major federal action significantly affecting the quality of the human environment." This finding was issued in connection with the REA's responsibilities under the National Environmental Policies Act of 1969, 42 U.S.C. §4321 et seq. (1977) (NEPA). Section 4332 of NEPA requires federal agencies taking "major federal actions" (which term has been held to include federal loans) to consider the effect of such action upon the human environment.

During the hearing on the merits, the ALJ requested the parties to brief the question of whether any actions or decisions by the REA would preempt this Commission from entering findings regarding the proposed transmission line which differ from the conclusion contained in the FONSI. Rio Grande did not assert that the Commission's ability to render a decision in this docket has been preempted. However, according to Rio Grande, the Environmental Assessment (EA) prepared by the REA "establishes that the proposed project is environmentally sound." Closing Statement of Rio Grande at 33-43.

A similar issue arose in a previous Commission case, Docket No. 5023, Application of CP&L, HL&P and SWEPCO for a +/- 400 kV HVDC Transmission Line from Walker County Station South to the Matagorda Station at the South Texas Project, _____ P.U.C. BULL. _____ (November 12, 1987). In that docket, the applicants argued that this Commission had been preempted from considering certain issues because of an order of the Federal Energy Regulatory Commission (FERC). The FERC order approved a settlement agreement which was the result of years of litigation. The FERC order stated: "...CSW and HLP are hereby required to construct or cause to be constructed the necessary facilities to effect the interconnections as described in or consistent with the settlement agreement..." The FERC found, among other things, that the interconnect agreement is in the public interest under §210 of the Federal Power Act as amended, 16 U.S.C.A. §824a, i, j, k.

The examiner in Docket No. 5023 and, on appeal, the Commission concluded that the Commission had been preempted in that case from considering two PURA §54(c) factors: the adequacy of existing service and the need for additional service. They held that the Commission would consider the other PURA §54(c) factors. Examiner's order (May 17, 1983) and Commission order (June 1, 1983), 8 P.U.C. BULL. 490 and Commission order on rehearing (July 15, 1983), 8 P.U.C. BULL. 619. In finding that preemption had occurred, they observed:

> The Federal Power Act, 16 U.S.C.A. §824, et seq., establishes a comprehensive scheme of control, at the federal level, of interconnection, coordination, and pooling of all electric facilities. Until November 9, 1978, interconnection among utilities was voluntary under the Federal Power Act. However, with the enactment of the Public Utilities Regulatory Policies Act (PURPA), Congress amended the Federal Power Act so that the FERC can, upon application of any electric utility, order the physical connection of the transmission facilities of any electric utility. 16 U.S.C.A. §824i. Furthermore, 16 U.S.C.A. §824a-1 allows the FERC to exempt electric utilities from any state rule or regulation which prohibits or prevents the voluntary coordination of electric utilities.

8 P.U.C. BULL. at 491.

In November 1984, the applicants in Docket No. 5023 sued for injunctive relief in district court in Travis County. In September 1984, District Court

Judge Harley Clark entered an order permanently enjoining the Commission from taking any action in Docket No. 5023 other than to choose a specific route within the FERC-approved corridor and to grant a certificate for that route. Further litigation in court and at the FERC ensued. FERC subsequently amended its order, allowing the utilities to substitute a line in a different location for that at issue in Docket No. 5023. Docket No. 5023 was subsequently dismissed as an obsolete petition.

The ALJ and the examiner believe that the present case is distinguishable from Docket No. 5023, based on the standard for federal preemption. The United States Supreme Court has described that standard as follows:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.

Louisiana Public Service Commission v. FCC, 106 S. Ct. 1890 (1986) (citations omitted).

Under this standard, the facts of Docket No. 5023 in several respects strongly supported a finding of preemption. In the Federal Power Act, Congress had expressed a clear intent to preempt any state law prohibiting or preventing the voluntary coordination of electric utilities. Pursuant to its statutory authority regarding such coordination, FERC had found that the facilities were needed, and had ordered the utilities to build them. A state decision refusing a certificate for the facilities on grounds they were not necessary would have conflicted with, and have prevented the utilities from complying with, the FERC order.

In contrast, the facts in the present case differ from those of Docket No. 5023 in several material respects. The discussion below reviews the facts in the present case in light of the federal preemption tests set forth in Louisiana Public Service Commission v. FCC.

Regarding the Rural Electrification Act, Congress has not expressed a clear intent to preempt state law. The United States Supreme Court discussed this point in a rate regulation context in Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 375, 385 (1983) (Arkansas). The preemption issue arose in Arkansas because a cooperative financed by the REA objected to state regulation of its wholesale rates. But the Supreme Court found that nothing in the Rural Electrification Act expressly preempts state rate regulation of power cooperatives financed by the REA. It further noted that the REA is a lending agency rather than a classic public utility regulatory body in the mold of either the FERC or a state public utility commission. According to the Court, the legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes. The Court stated, the "present published policy of the REA is wholly inconsistent with preemption of state regulatory jurisdiction." Arkansas, 461 U.S. at 386-7, 103 S.Ct. at 1914.

In the present case there would also be no outright or actual conflict between federal and state law, implicit federal barrier to state regulation or state-imposed obstacle to Congressional objectives. The REA loan involved only the southern 24 mile portion of the transmission line at issue in the present docket. The Cooperative has not yet applied for financial assistance from the REA concerning the remaining 30 mile portion of the line proposed in this case. Tr. at 1295.

Moreover, the United States Supreme Court has had the opportunity to reverse a state supreme court decision that denied a CCN to a project already financed by the REA, but declined to do so. See Western Colorado Power Co. v. Public Utilities Commission, 411 P.2d 785 (Colo. 1966), cert. denied, 385 U.S. 22 (1966). In that case, the Colorado Supreme Court held:

> The power to regulate entities affected with a public interest is a function of the police power of the state, and any business or activity which is affected with a public interest may be so classified and so regulated. . . .We hold that [an electric utility's] business is affected with a public interest and is subject to regulation under the police power of the State of Colorado, and that such regulation does not violate either the Constitution of the State of Colorado or the Constitution of the United States.

411 P.2d at 794.

The court further observed:

> The co-operative form of organization obviously has nothing to do with the question of what constitutes the public convenience and necessity, or with the obligation of any utility to prove public convenience and necessity in accordance with the theory of regulated monopoly as expressed by the statutes of the State of Colorado and the decisions of this court. These statutes were enacted for the benefit of the public as a whole, and result in the granting of regulated status to a supplier of a commodity essential to the public interest.

Id. at 795.

Finally, compliance with federal and state law would not be in effect physically impossible. REA has not ordered that the transmission line be built; it has merely approved the funding for that line. Perhaps in some circumstances federal concerns about securing federal loans could cause the preemption of state regulation. But here, if the application is denied there would be no need to disburse the loan.

As previously mentioned, the NEPA requires the Rural Electrification Administration to produce a FONSI prior to disbursing a loan. Accordingly, the analysis whether the facts in the present case indicate preemption under the tests set forth in Louisiana Public Service Commission v. FCC must also include a review of whether the NEPA requires preemption. Regarding the NEPA, there is no clear Congressional intent to preempt state regulation, outright or actual conflict between federal and state law, implicit federal barrier to state regulation or state-imposed obstacle to Congressional objectives. On the contrary, 42 U.S.C. §4331 states:

> ...it is the continuing policy of the Federal Government, in cooperation with state and local government, ... to use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony...

§4334 provides:

> Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal Agency ... (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Finally, 42 U.S.C.A. §4371 states:

> (b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relative to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.
>
> (2) The primary responsibility for implementing this policy rests with state and local governments.

Regarding the allocation of power between the federal and the state governments, this language is in marked contrast to that of the FPA provisions at issue in Docket No. 5023. In addition, the courts have held that compliance with the requirements of NEPA will not relieve an entity of the obligation to comply with state environmental law. See, Rankin v. Coleman, 394 F. Supp. 647, 660 (E.D.N.C. 1975), modified in other respects, 401 F. Supp. 664 (E.D.N.C. 1975).

Finally, the REA did not intend that its environmental analyses preempt state regulatory investigations. See 7 C.F.R. §1794.13 (1987), where the REA contemplates coordinating its preparation of environmental analyses with state regulatory actions.

The ALJ and examiner conclude that the Commission is not required under the Rural Electrification Act or NEPA to hold that the EA prepared by the REA "establishes" the environmental soundness of the proposed transmission line.

Of course, the federal Constitution may also prohibit certain state regulation. The Commerce Clause prohibits state interference in interstate commerce. In Arkansas, the Supreme Court adopted a less formalistic test, not previously used in a utility regulation case, to determine whether state regulation violates the Commerce Clause:

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

461 U.S. at 393, citing, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). (citation omitted).

No party to this case asserted that the Commission's authority to regulate the construction of transmission lines within the State of Texas violates the Commerce Clause. Such state regulation is permissible under the above test.

A related question is what weight the Commission should give to the environmental finding contained in the FONSI. The ALJ and examiner cannot recommend viewing the FONSI as decisive as to the environmental integrity factor for purposes of this case, for several reasons.

First, the FONSI incorporates and is based upon an EA prepared by the staff of the REA. The FONSI stated that the EA was the result of an independent evaluation. But that evaluation is based solely on the materials submitted by Rio Grande and two visits to Brewster County made by REA officials.

The EA adopts by reference the BER prepared by Rio Grande. The EA notes that "public input has indicated some errors in the environmental information contained in the BER. None are of such magnitude to render that document materially deficient." However, it appears from the evidence that the REA did not hold an evidentiary hearing on the application. In contrast, the person who prepared the BER, Ms. Janet Jo Stephenson, testified in the present case. As noted previously, at the hearing Ms. Stephenson's analysis of the environmental effect of the proposed transmission line was shown to be significantly inaccurate and incomplete.

Finally, the record in this case incorporates a much more extensive investigation of the environmental impact of the line proposed by Rio Grande than does the EA prepared by REA. Moreover, as noted previously, the REA loan relates to only approximately half of the line proposed in the present docket.

In summary, the ALJ and the examiner recommend that the Commission base its findings and conclusions regarding the proposed line's effect on environmental integrity on the evidence presented in this case, and in this connection not to give great weight to the finding in the FONSI that approval of financial assistance "would not constitute a major federal action significantly affecting the quality of the human environment." As discussed previously, based on the evidence, the ALJ and the examiner find that the proposed line is likely to have a significant adverse impact on environmental integrity. Finally, as later discussed, even if preemption were found to apply to the environmental integrity factor, balancing the other PURA §54(c) factors, the ALJ and the examiner would recommend denial of Rio Grande's application in this case.

9. Probable Improvement of Service or Lowering of Cost to Consumers

There are only a few ranches located along the path of the existing Alpine to Persimmon Gap line. Tr. at 1343. The proposed line promises more reliable service for these ranches and members directly served by the Persimmon Gap substation, including La Linda and Big Bend National Park.

But Rio Grande predicts load growth will be greatest in the Study Butte area. Tr. at 1199. Even if the proposed line is constructed, service to members in the Study Butte area will remain subject to service problems caused by the existing Persimmon Gap to Study Butte distribution line. Nothing in the record indicates that line is in better condition than the Alpine to Persimmon Gap line the Cooperative requests to replace in this docket. Alternative I calls for building a Persimmon Gap to Study Butte transmission line in 1992.

In a majority of instances, recent service interruptions were due to lightning strikes or wind damage to deteriorated poles. The ALJ and examiner conclude that spending more than $5 million on 90 foot steel poles is excessive where reviving regular maintenance practices common to other electric cooperatives but suspended by Rio Grande in 1980, and installing a static wire on the existing line, would be effective measures to prevent weather-related service interruptions.

There is very little evidence in the record concerning the cost of the proposed line to members of the Cooperative. Cost of service calculations were provided in 1987 in Docket No. 7284 but those calculations are based on Rio Grande's entire operations, not costs specifically attributable to the proposed line. Commission staff engineer Hughes testified that Rio Grande had not submitted any information in this docket concerning the cost of service effect on members. Tr. at 1085.

Such evidence as there is regarding cost of the proposed line to consumers is not encouraging. Alternative I includes plans to build a line from Persimmon Gap to Study Butte in 1992 and plans to build substations in 2007 to bring the proposed line up to 138 kV operation. But the financial forecast prepared by the Cooperative's consultant does not contemplate paying for these projects. Rio Grande had spent $728,000 on this docket at the time of the hearing. According to the BER, the approximate cost to replace the bad poles and cross-arms on the existing line is $700,000. Gage Exhibit No. 5 at 15.

The application first submitted by Rio Grande in this docket listed the following costs related to constructing the proposed line:

Right of Way	$ 163,636
Materials	$2,225,344
Labor and Transportation	$2,115,217
Engineering	$ 651,160
Total	$5,150,357

This schedule omits at least two substantial cost items. Rio Grande would need to purchase or lease at least one bucket truck capable of servicing 92 foot

poles. The trucks cost $158,000 each. Tr. at 994. Reconnecting distribution lines to the new transmission line would cost "thousands of dollars." Tr. at 1079.

One would expect such costs eventually to be reflected in rates. Given the magnitude of the probable costs, the effect on rates could be substantial. As noted previously, Rio Grande's rates are already high.

Of course, the proposed line is intended to replace the existing Alpine to Persimmon Gap line. An alternative to the Cooperative's proposal, merely replacing the bad poles and cross-arms on the existing line, would cost $700,000. To replace all poles and cross-arms and install a static wire for lightning protection on the existing line would cost $2,474,033. Gage Exhibit No. 5 at 35.

The cost to repair the existing line is high because of the radial transmission line configuration. Since the line is not a part of a "loop," the only way to maintain customer service during maintenance activities is to repair the line while it is energized, or "hot." Work on a hot line is dangerous and requires equipment that Rio Grande does not own. Tr. at 1390. Rio Grande's estimate of the costs to repair the existing line includes the extra expenses associated with working under these conditions. Nevertheless, based on the above numbers, constructing the proposed line would cost far more than repairing the existing line.

The cost of the proposed line is more reasonable in the context that it is the first phase of Alternative I. Constructing the Alpine to Persimmon Gap line now with 138 kV capability would mean the line could meet growing load demand, and would not need to be rebuilt until well into the next century. As previously mentioned, Rio Grande's project summary lists alternative transmission systems designated adequate for 4.4 percent load growth conditions; in the year 2007, the accumulated present worth of Alternative I is $11,008,625 and the accumulated present worth of Alternative II is $12,475,648. This would indicate Alternative I is less expensive and therefore the first phase of the plans - construction of the proposed line - should begin.

But a different picture appears if the economic analysis is based upon the staff's 2.9 percent load growth projection, recommended by the ALJ and the examiner. In the year 2007 the accumulated present worth of Alternative I is $7,085,024. The accumulated present worth of Alternative II is $7,119,548. Staff Exhibit No. 3 at HLH-6 through HLH-9. The staff projections are based on Rio Grande's construction cost estimates of the various components of the two Alternatives. Staff Exhibit No. 3 at 6. The two estimates differ because the staff used annual fixed cost rates it felt were more accurate and because the construction of the substations necessary to upgrade the proposed line from 69 kV to 138 kV operation was postponed. According to the staff, this upgrade will not be necessary for at least an additional ten years.

Of course, the above discussion still indicates that Alternative I is slightly less expensive. But, as previously discussed, Alternative II unnecessarily upgrades the transmission system. Alternative II is less expensive if reformulated to provide an adequate, but not oversized, transmission system. Under Alternative II, if 336 MCM conductor is used on the Alpine to Study Butte line rather than 556 MCM conductor, construction costs would be lowered by at least $1 million.

According to the staff, under Alternative II the need to upgrade the Alpine to Persimmon Gap line to 138 kV operation can be indefinitely postponed because load would be split between two radial lines - Alpine to Persimmon Gap or Alpine to Study Butte. Under the staff's analysis that utilizes the 2.9 percent load growth projection, Alternative I should call for upgrading the Alpine to Persimmon Gap line to 138 kV operation in the year 2017. Under Alternative II, such an upgrade would be indefinitely postponed beyond 2020.

The staff's analysis does not show the full cost effect of postponing the 138 kV upgrade, because it is based upon Rio Grande's cost estimates in the project summary. The estimate concerning upgrading the Alpine to Persimmon Gap line to 138 kV operation includes costs associated with a new transmission line terminal and new 138 kV substations at Altuda and Persimmon Gap. The estimate

does not include obtaining the prerequisite connection to a 138 kV source.

There are three options available to Rio Grande to obtain a 138 kV source. The first option is to construct an Alpine metering point step-up transformer that would increase voltage from the 69 kV provided by WTU up to the needed 138 kV level. This would cost approximately $400,000. Tr. at 1182.

The second option is to construct an additional transmission line connecting the Alpine metering point to the nearest 138 kV source. At present the closest 138 kV source is 15 miles distant and operated by WTU. But Rio Grande has not conducted a study and does not know whether that source can handle the additional load Rio Grande would impose on it. Tr. at 1183. Staff witness Mr. Hughes testified that it would cost $1,350,000 to construct an additional transmission line to connect to the nearest 138 kV source. Tr. at 1078.

The third alternative anticipates WTU providing a 138 kV source at the Alpine metering point. However, Rio Grande witness Mr. Schneider admitted that WTU has not planned any such conversion at least until 1997 and after that point has no corporate plans. Mr. Schneider assumed that such costs would be fully paid by WTU and not by Rio Grande. However, Rio Grande would at least in part account for the need to construct a new 138 kV source at the Alpine metering point, and might have to pay part of WTU's construction costs.

The ALJ and examiner conclude that building the proposed line would be far more costly than repairing the existing line. But an upgrading of the transmission system, as opposed to mere repairs, will be necessary. The proposed line is the first step of the Cooperative's Alternative I plans. Alternative II, which would not require construction of the proposed line, adjusted to reflect the costs of an adequate transmission system assuming 2.9 percent load growth, would be less expensive than the Cooperative's proposal.

D. Overall Conclusions and Recommendations

The most troubling aspect of this application is the inadequate explanation for certain decisions made by the Cooperative. No reason was given why regular maintenance on the existing line stopped in 1980, three years before the Cooperative first contemplated constructing a new transmission line. The Cooperative's testimony in this case offers reasons why the proposed line allegedly satisfies each element of §54(c) of the PURA, but never explains why a cooperative in financial trouble would contemplate constructing an $11 million transmission system whose alleged justification is a load growth projection that is based on two years of data.

Based on the evidence presented, the ALJ and examiner conclude that the Cooperative's preference for the proposed line is unreasonable. The Cooperative anticipates the greatest increase in load in the Study Butte Area. But the proposed line runs to Persimmon Gap. Before the Cooperative could upgrade the line between Persimmon Gap and Study Butte it would have to seek another amendment to its CCN. The fact that a portion of that line passes through Big Bend National Park means there almost certainly will be substantial opposition from intervenors. In contrast to such a proceeding, the hearing in this docket might some day be remembered as being rather calm.

The ALJ and examiner conclude the proposed line is not necessary for the service, accommodation, convenience, or safety of the public. This conclusion arises from a balancing of the factors enumerated in Section 54(c) of the PURA. These include the fact that the existing service inadequacies are due to the insufficient maintenance of the existing line, but increasing load demand requires an upgraded transmission system. However, except for the factor concerning the effect of the proposed line on other utilities, considering the alternatives, the Section 54(c) factors all balance against the line proposed in the Cooperative's application. The ALJ and examiner further believe that, even if this Commission were held to be federally preempted from adopting their conclusions concerning the environmental impact of the proposed line, the balance of all of the factors under Section 54(c) of the PURA would indicate the proposed line is not necessary for the service, accommodation, convenience or safety of the public.

The ALJ and examiner recommend that the Commission deny the Cooperative's application to amend its CCN.

III. Findings of Fact and Conclusions of Law

The ALJ and examiner further recommend that the Commission adopt the following Findings of Fact and Conclusions of Law:

A. Findings of Fact

1. Rio Grande Electric Cooperative, Inc. (Rio Grande or the Cooperative) provides electric utility service within its certificated service area, under Certificate of Convenience and Necessity No. 30129.

2. On March 18, 1987, the Cooperative filed an application to amend its certificate of convenience and necessity to include a proposed transmission line within Brewster County.

3. The proposed line would replace the Cooperative's existing transmission line that runs from a metering station near Alpine, Texas south to the Persimmon Gap area near the Highway 385 entrance to Big Bend National Park.

4. On March 19, 1987, the Cooperative filed with the Commission a sworn affidavit indicating that notice of this application had been given to all cities and neighboring utilities providing the same service within five miles of the proposed line.

5. On May 6, 1987, the Cooperative filed with the Commission sworn affidavits indicating that, beginning the week after the application was filed with the Commission, notice of this application was published for two consecutive weeks in the San Angelo Standard Times and the Alpine Avalanche. The two newspapers have general circulation in the county where the proposed transmission line would be located.

6. The following parties were granted intervenor status in this case: Susan Combs, A. S. Gage Ranches, Inc., J.B. Love, Jr., Sally Matthews Buchanan,

Chihuahuan Desert Research Institute, San Antonio Conservation Society, Mark Bleakley, J.P. Bryan, The National Audubon Society and the El Paso/Trans-Pecos Audubon Society, Texaco, Inc., and the Lone Star Chapter of the Sierra Club.

7. Chihuahuan Desert Research Institute's request to withdraw its intervention was granted on July 3, 1987.

8. The Texas Nature Conservancy of San Antonio participated in this case as a protestant.

9. The case was originally co-assigned to an Administrative Law Judge and a hearings examiner. The Administrative Law Judge presided over the hearing on the merits. The examiner originally co-assigned this case is no longer with the Commission. On March 30, 1988, the case was co-assigned to the undersigned hearings examiner, who has read the entire record.

10. A prehearing conference was held on May 5, 1987. Pursuant to the Administrative Law Judge's order, the following parties were grouped together and referred to as "A.S. Gage:" Susan Combs, A. S. Gage Ranches, Inc., J.B. Love, Jr. and Sally Matthews Buchanan.

11. Notice of the hearing on the merits was sent to the parties on May 8, 1987. The hearing lasted from November 17 to 20 and December 7 to 9, 1987.

12. For purposes of cross-examination, A.S. Gage, Mark Bleakley, J.P. Bryan, the Lone Star Chapter of the Sierra Club and the National Audubon Society and the El Paso/Trans-Pecos Audubon Society were grouped together. Each party was allowed to present a direct case. However, these parties were not allowed to cross-examine each other's witnesses and were required to designate one representative to cross-examine witnesses for Rio Grande, Texaco, Inc. and the Commission staff.

13. Rio Grande obtained financial assistance from the Rural Electrification Administration (REA) in order to construct the southern 24 mile portion of the proposed line.

14. The REA is a federal agency, created pursuant to the Rural Electrification Act of 1936, 7 U.S.C. §901 et seq. (1980).

15. As part of its loan procedure, and based upon its Environmental Assessment, the REA made a finding of no significant impact with respect to the construction of the proposed line. The REA concluded that the Environmental Assessment evaluated the impacts of the proposed project and that these impacts are acceptable.

16. Rio Grande does not generate electricity; it purchases power from outside sources and distributes it to its 3,600 members.

17. The existing transmission line that runs from Alpine, Texas to Persimmon Gap provides service to 1,100 members. The area served by the existing line is 6,000 square miles.

18. The existing line operates at 69 kV, was built in 1953, comprises 564 poles, and is 54 miles long. It runs from a metering point near Alpine, Texas (where WTU provides a 69 kV source) south to the Cooperative's Altuda substation and south to the Cooperative's Persimmon Gap substation.

19. The existing line utilizes 45 foot tall wooden poles. A transmission conductor runs from the top of the poles. Two additional transmission conductors are strung from a cross-arm. Two distribution conductors are strung from a lower cross-arm. The span between poles is 526 feet.

20. Individual Cooperative members are served by distribution feeders that run off of the existing line. The Study Butte, Terlingua and Lajitas area is served by a 66 mile distribution line connected to the Persimmon Gap substation.

21. The transmission line proposed in this docket is intended to replace the existing line. Similar to the existing line, it would run 54 miles from the Alpine metering point to the Persimmon Gap substation.

22. The northern 30 miles of the proposed line would run in close proximity to the path of the existing line. The southern 24 miles of the proposed line would follow a new 100 foot wide right-of-way. Within the new right-of-way, the actual path of the proposed line would be 40 feet wide.

23. The proposed line would utilize 92 foot tall steel poles that are approximately three times wider than the existing wooden poles. The poles would be made of weathering steel that over time turns brown. The span between poles would be 950 feet.

24. The proposed line would have six conductors running from pole to pole. The top of the pole would support a static wire. Below, three separate davit arms would each support a transmission conductor. Two distribution conductors would run near the pole itself. Except for the static wire, the conductors would be 336 thousand circular mills (MCM). The pole insulators are designed for up to 138 kilovolt (kV) operation.

25. Regular maintenance of the existing line ended in 1980. The Cooperative repairs the line only in circumstances threatening immediate service interruptions, such as when lightning or wind breaks a pole.

26. Compared to 43 electric cooperatives that should have similar transmission line operation and maintenance expenses, Rio Grande's expenditures on maintenance are approximately 17 times smaller.

27. Rio Grande determined that the existing line must be replaced based upon the following three criteria:

a. The deteriorated condition of the existing line and resulting excessive electric outages to members served by the line.

b. Excessive energy losses on the existing line.

c. The existing line had reached its capacity to maintain adequate voltage at the Persimmon Gap substation.

28. Between 1983 and August, 1987 the existing line suffered twelve service interruptions. Of these interruptions, seven were attributable to high winds breaking deteriorated poles or cross-arms; three to lightning; and two to power supply failure by West Texas Utilities Company (WTU).

29. Of the twelve service interruptions occurring between January, 1983 and August, 1987, nine were caused by improper maintenance of the existing line or conditions beyond the Cooperative's control. Specifically, proper line maintenance would have avoided the seven service interruptions due to high winds breaking deteriorated poles. The two service interruptions due to WTU power supply failure were beyond the Cooperative's control.

30. Existing service inadequacies are primarily due to the Cooperative's inadequate maintenance of the existing line.

31. The original application submitted March 18, 1987 stated "[l]oad growth was not used to justify the rebuilding of existing facilities." However, the Cooperative amended its application on the morning the hearing began, stating that continued load growth in part justifies constructing the proposed line.

32. Rio Grande projects continued load growth at an annual rate of 4.4 percent.

33. Rio Grande's 4.4 percent projection is the product of a "linear regression forecasting program." The projection is based solely on 1976 and 1986 Alpine to Persimmon Gap area peak kilowatt load data.

34. Based on the Alpine to Persimmon Gap area annual average increase in load demand during the years 1982 through 1986, the intervenor Texaco predicted a 2.24 percent annual load growth rate.

35. The Commission staff projected the Alpine to Persimmon Gap load growth at an annual rate of 2.9 percent.

36. The staff projection utilized a "state space model." This algorithm reviews data and selects the most relevant portions to predict future behavior. The model has been used in many applications, including forecasting economic indicators such as the consumer price index, interest rates, and the gross national product.

37. The staff projected growth for the years 1987 through 2016. The projection combined the analysis of two single-variable model calculations. The first calculation was based on total energy purchased from WTU at the Alpine metering point for the years 1956 through 1986. The second calculation used peak kilowatt demand at the Alpine metering point for the years 1975 through 1987.

38. The staff projected peak kilowatt demand growth at the Persimmon Gap substation because the staff predicts the greatest increase in demand at this substation.

39. The load growth projections of the Cooperative, the intervenor Texaco, and the Commission staff did not take into consideration the radial configuration of the Alpine to Persimmon Gap line.

40. The staff's load projection methodology best contemplates the multitude of factors that can affect future load growth and best distinguishes between short and long term growth trends. It is more believable than the methodology used by the Cooperative.

41. As evidence that load growth will increase at the 4.4 percent rate, the Cooperative provided a U.S. Department of Interior letter indicating Big Bend National Park's total peak demand will increase 107 percent.

42. Internal plans for the national park have been revised so that the current anticipated increase in total peak demand is 60 percent.

43. The Cooperative's 4.4 percent load projection is overstated to the extent it is based on the Cooperative's projections of load demand inside the national park.

44. The Cooperative's largest customer is La Dominicia S.A. De C.V. (La Linda), a mining facility. The mine sometimes represents more than 30 percent of the load on the Alpine to Persimmon Gap line.

45. As evidence that total load growth will increase at the 4.4 percent rate, the Cooperative asserted that the La Linda load will grow at an 11 percent rate.

46. The Commission staff projected an annual 3.2 percent load growth rate at La Linda.

47. The La Linda load demand increased 43 percent in 1983. The following year load demand increased 8 percent followed by two successive years where load demand decreased. In 1988, La Linda intends to increase demand from 1,500 kVA. In 1989, La Linda intends to increase demand to 2,100 kVA. La Linda does not have corporate plans extending beyond 1989.

48. Based upon a conversation with Mr. Jorge Diaz, the Director General of La Linda, a witness for intervenor Texaco concluded that La Linda's load growth rate will not exceed 3.2 percent. This is the most believable figure for La Linda load growth contained in the record.

49. The Cooperative's existing transmission system has provided service up to the Cooperative's contractual obligations under the current service contract with La Linda.

50. The La Linda mine is located in Mexico.

51. The Cooperative's 4.4 percent growth load projection is overstated to the extent it is based on the Cooperative's projected 11 percent annual load growth at La Linda.

52. The Cooperative did not collect demographic data to quantify the probable population and needs of its customers.

53. The persuasiveness of a load growth projection is reduced if it does not rely upon area demographic data.

54. The staff's projection is based on the most reasonable load growth projection methodology and, unlike the Cooperative's projection, is not influenced by the Cooperative's overestimates of load growth at Big Bend and La Linda.

55. Area annual load growth will increase at a rate of 2.9 percent.

56. The Cooperative's long-range corporate plan to rebuild its transmission system serving the Alpine to Persimmon Gap area, including construction of the proposed line, is designated as "Alternative I" in the Cooperative's project summary.

57. One alternative plan to rebuild the Cooperative's transmission system serving the Alpine to Persimmon Gap area, including construction of a transmission line from the Alpine metering point to Study Butte along Highway 118, is designated as "Alternative II" in the Cooperative's project summary.

58. Both alternatives provide an adequate transmission system for the future needs of the Alpine to Persimmon Gap area. According to the Cooperative, the cost associated with Alternative I discounted to its present value is $11,008,625. The cost associated with Alternative II discounted to its present value is $12,475,648.

59. Alternative II provides for using 556 MCM conductors on the Alpine to Study Butte line. Assuming a load growth rate smaller than 4.4 percent, the smaller 336 MCM conductor would provide adequate service for this line from 1989 to some time beyond 2018.

60. Alternative II provides for an unnecessarily oversized conductor, 556 MCM, on the Alpine to Persimmon Gap line. Utilization of 336 MCM conductor would be adequate. Utilizing the smaller conductor would result in a $1.0 million reduction of the estimated cost of Alternative II.

61. Alternative II calls for the complete rebuilding of the Alpine to Persimmon Gap line in 1988, which is unnecessary considering the Alternative calls for the complete rebuilding of the line again in 2003 using steel poles.

62. A reformulation of Alternative II, calling for the 1988 replacement of only those wooden poles and cross-arms considered "bad" on the Alpine to Persimmon Gap line, rather than completely rebuilding the line using all new wooden poles and cross-arms, would result in a $1.8 million reduction of the estimated cost of Alternative II.

63. If Alternative I plans are carried out, the entire area load would remain on one radial line. If Alternative II plans are carried out, the Study Butte area load would be carried by the Alpine to Study Butte line and the Altuda/Persimmon Gap load would be separately carried by the Alpine to Persimmon Gap line. Upon completion of the Alternative II plans, line losses would exponentially decrease because of the reduction of load on each line.

64. Based upon the split of area load between two radial lines under Alternative II, compared to Alternative I, Alternative II should not require the earlier upgrading of the Alpine to Persimmon Gap line to 138 kV operation.

65. A postponement of the estimated upgrading of the Alpine to Persimmon Gap line to 138 kV operation would result in a reduction of the estimated cost of Alternative II.

66. The financial forecast prepared by the Cooperative plans operations based on a $2.2 million rate increase. However, the Commission, in the Final Order in Docket No. 7284, dated June 23, 1987, granted only a $1.9 million rate increase.

67. The Cooperative's financial forecast does not budget money for construction of Alternative I plans for a 1992 Persimmon Gap to Study Butte line or the 2007 upgrading of the Alpine to Persimmon Gap line to 138 kV operation.

68. The Cooperative is currently in technical default on its REA loan commitments.

69. The Cooperative has obtained REA funding for the first 24 miles of the proposed line. The loan would be for approximately $2 million. The Cooperative has not obtained funding for the second 30 mile section of the proposed line. This would require an additional $3 million loan.

70. With the exception of the proposed line, the Cooperative did not show by a preponderance of the evidence it has the financial resources to undertake its corporate plans enumerated in Alternative I of the project summary.

71. WTU provides electric service to the City of Alpine, bordering the area served by the proposed line. The proposed line would have no effect on WTU or any other utility besides Rio Grande.

72. The Cooperative did not show by a preponderance of the evidence the proposed line would not have an adverse impact on community values.

73. The southern end of the proposed line at the Persimmon Gap substation is within five miles of Big Bend National Park and Black Gap Wildlife Management Area.

74. The proposed line could have an effect upon animals in the area that are a special asset of the national park and Black Gap Wildlife Management Area.

75. The Cooperative's evidence concerning the existence of particular animal species in the region and the consequent evaluation of the proposed line's effect on the species were admittedly the result of guesswork.

76. The proposed line would use steel poles three times wider and double the height of the existing wooden poles. The span between poles would be increased from 526 feet to 950 feet. The existing line crosses Highway 385 three times; the proposed line would cross the highway only once.

77. The Cooperative did not show by a preponderance of the evidence the proposed line would not have an adverse impact on recreational and park areas.

78. The proposed line would have a negative impact on park visitors' awareness and appreciation of the natural scenic vistas presented by the area.

79. There are at least 35 archeological sites along the path of the proposed line, most having prehistoric artifacts.

80. The proposed line would disturb at least three large archeological sites. The three sites may be eligible for listing in the National Register of Historic Places.

81. The proposed line would have an adverse impact on historical and aesthetic values.

82. The desert environment remains scarred due to the 1953 construction of the existing line.

83. The Cooperative believes area geological resources may be threatened by the proposed line. The Cooperative does not feel it has sufficiently identified geological resources and therefore intends in the future to employ a person to evaluate the impact of the line on these resources.

84. The Cabballos Novaculite outcrop may be in the path of the proposed line. The Texas National Heritage Program, a part of the Texas Parks and Wildlife Department, designates that outcrop as a sensitive habitat. The record does not reflect whether it can be avoided.

85. Soil compaction is a significant factor in a desert environment. The Cooperative failed to demonstrate that there would not be an unreasonable effect on the environmental integrity of the area due to soil compaction associated with construction of the proposed line.

86. A witness for the Cooperative prepared an on-the-ground cactus survey. According to the survey, there are three endangered species of cacti that are found in the general area but that are not in the proposed right-of-way.

87. The three endangered species referred to in Finding of Fact No. 87 are Lloyd's Hedgehog Cactus, Echinocereus davisii and Coryphantha minima. Eight other species of vegetation found in the area are of interest to the Texas National Heritage Program.

88. Two of the federally protected cactus species found in the area are difficult to detect because of their small size. The qualifications and work performed by the person who actually conducted the Cooperative's cactus survey are not detailed in the record. The weight which should be given the document is accordingly diminished.

89. After construction, vegetation would not return to the path of the proposed line for at least 35 years. The Cooperative is unprepared to minimize the effects of the proposed line on vegetation.

90. Both the existing and proposed lines cross Maravillas Creek. The creek is an important resource for wildlife because it provides a year round water supply. The creek attracts a high diversity of birds and mammals.

91. As suggested by the U.S. Fish and Wildlife Service, the proposed line to a large extent is routed to avoid the creek. But the Cooperative failed to show that filling arroyos during construction would not have a detrimental effect upon the creek.

92. Approximately fourteen bird species use the wood poles on the existing line as a nest site, perch site, or roost site.

93. The proposed line's pole design poses an increased threat of electrocution to the many birds found in the Trans-Pecos region.

94. The American peregrine falcon is an endangered species. The black-capped vireo is a candidate for addition to the endangered species list. Both species are found in the area of the proposed line. The record does not reflect how the Cooperative would attempt to minimize the effect of the proposed line on the two species.

95. Whether the existing line is repaired or the proposed line is built, the Cooperative's actions will have an adverse impact on the area's desert environment. The Cooperative did not show by a preponderance of the evidence that, if permitted to construct the proposed line, it will minimize the effects of construction and operation on the environment. The proposed line would have an adverse impact on environmental integrity.

96. Within the area served by the Alpine to Persimmon Gap line, load growth is greatest in the Study Butte area.

97. The proposed line runs from Alpine to Persimmon Gap. It will not alleviate service problems in the Study Butte area related to the Persimmon Gap to Study Butte distribution line.

98. The cost of service calculations discussed by the Cooperative were based on the Cooperative's entire operations. The record does not include cost of service calculations specifically pertaining to the proposed line.

99. The cost of the proposed line would include the following:

Right-of-Way	$ 163,636
Materials	$2,225,344
Labor and Transportation	$2,115,277
Engineering	$ 651,160
Total	$5,150,357

In addition, the Cooperative would need to purchase or lease at least one bucket truck capable of servicing 92 foot poles. The trucks cost $158,000 each. Reconnecting the distribution lines to the proposed line would cost an additional several thousand dollars.

100. The cost to replace all poles and cross-arms and install a static wire for lightning protection on the existing line is $2,474,033.

101. The cost to replace only the poles and cross-arms on the existing line found "bad" during the most recent inspection is $700,000.

102. The repair cost estimates include costs incurred due to the fact the existing line must be repaired while it is energized.

103. Based on Rio Grande's cost estimates, through the year 2007, the cost to implement a transmission system sufficient for 2.9 percent load growth under Alternative I is $7,085,024, and under Alternative II is $7,119,548.

104. If the Alternative I and Alternative II cost estimates that assume 2.9 percent load growth are reformulated to reflect more accurately costs required for an adequate transmission system, the cost of Alternative I would be substantially higher and the cost of Alternative II would be substantially lower.

105. The current service inadequacies related to the Alpine to Persimmon Gap line could be resolved by either repairing or replacing the existing line. Future load demand requires an upgrading of the transmission system. The proposed line, both considered alone and as the first step of Alternative I plans, is the more costly means to obtain these service improvements.

106. Whether considered independently or as the first step of Alternative I, the probable improvement of service promised by the proposed line could be attained by less costly alternative means.

B. Conclusions of Law

1. The Cooperative is a public utility as defined in Section 3(c)(1) of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988) (PURA).

2. The Commission has jurisdiction over this application pursuant to Sections 16(a), 17(e), 50, 52 and 54 of the PURA.

3. The case was co-assigned to the undersigned hearings examiner pursuant to Section 15 of the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1988).

4. The Cooperative provided adequate notice of this application in accordance with P.U.C. PROC. R. 21.24 and PURA Section 54. Adequate notice of Commission proceedings in this case was provided in accordance with that rule and with Section 13 of the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1988).

5. The Rural Electrification Act, 7 U.S.C. §901 et seq. (1980), and the policies of the REA do not preempt this Commission from making the findings of fact and conclusions of law it makes in this case.

6. The National Environmental Policies Act of 1969, 42 U.S.C. §4321 et seq. (1977) (NEPA), and the actions taken by the REA pursuant to its duties under the NEPA, do not preempt this Commission from making the findings of fact and conclusions of law it makes in this case.

7. The Cooperative is the party that seeks affirmative relief. Therefore, the Cooperative has the burden of proof to establish its entitlement to such relief. Pace Corp. v. Jackson, 155 Tex. 179, 284 S.W.2d 340 (1955); Wiley v. Schorr, 594 S.W.2d 484 (Tex. Civ. App--San Antonio 1979, writ. ref'd n.r.e.).

8. Rio Grande is not entitled to approval of the application described in the Findings of Fact, having failed to demonstrate that the proposed transmission line is necessary for the service, accommodation, convenience, or safety of the public within the meaning of Section 54(b) of PURA, taking into consideration the factors set out in Section 54(c) of PURA and discussed in the Findings of Fact.

Respectfully submitted,

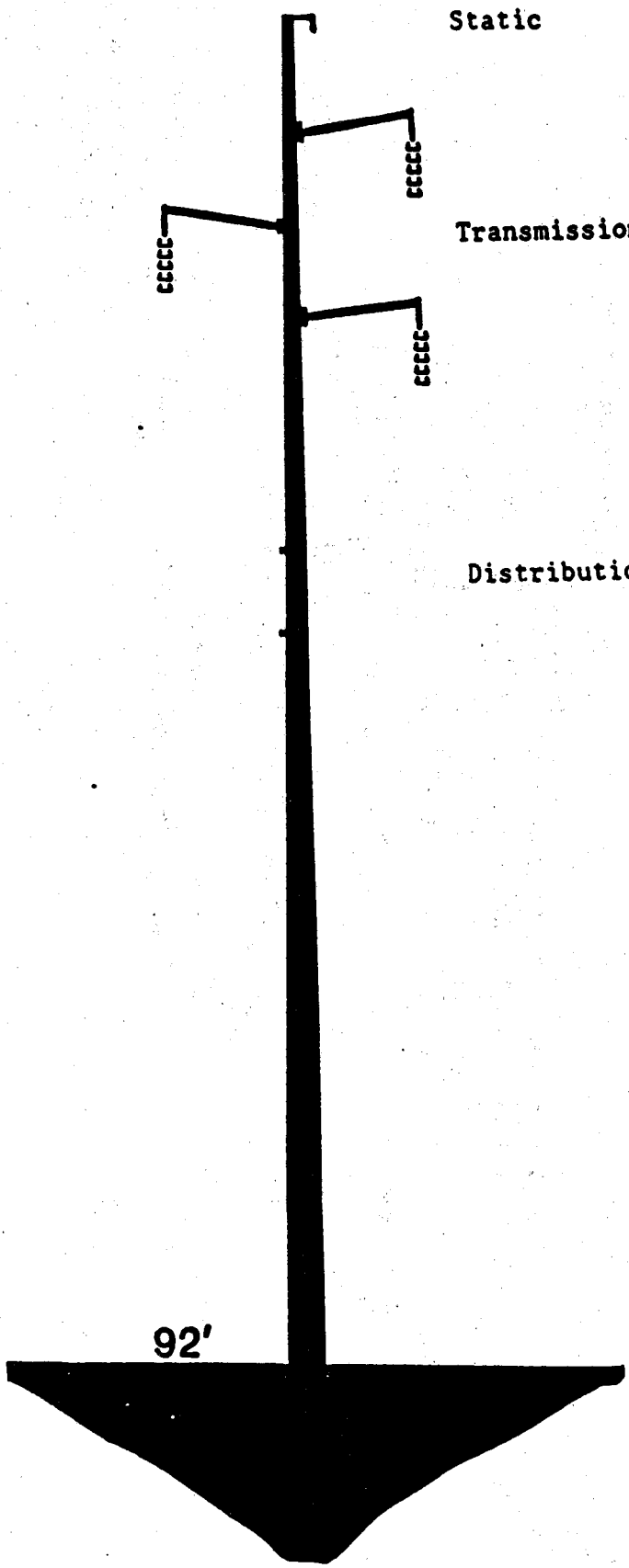
Richard S. O'Connell
RICHARD S. O'CONNELL
HEARINGS EXAMINER

Elizabeth Hagan Drews
ELIZABETH HAGAN DREWS
ADMINISTRATIVE LAW JUDGE

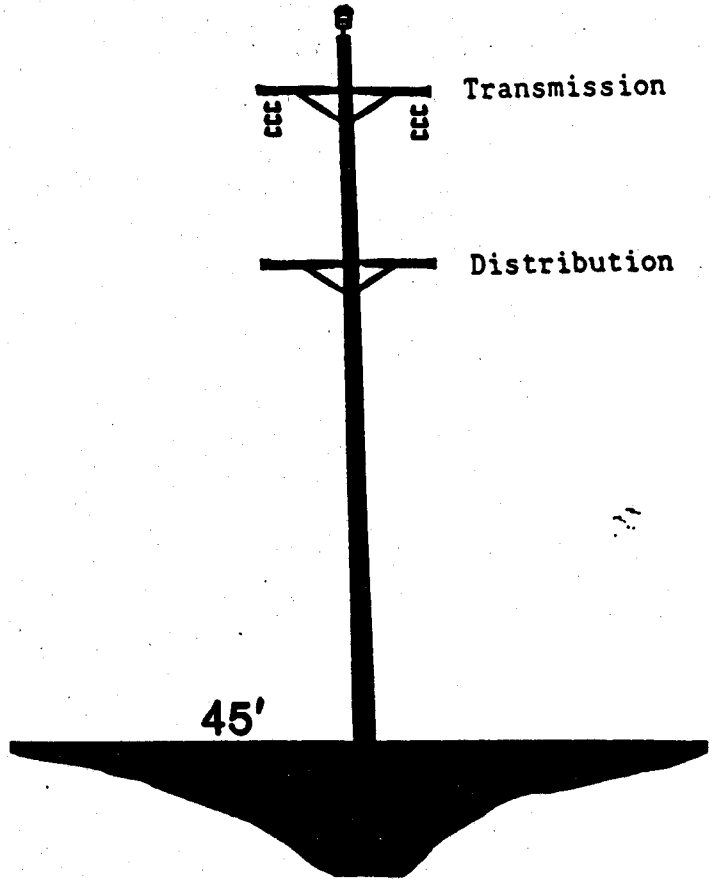
APPROVED on this the 9th day of August 1988.

Phillip A. Holder
PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

nsh

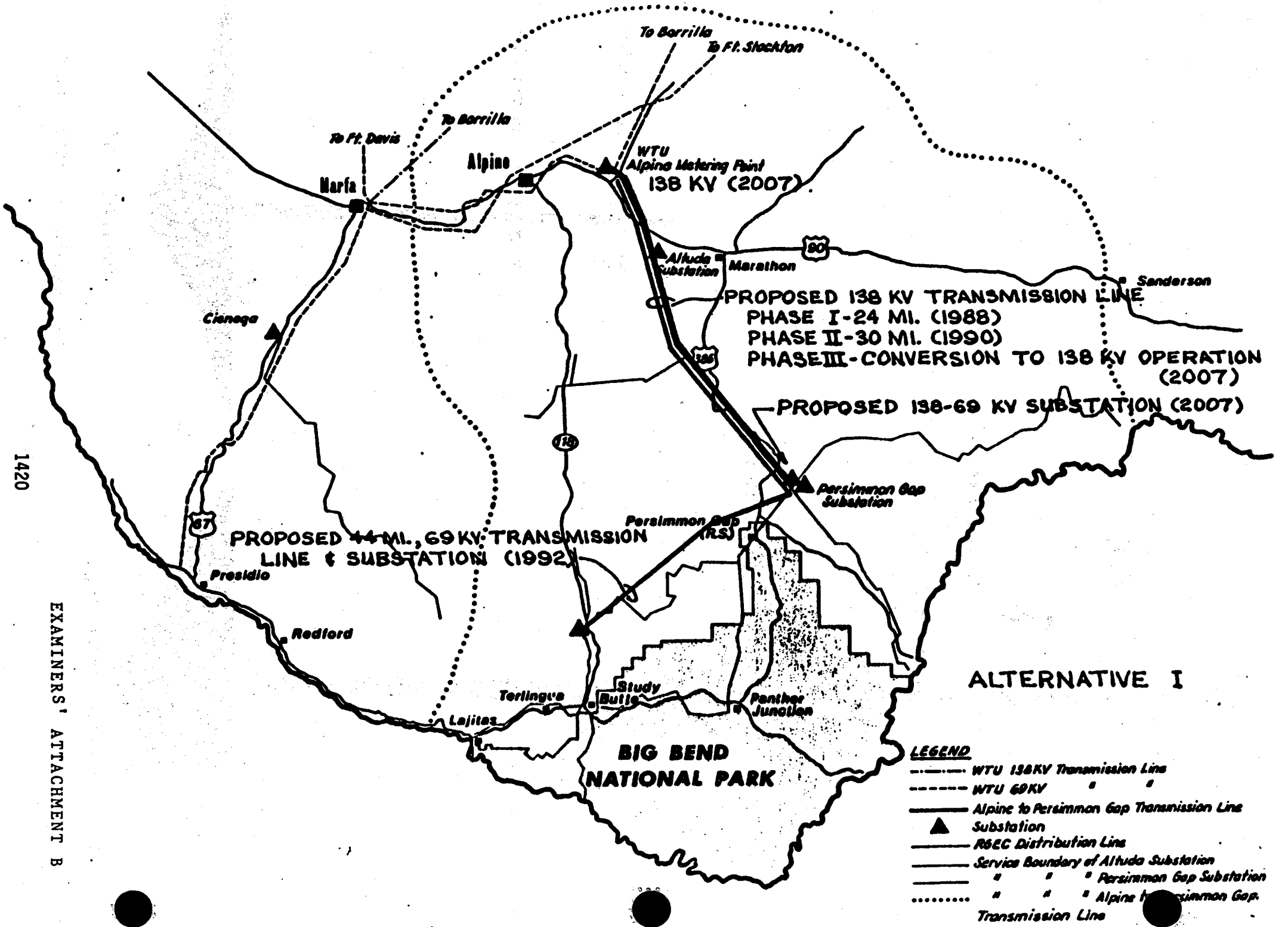


WEATHERED STEEL POLE



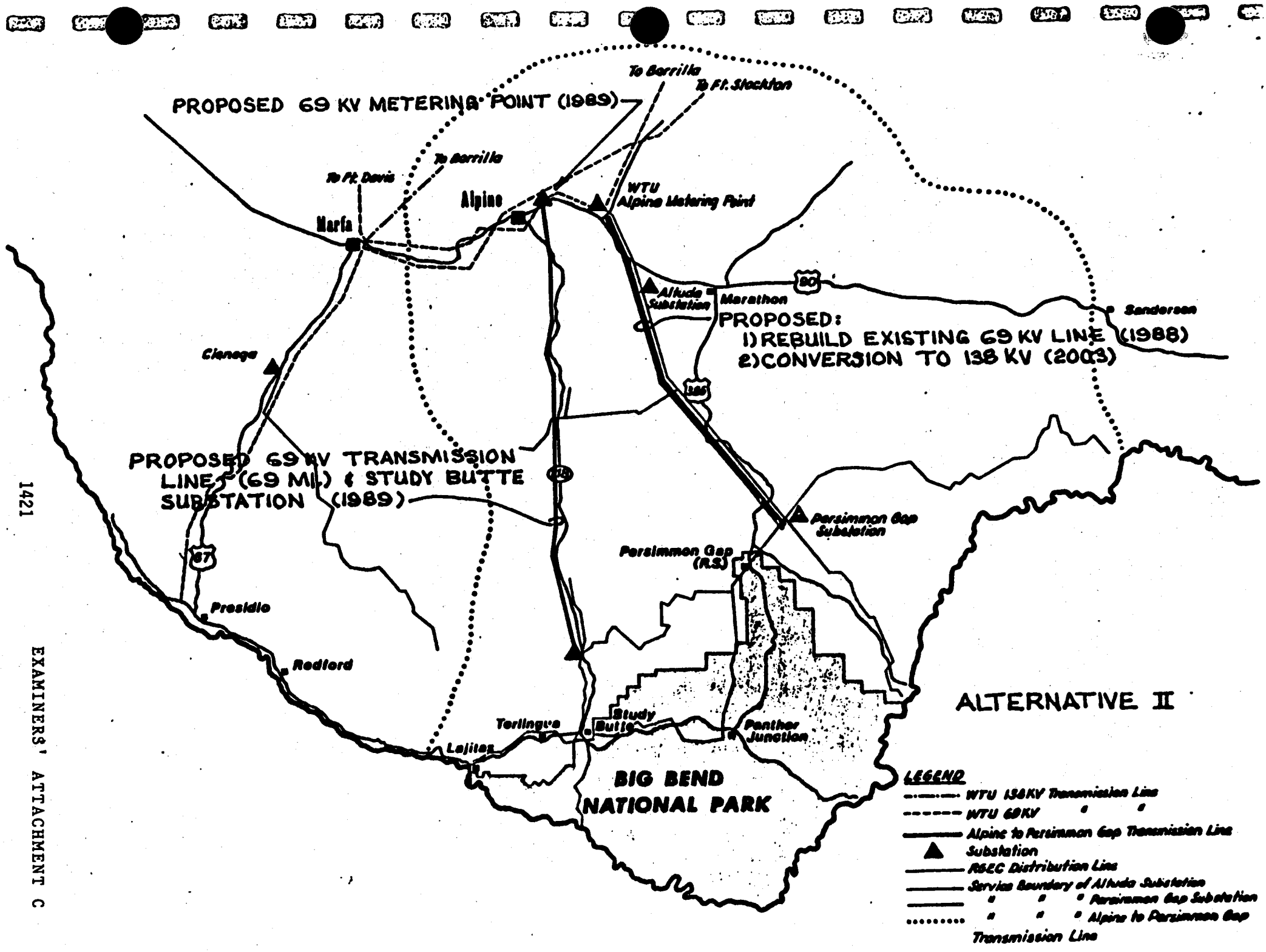
EXISTING POLE

EXAMINERS' ATTACHMENT A



1420

EXAMINERS' ATTACHMENT B


PROPOSED 69 KV METERING POINT (1989)
To Barrilla
To Ft. Stockton
To Barrilla
To Ft. Davis
Alpine
WTU
Alpine Metering Point
Marfa
Alhuda
Substation
Marathon
80
Sanderson
PROPOSED:
1) REBUILD EXISTING 69 KV LINE (1988)
2) CONVERSION TO 138 KV (2003)
Cienega
118
PROPOSED 69 KV TRANSMISSION
LINE (69 MI.) & STUDY BUTTE
SUBSTATION (1989)
Persimmon Gap
Substation
Persimmon Gap
(R.S.)
67
Presidio
Redford
Terlingua
Study
Butte
Panther
Junction
Lajitas
BIG BEND
NATIONAL PARK
ALTERNATIVE II
LEGEND
WTU 138KV Transmission Line
WTU 69KV " "
Alpine to Persimmon Gap Transmission Line
Substation
RSEC Distribution Line
Service Boundary of Alhuda Substation
" " " Persimmon Gap Substation
" " " Alpine to Persimmon Gap
Transmission Line

DOCKET NO. 7437

APPLICATION OF RIO GRANDE ELECTRIC COOPERATIVE, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO INCLUDE A PROPOSED TRANSMISSION LINE WITHIN BREWSTER COUNTY	§	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In public meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above styled application was processed in accordance with applicable statutes and rules by an administrative law judge and a hearings examiner, who prepared and filed a report containing Findings of Fact and Conclusions of Law. The Examiners' Report is ADOPTED and made a part hereof. The Commission further issues the following Order:

1. The application of Rio Grande Electric Cooperative, Inc. for an amendment to its certificate of convenience and necessity for a new transmission line in Brewster County, is DENIED.

2. All motions and requests for entry of specific findings of fact and conclusions of law or for any other form of relief, general or specific, if not expressly granted herein are DENIED for want of merit.

SIGNED AT AUSTIN, TEXAS on this the 8th day of September 1988.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: Marta Greytok
MARTA GREYTOK

SIGNED: Jo Campbell
JO CAMPBELL

SIGNED: William B Cassin
WILLIAM B. CASSIN

ATTEST:
Mary Ross McDonald for
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

PETITION OF PANDA ENERGY CORPORATION, ET AL. FOR A CEASE AND DESIST ORDER AGAINST TEXAS UTILITIES ELECTRIC COMPANY

§ § § §

DOCKET NO. 7470

October 21, 1987

Petition for order requiring utility to contract with a qualifying facility was denied.

[1] PROCEDURE--JURISDICTION--COGENERATION

States are required to implement but are not required to adopt federal regulations regarding qualifying facilities. (p. 1434)

[2] PROCEDURE--JURISDICTION--COGENERATION

Commission implemented the federal rules on cogeneration pursuant to 18 C.F.R. Part 292. (p. 1436)

[3] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

Public Utility Regulatory Policies Act was enacted to foster cogeneration by requiring utilities to consider cogeneration in meeting cogeneration needs. (p. 1445)

[4,5] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The Commission's cogeneration rules were promulgated to meet the demand and circumstances in Texas which envisioned the utility considering multiple cogeneration offers. (p. 1446)

[6] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The economical production of cogeneration is encouraged in Texas. (p. 1448)

[7] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The Commission will not second guess utility management which secures the best cogeneration proposal from the multiple offers contemplated under P.U.C. SUBST. R. 23.66(d)(1)(F)(iii). (p. 1449)

[8] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The Commission must reconcile the utility's obligation to secure the best contract (P.U.C. SUBST. R. 23.66(d)(1)(F)(iii)) with the conclusion that the utility's cogeneration purchases at avoided costs are deemed just and reasonable (P.U.C. SUBST. R. 23.66(e)(3)). Thus, while payments equal to avoided costs are deemed just and reasonable, the utilities have the additional burden to obtain the best proposal in negotiated purchases. (p. 1456)

[9] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The rate to be paid to a particular cogenerator is not to be based solely upon the utility's standard avoided cost as reflected in its standard terms and conditions. In a contested case, the cogenerator's cogeneration payment from the utility should be determined based upon the quality of firmness provided by that cogenerator. Snow Mountain Pine Company v. Maudlin, 734 P.2d 1366, 84 Or. App. 590 (1987). (p. 1457)

[10] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

The Commission may not disallow purchased power expenses that are at or below avoided cost. (p. 1462)

[11] COMPLAINTS AND DISPUTES--ANTI-COMPETITIVE PRACTICES

PURPA eliminated the possibility of competition for the generation of power between cogenerators and electric utilities, and therefore a cogenerator may not state a claim for which relief can be granted against an electric utility under Section 47 of PURA. (p. 1471)

[12] JURISDICTION--ELECTRIC--COGENERATION

Competition between cogenerators is unregulated. (p. 1471)

[13] COGENERATION--RATES FOR PURCHASES FROM QUALIFYING FACILITIES

A formal bid procedure for cogeneration contracts is not necessary in view of the Commission's decision not to include such detail in P.U.C. SUBST. R. 23.66(d)(1)(C). (p. 1473)

DOCKET NO. 7470

PETITION OF PANDA ENERGY CORPORATION, ET AL., FOR A CEASE AND DESIST ORDER AGAINST TEXAS UTILITIES ELECTRIC COMPANY	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINERS' REPORT

(This document serves as an Examiners' Report in Docket No. 7470 and as an Examiner's Order in Docket No. 7581. The only difference is that the Examiners' Report in Docket No. 7470 contains Findings of Fact and Conclusions of Law in Section V and there are no findings or conclusions in the Examiner's Order in Docket No. 7581. In every other aspect the documents are identical. This format facilitates the Commission's consideration of identical issues in separate dockets.)

I. Procedural History

A. Docket No. 7470

On April 14, 1987, Panda Energy Corporation and Rock-Tenn Company Mill Division, Inc. (Panda and Rock-Tenn or the Petitioners) filed a petition with this Commission requesting that Texas Utilities Electric Company (TU Electric) be ordered to enter into a long-term firm purchased power agreement with Panda, and that upon notice and hearing, the Commission order TU Electric to cease and desist from entering into any contracts for the purchase of capacity and energy from any other qualifying facility pending final ruling on this matter. On April 28, 1987, TU Electric filed its Answer to the Petitioner's Request.

Pursuant to notice, a prehearing conference was convened on May 5, 1987. Appearances were entered by the Petitioners, TU Electric, Occidental Electrochemical Corporation (Occidental), Gentex/TSG, Ltd. (Gentex), Cogen Lyondell, Inc. (Cogen Lyondell) and the Commission's General Counsel. The motions to intervene of Occidental and Gentex were granted. (Cogen Lyondell had not yet moved to intervene at the time of the prehearing conference.)

Pursuant to a prehearing order dated May 7, 1987, the examiners established a briefing schedule on legal issues relating to the appropriateness of a cease and desist order. The examiners also established the type of notice to be provided in this case. On May 12, 1987, the examiners set forth a briefing schedule to address the Petitioners' request for a Commission order requiring TU Electric to enter into a contract with the Petitioners.

On May 8, 1987, the Petitioners appealed the examiners' prehearing order regarding the cease and desist issues to the Commission, and on May 15, 1987, TU Electric filed its appeal of the examiners' order regarding notice, and further filed its response to the Petitioners' appeal. On May 18, 1987, the examiners advised the parties that, by written ballot, the Commission had declined to hear the appeals of the Petitioners and of TU Electric.

On May 20, 1987, TU Electric, with concurrence of all parties of record, requested that the examiners stay their May 7, 1987 order and further proposed a revised procedural schedule. In its motion, TU Electric asserted that the Petitioners would file an Amended Petition and that TU Electric would file an Answer and/or Motion to Dismiss thereto. The parties further requested an opportunity to file briefs on the Petitioners' Amended Petition and TU Electric's Answer and/or Motion to Dismiss. In its motion, TU Electric further proposed a revised procedural schedule for this case to which all the parties agreed. On May 20, 1987, the examiners granted TU Electric's motion and established a new procedural schedule to govern this case.

On May 21, 1987, the Petitioners filed their First Amended Original Petition. On June 5, 1987, TU Electric filed its First Amended Original Answer and Motion to Dismiss. On June 22, 1987, TU Electric filed its initial brief in

support of its Motion to Dismiss, and the Petitioners filed their initial brief in opposition to TU Electric's motion. On July 6, 1987, TU Electric, the Petitioners and the Commission's General Counsel all filed reply briefs. No other briefs were filed.

On May 7, 1987, the Petitioners filed a motion requesting a Commission order excepting Panda from complying with the confidentiality agreement into which it had entered with TU Electric; such agreement prohibited Panda from disclosing any information it had obtained during the negotiation process. On May 15, 1987, TU Electric filed its response to the Petitioners' request for an exception and Commission order regarding the confidentiality agreement. On May 21, 1987, the Petitioners filed comments regarding TU Electric's response to Panda's request to be excepted from complying with the confidentiality agreement. On May 29, 1987, the examiners directed the parties to file final comments regarding the issue of the confidentiality agreement, ordered TU Electric to file a proposed protective order, and established dates by which parties were required to file comments to TU Electric's proposed Protective Order. On June 8, 1987, and June 9, 1987, the Petitioners and TU Electric filed final comments regarding the issue of the confidentiality agreement. By order dated June 17, 1987, the examiners determined that parties could obtain discovery on confidential information relating to cogeneration contracts into which TU Electric had entered. Such access, however, must first be in compliance with the discovery dispute procedures which the examiners established in their June 17, 1987 order.

On June 18, 1987, TU Electric filed a proposed Protective Order. No timely comments were filed. On July 8, 1987, the examiners issued a Protective Order that did not adopt TU Electric's proposed in toto, and that would be utilized in this case only after the parties complied with the procedures relating to discovery disputes outlined in the June 17th order, and only after the examiners determined that the requested information is confidential, privileged, or otherwise exempted from disclosure.

On July 8, 1987, the Petitioners requested an opportunity to present oral argument in opposition to TU Electric's Motion to Dismiss. (The examiners note

that TU Electric had made a similar request at the May 5, 1987 prehearing conference.) Pursuant to an order dated July 27, 1987, oral argument was scheduled in Docket Nos. 7470 and 7581 for August 21, 1987. (Oral argument was heard in Docket No. 7581, Petition of National Cogeneration, Inc. for an Order Requiring Execution of Power Purchase Contract by Texas Utilities Electric Company, because the legal issues presented in that case were virtually identical to those presented in Docket No. 7470.)

On August 3, 1987, and on August 6, 1987, PSE, Inc. (PSE), Cogen Lynchburg and Cogen Lyondell filed a motion for protection against TU Electric being required to produce certain confidential information. On August 6, 1987, PSE, et al., filed affidavits in support of their motion. On August 3, 1987, Falcon Seaboard Oil Company (Falcon Seaboard) and Power Resources, Inc. (Power Resources) filed a similar motion, and further requested limited intervention to protect their interests against disclosure. On August 20, 1987, Applied Energy Resources, Inc. (AES) filed its objections to certain requests for information propounded upon TU Electric and further requested limited intervention. On August 21, 1987, Bio-Energy Partners (Bio-Energy) filed similar objections and motion. On August 3, 1987, TU Electric filed its objections to Petitioners' First Set of Requests for Information, and on August 3, 1987, and August 18, 1987, to Petitioners Second Request for Information. On August 3, 1987, the Petitioners and TU Electric filed a joint motion requesting relief from complying with the procedural discovery schedule established in the examiners' June 17, 1987 order regarding objections to the First and Second Requests for Information, and further requested approval of a revised procedural schedule to address these objections. On August 4, 1987, the examiners granted this motion. On August 12, 1987, the Petitioners requested clarification of the examiners' June 17, 1987 and July 8, 1987 orders because these orders did not delineate procedures to address third party discovery objections, and further requested an extension of time to file such responses.

On August 18, 1987, the examiners issued an order stating that outstanding requests for intervention, third-party discovery objections, and the Petitioners' request for clarification would be taken up at the August 21, 1987 prehearing conference.

On August 21, 1987, a joint prehearing conference was convened. Appearances were entered by TU Electric, the Petitioners, National Cogeneration, Inc. (National), Falcon Seaboard, Power Resources, Occidental, Cogen Lynchburg, Cogen Lyondell, PSE, and the Commission's General Counsel. Motions for limited intervention of Falcon Seaboard, Power Resources, PSE, Cogen Lynchburg, Cogen Lyondell, and AES were granted. Under the mechanism established in the examiners' June 17, 1987 order, the motion to intervene of Bio-Energy Resources was also granted. All discovery to which objections had been filed were placed in abeyance pending the examiners' ruling on TU Electric's Motion to Dismiss. Official notice was taken of the Examiner's Reports and Commission Orders in Docket No. 6065, Application of Texas Utilities Electric Company for Approval of Standard Avoided Cost Calculation; Docket No. 6190, Application of Texas Utilities Electric Company for Approval of Notice of Intent to File an Application for Certification of Combustion Turbine Generating Units in Ward, Mitchell and Hood Counties; Docket No. 6526, Application of Texas Utilities Electric Company for Certification of Combustion Turbine Generating Units in Ward, Mitchell and Hood Counties; and of pages VII-1 through VII-28 and VII-56 through VII-58 of Volume I of the "Long-Term Electric Peak Demand and Capacity Resource Plan for Texas," issued by the Commission in August 1986. (The examiners would note that official notice of these documents was also taken in Docket No. 7581.)

No notice, other than to the Texas Register, has been provided in this case.

(For purposes of simplification, when the examiners refer to Panda, they do not intend to ignore Rock-Tenn's position in the above case, but because it is identical to that of Panda, the report will simply refer to Panda for the sake of efficiency.)

Panda has requested the following relief, all of which TU Electric opposes:

1. A Commission order requiring that this cogeneration contract be based upon the terms and conditions and the standard avoided cost calculations as approved in Docket No. 6065;

2. A Commission order determining the true capacity needs of TU Electric and expanding the amount of firm energy and capacity for which TU Electric must contract with qualifying cogenerators, above the requirements reflected in TU Electric's "Long-Term Electric Peak Demand and Capacity Resource Forecast for Texas" as established under Section 16(f) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987);

3. A Commission order disallowing TU Electric's recovery of all payments made for cogenerated energy and capacity for all cogeneration contracts executed by TU Electric during the pendency of this case;

4. A Commission order prohibiting TU Electric from contacting any potential host of Panda or any utility with whom Panda is currently attempting to negotiate a cogeneration contract; and

5. A Commission order requiring TU Electric to adopt a specific formal bid procedure for evaluating offers from qualifying facilities within a specified period of time.

B. Docket No. 7581

On July 6, 1987, National Cogeneration, Inc. (National) filed its Original Petition and Complaint. In its Complaint, National prayed, in part, for an order requiring: (1) that TU Electric satisfy all the matters complained of or answer the Complaint within 20 days from date of service; (2) that TU Electric state in detail and with specificity the terms and conditions of National's proposed contract to which it objects and the basis for each objection; and (3) that an expedited hearing schedule be established.

Examiner's Order No. 1, entered on July 16, 1987, included the first two requirements set out above, set out a procedure to develop a protective order, and set a prehearing conference. On July 22, 1987, TU Electric filed a motion requesting modification of certain portions of Examiner's Order No. 1.

A prehearing conference was held on July 24, 1987. Portions of National's Complaint requesting the amendment of certain Commission Substantive Rules were dismissed as being inappropriately included as part of a complaint proceeding, and as not following the appropriate procedures for a rulemaking petition. Discovery procedures were set forth, and the examiner determined that should any material worthy of protection be requested, the protective order entered in Docket No. 7470 would be utilized in Docket No. 7581 also. TU Electric indicated that it would shortly be filing a motion to dismiss the docket. After determining that the issues in this docket were nearly identical to those raised in Docket No. 7470 (taking into account certain factual differences between National and Panda/Rock-Tenn situations, and that the prayers for relief were not identical), a briefing schedule was set that allowed the parties to "piggyback" their efforts onto the work that had already been done in Docket No. 7470.

TU Electric, in conformance with the examiner's order, filed its Motion to Dismiss and Original Answer on July 29, 1987, and its Initial Brief in support of its Motion to Dismiss on August 5, 1987. National filed its Response to the Motion to Dismiss on August 12, 1987, in which it adopted the briefs filed by Panda in Docket No. 7470. Since National has adopted Panda's briefs, for convenience the examiners will refer only to Panda, unless it is appropriate to distinguish between the two. TU Electric filed its Reply Brief on August 18, 1987. On August 19, 1987, the general counsel filed his Response to TU Electric's Motion to Dismiss, incorporating the brief filed by the general counsel in Docket No. 7470.

National has requested the following substantive relief, all of which TU Electric opposes:

1. That the Commission determine that National's Complaint states a prima facie case and conforms to the rules of the Commission;

2. That the Commission find that the proposed contract submitted as an attachment to the Complaint be found just, reasonable, nondiscriminatory, in the public interest, and in compliance with all applicable federal and state laws and rules; and that TU Electric be ordered to execute the contract at TU Electric's full avoided cost, or, in the alternative, substantially in accordance with the rates, terms and conditions of the proposed contract (as updated by National and Commission amendments);

3. The amendment or elimination of P.U.C. SUBST. R. 23.66(d)(1)(F) and (F)(iii), as the rules are discriminatory in practice and effectively circumvent Section 210 of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C.A. §824a-3 (this portion of the Complaint was dismissed in Examiner's Order No. 1);

4. The amendment of P.U.C. PROC. R. 23.66(d)(1)(G) in such a manner as to require each utility to set up timely and reasonable time periods or windows, with an orderly request for purchase procedure, during which the utilities are first to solicit and evaluate capacity offers from projects within that utility's service area (this portion of the Complaint was dismissed in Examiner's Order No. 1);

5. The disallowance, for ratemaking and rate recovery purposes, of any and all cogeneration contracts executed by TU Electric during the pendency of this docket, due to TU Electric's violation of the applicable federal and state statutes and rules; and

6. Such further relief as may be lawful and proper if it is found that TU Electric wrongfully misled National into protracted and expensive efforts to obtain a power purchase agreement.

C. Joint Prehearing Conference

On August 21, 1987, a joint prehearing conference was held in Docket Nos. 7470 and 7581 for the purpose of hearing oral argument on TU Electric's Motions to Dismiss, since many of the legal issues raised in Docket No. 7470 are identical to those raised in Docket No. 7581.

II. Jurisdiction: Federal Preemption and the Applicability of this Commission's Rules

TU Electric argues in its initial brief in support of its motion to dismiss that there is no legislative grant empowering this Commission to grant the relief sought by Panda and Rock-Tenn but that the relief sought is the very antithesis of the jurisdictional grant to the Commission, to encourage the economical production of cogeneration. TU Electric further argues that Panda has failed to state a cause of action upon which the requested relief may be granted. This argument assumes the validity of the Commission's rules. TU Electric also argues that the Commission may not single out TU Electric on an ad hoc basis and apply different rules to it. In response to each of Panda's requests for relief, TU Electric asserts either a lack of jurisdiction and/or that the relief requested would result in a disregard of the Commission's rules or an ad hoc treatment of the utility. TU Electric's motion to dismiss assumes that P.U.C. SUBST. R. 23.66 is in compliance with PURPA and the Federal Energy Regulatory Commission (FERC) regulations promulgated thereunder. In its reply brief, TU Electric takes the position that P.U.C. SUBST. R. 23.66 is not inconsistent with the FERC regulations.

Panda argues that the Commission has powers expressly and impliedly granted by the legislature and as directed by federal statutes and regulations. Panda further argues that the United States Supreme Court decision in FERC v. Mississippi, 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2532 (1982) (All future page citations will be the Supreme Court Reporter), requires states to implement and enforce FERC's rules promulgated under PURPA. Panda takes the position that P.U.C. SUBST. R. 23.66 is valid, so long as it does not operate to contradict the Commission's statutory mandate to encourage economical cogeneration; does not contravene the federal mandate to settle contractual disputes (18 C.F.R.

§292.401(a)); does not contravene the statutory prohibitions against discrimination (Section 47 of PURA or 18 C.F.R. §202.304(a)(ii)); does not contravene the statutory mandate not to allow recovery of cogeneration expenses that are not in the public interest; and does not contravene the Commission's authority to hold hearings and take remedial action to enforce PURA, PURPA and the FERC regulations. Tr. at 44-45.

In 1978, Section 210 of PURPA was enacted. This provision was designed to encourage the development of cogeneration facilities and to reduce the demand for fossil fuels. PURPA directs FERC to prescribe rules to implement this section of PURPA. 16 U.S.C.A. §824a-3(a). Congress further required each state regulatory authority to implement FERC's rules, after notice and opportunity for public hearing. 16 U.S.C.A. §824a-3(f)(1). The United States Supreme Court has ruled that Section 210 of PURPA, and the requirement that states implement FERC's regulations promulgated thereunder, are not violative of the Tenth Amendment of the U.S. Constitution. FERC v. Mississippi, supra.

FERC adopted regulations implementing Section 210 of PURPA in February 1980. 18 C.F.R. Part 292. Subpart D of FERC's regulations directs states to implement Subpart C of those rules. The FERC regulation affords state agencies "latitude in determining the manner in which the regulations are to be implemented." FERC v. Mississippi at 2133. 18 C.F.R. §292.401(a) states in pertinent part:

> Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof). (Emphasis added.)

[1] Both PURPA and the FERC regulations direct states to implement the federal regulations after notice and opportunity for public hearing. Neither the statute nor the regulations require states to adopt the federal rules. The Supreme Court has characterized the requirement of state implementation as one that gives latitude to the state. The requirement that the federal rules be implemented by states only after notice and comment implicitly supports the idea that states need not adopt by rote the exact rules adopted by FERC. If that had

been the Congressional intent, there would be no need for states to provide notice and comment because the states would not have the discretion to make any changes to FERC's rules.

The Commission implemented the FERC rules on September 14, 1981 (6 Tex. Reg. 3251), pursuant to the directive found in Section 16(a) of PURA, adopted by the 67th legislature, effective April 10, 1981, which stated the following:

> The commission shall make and enforce rules reasonably required to implement the rules and regulations of the Federal Energy Regulatory Commission pertaining to the production of electric energy by qualifying cogenerators and qualifying small power producers.

The first Commission rule concerning cogeneration differed from the current rule in certain respects which are significant to this discussion. The explicit statement that utilities shall not be required to contract for capacity in excess of the capacity requirements determined by the Commission pursuant to PURA Section 16(f), now found in P.U.C. SUBST. R. 23.66(d)(1)(D), was not in the initial rule adopted in 1981. Neither was there a statement concerning the purpose of the standard avoided cost calculation, which is now found in P.U.C. SUBST. R. 23.66(h)(3). The first set of rules also did not contain any reference to situations where more capacity is offered by qualifying facilities to any one utility than is required by the Commission approved forecast, now found in P.U.C. SUBST. R. 23.66(d)(1)(F) and (G).

The 68th legislature amended the provision of PURA governing cogenerators to read as follows:

> (g) The commission shall make and enforce rules to encourage the economical production of electric energy by qualifying cogenerators and qualifying small power producers.

This statutory amendment was effective on September 1, 1983. The Commission subsequently amended its rules concerning cogeneration. Initially the amended rules were adopted on an emergency basis, and as finally adopted, they were effective February 11, 1985. 9 Tex. Reg. 3899, 9 Tex. Reg. 5803, and 10 Tex. Reg. 332. For purposes of this Order, the relevant changes were the addition of

subparagraphs D and F to P.U.C. SUBST. R. 23.66(d)(1). Subparagraph D explicitly excuses utilities from contracting for excess capacity. Subparagraph F also addresses situations where more capacity is offered than the utility needs. Subparagraph F, as originally adopted, indicated that nothing would prohibit an electric utility from accepting through negotiation a price lower than avoided cost. The current provision, 23.66(d)(1)(F)(iii), which was effective May 16, 1985, states: "nothing in these rules shall prohibit an electric utility from accepting through negotiation the most favorable capacity proposal available based on a balanced consideration of expected price, terms and conditions of purchase, and quality of firmness. . . " (emphasis added.) 10 Tex. Reg. 1414 (1985).

[2] As this history of the Commission's cogeneration rules shows, the Commission has not merely adopted by rote the rules promulgated by FERC. The implementation of the rules governing arrangments between electric utilities and qualifying cogeneration facilities has been an evolving process, reflective of the peculiar circumstances of the State of Texas and an awareness that there may be more cogeneration capacity available than can be economically utilized by electric utilities. The Commission is not required to provide a case-by-case implementation of FERC's regulations, but may implement the federal regulations by its own rulemaking process. See 45 Fed. Reg. 12214, 12216 (1980) (Preamble to Final Adoption of 18 C.F.R. part 292) (henceforth FERC Preamble). In some areas, the Commission has implemented FERC's regulations through detailed, comprehensive rules. The Commission has also chosen to allow a petition to be filed in order to resolve a dispute between a utility and a qualifying facility, but that dispute must arise under Section 23.66 of the Commission's substantive rules. P.U.C. SUBST. R. 23.66(m). Neither PURPA nor the FERC rules require or authorize the Commission to resolve all disputes of every kind between utilities and cogenerators.

The examiners are unpersuaded by Panda's result-oriented argument on federal preemption. Panda's federal preemption argument, in summary, boils down to the following: to the extent that the Commission's substantive rules are applied to deny the specific relief requested by Panda, they are in conflict with, and therefore preempted by, FERC's regulations. A close examination of

the Commission's rules which implement the FERC regulations shows that there is no conflict between the two sets of regulations. As long as there is no conflict, the Commission's rules are presumptively valid.

Most of the factual allegations contained in Panda's petition are covered by rules found in Subpart C of the applicable FERC regulations. 18 C.F.R. §§ 292.301-292.308 (Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978). After careful comparison of the regulations found in that subpart and P.U.C. SUBST. R. 23.66, the examiners have concluded that there is no conflict between the Commission's rules and FERC's regulations.[1] In many instances, the Commission's rules are virtually identical to FERC's regulations. See P.U.C. SUBST. R. 23.66(b)(2) and 18 C.F.R. 292.301(b); and P.U.C. SUBST. R. 23.66(e)(1) and 18 C.F.R. 292.304(a)(1)(i) and (ii). In other instances, the Commission, in implementing the regulations promulgated by FERC under PURPA, has elaborated upon those regulations. See P.U.C. SUBST. R. 23.66(d)(1)(A-G) and 18 C.F.R. 292.303(a). Panda has pointed to no specific conflict between the Commission's rules and FERC's regulations and the examiners find that none exists.

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[1]

Heading	18 C.F.R. §	P.U.C. SUBST. R.
Scope	292.301	23.66(b)
Availability of electric utility system cost data	292.302	23.66(c)
Electric utility obligations under this subpart	292.303	23.66(d)
Rates for Purchases	292.304	23.66(e)
Rates for Purchases	292.304(a)	23.66(e)(1)&(2)
Relationship to avoided costs	292.304(b)	23.66(e)(2-4)
Standard rates for purchases	292.304(c)	23.66(f)
Factors affected rates for purchases	292.304(e)	23.66(a)(16)
Rates for sales	292.305	23.66(j)
Interconnection costs	292.306	23.66(k)
System emergencies	292.307	23.66(l)

The examiners have concluded that the Commission has subject matter jurisdiction over these matters pursuant to the Act. The individual requests for relief will be discussed in detail below. The examiners find that the state is in compliance with PURPA and properly implemented FERC regulations pursuant to specific statutory authority (Section 16(g), formerly Section 16(a) of the Act). The examiners' further conclude that there is no conflict between the state and federal regulations and therefore federal preemption is not an issue.

III. Factual Allegations

For the purposes of a motion to dismiss, the facts alleged by the petitioner are deemed to be true. Under this assumption, if the petitioner will not be able to prevail at the hearing on the merits, a motion to dismiss should be granted. Jenkins v. McKeithen, 395 U.S. 411, 83 S.Ct. 1843, (1969); Leimer v. State Mutual Life Assurance Company of Worcester, Massachusetts, 108 F.2d 302 (8th Cir. 1940).

A. Facts Alleged by Panda

Panda is a Texas corporation organized to develop, build, own, and operate qualifying cogeneration facilities. One of Panda's host facilities is a 125 megawatt facility in Dallas, Texas, the "Rock-Tenn Facility." Rock-Tenn is a customer of TU Electric. Rock-Tenn requires steam in its manufacturing process and has entered into a contract with Panda for Panda to provide Rock-Tenn with steam at a cost substantially below the cost at which Rock-Tenn currently produces its own steam requirements. (In its petition, Panda did not indicate the date of this contract.) By utilitizing Panda's cogeneration facilities, Rock-Tenn will avoid substantial capital costs otherwise necessary to renovate its boiler and boiler-associated equipment. Such renovation cost is approximately $2,000,000, which is approximately $1,000,000 above the price which Panda would charge Rock-Tenn to supply Rock-Tenn's steam requirements. Rock-Tenn's contract with Panda is contingent upon Panda's execution of a cogeneration contract with TU Electric.

Panda offered to sell TU Electric approximately 100 megawatts of electricity to be generated at the Rock-Tenn facility at a rate less than TU Electric's avoided cost with deliveries to commence on or before June 1, 1988. Panda has been attempting to negotiate a purchased power contract with TU Electric since January 1986. This negotiation concerned a West Texas facility, which project was subsequently discontinued. During June and July 1986, Panda commenced negotiations with TU Electric regarding the Rock-Tenn facility.

Panda obtained all permits necessary, including preliminary air quality permits, to satisfy TU Electric's requirements for a contract. TU Electric has executed contracts with other cogenerators to furnish or to increase previously contracted deliveries. Some of these contracts were executed pursuant to offers received subsequent to Panda's offer to sell cogenerated electricity to TU Electric at less than avoided cost and subsequent to the execution of Panda's contract with Rock-Tenn.

Panda alleges that TU Electric has also repeatedly attempted to contact Panda's prospective hosts and prospective utilities to which Panda desires to sell cogeneration and has repeatedly discouraged those prospective hosts and utilities from entering into host and cogeneration contracts with Panda.

On March 24, 1987, TU Electric notified Panda that it declined to purchase capacity from the Rock-Tenn facility.[2]

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[2]Panda has not alleged certain facts regarding TU Electric's capacity needs. These facts, as alleged by TU Electric, are necessary to understand the issues presented in this case. Under the August 1986 long term load forecast, TU Electric's requirements from qualifying facilities is 1,180 MW of capacity by 1991. TU Electric already has executed contracts towards its 1991 capacity requirements of 750 MW of long term capacity. 850 MW of short term capacity has also been contracted to meet TU Electric's 1987 system peak. TU Electric alleges that it is nearing consumation of its contractual arrangements to meet its 1991 capacity needs. TU Electric presently alleges that it is not negotiating with any qualifying facility regarding its post 1991 capacity requirements. TU Electric's First Amended Answer at 1-2, 5.

B. Facts Alleged by National

National is a Texas corporation organized to develop, build, own and operate qualifying facilities. National and its venture partners are attempting to develop the Big Spring Aquaculture and Industrial Complex in Big Spring, Texas. The planned industrial complex is an industrial park which will include approximately 300,000 square feet of enclosed space for fish product processing, ice production, refrigerated warehousing, fish hatchery and aquaculture research laboratories on 100 acres of land. The project will require new roads, air freight access, water, sewage and other improvements. The industrial complex will also include a 60 megawatt gas-fired cogeneration facility, which will be submitted to FERC for approval as a "qualifying facility." The project will produce electrical energy to be sold to TU Electric and will supply low cost steam to its acquaculture host.

National first contacted TU Electric in July 1985, to negotiate rates and financing terms on which TU Electric would purchase electric energy and capacity from cogeneration projects to be built by National through 1989. TU Electric notified National of its sincere interest and initiated power purchase contract negotiations during August 1985.

Between July 1985 and February 1987, National met with TU Electric more than 15 times and provided project information and proposed terms in an effort to negotiate a financially feasible power purchase contract. National endeavored to satisfy all of TU Electric's requirements for a contract. Subsequent to National's efforts to provide TU Electric with all project details, National was requested by TU Electric to make rate and contract concessions which created great difficulty for a small 60 megawatt project to obtain financing. Nevertheless, National and its venture partners were able to resolve the major financing conflicts with its investment bankers, and National was ready to sign a 1989 capacity contract with TU Electric in December 1986.

TU Electric delayed National's contract closing requests until the Spring of 1987, when TU Electric suddenly refused to consider further negotiations stating its need to focus entirely on cogeneration offers giving TU Electric

better terms and pricing than those offered by the proposed contract, although TU Electric never stated in negotiations with National or its legal representatives or in any of the eight contract drafts what terms and conditions were acceptable to TU Electric.

On April 2, 1987, National contacted Mr. Roger F. Bartlett, Jr. of the Consumer Affairs Office of this Commission in order to initiate a complaint against TU Electric. Mr. Bartlett requested that TU Electric provide to National and this Commission the specific requirements which a cogenerator must meet in order to obtain a contract to sell power to TU Electric.

The official response of TU Electric did not answer the request of Mr. Bartlett to provide the specific requirements a cogenerator must meet in order to obtain a contract to sell power to TU Electric. TU Electric's answer acknowledged National's intensive efforts since July 1985 to obtain a contract with TU Electric, but avoided the specific requirements request of the Commission.

Upon receipt of TU Electric's answer by this Commmission, the complaint was referred for further review, which resulted in a recommendation by the Consumer Affairs Office that National file a formal complaint.

IV. Requests for Relief

A. The Appropriateness of a Commission Order Requiring TU Electric to Enter into a Retroactive Cogeneration Contract with Panda

1. The Authority of the Commission to Order a Utility to Enter Into a Cogeneration Contract with a Cogenerator

Panda cites Sections 16(a), (g), (h) and 37 of PURA as the basis for the Commission's authority to order TU Electric to contract with it. Panda argues that if a utility should have entered into a contract with a cogenerator, the Commission's authority includes that authority necessary to require the utility to enter into such a contract. While Panda agrees that TU Electric is permitted

under the FERC regulations and Commission rules to negotiate contracts, when an agreement cannot be reached, once the cogenerator files a request for relief with the Commission, the Commission must require the utility to contract with the cogenerator at the utility's full avoided cost. Panda further argues that the contract offered by TU Electric has little resemblance to the contract the Commission adopted in Docket No. 6065. (Panda Reply Brief at 21.) If the standard avoided cost filing would never be used, Panda questions the validity of this filing.[3]

Panda cites two cases in support of its argument that this Commission has the authority to order such a contract. The Connecticut Department of Public Utility Control, in Re William Penchbeck, Inc., 78 PUR 4th 653 (August 19, 1986), ordered a utility to enter into a cogeneration contract pursuant to the Connecticut General Statutes. In Afton Energy, Inc. v. Idaho Power Company, 107 Idaho 781, 693 P.2d 427 (Idaho 1984), the Supreme Court of Idaho found that the Idaho Public Utilities Commission did not abuse its discretion in requiring the Idaho Power Company to contract with Afton Energy, Inc. for the purchase of its power over a thirty-five year period. The Idaho Commission had based its authority to require such a contract upon Section 210 of PURPA. The Idaho Supreme Court found that the FERC regulations provided the Idaho Commission authority to require a cogeneration contract. 18 C.F.R. §§292.303(a), 292.304(d) and 292.304(e)(iii). (Id. at 431-432.)

TU Electric argues that because the Commission has promulgated rules which allow utilities to negotiate contracts, it cannot impose a contract on the utility which would usurp the utility's right to so negotiate. P.U.C. SUBST.

[3]Official notice was taken of TU Electric's August 1986 Long Range Forecast, the Examiner's Report and Commission Final Order in Docket No. 6065, which is TU Electric's standard avoided cost filing, and the Examiner's Reports and Commission Final Orders in Docket Nos. 6190 and 6526, which address the certification of combustion turbine generating units in Ward, Mitchell and Hood Counties.

R. 23.66(b)(2). Moreover, the Commission's rules allow a utility to consider the most favorable contract offered in considering multiple cogeneration offers. P.U.C. SUBST. R. 23.66(d)(1)(F)(iii). TU Electric points out that Section 16(f) of PURA directs the Commission to promulgate rules which would encourage the economical production of cogeneration, which the Commission has done under P.U.C. SUBST. R. 23.66.

TU Electric further argues that while it agrees that full avoided cost applies in the absence of an agreement or waiver of such requirement by the FERC, it does not agree that a utility must pay the cogenerator a payment at the utility's full avoided cost where the utility and cogenerator have failed to reach an agreement. Rather, it is TU Electric's position that only where a utility cannot reach an agreement with any cogenerator will the payment of full avoided cost be necessary. While citing no case law, TU Electric argues it would be illogical to require a utility to pay full avoided cost when an agreement has not been reached with a particular cogenerator because such action will deprive TU Electric of the ability to enter into fruitful negotiations. While TU Electric is attempting to negotiate with one cogenerator, it will be forced to contract with another cogenerator at full avoided cost, leading to the likely result that the negotiation process will become a nullity. TU Electric argues that no incentive would exist for cogenerators to negotiate if a denial of an offer will lead to a cogeneration contract at full avoided cost. What the Commission would see is a race to the door by cogenerators to obtain a Commission order which requires a contract. Negotiations, as is envisioned under the rule, would no longer be practiced.

The Commission has promulgated substantive rules which implement PURPA's mandates. While the rules do not indicate that the Commission has direct authority to order utilities to enter certain cogeneration contracts, the Commission nevertheless possesses enforcement authority. P.U.C. SUBST. R. 23.66(m) states:

> **Enforcement.** A proceeding to resolve a dispute between a utility and a qualifying facility arising under this section may be instituted by the filing of a petition with the Commission. . . . The institution, conduct and determination of the proceeding shall be in full accordance with the rules of practice and procedure of the Commission.

Yet, for a number of reasons, the examiners find that the Commission cannot appropriately compel TU Electric to contract with Panda or National under this provision.

First, P.U.C. SUBST. R. 23.66(d)(1)(F)(iii) permits a utility to secure the "best proposal" available in negotiating purchases. This subsection states the following:

> (F) A utility shall purchase capacity from qualifying facilities on the basis of avoided cost adjusted for the quality of firmness of such capacity. If more capacity is offered by the qualifying facilities to any one utility than is required by the commission-approved forecast and generation expansion plan for that utility, the utility is required to purchase capacity and energy from qualifying facilities according to the following order of priorities:
>
> (i) qualifying facilities offering power produced from municipal solid waste, as defined in Texas Civil Statutes, Article 4477-7, §2(6), or renewable fuel sources;
>
> (ii) all others;
>
> (iii) within each category listed in clauses (i) and (ii) of this subparagraph, nothing in these rules shall prohibit an electric utility from accepting through negotiation the most favorable capacity proposal available based on a balanced consideration of expected price, terms and conditions of purchase, and quality of firmness. The utility may consider, in addition, diversification of contracts with qualifying facilities which provide firm capacity with regard to ownership, type of industry, technology, and fuel type. Nothing in this priority system should be construed so as to permit capacity offered from qualifying facilities with a higher priority to displace or reduce the capacity currently being supplied, or to be provided, by qualifying facilities with lower priorities, with which contracts have been executed.

While a utility is required to purchase any energy or capacity made available to it from a qualifying facility (P.U.C. SUBST. R. 23.66(d)(1)(A)), such purchase is subject to certain conditions, such as the utility's need for capacity (P.U.C. SUBST. R. 23.66(d)(1)(D)), and that such offer constitutes the "best proposal" offered (P.U.C. SUBST. R. 23.66(d)(1)(F)(iii)). The general requirement that a utility purchase energy and capacity offered it by a qualifying facility has been modified in Texas for a very important reason:

Texas utilities have more cogenerated capacity available than they need to meet their capacity requirements. This is at least true for Panda, which states the following in its amended petition:

> This Commission has the jurisdiction in this proceeding to determine whether TUEC's actions are such as to warrant a finding and ultimate decision that any cogeneration contracts executed by TUEC during the pendency of this proceeding should be disallowed because Panda's ability to compete for any remaining window of capacity may be foreclosed by the execution of those contracts. . . .
>
> Each new contract for cogeneration executed by TUEC either narrows or eliminates the window of cogeneration for which Panda may offer to sell capacity and energy pursuant to the Commission's Substantive Rules, PURPA and FERC's implementing regulations.

Panda's First Amended Petition at 17. It is clear to the examiners that the above statements reflect that more cogeneration capacity exists and has been offered or made available to TU Electric than TU Electric needs. National, however, has not included in its Complaint any allegation that TU Electric may have more capacity offered than it needs.

[3] At the time PURPA was implemented, utilities were not contracting with qualifying facilities for cogenerated power. PURPA was enacted to foster cogeneration by requiring utilities to consider cogeneration in meeting their capacity needs. The Preamble to 18 C.F.R. Part 292 states the following as to the raison d'etre for PURPA:

> Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced three major obstacles. First, a utility was not generally required to purchase the electric output, at an appropriate rate. Secondly, some utilities charged discriminatorily high rates for back-up service to cogenerators and small power producers. Thirdly, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered an electric utility and thus being subjected to State and Federal regulation as an electric utility.
>
> Section 201 and 210 of PURPA are designed to remove these obstacles. Each electric utility is required under section 210 to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status under section 201 of PURPA. For such purchases, electric utilities are

> required to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers. Section 210 also requires electric utilities to provide electric service to qualifying facilities at rates which are just and reasonable, in the public interest, and which do not discriminate against cogenerators and small power producers. Section 210(e) of PURPA provides that the Commission can exempt qualifying facilities from State regulation regarding utility rates and financial organization, from Federal regulation under the Federal Power Act (other than licensing under Part I), and from the Public Utility Holding Company Act.

FERC Preamble, 45 Fed. Reg. at 12215.

The U.S. Supreme Court in FERC v. Mississippi, supra, citing the legislative history of PURPA and remarks made by Sen. Cranston and Sen. Percy, reiterated that Congress' intent in enacting PURPA was to address two problems that impeded the development of cogeneration: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development. Id. at 2132-2133.

[4] The circumstances which existed at the time PURPA was enacted simply do not exist in Texas. The rules FERC implemented were designed to provide an impetus for cogeneration. There is no lack of cogeneration purchases by TU Electric, as is evident by Panda's request to have the Commission order a contract before TU Electric's available window of capacity closes, and to have this contract be made retroactive in time. More importantly, because TU Electric is indeed negotiating and signing cogeneration contracts (Panda's First Amended Answer at 11), the creation of an impetus to encourage utilities to execute cogeneration contracts with qualifying facilities is not needed. The Commission has promulgated rules to meet the demand and circumstances present in Texas. Such demand and circumstances were not the basis for the FERC rules, thus the Commission's rules are not inconsistent with those of the FERC.

[5] The Commission's rules address the foreseeable competition among cogenerators to sell capacity to utilities and provide the flexibility needed to

meet such multiple offers. P.U.C. SUBST. R. 23.66(d)(1)(F)(iii). If the Commission did not wish utilities to consider multiple offers, but rather desired utilities to accept any offer which was less than the utilities' avoided cost filings, it could have simply required utilities not to conduct a balancing of the offers made and thus removed any managerial decision-making from utilities by requiring them to pay full avoided costs for any cogenerated capacity offered them.

While Panda would argue that such construction of the Commission's rules is in conflict with FERC's regulations, that is simply not the case. The preamble to FERC's regulations states, in part, the following regarding 18 C.F.R. §292.303 (**Electric Utility Obligations under this subpart**):

> A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load. These rules impose no requirement on the purchasing utility to deliver unusable energy or capacity to another utility for subsequent sale.

FERC Premable, 45 Fed. Reg. at 12219.

FERC recognized that a utility should not be expected to pay for capacity it does not need. If the utility does not enter a contract with a qualifying facility based upon the availability of excess cogeneration, is the utility in violation of federal rules? Is the refusal to contract for unneeded capacity any different in effect that executing contracts which would result in $-0-capacity payments?[4] The examiners conclude that P.U.C. SUBST. R. 23.66(d)(1)(D)

[4]18 C.F.R. 292.303(a) addresses "obligation to purchase from qualifying facilities." Unfortunately, FERC, in its Preamble, made no comments regarding this rule and thus the Commission does not have the benefit of FERC's explanation of its intent in the promulgation of this rule. The Commission is thus forced to construct the Commission's rules without the benefit of FERC comments.

reaches the same result, without requiring the execution of a contract for zero capacity payments.

Second, the examiners agree with TU Electric that the negotiating process will indeed become a nullity under Panda's interpretation, i.e., that once a utility declines to enter into a contract with a qualifying facility, the qualifying facility can obtain a contract at full avoided cost. The purpose and environment under which PURPA was enacted, as described above, is significant in resolving this issue. In an environment of excess cogeneration, competition among cogenerators will exist. Competition, of course, will lead utilities such as TU Electric to solicit and choose the best offer available, as contemplated by P.U.C. SUBST. R. 23.66(d)(1)(F)(iii). Yet, to solicit and choose the best offer, utilities must have the opportunity and flexibility to negotiate. This cannot be effectuated under Panda's interpretation of the negotiating process, that is, a utility is required to contract with a qualifying facility once the utility refuses to accept the qualifying facility's offer. Panda's interpretation would discourage the economical production of cogeneration at the expense of the utility's ratepayers. The more reasonable interpretation is that argued by TU Electric, that only if a utility fails to satisfy its cogeneration capacity requirement through the negotiation process with all offering qualifying facilities, will the payment of full avoided cost be warranted.

[6] The examiners further disagree with Panda's statement in brief that the Commission would never address disputes in an excess cogeneration situation. The instant case is an example of such. A utility must purchase cogeneration only to the extent it is needed. While encouragement of the "economical" production of cogeneration is not mandated under the FERC rules or PURPA, which refer only to the encouragement of cogeneration, such mandate is found in the PURA. Such directive, the examiners submit, cannot be deemed to stand in opposition to federal law; surely, cogeneration is not to be fostered at the expense of the ratepayers. If TU Electric, in an excess cogeneration environment, refused to execute any contracts, TU Electric would not be complying with PURPA or the Commission's mandate under PURPA, and this Commission could fashion an appropriate remedy. Such circumstance is not present in the instant dockets.

Third, the Connecticut and Idaho cases relied upon by Panda do not reflect that those cases were decided in an environment of excess availability of cogeneration, as is evidently the case here. Further, these cases did not deal with statutory and regulatory provisions such as Section 16(g) of PURA and P.U.C. SUBST. R. 23.66(d)(1)(F). For these reasons, the examiners question the applicability of those cases to the requests of Panda and National, and will not apply them in this instance.

Fourth, P.U.C. SUBST. R. 23.66(e)(1) and (3) state that purchased power expenses which do not exceed a utility's avoided cost will be deemed reasonable and necessary and in the public interest. In that regard, while the rule specifically indicates payments are reasonable if they equal avoided costs, the examiners believe any payments less than the utility's avoided costs must also be considered reasonable. Moreover, the avoided costs referenced in the rule must refer to the utility's standard avoided cost filings; otherwise, a utility would need to prove for each and every contract into which it enters that the payments do not exceed its actual avoided costs. Panda has not alleged that payments under any of the contracts TU Electric has executed exceed its avoided costs.

[7] The examiners conclude that this indicates that the Commission does not intend to second guess utility management in securing cogeneration contracts. P.U.C. SUBST. R. 23.66(d)(1)(F)(iii) contemplates that utilities will receive multiple offers; if the Commission intended to disallow any contract which was not the "best" contract, the Commission certainly could have reflected such policy in its rules. If the Commission were to examine Panda's proposed contract with TU Electric, would all of TU Electric's cogeneration contracts become relevant in determining whether Panda should have received a contract? The examiners find that such scrutiny is unnecessary since Panda has not pled that its proposal was the best proposal made. Panda has pled, and the gravaman of its complaint is, that its offer was made prior to those offers accepted by TU Electric.

Fifth, the ratepayers remain indifferent which cogenerator is awarded a contract. As long as the utility pays no more than that amount which the

ratepayers would pay if the utility had not made purchases from a qualifying facility, there is no shortfall to the ratepayer. FERC Preamble, 45 Fed. Reg. at 12222. As has been seen above, the Commission has modified this standard when the situation involves negotiated contracts.

Finally, Panda has made no showing that TU Electric is not entering cogeneration contracts in violation of PURPA and the Commission's mandate. On the contrary, as discussed earlier, because of TU Electric's apparent vigor in negotiation, it is able to pick and choose a contract which it determines to be most appropriate for its ratepayers, which is exactly the treatment required under the Commission's rules. P.U.C. SUBST. R. 23.66(d)(1)(F)(iii). Mere failure of a utility to enter into a contract with a given cogenerator, when a number of cogeneration options are available, does not constitute an action for which a remedy is warranted.

The examiners believe that the only issue which may require the development of evidence in this case is whether excess cogeneration capacity is available and has been offered to TU Electric. As concerns Panda, the examiners find that the factual allegations in its Petition indicate that TU Electric is in an excess capacity situation. Thus, no further proceedings are necessary in Docket No. 7470 concerning this issue. With regard to National, evidence on the excess capacity issue will be necessary, as National's Complaint contains no factual allegations other than the implicit one that signing a contract with National will not put TU Electric over its capacity requirements. National cannot be bound by the factual allegations contained in Panda's Petition.

In sum, the examiners find that Panda has failed to state a claim upon which relief can be granted, and therefore Panda's request for a contract should be dismissed. With regard to National, TU Electric's Motion to Dismiss is held in abeyance pending determination of the amount of capacity that has been offered to TU Electric. A prehearing conference will be held in Docket No. 7581 beginning at 10:00 a.m. on October 23, 1987, at the Commission's offices at 7800 Shoal Creek Boulevard, Austin, Texas, to consider whether determination of that issue should be done via sworn affidavits or at a hearing.

Although the examiners have determined that this issue should result in dismissal of Panda's petition, the remaining issues raised in the Motion to Dismiss will be discussed below.

2. The Authority of the Commission to Make the Contract Retroactive.

Panda argues that P.U.C. SUBST. R. 23.66(d)(1)(C) permits the imposition of a retroactive contract. Panda states that a utility enters into a contract under the presumption that the contract is governed by all the laws applicable to it at the time the negotiations were entered. Because the Commission's rules address the appropriateness of a retroactive contract by agreement, if such retroactivity is permitted, it must also be permitted under Commission order.

TU Electric argues that because it believes the Commission cannot compel a contract, a retroactive contract also cannot be compelled. TU Electric differentiates a retroactive contract to which parties agree from an order which is imposed upon the parties. TU Electric argues that a Commission-ordered retroactive contract is violative of its constitutional rights under Article 1, Section 16 of the Texas Constitution, which prohibits retroactive laws. Moreover, because the facilities have not yet been built and thus no capacity is available for sale, P.U.C. SUBST. R. 23.66(d)(1)(C) is not applicable.

P.U.C. SUBST. R. 23.66(d)(1)(C) states the following:

> (C) Each electric utility shall purchase energy and capacity from a qualifying facility with a design capacity of 100 KW or more within 90 days of being notified by the qualifying facility that such energy and capacity are or will be available, provided that the electric utility has sufficient interconnection facilities available. If an agreement to purchase energy and capacity is not reached within 90 days after the qualifying facility provides such notification, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy (and capacity) delivered to the electric utility correspondent with the 90th day following such notice. If the electric utility determines that adequate interconnection facilities are not available, the electric utility shall inform the qualifying facility within 30 days after being notified for distribution interconnection, or within 60 days for transmission interconnection, giving the qualifying facility a description of the additional facilities required as well as cost and schedule estimates for construction of such facilities. If an agreement to purchase energy

> and capacity is not reached upon completion of construction of the interconnection facilities or 90 days after notification by the qualifying facility that such energy and capacity are or will be available, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy and capacity delivered to the electric utility correspondent with the time of interconnection or the 90th day, whichever is later. Nothing in this subsection shall be construed in such a manner so as to preclude a qualifying facility from notifying and contracting for energy and/or capacity with a utility prior to 90 days before delivery of such energy and/or capacity. (Emphasis added.)

It is upon this rule that Panda apparently bases its request for a retroactive contract. It would appear that Panda requests a retroactive contract ostensibly so that its contract with TU Electric would occur prior in time to TU Electric's subsequently executed contracts with other cogenerators.

The above rule requires a utility to purchase energy or capacity from a qualifying facility with a design capacity of 100 KW or more "within 90 days of being notified" by the qualifying facility that energy or capacity are or will be available as long as sufficient interconnect facilities exist. Panda does not allege that the failure of an executed agreement between Panda and TU Electric rests upon insufficient interconnect facilities. If a utility has sufficient interconnect facilities, must it purchase the energy or capacity offered? The examiners have determined that the rule does not require this result. The rule states that the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy (and capacity) delivered to the electric utility correspondent with the 90th day following such notice.[5]

[5]If the lack of interconnect facilities has caused the delay in executing a contract, the Commission rules provide that the utility shall provide the qualifying facility a period as to the estimated time for construction. The rule further states that the contract, if and when achieved, will reflect an effective date correspondent with the time of interconnection or the 90th day, whichever is later.

Thus, the Commission certainly contemplated that not all offers would culminate in a contract. If all that was necessary were an offer, the language in this rule would reflect "when achieved" and not "if and when achieved."

The requirement that utilities purchase capacity and energy which a qualifying facility offers is further qualified by P.U.C. SUBST. R. 23.66(d)(1)(D) which states the following:

> (D) Nothing in this rule shall be interpreted to require a utility to contract for capacity from qualifying facilities in excess of its capacity requirements, as determined by the commission through its electric forecast responsibilities mandated by the PURA, §16(f).

Thus, if TU Electric were to enter into a negotiated contract with Panda, and if such contract would not exceed its capacity requirements, and if sufficient interconnect facilities exist to receive the capacity, the contract could bear the retroactive date reflected in P.U.C. SUBST. R. 23.66(d)(1)(C). The inclusion of the conditional "if and when" language in the rule, however, does not indicate that a contract must be consumated. TU Electric's argument that the absence of completed cogeneration facilities renders inapplicable P.U.C. SUBST. R. 23.66(d)(1)(C) is not persuasive, for it would be foolhardy for Panda to construct facilities prior to obtaining a contract from TU Electric to purchase the capacity produced by such qualifying facility.

B. A Commission Order Requiring that the Cogeneration Contract be Based Upon the Terms and Conditions and the Standard Avoided Cost Calculations as Approved in Docket No. 6065

Panda argues that, in the absence of an agreement or waiver, the terms and conditions and standard avoided cost calculations approved by this Commission in Docket No. 6065 are appropriate and should be applied in Panda's case. 18 C.F.R. §292.304(b) and American Paper Institute v. American Electric Power Service Corporation, 461 U.S. 402, 103 S. Ct. 1921 (1983) (All page citations will be to the Supreme Court Reporter). Thus, as the examiners interpret Panda's pleadings, Panda requests that all the terms and conditions and the avoided cost calculations approved therein would form the basis of Panda's contract with TU Electric. If full avoided cost is not appropriate, Panda

alternatively pleads that its last offer to TU Electric form the basis for the contract.

TU Electric argues that P.U.C. SUBST. R. 23.66(h)(3), regarding the standard avoided cost calculation and its terms and conditions, is permissive in its application to purchase arrangements between a utility and a qualifying facility, based on the use of the word "may." The calculations and terms and conditions stipulated in the standard avoided cost docket were not designed to be binding upon TU Electric in that they were not required to be reflected in their executed cogeneration contracts, but rather the cost calculation and terms of that filing as well as the Commission rules were to form the basis for TU Electric actions regarding negotiated cogeneration contracts. TU Electric argues that in the face of excess cogeneration capacity and lower fuel costs, such flexibility is appropriate and necessary.

Panda is correct that in the absence of a waiver or a negotiated price, the price paid by the utility must be based upon the utility's avoided costs. American Paper at 1930. TU Electric agrees with that statement if the Commission were to order a contract. Tr. at 30-31. The question thus to be answered is what is the utility's avoided cost? Is it the standard avoided cost calculated in Docket No. 6065 or is it something else, such as the utility's actual avoided costs vis-a-vis the specific qualifying facility involved?

P.U.C. SUBST. R. 23.66(d)(1)(E) sets forth the obligations of utilities in determining the purchase of cogenerated capacity. This rule states:

> The price may be adjusted for differences in quality of firmness between the power offered by the qualifying facility and the power to be supplied by the generating unit or planned capacity addition.

P.U.C. SUBST. R. 23.66(d)(1)(F) states, in part:

> A utility shall purchase capacity from qualifying facilities on the basis of avoided cost adjusted for the quality of firmness of such capacity.

P.U.C. SUBST. R. 23.66(a)(16) defines quality of firmness to include the following:

> **Quality of firmness of a qualifying facility's power.** The degree to which the capacity offered by the qualifying facility is an equivalent quality substitute for the utility's own generation or firm purchased power. At a minimum the following factors should be considered in determining quality of firmness:
>
> (A) reliability of generation and interconnection;
> (B) forced outage rate;
> (C) availability during peak periods;
> (D) the terms of any contract or other legally enforceable obligation, including but not limited to, the duration of the obligation performance guarantees, termination notice requirements, and sanctions for noncompliance;
> (E) maintenance scheduling;
> (F) availability for system emergencies, including the ability to separate the qualifying facility's load from its generation;
> (G) the individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system;
> (H) other dispatch characteristics;
> (I) reliability of primary and secondary fuel supplies used by the qualifying facility; and
> (J) impact on utility system stability.

It is interesting to note that an earlier version of P.U.C. SUBST. R. 23.66(h)(3) had expressed that the utilities' standard filings were considered to be standard offers:

> (3) By September 30, 1984, and at least every two years thereafter, each electric utility shall file with the commission a standard offer for the purchase of firm energy and capacity from qualified facilities, the terms of which are to be subject to commission review and approval. The purpose of the standard offer is to assure that a good faith purchase offer is made available by the utility, and to provide prices, terms, and conditions applicable to purchase arrangements in which a contract is not otherwise negotiated between a utility and a qualified facility. (Emphasis added.)

This rule was amended effective January 29, 1987, to state that the filings are now considered standard avoided cost calculations:

> (3) By December 30, 1984, and at least every two years thereafter, each electric utility shall file with the commission a standard avoided cost calculation and terms and conditions for the purchase of firm energy and capacity from qualifying facilities, the terms of

> which are to be subject to commission review and approval after notice and opportunity for hearing. Prior to a hearing, the presiding examiner shall discuss settlement of all issues in dispute. The parties shall be required to present to the presiding examiner a list of all issues which have been settled and a list of all issues which remain in dispute. The hearing on the merits shall be limited to those issues which remain in dispute. Failure to participate in the settlement conference by any party shall be grounds for dismissal as a party to the proceedings. The purpose of the standard avoided cost calculation and terms and conditions for purchase is to provide prices, terms and conditions that may be applicable to purchase arrangements between a utility and a qualifying facility. The standard avoided cost calculation shall be stated in terms of dollars-per-kilowatt (or per KVA) per year (or per month) and cents per kilowatt-hour. Along with these calculations, each utility shall file with the commission the program logic (except to commercial programs subject to copyright protection) and associated data used to derive these calculations, along with any narrative instruction necessary to understand the calculations. The actual computer programs, or reasonable substitute, and data shall be made available by the utility on the appropriate computer media at not more than the actual reproduction. (Emphasis added.)

Under the old rule, if a utility and a cogenerator were not able to reach an agreement, it appeared that the standard offer would then constitute the basis of a contract. The amendment to the rule, in which the Commission deleted the word "offer" and inserted the words "standard avoided cost calculation" and "may", casts doubt on Panda's argument that the standard avoided cost filing constitutes the basis of a contract in the absence of a negotiated agreement.[6]

[8] The Commission rules clearly use the avoided cost calculations as a ceiling for the appropriate level of payments to cogenerators. Moreover, the interest of the consumers must also be considered in determining the appropriateness of a given contract. P.U.C. SUBST. R. 23.66(e)(1). And while the Commission rules indicate that rates will be deemed just and reasonable and in the public interest

[6]While the rule itself has changed in that language exists regarding the filing of interim filings for good cause, the language in question noted above exists in the current rule. The interim filing referenced in the current rule is made at the utility's election for good cause.

if they equal the utility's avoided costs (P.U.C. SUBST. R. 23.66(e)(3)), the examiners must reconcile such rule with P.U.C. SUBST. R. 23.66(d)(1)(F)(iii) which requires a utility to obtain the best proposal in negotiated purchases. If all that was needed was a contract with payments equal to or less than avoided costs, why the necessity of the rule regarding "best proposal?" The answer must be that the Commission wanted to ascertain that TU Electric aggressively negotiated contracts. Thus, while the Commission was concerned with encouraging cogeneration in Texas, it was not to be at the expense of the utility's ratepayers. Therefore, although the Commission determined that payments equal to avoided costs would be deemed reasonable and necessary expense of a utility, the Commission nevertheless imposed an additional burden on the utility to obtain the best proposal available for the ratepayers in negotiated purchases.

[9] A utility's avoided costs are those based upon all the criteria announced in P.U.C. SUBST. R. 23.66(a)(16) in determining a cogenerator's quality of firmness. These same criteria are included as part of the factors taken into account in determining avoided costs by FERC. 18 C.F.R. §292.304(e). Thus, the utility's avoided cost for a negotiated cogeneration contract is and should be different from that determined in the utility's standard avoided cost filing, which is made pursuant to P.U.C. SUBST. R. 23.66(h). The standard avoided cost calculation may be utilized in determining the appropriateness of a contract between a cogenerator and utility. It is not required to be used; it is a point of departure in negotiations. The avoided cost calculation in a negotiated contract is based upon all of the factors regarding quality of firmness. These same factors should be reflected in the price a utility is required to pay for that cogenerated power. Thus, a utility's avoided cost for a specific cogenerator is adjusted to consider the quality of firmness of the service provided by that cogenerator. P.U.C. SUBST. R. 23.66(d)(1)(E) and (F).

Because the quality of firmness of each cogenerator is not identical, in the absence of a negotiated agreement a hearing to determine the avoided cost for a particular cogenerator is the only appropriate manner in which to determine the reasonable price and terms for a given cogeneration offer. Thus, should this issue eventually be litigated, a hearing would be necessary to

determine the level of avoided cost to be paid to this cogenerator (National or Panda) and the appropriate terms and conditions for such a contract. The examiners do not agree that all other contracts must be scrutinized in this docket to determine the price and terms and conditions for Panda's or National's contract. P.U.C. SUBST. R. 23.66(d)(1)(F)(iii) references the most favorable proposal in "negotiated" contracts. If the Commission orders a contract, it is no longer a negotiated contract and the Commission's rule regarding the most favorable proposal is no longer applicable. TU Electric's other contracts need not be called into question. The Commission should focus upon the utility's avoided cost for a particular cogenerator at the time the obligation is incurred or at the time of delivery. 18 C.F.R. §292.304(d)(2) and P.U.C. SUBST. R. 23.66(e)(2). (P.U.C. SUBST. R. 23.66(e)(2), unlike the federal rule, does not clearly spell out the elective process of a cogenerator who has the option to have the avoided cost rates calculated at the time the obligation is incurred or at the time of delivery; it is clear from this rule, however, that such election is contemplated.)

One court has held that calculation of a utility's avoided cost vis-a-vis a specific cogenerator is indeed the appropriate manner in which to price a cogeneration contract in determining the appropriate level of payment when such contract is ordered by a Commission. Such calculation may be different than the standard filing. In Snow Mountain Pine Company v. Maudlin, 734 P.2d. 1366, 84 Or. App. 590 (1987), the Oregon appellate court determined that when a utility offers to provide capacity pursuant to a legally enforceable obligation, the cogenerator, at its option, may base the purchased price on the utility's "avoided" costs calculated at the time the obligation is incurred or at the time of delivery. The obligation occurs when the facility obligates itself to deliver energy; it is this date upon which avoided costs are determined. In that case, the court determined that the avoided costs must "be based on the utility's actual "avoided costs" vis-a-vis the particular qualifying facility on the date the obligation is incurred, projected to apply over the life of the obligation. CP's [the utility] actual "avoided costs" may be different from the schedule of "avoided costs" on file in July, 1983." Id. at 1371.

In summary, should the Commission determine that a hearing is necessary to adjudicate the validity of Panda's (National's) claim for a contract, such contract should be based upon TU Electric's avoided cost either at the time the obligation is incurred or at the time of delivery, at the option of Panda (National).

C. The Appropriateness of a Commission Finding that TU Electric has More Cogenerated Capacity than that which is Reflected in its "Long-Term Electric Peak Demand and Capacity Resource Forecast for Texas" as Established Pursuant to TU Electric's Compliance with Section 16(f) of the PURA

As the examiners understand Panda's argument, while not requesting a redetermination of TU Electric's capacity requirement as reflected in Docket No. 6065 or in TU Electric's Long Term Load Forecast, Panda does seek to have the Commission determine that TU Electric capacity needs have not been met with its executed cogeneration contracts. Specifically, Panda claims that "TUEC has failed to adjust the price and terms of its contracts to appropriately reflect quality of firmness as recognized by Substantive Rule 23.66(b)." Panda's Reply Brief at 26. While the Commission's rules refer to quality of firmness only in the context of calculating the price of avoided capacity, Panda argues that TU Electric's capacity needs should be reviewed based on quality of firmness and that this will not affect current contracts but will further cogeneration. Panda requests that because the contracts were not properly priced, they should not be counted in determining TU Electric's capacity needs. Tr. at 94.

TU Electric argues that its capacity requirements cannot be redetermined. Its capacity levels were reviewed and made final in Docket No. 6065 and in TU Electric's biennial load forecast filing pursuant to Section 16(f) of the Act. TU Electric's next long range forecast is not due until 1988. Its next standard avoided cost filing under Section 23.66(h)(3) is not required until December 30, 1987. Moreover, any interim filing pursuant to that rule prior to the above date is permitted only for good cause. More importantly, TU Electric argues that quality of firmness or duration of cogeneration is not relevant to the capacity issue, which focuses upon capacity being made available at the time

of the utility's system peak. Quality of firmness affects the price, not the capacity necessary to meet a utility's demand. P.U.C. SUBST. R. 23.66(d)(1)(E) and (F).

The relitigation of the capacity issue is not necessary. P.U.C. SUBST. R. 23.66(d)(1)(D) states:

> (D) Nothing in this rule shall be interpreted to require a utility to contract for capacity from qualifying facilities in excess of its capacity requirements, as determined by the commission through its electric forecast responsibilities mandated by the PURA, §16(f).

Thus, TU Electric may not be required to purchase more capacity than that reflected in its long range forecast, 1,180 MW. TUEC Brief 23-24; Long Range Forecast at VII-57.

Regarding Panda's request to re-evaluate how much of that capacity TU Electric has met by evaluating the quality of firmness of other cogeneration contracts, the examiners have not been persuaded that quality of firmness of these contracts is a proper measure to determine to what extent TU Electric has met capacity needs. Quality of firmness is a factor in determining the appropriate price to be paid for a qualifying facility's capacity. While some capacity is more firm than others, this difference is reflected in the price paid, not in the overall capacity purchased.

The examiners find that no basis exists to evaluate TU Electric's capacity either by relitigating the capacity level per se or in determining the effect of quality of firmness upon TUEC's capacity levels.

The examiners also reject the argument that the Commission should review the capacity levels to determine if the proper price was paid, and if not, to discount the contract from TU Electric's capacity determination. The examiners find that this issue should be addressed in a rate proceeding and not a complaint proceeding. While Panda is not stating that the rates TU Electric will pay for this contract should be disallowed on this basis (Tr. at 94), the examiners do not find it proper to address the reasonableness of the price paid for these contracts in the complaint proceeding. Disallowance of costs is generally more a component of a fuel reconciliation or rate case.

D. The Appropriateness of a Commission Order Disallowing TU Electric's Recovery of the Payments made for Cogenerated Energy and Capacity to Any Cogeneration Contract Executed by TU Electric During the Pendency of the Hearing

P.U.C. SUBST. R. 23.66(e)(3) states that:

> (1) Rates for purchases of energy and capacity from any qualifying facility shall be just and reasonable to the consumers of the electric utility and in the public interest, and shall not discriminate against qualifying cogeneration and small power production facilities.
>
> (2) Rates for purchases of energy and capacity from any qualifying facility shall not exceed avoided cost; however, in the case in which the rates for purchase are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subsection if the rates for such purchases differ from avoided costs at the time of delivery.
>
> (3) Rates for purchases satisfy the requirements of paragraph (1) of this subsection if they equal avoided cost.
>
> (4) Rates for purchases from qualifying facilities shall be in accordance with paragraphs (1)-(3) of this subsection, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.
>
> (5) Payments by a utility to any qualifying facility, if in accordance with paragraphs (1)-(3) of this subsection, shall be considered reasonable and necessary operating expenses of that utility.

Based upon TU Electric's refusal to contract with Panda and its alleged bad faith negotiations, Panda argues that any cogeneration contract entered into by TU Electric since November 1985 is imprudent and inappropriate. Panda's First Amended Petition at 17. Panda notes that, under PURA Section 41(c)(3)(D), expenses that are unreasonable, unnecessary or not in the public interest are to be disallowed, and argues that such contracts are not in the public interest. But ultimately, Panda requests that the Commission disallow purchased power expenses incurred by TU Electric only for any cogeneration contracts executed during the pendency of this case (Panda's First Amended Petition at 17 and 18-19).

TU Electric argues that if it meets those factors set forth in P.U.C. SUBST. R. 23.66(e) the payments for its cogeneration contracts are deemed reasonable and necessary, and by the Commission's own rules TU Electric must be

permitted recovery as required under Section 39(a) of PURA. As cited above, P.U.C. SUBST. R. 23.66(e)(5) expressly states that any payments which do not exceed avoided cost "shall be considered reasonable and necessary operating expenses of that utility." Moreover, any disallowance of reasonable and necessary operating expenses constitutes confiscation of property in violation of Article 1, Sections 17 and 19, of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

[10] While Panda refers to disallowance of cogeneration contracts, the examiners interpret Panda's request as one requiring the disallowance of the purchased power expense associated with the cogeneration contracts entered into between TU Electric and other cogenerators during the pendency of the hearing. Panda's arguments fail on several accounts. First, the last paragraph of PURA Section 41 states that: "The Regulatory Authority may promulgate reasonable rules and regulations with respect to the allowance or disallowance of any expenses for ratemaking purposes." P.U.C. SUBST. R. 23.66(e) is such a rule. Under paragraph 3 of that rule, rates for purchase of capacity from a qualifying facility are just, reasonable and in the public interest if they equal avoided cost. As noted earlier, all of the parties and the examiners agree that that paragraph should be read to mean that rates below avoided cost are also just, reasonable and in the public interest. Paragraph 5 of that rule states that payments made in accordance with paragraphs 1 through 3 "shall be considered reasonable and necessary operating expenses of that utility." Thus, pursuant to PURA Section 41, the Commission has made a binding policy choice that payments at or below avoided cost are just, reasonable, necessary and in the public interest. There is no provision of PURA that would allow such an expense to be disallowed.

Moreover, Section 41A to PURA, enacted in the last legislative session, appears to be in essence a statutory codification of P.U.C. SUBST. R. 23.66(e). The relevant portions of this amendment state:

> Sec. 41A. (a) In this section "qualifying facility" means a qualifying cogenerator or a qualifying small-power producer, as defined by Sections 3(18)(C) and 3(17)(D), respectively, Federal Power Act (16 U.S.C. Sections 796(18)(C) and 796(17)(D)).

(b) If an electric utility and a qualifying facility enter into an agreement providing for the purchase of capacity, the electric utility or qualifying facility may submit a copy of the agreement to the commission for certification under this section. The agreement may provide that it is contingent on that certification. Before the deadline specified by Subsection (d) of this section, the commission shall determine whether:

(1) the payments provided for in the agreement over the contract term are equal to or less than the utility's avoided costs as established by the commission and in effect at the time the agreement was signed. Contracts entered into before the effective date of this section may not be submitted for certification by the commission; and

(2) the agreement provides the electric utility the opportunity to acquire the cogeneration or small-power production installation before the installation is offered to another purchaser in the event of its abandonment, or provides other sufficient assurance that the electric utility will be provided with a comparable supply of electricity, if the qualifying facility ceases to operate the installation.

(c) If the commission determines that the agreement meets the requirements of Subdivisions (1) and (2) of Subsection (b) of this section, it shall certify that the agreement meets these requirements. If the commission does not make a determination under Subsection (b) of this section before the deadline specified by Subsection (d) [regarding timeframe in which Commission must act] of this section, the agreement is considered to meet the requirements of Subdivisions (1) and (2) of Subsection (b) of this section and certification is considered granted. A certification is effective until the earlier of 15 years after the date of the certification or the expiration date of the agreement.

* * *

(e) In setting the electric utility's rates for a period during which the certification is effective, the regulatory authority shall consider payments made under the agreement to be reasonable and necessary operating expenses of the electric utility. The regulatory authority shall allow full, concurrent, and monthly recovery of the amount of the payments.

While all of TU Electric's cogeneration contracts may not come under such new enactment, Panda requests only those contracts executed during the pendency of the docket be disallowed from TU Electric's fuel expense. To date, only one such contract allegedly has been consumated. Tr. at 20, and 56-57.

If the utility meets the criteria required under Section 41A(b) of PURA, the Commission is required to certify the agreement. The result of certification is that the cogeneration payments are deemed reasonable and

necessary operating expenses AND the Commission is required to allow full concurrent and monthly recovery of these payments. Panda's request that contracts executed during the pendency of the case be disallowed, cannot be granted as a matter of law if such contracts are certified under Section 41A of PURA. There is currently pending an application by TU Electric to have a cogeneration contract with EDC-One certified pursuant to Section 41A, which has been assigned Docket No. 7623. Panda has indicated, however, that it has not yet determined whether it will intervene in that docket. Tr. at 56-58. The examiners believe that the recovery of those purchased power expenses has been mandated by the legislature, which did not envision any litigation after certification under Section 41A. Panda may argue that it will never have the opportunity to request that the Commission disallow the expenses associated with other cogeneration contracts entered into by TU Electric, and it will be absolutely correct. Quite simply, the legislature's and this Commission's judgment has been that, in order to encourage utilities to sign cogeneration contracts, the expenses associated with such contracts shall be recovered by the utility as long as the rate is at or below avoided cost.

E. National's Claim of Discrimination Against Cogeneration Projects of Less than 100 Megawatts

Several of National's claims deal with the subject of the relatively small size of National's cogeneration facility (60 megawatts). National takes issue with its having to meet the same terms and conditions imposed on larger cogeneration projects, claiming that for a facility of its size, such conditions are financially onerous if not outright destructive. National notes that TU Electric has never signed a long term cogeneration contract with a facility of under 75 megawatts. National cites P.U.C. SUBST. R. 23.66(e)(1), dealing with rates for purchases, and 18 C.F.R. §292.304(a), also dealing with rates for purchase, to support its claim.

This claim can be disposed of rather quickly. As TU Electric notes, there is nothing in PURPA, the FERC regulations, or this Commission's rules that sets up classes of cogenerators depending upon whether they are under or over 100 megawatts of capacity. A reference to 80 megawatts is found at 18 C.F.R.

§292.204(a), which provides that a facility cannot qualify as a small power production facility if its capacity, when added to the capacity of all other facilities at the same site, using the same energy resource, and owned by the same person, will exceed 80 megawatts. This provision of the regulations does not come into play, as National's facility will be a cogeneration facility, not a small power production facility.

A 100 kilowatt figure is found at 18 C.F.R. §292.304(c) and at P.U.C. SUBST. R. 23.66(f). But those rules deal with the requirement that utilities put into effect standard rates for purchases from qualifying facilities with a design capacity of under 100 kilowatts. Obviously, National's project does not meet such criteria.

There being no statute, rule or regulation differentiating between cogeneration facilities of over and under 100 megawatts of capacity, the examiners find that there is no basis for a claim of discrimination based on the amount of capacity offered for sale by National.

F. National's Claim that TU Electric has Violated Anti-Trust Laws

National makes several claims that TU Electric has violated anti-trust statutes by refusing to sign with National while installing combustion turbine generating capacity. The examiners are quite simply unable to discern any possible violation of anti-trust laws based on National's Complaint, and by adopting Panda's briefs, National has not provided any arguments relating to such a violation. Further, as TU Electric points out, anti-trust claims are properly brought only in Federal courts, which have exclusive jurisdiction over such claims. Thus, any claim as to violation of anti-trust laws by TU Electric is hereby dismissed.

G. The Appropriateness of a Commission Order Prohibiting TU Electric from Contacting Any Potential Host of Panda or Any Utility with Whom Panda is Currently Attempting to Negotiate a Congeneration Contract

The factual allegations upon which Panda relies in seeking the specific relief discussed in this section, and which are assumed to be true for purposes of the motion to dismiss, are as follows:

> TUEC has also repeatedly attempted to contact Panda's prospective hosts and prospective utilities to which Panda wishes to sell cogeneration and has repeatedly discouraged those prospective hosts and utilities from entering into host and cogeneration contracts with Panda. The effect of these contacts has been to deter Panda from executing viable cogeneration and host contracts. Panda's inability to execute such contracts has prevented Panda from effectively competing with other cogeneration offers made to TUEC.

First Amended Original Petition of Panda at 11-12 (emphasis added). Panda further alleges that these contacts by TU Electric have resulted in Panda's inability to compete with TU Electric, in violation of Section 47 of PURA and of 18 C.F.R. §292.304(a). Panda's Petition at 13.

In Panda's initial brief in opposition to TU Electric's motion to dismiss, it attempts to broaden its factual allegation to include an alleged pattern of discrimination by TU Electric against long term cogenerators which allegedly drives the cogenerators out of business, thereby relieving TU Electric of the burden of having to enter into cogeneration contracts. Panda's Initial Brief at 50. Panda alleges that these actions constitute discrimination against corporations seeking to generate electricity in violation of Section 47 of PURA. Panda's Initial Brief at 51.

In its initial brief, Panda states that the purpose of the requested relief is to prevent interference with Panda's prospective business relationships and to prevent additional anti-competitive or discriminatory activities by TU Electric. Panda's Initial Brief at 34. Panda argues that the state's interest in prohibiting discrimination or anti-competitive practices is a compelling state interest which justifies regulation of the free speech privilege guaranteed by the U.S. and Texas Constitutions. It acknowleges that

such regulation must be accomplished with narrow specificity. Panda's Brief at 34-35. Alternatively, Panda argues that if the Commission determines the requested relief is too broad, the Commission may narrowly tailor the relief it grants. Panda argues that the Commission can require TU Electric to "refrain only from discussions of Panda's cogeneration contracts with such entities or to report the scope, content, date and place of such contacts." Panda's Initial Brief at 35. Panda argues that the legal basis for such relief is found in the ex parte prohibitions of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1987), as well as Sections 6(d), 6(g) and 34 of PURA.

In its reply brief, Panda responds to the First Amendment issue by arguing that the cases cited by TU Electric are inapplicable because they do not address the "efforts of a business to dissuade its customers from discontinuing (sic) their mutual business relationship to pursue a new business relationship with a competitor." Panda's Reply Brief at 29. Panda further argues that in the "utility/cogeneration business the free market operates only with significant restrictions."

Finally, Panda alleges in its reply brief that TU Electric "has engaged in a practice which discriminates against a purveyor of a service similar to that offered by TU Electric." Panda's Reply Brief at 30. Panda alleged in its oral argument that TU Electric is securing contracts from qualifying facilities from outside of its service territory in order to eliminate competition from within its service territory. Tr. at 91. This allegation does not appear in Panda's pleadings or briefs.

TU Electric's initial response to these allegations, assuming they are true for purposes of the motion, is that they do not constitute a violation of Section 47 of PURA. TU Electric's First Amended Original Answer at 16. In its initial brief, TU Electric states that the federal regulation relied upon by Panda is inapposite because: (1) FERC regulation 292.301(b) clearly authorizes utilities to negotiate rates; and (2) the factual allegations do not involve rates, which is the sole subject of 18 C.F.R. 292.304(a). TU Electric's Initial Brief at 27-28. TU Electric also argues that no violation of Section 47 of PURA

is alleged, because no act of discrimination is alleged and to the extent the allegations involve speech, they are protected by the First Amendment of the U.S. Constitution and by Article I, Section 8 of the Texas Constitution. TU Electric's Initial Brief at 28-29. In its reply brief, TU Electric discusses cases dealing with subject matter restrictions on free speech, and points out that such restrictions have been found to be lawful only under very narrow circumstances. TU Electric's Reply Brief at 27-28.

The factual allegations that Panda makes in its petition, which are the only ones assumed to be true for purposes of this order, are that its ability to compete with other cogeneration offers made to TU Electric has been impaired by the actions taken by TU Electric. In subsequent briefs and oral argument, Panda has sought to enlarge upon the factual allegations by including claims of discrimination against the cogeneration industry generally and within TU Electric's service territory, and impairment of competition between Panda and TU Electric. Finding that Panda's petition also contains factual allegations that TU Electric has contracted with other cogenerators, the examiners conclude that an allegation of discrimination by TU Electric against the cogeneration industry generally cannot be sustained. As to Panda's oral argument that TU Electric is discriminating against cogenerators within its service territory, there is no indication in either a statute or regulation that purchases of capacity by electric utilities are restricted to cogenerators within a utility's service territory. Tr. at 92. Although a factual allegation not contained in the petition should not be assumed true, the allegation made by Panda that TU Electric's actions impede competition between Panda and TU Electric will be discussed below, along with a discussion of a cause of action premised on impairment of competition with other cogenerators.

Beginning with Panda's reliance upon the federal regulations, it is instructive to explore the purpose of PURPA and the applicable FERC regulations in order to analyze Panda's cause of action. The preamble to FERC's regulations describes the problems facing cogenerators which necessitated the enactment of Section 210 of PURPA:

> Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced

> three major obstacles. First, a utility was not generally required to purchase the electric output, at an appropriate rate. Secondly, some utilities charged discriminatorily high rates for back-up service to cogenerators and small power producers. Thirdly, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered an electric utility and thus being subjected to State and Federal regulation as an electric utility.

FERC Preamble, 45 Fed. Reg. at 12215.

The FERC regulation which specifically addresses these problems, and upon which Panda relies for its discrimination argument, is 18 C.F.R. §292.304(a). That provision states in pertinent part: "Rates for purchases shall: * * * (ii) Not discriminate against qualifying cogeneration and small power production facilities." "Purchase" is restricted to transactions in which an electric utility buys from a qualifying facility. 18 C.F.R. §292.101(b)(2). The preamble to Section 292.304 states that it was the Congressional intent to exempt qualifying facilities from regulation to the extent necessary to encourage cogeneration. It is important to note that the specific provision talks about discrimination <u>against</u> qualifying cogenerators and not about discrimination <u>between</u> qualifying cogeneration facilities. The comparable state regulation is found at P.U.C. SUBST. R. 23.66(a)(1).

The examiners agree with TU Electric that this federal provision is not applicable to the factual situations alleged by Panda in its petition. Panda's factual allegations concern TU Electric's contacts with hosts and utilities which Panda alleges impair its competition either with TU Electric or other cogenerators. The federal regulation is concerned with rates, and was clearly intended to address situations where utilities discriminate against cogenerators by refusing to deal with the industry as a whole, or by charging discriminatorily high rates to cogenerators for certain services. Panda's petition makes clear that TU Electric is dealing with other cogenerators, apparently much to Panda's chagrin, and the petition contains no allegations concerning back-up service rates or any comparable practice which discriminates against cogenerators in rate structure.

Panda's argument that TU Electric's actions result in impairment of competition <u>between</u> a cogenerator and an electric utility should be rejected.

It is clear that the federal regulation does not contemplate a market where those two types of entities compete with each other. It is important to remember that at the time Section 210 of PURPA was enacted Congress found there was too much reliance upon scarce fossil fuels and it sought to encourage the creation of cogeneration facilities. This section of PURPA was enacted for the express purpose of forcing electric utilities to do business with cogenerators, and therefore the generation of power that might have existed previously between the two industries. Additionally, PURPA provides, in pertinent part: FERC's "rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale." 16 U.S.C.A. §824a-2(a). In American Paper Institute, Inc. v. American Electric Power Service Corporation, supra, the United States Supreme Court cites part of the legislative history of PURPA. The conference report states in pertinent part:

> "The conferees recognize that cogenerators. . . are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration. . . enterprise is not guaranteed to be recoverable. * * * The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration. . . "

American Paper at 1928-1929.

Panda also relies upon Section 47 of PURA making its claim of discrimination. That statutory provision prohibits discrimination "against any person or corporation that sells or leases equipment or performs services in competition with the public utility" and prohibits the utility from engaging "in any other practice that tends to restrict or impair such competition." In determining whether Section 47 of PURA provides a basis for the relief requested, it is instructive to look at the history of the PURA. Section 47 has been in PURA since its enactment in 1975. The issue of cogeneration did not appear until 1981, at which time the Commission was directed by the legislature to implement FERC's rules (former Section 16(a) of PURA). At the same time, PURA was also amended to specifically exempt qualifying cogenerators from the definition of public utility found in Section 3(c). This change in definition was also reflected in P.U.C. SUBST. R. 23.3.

In analyzing Section 47 of PURA, it is important to look to the terms used therein. The term "service" is defined in Section 3(s) of the Act and is limited to acts by "public utilities". The term "public utility", as defined in Section 3(c), specifically excludes qualifying cogenerators. Under accepted rules of statutory construction, Section 47, therefore, should not be applied to an entity that is not a public utility, even if one assumes it provides a competitive service.

[11] Section 47 of PURA also refers to situations involving "competition". As discussed above, the examiners find that PURPA has eliminated any possible competition for the generation of power between cogenerators and electric utilities. If there is competition between utilities and cogenerators as to who will serve host facilities, any restriction on competition must not be so broad as to effectively prohibit the regulated utility from winning the business of the host. This result would change the prohibition against restricting or impairing competition, to a prohibition against competing at all. The acts complained of by Panda do not constitute unreasonable restriction or impairment of competition and therefore do not state a claim for which relief can be granted under Section 47 of PURA.

[12] State and federal statutes require electric utilities to contract with cogenerators for a specified amount of capacity, resulting in a compulsory buyer-seller relationship, but not in a competitive relationship. The regulation has apparently worked so well that it has created a competitive market between cogenerators. Such a situation was clearly not contemplated by Congress when it enacted legislation to encourage the development of the industry. That industry was purposely left unfettered by regulation and must now bear the risks attendant to the competitive market which has resulted from regulation that encouraged the industry's development. The examiners conclude that Panda's claims of discrimination vis-a-vis Panda's competition with other cogenerators does not state a cause of action for which relief can be granted.

In addition, the examiners wish to address the constitutional argument presented by TU Electric. Panda concedes that in order to impose restrictions on First Amendment privileges, there must be a compelling state interest to

justify the regulation. The examiners find that the interest being asserted by Panda is the protection of cogenerators against competitive marketplace forces. Panda has cited no cases in which this interest has been shown to serve a compelling state interest. The history of the enactment of PURPA does not indicate any compelling state interest in protecting cogenerators from competition. The compelling interests found by the Supreme Court in FERC v. Mississippi were a national interest in reducing reliance upon scarce fossil fuels and the encouragement of economical cogeneration. The factual allegations made by Panda in its petition do not indicate that either of those purposes is in any way frustrated by TU Electric's actions.

Panda alternatively argues that the Commission may narrowly tailor the relief granted if it determines that the requested relief is too broad and would constitute impermissible restrictions on free speech. The examiners are puzzled by Panda's reliance, in making this argument, upon ex parte prohibitions found in the APTRA and similar provisions contained in PURA. Clearly, ex parte prohibitions are aimed at ensuring the impartiality of the decision-making process and are totally unrelated to governmental regulation of the speech of a regulated utility. The examiners find that the relief requested would constitute an impermissible regulation of free speech in violation of the U.S. and Texas Constitutions.

H. The Appropriateness of a Commission Order Requiring TU Electric to Adopt a Specific Formal Procedure for Evaluating Offers From Qualifying Facilities within a Specified Period of Time

Panda argues that the Commission's authority is not limited to its rules but rather should be broadly construed as set forth in Section 16(a) of PURA, which permits the Commission to do anything "reasonably required in the exercise of its powers and jurisdiction." Moreover, Panda argues that P.U.C. SUBST. R. 23.66(d)(1)(G), while placing no time limits on negotiations, also does not leave the period for negotiation "open-ended" as Panda alleges TU Electric has done. Panda's Petition at 14. Panda argues that, in essence, TU Electric imposes standards in its negotiations that TU Electric itself could not bear. Panda's Brief at 54. Panda requests that formal bid procedures be imposed upon

TU Electric without specifying what those procedures should include. Such procedures, Panda argues, will be formulated depending on the evidence produced at the hearing and the evil to be remedied.

TU Electric argues that P.U.C. SUBST. R. 23.66(d)(1)(G) is permissive in nature in that a utility is "allowed" and not required to set up timely and reasonable time periods. TU Electric applauds the Commission's decision, as it interprets it, to allow utilities to conduct negotiations as they feel would be appropriate, as such will result in the most favorable contracts to their customers.

P.U.C. SUBST. R. 23.66(d)(1)(G) states the following:

> (G) In order to provide for an orderly consideration of the potential for purchased power from qualifying facilities to displace or defer a planned generation addition and/or provide for the orderly consideration of multiple and competing offers to supply future capacity, a utility is allowed to set up timely and reasonable time periods, or "windows," for the solicitation and evaluation of capacity offers. Each utility shall maintain records of all offers received from qualifying facilities for a period of five years from receipt thereof. (Emphasis added.)

The Commission received comments at the time it considered adoption of P.U.C. SUBST. R. 23.66(d)(1)(C), (E), (F) and (G). The Commission noted concern "that a time limit should be placed on the negotiation and signing of a contract for energy and/or capacity between an electric utility and a qualifying facility." In adopting the rule, the Commission "declined to adopt a proposal to set a specific amount of time in which to negotiate a contract because the present rules provide fair guidelines for both the electric utilities and the cogenerators in their negotiations." 10 Tex. Reg. 1415 (1985).

[13] This rule reflects that the Commission contemplated utilities would receive "multiple and competing" offers to purchase cogeneration capacity. The Commission's comments to the rule clearly reflect that the Commission, interested in permitting the parties as much latitude as possible in the negotiations process, declined to adopt specific time limits in the negotiation of cogeneration contracts. Such being the case, surely the Commission would not

impose strict time periods in which a utility could solicit offers for these contracts. Nevertheless, the rule permits, but does not require, utilities to establish "windows" to accept multiple offers. Yet, if a utility establishes such windows, they must be "timely and reasonable". Panda has not alleged, however, that TU Electric has established a window.

The examiners find it unnecessary to require a formal bid procedure for TU Electric. The Commission determined "windows" may be made available, it did not determine that certain other criteria, i.e., number of offers accepted, what the bid proposals should include, etc., be required. A specific bid procedure as requested by Panda would appear to interfere with the managerial decision-making of a utility. Moreover, if the Commission believed more guidance and scrutiny was necessary in the bid procedure, it would have so outlined such parameters in its rule. If Panda desires to see the Commission's rule expanded, a rulemaking proceeding, and not the instant docket, is the proper proceeding in which to do so. The examiners choose not to turn this proceeding into a rule proceeding.

G. Conclusion

In summary, the examiners recommend that Panda's Petition be dismissed in its entirety pursuant to P.U.C. PROC. R. 21.82(a) for failure to state a claim upon which relief can be granted. The Commission has determined that failure to state a claim upon which relief can be granted constitutes a lack of jurisdiction. Docket No. 5560, Application of Gulf States Utilities Company for a Rate Increase, 10 P.U.C. BULL. 405 (July 14, 1984); Docket No. 6027, Application of the Lower Colorado River Authority for a Rate Increase, 10 P.U.C. BULL. 1339 (January 25, 1985); Docket No. 6350, Application of El Paso Electric Company for a Rate Increase, ____ P.U.C. BULL. ____ (January 31, 1986); Docket No. 6525, et al., Application of Gulf States Utilities Company for a Rate Increase, ____ P.U.C. BULL. ____ (October 15, 1986). As to National, a prehearing conference has been set in order to determine how best to proceed in Docket No. 7581 concerning the excess capacity issue. Should an excess capacity situation be found, National's Complaint will be dismissed in its entirety. If not, that docket will go forward, subject to the rulings made herein. With

regard to the type of notice to be provided in Docket No. 7581, the examiner will reserve ruling on this issue until such time TU Electric's Motion to Dismiss is resolved.

V. Findings of Fact and Conclusions of Law

The examiners further recommend that the Commission adopt the following Findings of Fact and Conclusions of Law.

A. Findings of Fact

1. On April 14, 1987, Panda Energy Corporation and Rock-Tenn Company Mill Division, Inc. (Panda or the Petitioners) filed a petition with this Commission requesting that Texas Utilities Electric Company (TU Electric) be ordered to enter into a long-term firm purchased power contract with Panda, and that upon notice and hearing, the Commission order TU Electric to cease and desist from entering into any contracts for the purchase of capacity and energy from any qualifying facility pending final ruling on this matter.

2. On May 7, 1987, a prehearing conference was convened to take up the Petitioners' request. The examiners ordered briefs on certain legal issues relating to the Commission's authority to order a cogeneration contract and to the appropriateness of a cease and desist order.

3. Although the Petitioners and TU Electric appealed the examiners' order requiring briefs on the cease and desist issues and on the provision of notice, the Commission declined to hear the appeals.

4. Pursuant to the parties' request, the examiners revised the procedural schedule. On May 23, 1987, the Petitioners filed their First Amended Original Petition, and on June 5, 1987, TU Electric filed its First Amended Original Answer and Motion to Dismiss thereto . TU Electric and the Petitioners filed briefs in support of and opposition to the Motion to Dismiss; TU Electric, the Petitioners, and the Commission's General Counsel filed reply briefs. No other briefs were filed.

5. Motions to intervene of Gentex and Occidental were granted. Limited motions to intervene for the purpose of addressing discovery disputes of Bio-Energy, Cogen Lyondell, Cogen Lynchburg, PSE, Falcon Seaboard, Power Resources, and AES were granted.

6. No notice, other than to the Texas Register, has been provided in this case.

7. A prehearing conference to hear oral argument on TU Electric's Motion to Dismiss was convened on August 21, 1987. Because the legal arguments in this case are virtually identical to those presented in Docket No. 7581, Petition of National Cogeneration, Inc. for an Order Requiring Execution of Power Purchase Contract by Texas Utilities Electric Company, a joint prehearing conference was held for the purpose of taking oral argument in these two cases.

8. Official notice was taken of the Examiner's Reports and Commission Orders in Docket No. 6065, Application of Texas Utilities Electric Company for Approval of Standard Avoided Cost Calculation; Docket No. 6190, Application of Texas Utilities Electric Company for Approval of Notice of Intent to File an Application for Certification of Combustion Turbine Generating Units in Ward, Mitchell and Hood Counties; Docket No. 6526, Application of Texas Utilities Electric Company for Certification of Combustion Turbine Generating Units in Ward, Mitchell and Hood Counties; and of pages VII-1 through VII-28 and VII-56 through VII-58 of Volume I of the "Long-Term Electric Peak Demand and Capacity Resource Plan for Texas," issued by the Commission in August 1986.

9. For the purpose of ruling upon TU Electric's Motion to Dismiss, the factual assertions contained in the Petitioners' Petition are taken as true:

a. Panda is a Texas corporation organized to develop, build, own, and operate qualifying cogeneration facilities.

b. Rock-Tenn is a 125 megawatt host facility which requires steam in its manufacturing process and has entered into a contract with Panda for Panda to provide Rock-Tenn with steam.

c. Panda has offered to sell TU Electric approximately 100 megawatts of electricity to be generated at the Rock-Tenn facility, at a rate less than TU Electric's avoided cost.

d. TU Electric has executed contracts with other cogenerators to furnish or to increase previously contracted deliveries; some of these contracts were executed pursuant to offers received subsequent to Panda's offer to sell cogenerated electricity to TU Electric at less than avoided cost and subsequent to the execution of Panda's contract with Rock-Tenn.

e. Panda's ability to compete for a remaining window of capacity may be foreclosed by the execution of contracts by TU Electric and other cogenerators.

f. Each cogeneration contract executed by TU Electric either narrows or eliminates TU Electric's window of cogeneration capacity.

g. There currently exists more cogeneration capacity than TU Electric needs to fulfill its cogeneration capacity requirements; and that capacity is being offered, or made available to TU Electric.

h. TU Electric has repeatedly attempted to contact Panda's prospective hosts and prospective utilities to which Panda desires to sell cogeneration and has repeatedly discouraged those hosts and utilities from entering into contracts with Panda.

i. TU Electric notified Panda, on March 24, 1987, that it would not purchase capacity from the Rock-Tenn facility.

10. To require a utility to enter into a cogeneration contract at full avoided cost if the utility and cogenerator fail to achieve a negotiated contract, would nullify the negotiation process because cogenerators would have no incentive to negotiate with utilities.

11. TU Electric's ratepayers are indifferent as to which cogenerator is awarded a contract, as long as the contract amount is not more than avoided cost.

B. Conclusions of Law

1. TU Electric is a public utility as defined in Section 3(c) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987), and is therefore subject to this Commission's jurisdiction.

2. Panda is a qualifying cogenerator as defined in Sections 3(17)(D) and 3(18)(C) of the Federal Power Act, as amended. 16 U.S.C.A. §§796(17)(D) and 796(18)(C).

3. Panda is not a public utility as defined in Section 3(c)(1) of PURA.

4. For the purposes of a motion to dismiss, the facts alleged by the petitioner are deemed to be true. Under this assumption, if the petitioner will not be able to prevail at the hearing on the merits, a motion to dismiss should be granted. Jenkins v. McKeithen, 395 U.S. 411, 83 S.Ct. 1843, (1969); Leimer v. State Mutual Life Assurance Company of Worcester, Massachusetts, 108 F.2d 302 (8th Cir. 1940).

5. The Commission has jurisdiction over the issues raised in this petition pursuant to Section 16(g) of PURA and P.U.C. SUBST. R. 23.66.

6. Section 210 of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C.A. §824a-3, requires the Federal Energy Regulatory Commission (FERC) to prescribe rules to implement this section of PURPA. 16 U.S.C.A. §824a-3(a).

7. Each state is required to implement the regulations promulgated by FERC. 16 U.S.C.A. §824a-3(f)(1).

8. Section 210 of PURPA is not violative of the Tenth Amendment of the U.S. Constitution. FERC v. Mississippi, 456 U.S. 742, 102 S. Ct. 2126, 72 L.Ed. 2532 (1982).

9. FERC adopted regulations implementing Section 210 of PURPA. 18 C.F.R. Part 292 (February 1980).

10. The FERC regulations afford state agencies latitude in determining the manner in which the regulations are to be implemented; states are not required to adopt the FERC regulations by rote. 18 C.F.R. §292.401(a) and FERC v. Mississippi, 102 S.Ct. 2126 at 2133.

11. The 67th Texas legislature directed the Commission to adopt rules to implement FERC's regulations. Former Section 16(a) of PURA (eff. April 10, 1981), now Section 16(g) of PURA.

12. The Commission adopted rules to implement FERC regulations on September 14, 1981 (6 Tex. Reg. 3251), and amended those rules on February 11, 1985 (10 Tex. Reg. 332) and May 16, 1985 (10 Tex. Reg. 1414). P.U.C. SUBST. R. 23.66.

13. The Commission's rules do not conflict with FERC's regulations or the directive of Section 210 of PURPA.

14. The Commission cannot compel TU Electric to contract with Panda for cogeneration capacity because:

a. In an excess capacity situation, a utility is allowed to negotiate the most favorable capacity proposal available (P.U.C. SUBST. R. 23.66(d)(1)(F)(iii));
b. A utility may not be required to contract for capacity from qualifying facilities in excess of its capacity requirements (P.U.C. SUBST. R. 23.66(d)(1)(D)); and
c. Only if a utility fails to satisfy its cogeneration capacity requirement through the negotiation process, can a contract at full avoided cost be compelled.

15. Panda's request for a Commission order requiring TU Electric to enter into a retroactive cogeneration contract with Panda fails to state a claim upon which relief can be granted.

16. The Commission rule which addresses the appropriateness of a retroactive contract where the parties reach an agreement on a cogeneration contract, does not empower the Commission to order a retoractive contract in the absence of an agreement. P.U.C. SUBST. R. 23.66(d)(1)(C).

17. A utility's avoided costs are those based upon all the criteria relating to quality of firmness found in P.U.C. SUBST. R. 23.66(a)(16). P.U.C. SUBST. R. 23.66(d)(1)(E) and (F) and 18 C.F.R. §§292.304(b)(2) and 292.304(e).

18. A utility's standard avoided cost, determined pursuant to P.U.C. SUBST. R. 23.66(h), is not required to be used to determine the appropriateness of the contract terms between a cogenerator and a utility, but is the ceiling for such a contract, which is adjusted based on the quality of firmness.

19. The quality of firmness of other cogeneration contracts executed by TU Electric affects only the price of those contracts and is not a proper measure to determine to what extent TU Electric has met the capacity requirements imposed upon it by the Commission's long range forecast, which was mandated by Section 16(f) of PURA. P.U.C. SUBST. R. 23.66(d)(1)(E) and (F).

20. The Commission may not disallow, as unreasonable, unnecessary or not in the public interest, the purchased power expense associated with cogeneration contracts entered into between TU Electric and other cogenerators because under P.U.C. SUBST. R. 23.66(e) those expenses are deemed just, reasonable and in the public interest if they equal (or are less than) avoided cost. Section 41 of PURA.

21. Pursuant to Section 41A of PURA, the Commission may certify cogeneration contracts; such certification would preclude Panda's request that some of TU Electric's contracts be disallowed.

22. In order to achieve the goal of encouraging cogeneration of electricity, PURPA eliminated competition for the generation of electricity between cogenerators and electric utilities by requiring utilities to buy certain amounts of capacity from cogenerators.

23. The competition between cogenerators is unregulated. PURA §§3(c) and 47 and P.U.C. SUBST. R. 23.3.

24. TU Electric's actions do not constitute unreasonable restriction or impairment of competition and therefore Panda has failed to state a claim of discrimination for which relief can be granted under Section 47 of PURA.

25. There is no compelling state interest in protecting cogenerators from the competitive marketplace forces that exist in an environment of excess cogeneration capacity.

26. Panda's request that TU Electric be prohibited from contacting Panda's potential hosts or utilities with whom Panda is negotiating would constitute an impermissible regulation of free speech, in violation of the U.S. and Texas Constitutions.

27. P.U.C. SUBST. R. 23.66(d)(1)(G) is permissive in nature and does not require a utility to establish formal procedures for evaluating offers from qualifying facilities.

28. Panda's First Amended Original Petition fails to state a claim upon which relief can be granted and therefore should be dismissed in its entirety. P.U.C. PROC. R. 21.82(a); Docket No. 5560, Application of Gulf States Utilities Company for a Rate Increase, 10 P.U.C. BULL. 405 (July 14, 1984); Docket No. 6027, Application of the Lower Colorado River Authority for a Rate Increase, 10 P.U.C. BULL. 1339 (January 25, 1985); Docket No. 6350, Application of El Paso Electric Company for a Rate Increase, ____ P.U.C. BULL. ____

(January 31, 1986); Docket No. 6525, et al., Application of Gulf States Utilities Company for a Rate Increase, ____ P.U.C. BULL. ____ (October 15, 1986).

Respectfully submitted,

Paula Cyr
PAULA CYR
ADMINISTRATIVE LAW JUDGE

J. Kay Trostle
J. KAY TROSTLE
HEARINGS EXAMINER

APPROVED on this the 1st day of October 1987.

Phillip A. Holder
PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

lsw

DOCKET NO. 7470

PETITION OF PANDA ENERGY CORPORATION, ET AL., FOR A CEASE AND DESIST ORDER AGAINST TEXAS UTILITIES ELECTRIC COMPANY	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In public meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above referenced application was processed in accordance with applicable statutes and rules by examiners who prepared and filed a report containing Findings of Fact and Conclusions of Law, which Examiners' Report is ADOPTED and made a part hereof. The Commission further issues the following Order:

1. Panda Energy Corporation and Rock-Tenn Mill Division, Inc.'s Petition is hereby DISMISSED for those reasons reflected in the Examiners' Report in that the Petitioners have failed to state a claim for which relief can be granted.

2. For the purposes of ruling upon Texas Utilities Electric Company's Motion to Dismiss, the factual assertions contained in the Petition are taken as true.

-continued-

3. All motions, applications, and requests for entry of specific Findings of Fact and Conclusions of Law, and any other requests for relief, general or specific, if not expressly granted herein are DENIED for want of merit.

SIGNED AT AUSTIN, TEXAS on this the 21st day of October 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: Dennis L. Thomas
DENNIS L. THOMAS

SIGNED: Jo Campbell
JO CAMPBELL

SIGNED: Marta Greytok
MARTA GREYTOK

ATTEST:

Phillip A. Holder
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

lsw

MEMORANDUM DECISIONS

TELEPHONE

Lipan Telephone Company, Docket No. 6906. Examiner's Report adopted October 29, 1986. Application to revise tariff and make minor rate changes was approved to the extent recommended by the examiner.

AT&T Communications of the Southwest, Docket Nos. 6926 & 7113. Examiner's Report and Supplemental Examiner's Report adopted December 2, 1986. Motions for rehearing denied January 9, 1987. Tariffs approved to flow through access charge rate reductions approved in previous cases.

General Telephone Company of the Southwest, Docket No. 6927. Examiner's Report adopted January 12, 1987. Application approved to decrease rates for Centrex service to four customers.

Texas Midland Telephone Company, Docket No. 7040. Examiner's Report adopted January 28, 1987. Application to change depreciation rates approved.

Poka Lambro Rural Telephone Cooperative, Docket No. 7121. Examiner's Report adopted February 25, 1987. Application approved to detariff mobile and customer premises equipment pursuant to FCC order.

Southwestern Bell Telephone Company, Docket No. 7383. Complaint of Harvey Hudspeth and counterclaim by Bell were withdrawn. Order of dismissal signed May 1, 1987.

ELECTRIC

Cap Rock Electric Cooperative, Docket No. 6130. Examiner's Report adopted January 28, 1987. Applicant's standard avoided cost filing approved as to form.

Kaufman County Electric Cooperative, Docket No. 6132. Examiner's Report adopted January 28, 1987. Applicant's standard avoided cost filing approved as to form.

Swisher Electric Cooperative, Docket No. 6133. Examiner's Report adopted January 28, 1987. Applicant's standard avoided cost filing approved as to form.

Southwestern Electric Cooperative, Docket No. 6770. Examiner's Report adopted February 25, 1987. Application for reciprocal rate increase approved.

Swisher Electric Cooperative, Docket No. 6796. Examiner's Report adopted September 10, 1986. Application for rate increase approved as modified by the staff's recommendations with the agreement of the applicant.

Harmon Electric Association, Docket No. 6933. Examiner's Report adopted December 2, 1986. Application for reciprocal rate increase approved.

Lea County Electric Cooperative, Docket No. 7161. Examiner's Report adopted May 13, 1987. Application approved for a levelized PCRF for a one-year trial period.

Hunt-Collin Electric Cooperative, Docket No. 7185. Examiner's Report adopted April 6, 1987. Application for rate increase approved as modified by the staff recommendations with the agreement of the applicant.

Texas Utilities Electric Company, Docket No. 7356. Examiner's Report adopted January 20, 1988. Application approved for amendment of certificate to include a proposed 138-kV transmission line and the proposed Walnut Street substation in Dallas.