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COMPLAINT OF METRO-NET, INC. AGAINST § DOCKET NO. 7438
SOUTHWESTERN BELL TELEPHONE COMPANY §

May 20, 1988

Examiner's Report adopted as modified, and application denied.

[1] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

The requirement that utility rates and practices be stated in the tariff helps notify interested persons of practices in effect and ensure that customers are treated consistently.

[2] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

A tariff is not required to describe every action of a utility, no matter how obvious or trivial or how tenuous the relationship between the action and the utility's rates or services.

[3] JURISDICTION
PROCEDURE - RATES/TARIFFS

COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

The Commission has the authority to interpret a utility's tariff.

[4] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

In deciding if a utility's action must be described in its tariff, the Commission can consider legislative intent and the nature of the utility action.

[5] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

In construing a tariff, the Commission may consider the express language of the tariff, principles of construction, rules of syntax and accepted meanings of words.

[6] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

In construing a tariff, the Commission is not limited to ordinary dictionary definitions of words, if the context suggests that a more narrow technical meaning was intended.

[7] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

When interpreting a tariff, statutory construction principles are more applicable than are contract construction principles.

[8] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

When interpreting a tariff, the proper focus is on determining the Commission's intent in approving the tariff and effectuating that intent where possible.

[9] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

The Commission has the right and duty to interpret tariff provisions in the manner that is consistent with the public interest and makes the most sense.

[10] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Complainants found not to be reselling local exchange service.

[11] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS.

Complainants found not to be interexchange carriers.

[12] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Tariff provision "Terminal equipment . . . may be connected at the customer's premises . . ." found to require that customer terminal equipment be connected at the customer's premises.

[13] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Complainants' customers found to "occupy" area within complainants' building sufficiently to establish customers' premises there.

[14] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Complainants found not to be competitors of local exchange company.

[15] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Utility's interpretation of its tariff should not be rejected simply because it fails either to detect every tariff violation instantly or to provide perfectly consistent and complete tariff interpretation training for its employees who deal with the public.

[16] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Proposed interpretation that "occupation" of customer premises must be more than simply an arrangement intended to avoid applicable rates rejected as unduly difficult to apply and enforce.

[17] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Tariff interpretation proposed by utility rejected because construction not reflected in tariff and utility has not itself agreed on definition of terms and has applied tariff inconsistently.

[18] COMPLAINTS AND DISPUTES - TARIFF INTERPRETATIONS

Complainants held not to be "telephone answering services".

DOCKET NO. 7438

COMPLAINT OF METRO-NET, INC. AGAINST / PUBLIC UTILITY COMMISSION
SOUTHWESTERN BELL TELEPHONE COMPANY / OF TEXAS

EXAMINER'S REPORT

I. Procedural History

On March 19, 1987, Metro-Net, Inc. (Metro-Net) filed a complaint against Southwestern Bell Telephone Company (Bell). Metro-Net provides a telecommunications-related service to businesses located in the Dallas - Fort Worth area and outside Bell's extended metropolitan service (EMS)[1] area for Dallas - Fort Worth. Metro-Net's service requires that the EMS lines Bell provides to Metro-Net's customers terminate at Metro-Net's offices. Metro-Net filed the complaint in response to Bell's threatened refusal to process new orders for customers wanting EMS lines terminating at Metro-Net's offices.

In the complaint, Metro-Net requested an interim order requiring Bell to continue processing such orders pending final disposition of the complaint. However, the parties agreed that Bell would do this, and on March 20, 1987, Metro-Net withdrew its request for an interim order.

A prehearing conference was held on April 24, 1987. Appearances were entered by: Philip F. Ricketts for Metro-Net; Barbara R. Hunt, José Varela and Alfred G. Richter, Jr. for Bell; and Commission General Counsel Lambeth Townsend for the public interest.

At the prehearing conference, Ms. Hunt said that Bell is asking to be allowed to disconnect existing service and refuse new service if such service is used to access the type of service offered by Metro-Net. Bell requests such relief in this case regarding all entities in the same business as Metro-Net. Ms. Hunt indicated that Plex-Net, Inc. (Plex-Net), which provides service in the Midland - Odessa area, was the only other such entity known to Bell, and that Bell would notify Plex-Net concerning this docket.

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1 EMS (also called extended area service (EAS)) is a service allowing a customer to extend his toll-free area to include a nearby exchange, in return for paying a higher rate.

The issue of public notice was discussed. Mr. Ricketts said that Metro-Net had not informed its customers of the dispute. However, some of them had had actual notice in that Bell had at one point refused them service. Ms. Hunt stated that if, as a result of this case, Bell no longer served these customers under the current arrangement, they would incur substantial nonrecurring installation charges if they later wanted foreign zoned lines from Bell.

The examiner considered requiring that Metro-Net's current and prospective customers be notified of the existence of this docket. She decided not to do so because, as noted by Mr. Ricketts, requiring such notice seemed likely to significantly damage Metro-Net's business before the merits of its complaint could even be determined. Also, in litigating this case Metro-Net has a strong interest in protecting its customers' interests. Finally, the customers' interests would be adversely affected only if Metro-Net lost the case, which presumably would imply a Commission conclusion that the amounts charged such customers during the pendency of the docket had been too low. This would tend to offset concern about nonrecurring charges later incurred by the customers. The parties agreed to notify the examiner promptly if they learned of other entities providing Bell customers service similar to Metro-Net's.

On May 4, 1987, Plex-Net moved to intervene. Metro-Net and Plex-Net are represented by the same counsel. This motion was granted without objection.

In June 1987, Bell filed copies of letters it had sent to Midessa, a firm in the Midland - Odessa area, and to King Water Softeners (King), an Odessa business that had requested four lines to be installed at Midessa's offices. The letters say that Bell will not accept orders for service to customers other than Midessa to be installed at Midessa's offices, for the reasons set out in Bell's answer to Metro-Net's complaint, attached to the letters. Bell offered to process such orders pending a result in this docket if Midessa moved to intervene. The examiner sent Midessa and King copies of orders issued in this case and information about intervention. In an August 1987 letter to Midessa, Bell stated that it had learned Midessa is providing several Bell customers

service similar to Metro-Net's, and repeated its offer to process new orders should Midessa move to intervene. Neither Midessa nor King has moved to intervene.

The hearing convened on September 8, 1987. Appearances were entered by: Mr. Ricketts and Rhonda Colbert Ryan for the complainants; Ms. Hunt and Mr. Varela for Bell; and Assistant General Counsel Pam Mabry for the public interest. At the parties' request, on September 10, 1987, the hearing was recessed for settlement negotiations. The negotiations were unsuccessful. The hearing reconvened on September 21, 1987, and adjourned on September 23, 1987.

At the hearing, the complainants objected to staff testimony recommending some amendments to Bell's tariff. The complainants argued that the staff was the only party proposing any such amendments, and that it had done so for the first time in testimony filed a week before the hearing.

The examiner agreed that the issue of what tariff changes, if any, should be approved to account for alleged problems resulting from the complainants' operations should be excluded from the scope of this docket. She concluded that this might avoid the expense of litigating a complicated issue which might never arise. The Commission has not previously ruled on such threshold issues as whether or not such problems exist and the sufficiency of Bell's current tariff to address the problems if they do exist. The examiner also decided that any such revisions to Bell's tariff should be accomplished in a later proceeding, after Bell and other interested parties have an opportunity to develop specific proposals and language. However, the staff testimony in question was admitted in order to support the staff's conclusion that tariff amendments might be advisable in a future docket.

The Commission has jurisdiction over this complaint pursuant to Sections 16(a), 18(b), 37 and 83 of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987).

II. Description of Complainants' Operations

Plex-Net was incorporated in January 1986 and began providing service in February 1986. Ron McReynolds is its President, Board Chairman and only stockholder. The operations at issue in this case were conceived of by Mr. McReynolds.

Metro-Net was incorporated in October 1986 and began providing service in December 1986. Charles W. Sutton is Metro-Net's President and Chief Executive Officer, and is a major stockholder. Mr. McReynolds discussed his business with Mr. Sutton in June 1986. After some investigation, Mr. Sutton decided to form a similar business in a different geographic market. Mr. McReynolds owns part of Metro-Net, and provides technical assistance to it from time to time.

A. Background Concerning Geographic Areas

The type of business provided by the complainants could be offered in any EMS complex where the calling scope of one or more exchanges (such as a midstrip between two cities) is much larger than that of one or more nearby exchanges (such as the two cities). The operation would be conducted from a location in the midstrip. For example, Metro-Net operates in Dallas - Fort Worth and has an office in Grand Prairie, and Plex-Net operates in Midland - Odessa and has an office in Terminal. (Beaumont - Port Arthur might also be an appropriate site for such businesses, although none are known to be operating there presently.) Metro-Net customers lease an EMS line from Bell. Plex-Net customers instead lease a basic individual business service (1FB) line. Attachment A to the Examiner's Report contains maps showing the calling scopes in Dallas - Fort Worth and Midland - Odessa.

A Bell 1FB customer in Terminal can make toll-free calls within the entire Midland - Odessa calling scope. A 1FB customer in Midland or Odessa who does not also subscribe to a service like Plex-Net's may call the other city

toll-free only by subscribing to foreign exchange service (FX)[2]. Such a customer would pay mileage charges from the Terminal central office (CO) to the exchange in which the customer is physically located, as well as a charge per minute of use for calls to or from the Terminal CO.

A Bell business customer in Grand Prairie may subscribe to 1FB, or for a higher monthly charge, to EMS. The local calling scope is the Dallas Metropolitan Exchange for Grand Prairie customers who subscribe to 1FB and the Dallas and Fort Worth Metropolitan Exchanges for those who subscribe to EMS. A non-Metro-Net customer in Dallas or Fort Worth who is outside the zones where EMS is offered may obtain the EMS calling scope only by ordering foreign serving office service (FSO)[3]. Such an FSO customer would pay the monthly EMS rate plus charges based on the mileage between the usual CO for that customer and the EMS CO from which dial tone is obtained.

Since Plex-Net's operation is nearly identical to that of Metro-Net, in the Examiner's Report much of the discussion is presented using Metro-Net as an example. Where the record reflects relevant differences between the operations of Metro-Net and Plex-Net, they are noted in the Report.

B. Technical Description

Metro-Net's customers pay Bell a monthly charge to lease the EMS line, plus all installation or move charges regarding that line. They also pay Bell an additional monthly charge to receive call forwarding and three way calling capability. (The same is true of Plex-Net customers, except that they lease a 1FB, rather than an EMS, line.)

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2 FX is a service whereby a telephone in one exchange, instead of being connected directly to the serving CO in that exchange, is directly connected to a CO in another exchange via a private line.

3 FSO is a service whereby a telephone in one exchange, instead of being connected directly to the serving office (CO) in that exchange, is directly connected to another serving office in that exchange via a private line.

Metro-Net customers can lease from Metro-Net an electronic device known as a Telexpand. Attachment B to the Examiner's Report is a picture of this device after installation. (Unlike in the picture, the complainants' Telexpands are attached only to jacks, not to telephones.) Telexpands are manufactured by US MetroLink Corporation, which is based in Bellevue, Washington.

Ordinarily, local exchange lines, including EMS lines, extend to a customer's premises located within the CO serving area in which that customer is physically located. Such lines are terminated at a jack, interface device or other equipment on the customer's premises.

Metro-Net's customers typically are businesses located outside the midstrip in either Dallas or Fort Worth. When a person becomes a Metro-Net customer, his EMS service must be disconnected at his address and reconnected at Metro-Net's building. The line terminates on an interface provided by Bell. Metro-Net cables the line into its offices and terminates the line there in a jack or, if the customer is leasing a Telexpand, in a Telexpand.

To utilize Bell's call forwarding and three way calling features, a non-Metro-Net customer must program such features using his telephone. For a Metro-Net customer, the Telexpand electronically performs the programming. The feature in question is activated when the Bell CO equipment perceives hook switch flashes, which are caused when a person or electronic device momentarily depresses and releases the hookswitch on the telephone.

If a Metro-Net customer wants to place a call, he dials his EMS number, inserts his Metro-Net authorization code, and dials the number he wants to reach. (A Plex-Net customer would instead dial his Terminal telephone number, insert his Plex-Net code, and dial the number he wants to reach.)

Metro-Net's customers take service under one of three service options: Inward Only, Outward Only, and Two Way. Inward Only provides forwarding of any call to the customer from Dallas and Fort Worth without the caller incurring toll charges, or the receiver incurring other charges (EMS mileage charges in

the case of Metro-Net and FX charges in the case of Plex-Net). Outward Only allows the customer to call any Dallas or Fort Worth number from any local touch tone telephone without incurring such charges. Two Way combines the first two services. Outward Only and Two Way require use of a Telexpand; Inward Only does not. The complainants also offer some special services, such as restricting toll calls but allowing 1-800 calls to be completed on a line.

III. Substantive Objections to Complainants' Operations

To understand some of the legal and other grounds for relief urged by the parties, one must consider the effects of the complainants' operations on the public interest. Bell and the staff contend that such operations reduce Bell's revenues, increase its cost of handling a call, reduce pay telephone revenues, exacerbate problems involving fraudulent use of access codes, and cause difficulties in identifying the location of persons making emergency calls. The examiner finds that the complainants' operations present serious policy concerns, given the level of charges Bell presently imposes concerning them.

A. Bell's Loss of Revenues

Eugene F. Springfield, Division Staff Manager - Rate Administration for Bell's Texas Division, and Staff Telephone Rate Analyst John A. Costello testified that Metro-Net's and Plex-Net's operations result in a revenue loss for Bell. This statement is unchallenged, and would be difficult to deny, since what the complainants are selling is a marked reduction in customers' telecommunications costs, even after fees are paid to the complainants. The examiner finds that the complainants' operations reduce, and have the potential to considerably further reduce, Bell's revenues. By itself, that does not mean such operations are not in the public interest. A finding on that issue depends on other factors, subsequently discussed. However, one effect of such operations is to decrease the dollar amount of contribution that FX and FSO provide above the incremental costs of such services. In the long run this would tend to result in higher rates for basic telephone service. The contribution provided by FX and FSO averages between 35 and 50 percent.

Both witnesses tried to quantify Bell's revenue loss as a result of the complainants' operations. Mr. Springfield estimated this figure at $94.70 per month per line due to Metro-Net's operations, and $169.55 per month per line due to Plex-Net's operations. His calculations are contained in his direct testimony, Bell Exh. 19 at 11 - 14.

Mr. Costello estimated Bell's revenue loss at $101.80 per month per line due to Metro-Net's operations. This is an annual revenue decrease of $105,058 based on the 86 customer lines Metro-Net now serves, and $1,099,000 based on its present capacity to serve 900 lines. He estimated Bell's revenue loss at $170.77 per month per line due to Plex-Net's operations. This is an annual revenue decrease of $358,617 based on the 175 lines Plex-Net now serves, and $1,065,000 based on its present capacity to serve 520 lines. Mr. Costello's calculations are contained in his testimony, Staff Exh. 2 at 15 and Att. 3 and 5.

The witnesses' estimates of Bell's revenue loss due to the complainants' operations are similar and were not challenged. The examiner finds that they represent reasonable estimates of such revenue loss. She also finds it probable that, if the current serving arrangements and rates remain in effect, similar businesses will enter these or other geographic markets (such as Beaumont - Port Arthur), adding to Bell's revenue loss.

B. Increased Cost of Handling Calls

Daniel L. Poole, Area Manager - Network Regulatory Coordination for Bell's Texas Division, testified that the serving arrangement for Metro-Net and Plex-Net customers increases Bell's cost of serving those customers. This testimony was not rebutted. The examiner finds that it is credible, and that Bell incurs significantly higher costs to serve the complainants' customers as a result of the complainants' operations. The technical reasons this is true are summarized below. Outgoing calls (those made by the Metro-Net customer) and incoming calls (those made to such a customer) are discussed.

Attachment C to the Examiner's Report is Exhibit No. 1 to Mr. Poole's testimony. That exhibit is based on an example outgoing call originating in the Fort Worth Edison 335 CO and terminating in the Dallas Evergreen 391 CO. It shows the difference in the way this call would be completed for a caller who is a Metro-Net customer, and for one who is not, but who subscribes to Bell's FSO service. Attachment D is an excerpt from Mr. Poole's testimony containing a step by step description of the routing for a call.

As shown in the above example, the serving arrangement for Metro-Net customers creates three problems that raise Bell's cost of processing a call: the Metro-Net call must be switched four times and the FSO call only twice; the Metro-Net call travels a greater distance over Bell's network than does the FSO call; and the Metro-Net call requires use of a 3-Port Conference Circuit[4], while the FSO call does not.

Regarding the third problem listed above, the average holding time[5] on 3-Port Conference Circuits is approximately 135 seconds in the Terminal CO, compared to 60 seconds in other Bell COs with similar percentages of customers subscribing to three way calling. The only explanation for this difference shown in the record is the additional use of 3-Port Conference Circuits by Plex-Net customers.

In July 1987, Bell added nine 3-Port Conference Circuits in the Terminal CO due to increased holding time on such circuits. The additions are estimated to cost in excess of $5,000. Only nine circuits were added because there were only enough terminations remaining on the Trunk Link Networks (TLN) to add nine

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4 A 3-Port Conference Circuit is a hardware circuit located in a Bell CO and used to interconnect three Bell network paths (trunk circuits or line loops). Bell's three way calling and call waiting features, and the Centrex features of call hold and call transfer, require use of such a circuit. A typical customer uses three way calling only on a limited basis, whereas Metro-Net customers placing outgoing calls use 3-Port Conference Circuits on every call.

5 Average holding time is a measure of how long a circuit is in use during a call.

circuits. Adding any more 3-Port Conference Circuits at the Terminal CO would require addition of another TLN, at a probable cost of more than $100,000.

Total usage of Bell facilities such as 3-Port Conference Circuits or TLNs is a function of demand by numerous customers in connection with a variety of services. The need to add facilities depends not only on usage, but also on the level of reserve capacity of the existing facilities. However, the examiner finds that the complainants' operations tend to increase the need for Bell to add such facilities, and in one instance have already contributed to the need for Bell to do so.

When Metro-Net's equipment is used to perform call forwarding, the impact on Bell's network is the same for incoming as for outgoing calls. The only difference is that the person placing the incoming call would dial the EMS number of Metro-Net's customer and the call would automatically be forwarded to Metro-Net's customer. The caller would not have to dial the Metro-Net security code or a second telephone number for the call to be completed.

C. Loss of Revenues by Pay Telephone Providers

Telexpands have an "unpayphone" feature allowing a customer to place an unlimited number of calls from a coin telephone using only one quarter. A step by step technical description of how this works is contained in Mr. Poole's direct testimony, Bell Exh. 16 at 13 - 17. The routing is depicted in Poole Exh. 3 to that testimony. The unpayphone feature reduces the revenues collected by the pay telephone provider, whether the telephone is a public pay telephone supplied by Bell or a private pay telephone.

Mr. McReynolds testified that the microchips initially installed in the Telexpands allowed the customers approximately 46 seconds after the called party had disconnected in which to dial "##" and receive another confirmation tone without calling the Telexpand again. This was a problem because during that period the Telexpand could not receive another call; callers would hear only a busy signal. The complainants asked the manufacturer if it was possible

to reduce the disconnect time. The manufacturer responded that this was possible, but that in doing so the ability to use the unpayphone feature would be lost. The complainants decided to sacrifice the unpayphone feature in order to obtain a shorter disconnect time. By the time of the hearing, new software preventing use of the unpayphone feature had been installed in all of Metro-Net's and ninety percent of Plex-Net's Telexpands. All of the complainants' new Telexpands contain this software.

The Telexpands can easily be reprogrammed to permit use of the unpayphone feature. However, the examiner finds credible the complainants' testimony that they cannot currently obtain the reduced disconnect time without sacrificing the unpayphone feature, and that the former consideration is more important to them than is the latter. If in the future the unpayphone feature becomes a concern regarding the complainants or other Telexpand providers, this issue should be reconsidered.

D. Fraudulent Use of Access Codes

Mr. McReynolds testified that it would not be difficult for a person to learn a customer's five-digit Plex-Net security code by computer or by repeated experimentation. (Presumably this is equally true regarding Metro-Net's security code.) That person could then fraudulently use the security code to dial long distance calls. If the calls involved an IXC for which Bell performed the billing and collection function, several weeks could pass before the customer received the next bill and discovered the fraud.

This is a problem common to telephone credit card and other arrangements which rely on a customer security code to restrict access to the long distance network. However, the complainants' operations present an additional concern in this regard. It would be much more difficult to investigate calls made through fraudulent use of a Metro-Net or Plex-Net security code than of a credit card number, because the remotely accessed feature of the Telexpand causes the billing equipment to show the calls as having originated at the customer's location. Since the local exchange line is ordered in the

customer's name, the customer is responsible for all toll calls that appear to have been direct distance dialed from that line.

A Telexpand can be programmed to restrict toll calls. However, a customer might not wish to do so, or might not know about the special problem with investigation of access code fraud described above. The examiner finds this problem to be of concern. If the Commission's order in this case results in the complainants losing customers, the problem will be reduced to that extent. Arguably, another option would be for the Commission to require that businesses like Metro-Net inform their customers of the special problem described above as a condition of receiving Bell's service. The Commission has previously required private pay telephone providers to take certain actions as a condition of receiving Bell's private pay telephone service. However, unlike private pay telephone providers, the complainants are not Bell's customers regarding the lines in question; their customers are. Bell and the staff might wish to consider if the problem of access code fraud can be addressed through Bell's tariff, and if so, to propose appropriate tariff amendments.

E. Difficulty in Responding to Emergency Calls

Mr. Costello expressed concern that if anyone made an emergency call using a Telexpand for outgoing service in conjunction with an automatic dialer, automatic number identification might not identify, or might identify the wrong, point of origin for the call. Mr. McReynolds responded that the dialers supplied by the complainants are programmed to recognize certain dialing sequences, such as 911, and not to interfere with the direct placement of those calls. The examiner found Mr. McReynolds' testimony on this point to be credible, and finds that difficulty in responding to emergency calls as a result of the complainants' operations appears not to be a significant problem.

F. Examiner's Conclusions

From a public interest standpoint, the examiner can see no value in the complainants' business. It offers customers nothing of substance they are not

already receiving but the opportunity to circumvent Bell's tariffs, to the detriment of Bell and its other customers. In discussing these and other issues in this case, the examiner found it helpful to consider the following hypothetical situation.

A landowner uses his land to build a private toll highway available for use by the public. He erects a few toll booths and charges tolls set at a level necessary to recover the cost of building and maintaining the highway and toll booths plus a reasonable profit. A neighbor then builds a short driveway allowing drivers to bypass one of the toll booths, and builds his own toll booth. He charges the drivers a much lower sum, since he needs to recover only the cost of building and maintaining the driveway and toll booth plus a reasonable profit. (To make the analogy more apt, one should assume that these events occur in an place where government does not build highways, but does set tolls charged on them, although not tolls charged on driveways.)

The neighbor's actions might make the drivers very grateful. The neighbor might see himself as providing a public service because the public pays less to use the highway, or rationalize his actions by noting that the landowner is recovering some money for his investment. However, if this situation persists, either the landowner will be denied a chance to recover his full investment, or the costs will be shifted to drivers who only use other parts of the highway.

The landowner might want to ensure that he can collect his toll either by erecting a barricade on his land preventing drivers access to the driveway, or by moving his toll booth so that if they use the driveway, they must pay the landowner's toll plus whatever the neighbor charges them. This might drive the neighbor out of business. It might deny him the ability to recover his investment in the driveway and toll booth. Nevertheless, it seems clear that the public interest lies in permitting the landowner some such relief.

A key difference between this illustration and the facts in this case is that the neighbor's operations affect only the landowner's revenues, not his costs. In contrast, the complainants' operations do increase Bell's costs.

As with most analogies, the illustration may assist in understanding but not present the whole picture. The examiner has tried to include such nuances in this Report. Weighing the record as a whole, however, she believes that the illustration accurately depicts the basic facts in this case, and that in either the short run or the long run (depending on an assessment of the legal issues and of concerns about the complainants' and their customers' investment in the present arrangement), the complainants' customers should be required to pay rates comparable to those charged similarly situated Bell customers.

IV. Interpretation of Bell's Tariffs

This section concerns a dispute as to what provisions of Bell's current tariffs apply to the complainants' operations. The tariff provisions in question are the prohibition on resale of local exchange service, the access service tariff, a requirement that local exchange lines be terminated only at a customer's premises, and the telephone answering service tariff. Bell and the staff urge that these provisions allow Bell to disconnect existing, and to refuse to connect new, customer lines terminating at the complainants' locations, or alternatively, to impose higher charges than those currently being assessed. The complainants disagree, and also respond that Bell's and the staff's positions contravene the requirements in the PURA that a utility's rates and practices be shown in its tariff and that they not be discriminatory.

Part of the dispute over Bell's tariff springs from differences among the parties as to the proper approach to tariff interpretation. Before specific tariff sections are addressed, tariff interpretation is generally discussed.

A. Disputes Over Proper Approach to Tariff Interpretation

1. Requirement that Rates and Practices be Reflected in Tariff

According to the complainants, Bell and the staff are urging imposition of requirements not contained in the tariff. Bell and the staff respond that such requirements are included within the intent of the tariff.

Under PURA Section 32, Bell must file with the Commission tariff schedules showing: ". . . all rules and regulations relating to or affecting the rates, public utility service, product, or commodity furnished by such utility." Section 46 provides: "No public utility may, directly or indirectly, by any device whatsoever or in any manner, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedule of rates of the public utility applicable thereto . . . " Failure to pay charges or to follow rules and regulations set out in the utility's tariff are among the few reasons permitting a utility to refuse or to discontinue service. PURA Section 58(b), P.U.C. SUBST. R. 23.42 and 23.46.

[1,2,3] The requirement that utility rates and practices be stated in the tariff serves important purposes. As noted in Petition of Southwestern Bell Telephone Company for an Order to Show Cause Concerning Disconnection of DIAL 976 Service to Norman Cheney and for Other Relief, Docket No. 7252, _____ P.U.C. BULL. _____, Examiner's Report at 16 (March 13, 1987) (Cheney): "The tariff serves to notify interested persons of practices of a utility which are in effect at a given time. Moreover, since the tariff applies to all customers, requiring that such practices be stated in the tariff helps ensure that all consumers in a customer class will be treated in a consistent manner as required by PURA Section 38." However, it would be absurd to construe Sections 32 and 46 to require that the tariff describe every action of a utility, no matter how obvious or trivial or how tenuous the relationship between the action and the utility's rates or services. Otherwise, the tariff would have to discuss how to sharpen a pencil or add numbers. Under PURA Sections 16(a) and 83, the Commission has the authority to interpret a utility's tariff. Cheney, Examiner's Report at 15; Petition of Airco, Inc. Against Houston Lighting and Power Company, Docket No. 6669, unpublished, Examiner's Report at 33 (May 27, 1987) (Airco).

[4] In deciding if a utility's action is required to be described in its tariff, the Commission can consider the legislative intent behind PURA Sections 32 and 46 and the nature of the utility action. For example, Complaint of West

Texas Wholesale Supply Company Against Southwestern Bell Telephone Company Regarding WATS Billing, Docket No. 6293, ____ P.U.C. BULL. ____ (December 17, 1986), concerned Bell's policy of rounding certain numbers up, than rounding them to the nearest whole number. In that docket, the Commission stated:

> The applicability of Section 32 to the practice of rounding up follows from the finding that the practice constitutes a rate within the meaning of Section 3(d). Pursuant to Section 32, the practice should have been set out in SWB's tariffs. It was not. While the omission of a revenue-neutral provision, such as one providing for conventional rounding, might be unobjectionable, the omission of a practice that adds an average of three billable seconds per call to 45 million calls a month is objectionable.

Examiner's Report at 19.

[5,6] In construing a tariff, the Commission may consider not only the express language of the tariff, but also principles of construction, rules of syntax, and accepted meanings of words. It is not limited to ordinary dictionary definitions of words, if the context suggests that a more narrow technical meaning was intended. Airco, Examiner's Report at 33.

2. Principles of Construction for Contracts and for Statutes

In discussing the meaning of Bell's tariff, the parties in this docket cite various principles of construction of contracts. For instance, the complainants rely on Texas cases holding that when a contract is ambiguous, it is construed against the drafter. Bell counters by observing that a contract is interpreted by considering the parties' intent as gathered from the language of the entire contract.

However, the examiner agrees with Bell that contract construction principles are of limited value in interpreting a utility's tariff, for several reasons. First, it is difficult to apply the theory that ambiguities in a tariff are construed against its drafter, because in a given tariff some clauses may have been drafted by the utility, others drafted by the Commission or intervenors and accepted by the utility, and others drafted by the Commission or intervenors and not accepted by the utility, but required by the Commission to be included in the tariff. Second, principles of contract

construction contemplate a meeting of the minds between the parties. In contrast, a valid tariff does not require a meeting of the minds between the utility and the customer; it binds subscribers even if they had no actual knowledge of the tariff. Southwestern Bell Telephone Company v. Rucker, 537 S.W.2d 326, 331 (Tex. Civ. App. - El Paso 1976, writ ref'd n.r.e.). As a result, principles oriented toward determining the original intent of the parties are of little value. Finally, under PURA Sections 31, 32, 35(b) and 37, a utility's tariff is more than a contract between private parties. It has the force and effect of law, and governs the service of numerous customers.

[7,8,9] The examiner concludes that when interpreting a tariff, principles of statutory construction are more applicable than are those of contract construction.[6] Thus, the proper focus is on determining the Commission's intent in approving the tariff, and effectuating that intent where possible. This task is not limited to determining the particular situation the Commission had in mind when it approved the tariff language. As with statutes, tariffs apply prospectively, and may be broadly worded with the intent that changes in facts will not defeat the purpose of the provision. In Airco, the Commission stated: "From a perspective of the administrative process the Commission has the right to interpret and the duty to construe tariff provisions in a manner consistent with the public interest, and in the manner that makes the most sense." Examiner's Report at 16.

B. Prohibition on Resale of Local Exchange Service

Bell contends that the complainants' operations violate Paragraph 5.1, Sheet 4, Section 23 of its general exchange tariff, which states:

> . . . Local business exchange service may be used for providing access to resold or shared customer premises key or switching equipment, intra-LATA Long Distance Message Telecommunications Service and intra-LATA Wide Area Telecommunications Service. Where local exchange service is used for this purpose, no payment, either direct or by means of a coin collection device,

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6 This may or may not be true regarding tariff provisions which originated as actual contracts between a utility and a particular customer. The examiner has not attempted to decide that issue, which is not present in this case.

or consideration for the local business exchange service is to be paid any party other than the Telephone Company except as provided in this Tariff. This prohibition shall not apply to a Composite Data Service Vendor in the provision of a composite data service to its patrons or to International Record Carriers in the provision of data message service, nor does this prohibition apply to Private Coin Service. (Emphasis added.)

As shown in the complainants' advertisements (Attachment E to this Report), their service is marketed as a way to reduce one's telephone bill. Because the service functions exclusively by use of local exchange service connections, Bell concludes that the complainants are reselling local exchange service.

Mr. Costello testified that in general terms, the complainants are not reselling local exchange service, and could better be compared to resellers of intraLATA long distance service.

The complainants note that their customers are listed in Bell's records as lessees of the lines terminating at the complainants' buildings, and that the customers, not the complainants, pay Bell for the lease of the lines, call forwarding and three way calling capability and installation and move charges associated with the lines. However, Mr. McReynolds testified that the serving arrangement would work just as well if Bell billed the complainants for the use of the lines, except that this would cause problems with directory listings.

[10] The examiner concludes that the complainants are not reselling local exchange service. In the highway example discussed previously, the neighbor who built the driveway is not selling the right for drivers to use the highway. He is selling the right for drivers to use his driveway so as to avoid paying the owner of the highway the full price for using the highway. The owner of the highway is selling the right for drivers to use the highway; the fact that he is having trouble collecting all of the actual payments does not change this. Similarly, the complainants do not buy anything from Bell that is sold or resold to customers. Their service consists of the lease of equipment and space to house it and programming and maintenance of the equipment, all of which allow customers to reduce their telephone bills.

Bell's arguments to the contrary are unpersuasive. FCC-registered terminal equipment by its nature functions exclusively by use of local exchange service connections. A telephone, for instance, is useless unless it is connected to local exchange service. Similarly, many vendors of FCC-registered equipment market their equipment as a way for customers to reduce their telephone bills. It has been held that provision of terminal equipment is not an aspect of common carrier service. Western Union Telegraph Co. v. FCC, 674 F.2d 160 (2d Cir. 1982).

Bell also cites statements by the complainants suggesting that they are selling telephone service. For instance, Metro-Net's general description of its service states: "Metro-Net, for a small monthly charge, can provide this same Metro service and eliminate all mileage charges." However, while such statements could have been more clearly worded, the examiner interprets them as representations by the complainants that they can provide a way for customers to save money and still receive the same telephone service - from Bell. Even if the complainants' statements should be read as saying that they are selling telephone service, that would not mean that they are selling such service within the meaning of the tariff.

The examiner concludes that the complainants are not in violation of the above quoted section of Bell's tariff. That section also states:

> Local exchange service . . . is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except that the use of the customer service may be extended for switched data (non-voice) communication relating directly to the business of Composite Data Service Vendor's patrons, to joint users, to Private Coin Service, or to guests of a Hotel-Motel. The Telephone Company has the right to refuse to install customer service or to permit such service to remain on the premises of a public or semi-public character, except for Private Coin Service, when the service is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the service is so located that it is not accessible for public use. (Emphasis added.)

The examiner also concludes that the complainants are not in violation of this provision. In this case, the "customer" referred to above is the customer of

Bell and of Metro-Net or Plex-Net. The evidence does not show that these customers are letting persons other than themselves or their employees use their lines. If Bell discovers that such activity is occurring, it can take action against the customer(s) in question under the above provision.

C. Access Service Tariff

Section 2, Sheet 41 of Bell's access service tariff states: "Interexchange Carrier denotes any . . . corporation engaged for hire in intrastate communication by wire or radio, between two or more exchanges." (Emphasis added.) Bell and the staff argue that the complainants are IXCs.

An IXC providing interexchange message toll-type service using local exchange lines pays Bell access charges for its originating and terminating traffic, unless it is reselling another IXC's service. According to Bell, the complainants are not reselling interexchange message toll-type service, but are themselves providing such service, and should pay access charges for their originating and terminating traffic. If they paid such charges, Bell would not object to their operations. Its access service tariff does not contain the same resale prohibitions or customer premises requirements (discussed subsequently) as does the general exchange tariff.

Mr. Costello agreed with Bell that the complainants are IXCs, but concluded that they are analogous to resellers. He reasoned that a reseller's customer dials up the reseller's line, hears a ring, and obtains a dial tone. The customer then inserts a calling code, gets a second dial tone and calls the number he wants to reach. Similarly, a Metro-Net customer dials his EMS line which is terminated at Metro-Net, and hears one ring. He then inserts a security code, gets a confirmation tone (second dial tone) and dials the number he wants to reach. In the final sequence, both the reseller's customer and Metro-Net's customer have gained access to calling scopes not previously accessible except through such services as long distance service and FX. Mr. Costello recommended that the complainants be required to register with the

Commission as IXCs, as required by PURA Section 18, and to purchase services out of Bell's access service tariff.

[11] Just as the complainants are not reselling local exchange service, the examiner agrees with the complainants that they are not IXCs. They are not providing intrastate communication by wire or radio between two or more exchanges; Bell is. They do not own or lease any wire or radio, or carry anything. As Bell stated in its answer filed in this docket: ". . . Southwestern Bell is hauling the call the entire distance from Odessa to Big Springs. Plex-Net has changed the calling pattern so that more switching and other central office activity is involved, but Plex-Net, like Metro-Net, is not providing any switching or other facilities." Also, as noted by the complainants, Bell's recommendation that access charges be applied is internally inconsistent. Access charges cannot be assessed against the complainants, because such charges are assessed against IXCs on a per line basis, and the only lines owned by the complainants are their own administrative lines. Thus, the access charges would have to be assessed on the lines Bell leases to the complainants' customers. However, the customers are not IXCs under any construction of Bell's tariff.

D. Customer Premises Provision

Section 8, Sheet 1, Paragraph 1.1 of Bell's general exchange tariff states: "Terminal equipment and communication systems may be connected at the customer's premises to telecommunications services furnished by the Telephone Company where such connections are made in accordance with the provision of this section. . . ." (Emphasis added.) Bell and the staff contend that the terminal equipment (the jack or Telexpand) of the complainants' customers is connected at the complainants', not their own, premises, and thus under the above provision, Bell can disconnect existing, and refuse to connect new, customer lines terminating at the complainants' buildings. The examiner concludes otherwise. The parties presented numerous arguments concerning this issue, discussed in the sections which follow.

1. Use of the Word "May"

The complainants contend that the use of the permissive word "may" shows that the provision does not prohibit termination of connections at locations other than the customer's premises. They argue that if it did, it would state that equipment may not be connected at a location other than the customer's premises, or that equipment may be connected only at the customer's premises.

The examiner agrees that if the customer premises provision was intended to provide that local exchange service may be terminated only at a customer's premises, it could have been worded in a manner more clearly reflecting that intent. On the other hand, the same may be said of the intent urged by the complainants. For instance, the provision could have stated that equipment may be connected at the customer's premises or at other premises designated by the customer. Being able to imagine clearer wording does not compel rejection of a reasonable interpretation of the tariff language which was in fact used.

[12] The examiner finds persuasive Bell's argument that the word "may" is used because Bell cannot require a customer to have his terminal equipment connected to Bell's network. A customer may do so, if he meets the requirements of the customer premises provision. Those requirements are that the terminal equipment be connected "at the customer's premises", and that "such connections are made in accordance with the provision of this section". If one read the word "may" as applying to the entire sentence, the customer could choose whether or not "such connections are made in accordance with the provision of this section", which cannot have been the intent of that provision. The phrase "at the customer's premises" is most reasonably read as a restriction on the type of connection which is permitted. No other reason for including that phrase appears in the record.

2. Definition of "Customer's Premises"

Section 14, Sheet 8, Paragraph 93.1 of Bell's general exchange tariff defines "premises" as: "All portions of the same building occupied by the same

customer . . ." The complainants argue that the customers occupy the small space in the complainants' offices containing the leased jack or Telexpand, and that this space constitutes the customers' premises within the meaning of the tariff. For reasons discussed in this and subsequent sections of the Examiner's Report, the examiner agrees. Bell's and the staff's interpretations envision restrictions on the meaning of "occupied" which are not contained in the tariff, and a definition of that word which is narrower than either the ordinary dictionary definition or the definition used by Bell in applying the customer premises provision in other circumstances.

Bell's tariff does not define the word "occupied". Mr. Springfield stated that in administering the customer premises provision, Bell considers if the customer physically resides as an owner or tenant at the location in question. However, cross-examination by the complainants showed that Mr. Springfield would apply different definitions of the word "occupied" depending on the circumstances, often, as he acknowledged, without any apparent policy reason for the differences. For example, he testified that if a person's house burns down and as a result that person is a guest at another's home, service cannot be installed at that home under that person's name. Mr. Springfield indicated that if a mother moved in with an adult child, under a strict tariff interpretation she could not have telephone service under her own name, but he believed that some arrangements could be worked out. However, he continued, a customer could have service installed at his apartment even if he never moved in. The evidence indicates that Bell has not decided on a definition of "occupied" for purposes of administering the customer premises definition.

[13] Webster's Third New International Dictionary of the English Language Unabridged (1976) defines "occupy" as: ". . . 2 a: to fill up (a place or extent) . . . 5: to reside in as an owner or tenant . . ." As Mr. Springfield stated, one may be a tenant without physically occupying a place. The examiner concludes that the customers occupy the portions of the complainants' offices containing their leased jack or Telexpand, within the ordinary meaning of that word, in two senses: their equipment fills up that space, and they lease that space from the complainants.

3. Discriminatory Application of the Customer Premises Provision

According to the complainants, Bell is trying to apply a stricter interpretation of the customer premises provision in this case than it applies regarding other customers, in violation of the PURA. The following sections discuss the applicability of the PURA provisions in question to the complainants' operations, and the instances in which Bell is alleged to be applying inconsistent constructions of the customer premises provision.

a. Competition and Discrimination

Metro-Net and Plex-Net contend that, in applying different constructions of the customer premises provision, Bell is discriminating against the complainants as competitors. PURA Section 47 states: "No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor may any public utility engage in any other practice that tends to restrict or impair such competition."

There is a contradiction in the complainants' arguments that they compete with Bell but are not resellers of local exchange or long distance service. If they do not resell telephone service, in what sense do they compete with Bell?

[14] As discussed previously, the examiner agrees with the complainants that they do not resell local exchange or long distance service. She also concludes that they do not compete with Bell within the meaning of PURA Section 47. One could argue that the complainants and Bell are competitors because they compete for the same customers and revenues. However, in the illustration, the landowner and the neighbor also compete for the same customers and revenues. The examiner doubts that the neighbor would be regarded as furthering competition in the market for highways. Like the neighbor and the landowner, the complainants do not provide the same service as Bell. Rather, Bell provides the service and the complainants provide a way for customers not to pay the full price for Bell's service.

For this reason, the relationship between the complainants and Bell differs from that involved in previous cases analyzing the PURA prohibitions on anti-competitive utility practices. In Amtel Communications v. Public Utility Commission, 687 S.W.2d 95, 102 (Tex. App. 1985 - no writ), Amtel Communications and Bell both supplied concentrators to telephone answering services. In AT&T Communications of the Southwest v. Public Utility Commission, 735 S.W.2d 866 (Tex. App. - 1987, writ pending), the IXCs and Bell all supplied long distance telephone service within local access and transport areas.

However, the complainants' discrimination argument does not require that they be found to be competitors of Bell. PURA Section 45 states: "No public utility may, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. . . ."

b. Bell's Application of the Customer Premises Provision

In addition to the hypotheticals previously discussed, the complainants identified several situations in which Bell appears to have applied a construction of the customer premises provision different from that urged by Bell in this docket.

First, Bell offers local remote call forwarding service (LRCF), which is similar to the complainants' serving arrangement for Incoming Only. With LRCF, a customer is assigned a telephone number in a Bell CO, and calls to the LRCF number are automatically forwarded to a different number within the local calling area of the exchange in which the LRCF number is located. A customer located outside an EMS calling area who is provided LRCF in an EMS area essentially has an expanded local calling scope. Concerning this example, Mr. Springfield stated that Bell's LRCF cost studies did not envision use of LRCF to expand a customer's local calling scope. Bell has filed tariff revisions clarifying that LRCF may not be used for this purpose, and is retraining its service representatives to ensure that that does not occur.

Second, press boxes at athletic stadiums are owned by the stadium, but telephone lines leased by radio stations terminate in those press boxes. None of the witnesses appeared to know if the radio stations leased the press boxes from the stadium, but all agreed that the radio stations had an employee present in the press boxes during the broadcast.

Third, automated teller machines (ATMs) at convenience stores are owned by banks and often operate by use of a telephone line subscribed to by the banks.

According to Bell, the complainants' argument concerning such examples amounts to a plea that their customers be granted an exception from the customer premises requirement. The examiner instead sees the argument as a plea that Bell apply the same construction of the customer premises provision to the complainants' customers as it does to its other customers.

[15] The examiner would agree that one should not necessarily reject a utility's interpretation of its tariff simply because it fails either to detect every tariff violation instantly or to provide perfectly consistent and complete tariff interpretation training for its employees who deal with the public. However, the contradictions in Bell's position concerning the customer premises provision go beyond that. Bell appears not to have even a working definition of "occupied" which it intends be consistently applied. Moreover, the record does not suggest any intent by Bell to take action concerning the radio stations and banks in the situations described above. The examiner believes that, under the current language of Bell's tariff, a Metro-Net or Plex-Net customer's claim to the space containing his Telexpand being considered "occupation" is as strong as that presented in some situations in which Bell has no objection to serving, and in fact serves.

4. Customer Listing in Telephone Directory

As Bell notes, the complainants assist each of their customers in ensuring that the address for Metro-Net or Plex-Net is not listed as the customer's address in the telephone directory. However, this does not mean that the

customers have not established premises in the complainants' buildings. The tariff does not define "customer's premises" as "the address at which the customer is listed in the directory". If such a definition were used, a customer who chose not to be listed in the directory would have no premises, and would have to be denied telephone service.

Each Metro-Net or Plex-Net customer has a Telexpand (or jack) connected to Bell's service in one place and a telephone connected to Bell's service in another. Thus, under the complainants' interpretation, each customer has more than one customer's premises within the meaning of the tariff. However, there appears to be no prohibition on a customer having more than one premises. Under Bell's interpretation, any business with local telephone service at multiple offices has more than one premises. It seems likely that at least some such businesses have only one office listed in the telephone directory. For instance, a business with one office for employees and one where materials are stored might want telephone service at both offices but a directory listing only for the former. Presumably Bell does not object to such arrangements.

5. "Proper Motive" Requirement

[16] Bell and the staff also contend that, for the customer premises definition to apply, the occupation must be more than an arrangement of convenience for the purpose of avoiding applicable rates. However, as Mr. Springfield acknowledged, such a standard would be extremely difficult to apply and enforce. During cross-examination, for instance, Mr. Springfield was asked about three situations: (1) businesses that locate in the Dallas - Fort Worth midstrip solely because of the calling scope that EMS offers; (2) businesses with offices in Dallas or Fort Worth that lease a small conference room in the midstrip with nothing in it but a Telexpand, and (3) the complainants' customers. He testified that (3) would violate the customer premises requirement and (1) would not. He was not sure about (2).

In addition, as Mr. Springfield testified, there is nothing unlawful or fraudulent about a customer taking service under a tariff for which he

qualifies. If he qualifies under several tariffs, there is nothing improper in his taking service under a particular one because it would result in the lowest bills.

6. Threat to Bell's Access Charge Revenues

Bell and the staff also argue that their interpretation of the customer premises provision is critical to Bell's ability to recover revenues. Their interest springs from concern not only about the complainants' operations, but also about recovery of access charges. Bell and the staff urge that if the Commission holds that a customer can have his local exchange line terminated at a location other than his premises, customers could order such a line to be installed at the premises of their IXC, thereby allowing the IXC to avoid access charges. The result would be an erosion of Bell's originating switched access service revenues, which are approximately $283,000,000 per year.

As previously discussed, the examiner has concluded that Bell's tariff prohibits termination of local exchange service at a location other than the customer's premises, but that the space containing the leased jack or Telexpand constitutes the customer's premises within the meaning of the customer premises provision as presently drafted. The record was insufficiently developed to enable the examiner to determine if one could argue that a customer's premises could be located at the offices of his IXC. While acknowledging the extreme importance of Bell having an opportunity to collect authorized access charges, the examiner has difficulty deciding against the complainants (which she has concluded are not IXCs) on that basis.

The examiner has recommended that Bell consider submitting revised tariff language addressing other problems suggested by the evidence in this case. Bell may propose tariff amendments intended to eliminate any possible ambiguity concerning the application of the customer premises requirement to a customer wanting service terminated at his IXC's offices, if it believes that such amendments would be desirable.

7. Examiner's Conclusions

[17] Given that Bell urges application of a definition of "occupation" which is not contained in its tariff, which is narrower than the ordinary meaning of the word, and which is narrower than that employed by Bell in implementing the customer premises provision when other types of customers are involved, the examiner concludes that finding the complainants' customers to be in violation of the customer premises requirement would violate the PURA Section 32 requirement that a utility's practices be reflected in its tariff. This is not an instance in which one can imply a definition of "occupy" which is more technical than the ordinary meaning of the word, or which is consistent with the public interest. Bell has not advanced even its own definition of the word for consistent use in implementing the customer premises provision. The examiner further finds that to use one definition for the complainants' customers, and another for other customers, when such a distinction is not contained in the tariff, would violate the PURA Section 45 requirement that no utility subject any person within any classification to any unreasonable prejudice or disadvantage.

E. Answering Service Tariff

As an alternative response to the customer premises argument, the complainants contend that they are answering services. Bell's answering service tariff, Section 32 of its general exchange tariff, expressly allows customers' service to be terminated at a location other than their own premises, if the location is that of an answering service. Paragraph 1.4.2 defines "secretarial answering line" as: "An arrangement whereby patron's main service, Foreign Exchange Service or Inward WATS service is terminated at a telephone answering and secretarial service location. One way inward or two way service may be provided." (Emphasis added.) As noted above, the examiner has concluded that the complainants' customers are not in violation of the customer premises requirement. If the Commission agrees with this conclusion, the answering service issue is moot for purposes of this docket.

The examiner agrees with Bell and the staff that the complainants are not answering services, and that the Telexpand does not answer calls within the meaning of that tariff.

Paragraph 1.1 of the tariff states: "(t)elephone answering and secretarial service consists of facilities and services furnished to business customers enabling them to use their patron service in the provision of answering and secretarial service to the patron." This definition does not address the issue presented in this case, since it does not define "answering service".

Bell and the staff argue that the primary function of an answering service is to answer calls and take messages for its customers while they are unavailable to answer their calls. Except for one customer, discussed subsequently, Metro-Net and Plex-Net do not perform this function. Bell and the staff acknowledge that an answering service may also patch a call through to another line so that the caller can talk to the person called at a location designated by that person. However, this function would occur on a limited basis, and typically an answering service would not have enough outgoing lines to perform such a function for all of its customers all of the time. In contrast, Metro-Net and Plex-Net provide continuous patching of all calls for all of their customers at all hours of the day.

The complainants urge that Bell and the staff are adding requirements for qualifying as an answering service which are not contained in the tariff. They note that the tariff does not define the term "answer calls". The complainants argue that the Telexpand does answer calls. In describing the complainants' serving arrangements, Mr. Poole stated: "(a)n established call connection now exists, which was originated by the Metro-Net customer located in the Dallas Evergreen 381CO and which has been terminated to the Metro-Net equipment served out of the Grand Prairie 263CO." The complainants also observe that the answering service tariff does not contain Bell's and the staff's theory of the primary functions of an answering service, or limit the amount of three way calling and call forwarding an answering service can perform.

[18] As noted previously, in interpreting a tariff the Commission may consider the meaning of terms used in the tariff. Telephony's Dictionary, Second Edition (1986) defines "answering service, telephone" as: "Service provided when a subscriber is unable to answer his own phone. The line is switched to a central bureau which takes messages." (Emphasis added.) Customers do not use the complainants' service when they cannot answer their telephone; they use it when they can answer their telephone, in order to lower their telephone bills. Nor, except for one customer, do the complainants take messages for customers.

Similarly, the references in the answering service tariff to an answering service "answering" calls are most reasonably read to mean: "answering a subscriber's calls when he is unable to answer his telephone, and taking messages". The examiner concludes that the Telexpand does not answer calls within the meaning of that tariff.

The complainants present several other arguments. First, Mr. McReynolds testified that he could find no provision of the answering service tariff which the complainants are violating. He discussed numerous provisions of that tariff, the terms of which he believes apply in this case. For example, the tariff provides for the answering service answering patrons' incoming calls and placing outgoing calls over the patrons' lines. Mr. McReynolds testified that these functions are exactly what the Telexpand does. This, however, assumes a definition of "answering" which the examiner concludes is incorrect.

The tariff also provides that: telephone communication between the answering service and its patron may be accomplished through the general exchange network; the patron's lines may be terminated in non-key arrangements; when the service is terminated as two-way service, responsibility for all local and long distance charges is assumed by the patron; if Bell incurs unusual expenditures to provide facilities in excess of those normally provided to an answering service location, such costs will be assessed against the answering service; and the patron will be billed the applicable business or residential rate as provided for in the local exchange tariff or WATS tariff. Mr. McReynolds stated that these provisions describe the complainants' operations.

The examiner concludes that these tariff provisions do not show that the complainants are answering services within the meaning of the tariff. Such provisions do not define an answering service, but merely describe how a business which qualifies as an answering service and its customers will be treated under the tariff.

Second, the complainants argue that they and Bell have consistently treated the complainants as answering services. For example, in a discovery response, Bell stated:

> In the process of initial service establishment and throughout continued negotiations since the time of that initial service establishment, both Plex-Net, Inc. and Metro-Net, Inc. have continuously referred to their line of business as being that of a telephone answering service. This has been confirmed through Business Office representatives and Managers responsible for these accounts. In the case of Plex-Net, Inc., this is further corroborated by their listing in the Midland Yellow Pages Directory under the heading of "Telephone Answering Service". . . .

In an October 24, 1986, memorandum approving the agreement whereby Metro-Net undertook to pay the excess cost of facilities terminating at Metro-Net's location, Mr. Springfield referred to Metro-Net as a new answering service. Mr. McReynolds stated that previously, Plex-Net and Bell had determined together that Plex-Net could be classified as an answering service.

Actually, the evidence shows that neither the complainants nor Bell have been consistent in referring to or treating the complainants as answering services. For example, although Mr. Sutton testified that he has always thought of Metro-Net as an answering service, he does not view his target market as businesses that want someone to answer their telephones. He described his target market as "100 percent of the foreign exchange or foreign serving office Metro customers comprising Southwestern Bell's customer base." Moreover, although the complainants argue that they are competitors of Bell, no one contends that Bell is in the answering service business. Even if the complainants or Bell had been consistent in referring to or treating the complainants as answering services, this would not make them answering services within the meaning of the tariff.

Third, the complainants argue that, with some changes, they could answer calls and take messages for their customers over all lines which terminate in Telexpands. At present, there is not always an employee at Metro-Net's office. Telephones are not attached to the Telexpands, and there is no audible ringing when a call comes through; only clicking and an "in-use" light on the Telexpand. However, if the complainants bought more telephones and attached them to the Telexpands, when a call came in, the Telexpand would ring and Metro-Net or Plex-Net could take a message for the customer if he could not answer his calls. Mr. McReynolds testified that this service is exactly what many answering services provide. However, the fact that the complainants could function as an answering service does not change the fact that they do not.

Fourth, the complainants note that partway through the hearing, Plex-Net began to provide message-taking for one customer, with that service to be billed on a per message basis. (Thus, if no messages are taken, there would be no charge.) If this is still the case, then under the current tariff, with respect to that customer and service, Plex-Net appears to be an answering service. It is not with respect to its other customers. Thus, if the Commission rejects the examiner's conclusion that the complainants' customers are not in violation of the customer premises requirement, then only that one customer could, pursuant to the answering service tariff, lawfully have his local exchange line terminated at Plex-Net's building.

There may be answering services which use call patching to enable their customers to have calls between cities constitute local exchange calls. Bell is investigating approximately thirteen answering services in the Dallas - Fort Worth area that have EMS in both Dallas and Fort Worth, as well as one in Terminal, to see if this is a problem. It is also possible that a company could provide call patching for this purpose on a regular basis and function as an answering service for perhaps one hour a day, so that its customers could have their local exchange lines terminate at the company's building. As regarding other tariff provisions at issue in this case, Bell should request amendment of its answering service tariff if it believes that the evidence reveals problems which the current tariff language is inadequate to address.

V. Federal Preemption Issue

The complainants have, in addition to the answering service argument, another alternative response to the claim that its customers are in violation of the customer premises provision. Specifically, Telexpands are terminal equipment registered by the FCC. Section 68.100 of the FCC rules regarding the registration program (located in 47 CFR Part 68 and amendments thereto) provides that terminal equipment may be directly connected to the public switched telephone network (PSTN) in accordance with the FCC rules. The complainants argue that the FCC has preempted this Commission from limiting the locations at which customers can connect their Telexpands to the PSTN. As with the answering service issue, the federal preemption issue is moot for purposes of this case if the Commission agrees with the examiner that the complainants' customers are not in violation of the customer premises provision.

A. Discussion of Legal Authorities

The standard applicable to federal preemption questions was discussed by the United States Supreme Court in La. Pub. Serv. Comm'n v. FCC, 106 S.Ct. 1890, 1898 (1986) (Louisiana):

> 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. (Citations omitted.)

The FCC and the states share the duty of regulating telecommunications. Pursuant to the Communications Act of 1934, 47 U.S.C. Section 151 et seq., the FCC has broad authority to develop and regulate "interstate and foreign commerce in wire and radio communications". 47 U.S.C. Section 151. However,

Section 152(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." Intrastate telecommunications is regulated by the states.

A long line of FCC and federal court of appeals decisions had construed the Communications Act to give the FCC broad power to preempt state regulation of telecommunications. See, e.g., North Carolina Util. Comm'n v. FCC, 537 F.2d. 787 (Fourth Circuit), cert. denied, 429 U.S. 1027, 97 S.Ct. 651 (1976) (North Carolina I or NCUC I); and North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (Fourth Circuit), cert. denied, 434 U.S. 874, 98 S.Ct. 222 (1977) (North Carolina II or NCUC II). However, in Louisiana, 106 S. Ct. at 1901, the United States Supreme Court rejected such holdings:

> Numerous decisions of the Courts of Appeals are cited as authority for the proposition that § 152(b) applies as a jurisdictional bar to FCC preemptive action only when two factors are present; first, when the matter to be regulated is purely local and second, when interstate communication is not affected by the state regulation which the FCC would seek to pre-empt. The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption. While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it is also true that a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. (Citations omitted.)

The Court overturned the FCC action at issue in that case, on the ground that, in a manner contrary to Congressional intent, it intruded on the states' power to regulate intrastate telecommunications.

One might think that the interstate - intrastate division of responsibility between the FCC and the states would mean that federal preemption has not occurred in this case. The complainants and their customers are located in Texas; the complainants' service consists of providing a way for customers to lower their intrastate telephone bills; and the problems caused by their operations involve Bell's intrastate revenues and cost of providing intrastate

service. Indeed, the complainants do not argue that this Commission has been federally preempted from granting one of the two alternative remedies requested by Bell and the staff - an order allowing Bell to impose higher charges in connection with the complainants' operations. However, the complainants do argue that the Commission has been preempted from granting the other requested remedy - an order authorizing Bell to disconnect existing, and to refuse to connect new, local exchange lines of the complainants' customers terminating at terminal equipment located in the complainants' buildings.

There is support for the complainants' position. The court in North Carolina I observed: "Of course, rate making typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other." 537 F.2d at 793. In contrast, numerous FCC and federal court decisions, including North Carolina I and II, hold that the FCC, not the states, regulates the right to connect terminal equipment to the PSTN. The reason is that a state limitation on terminal equipment used to make intrastate calls in effect would constitute a limitation on equipment used to make interstate calls. The Supreme Court observed in Louisiana, 106 S. Ct. at 1894:

> However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres - one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction - in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities.

In Louisiana, the Court overturned an FCC order prescribing depreciation methods to be used to set interstate and intrastate rates. It did not disturb the FCC and Court of Appeals decisions holding that the FCC regulates the right to connect terminal equipment to the PSTN. On the contrary, the Court stated in 106 S.Ct. at 1902, n. 4:

> Thus, this case is readily distinguishable from those in which FCC preemption of state regulation was upheld where it was not possible to

separate the interstate and the intrastate components of the asserted FCC regulation. [Citing North Carolina I and II] (Where FCC acted within its authority to permit subscribers to provide their own telephones, preemption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff.) (Emphasis in original.)

Bell and the staff urge that the concerns they raised in this docket are not among those considered by the FCC when it registers terminal equipment. Section 68.1 of the FCC rules regarding the registration program states that its purpose is to "provide for uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment and associated wiring thereto . . ." (Emphasis added.) Section 68.3 defines "harm" as: "Electrical hazards to telephone company personnel, damage to telephone company equipment, malfunction of telephone company billing equipment, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party." None of these harms has been alleged to result from the complainants' use of the Telexpand in this docket.

The harms listed above are not the only permissible reasons to limit a customer's right to have his terminal equipment connected to the PSTN. The standard, established in Hush-a-Phone v. United States, 238 F.2d 266 (1956) (Hush-a-Phone), is that a customer can use his telecommunications equipment in ways that are "privately beneficial without being publicly detrimental".

The FCC has concluded that an entity opposing connection of privately-owned terminal equipment bears the burden to show that the public detriment of allowing such connection outweighs the private benefit of doing so. Fort Mill Tel. Co. v. FCC, 719 F.2d 89 (4th Cir. 1983) (Fort Mill) was an appeal of an FCC order so holding. The court did not disturb this holding.

The Hush-a-Phone standard has been discussed in a number of cases involving the right to connect terminal equipment. Fort Mill involved the Heritage Village Church and Missionary Fellowship, Inc. (Heritage), also known as the PTL Club. Heritage owned a contiguous tract of land consisting of 1000 acres in South Carolina and 50 acres in North Carolina. Certain buildings were

located in the South Carolina portion of this tract, which Fort Mill Telephone Company (Fort Mill) was certificated to serve. However, Heritage decided to place its private branch exchange (PBX) serving these buildings in the North Carolina portion, which allowed it to interconnect with Southern Bell Telephone and Telegraph (Southern Bell). According to Heritage, this decision was based on its desire to maintain its established identity with Charlotte, North Carolina, as well as economic, technical and religious reasons.

Fort Mill filed a complaint about this situation with the South Carolina Public Service Commission (SCPSC). The SCPSC concluded that Southern Bell was furnishing telephone service in Fort Mill's certificated area without a certificate. It ordered that Southern Bell discontinue service to Heritage, and that Fort Mill serve Heritage. On appeal, the FCC overturned the SCPSC's order, holding that Heritage had a federal right to interconnect its PBX in North Carolina. The federal court concluded that the FCC had acted within its authority.

Arguably, Fort Mill could be distinguished from the present docket. The court in Fort Mill commented: "Heritage owns contiguous property in North and South Carolina. It has the right to locate its switching equipment wherever it chooses on its own property. . . . We are not dealing with a case in which the subscriber is guilty of any sort of fraud in the location of his equipment." In contrast, the Telexpand is not located in the same contiguous tract as the complainants or the telephones they are using. It is not clear how the Fort Mill court would view that aspect of the present docket. However, as discussed below, the FCC has overturned a state order similar to that involved in Fort Mill, in which the customer's premises were located in noncontiguous tracts in two different towns. See, In the Matter of Atlantic Richfield Company, FCC 88-23 (January 19, 1988) (ARCO).

One could also contend that the present case can be distinguished from Fort Mill because all locations involved are in Texas, whereas Fort Mill concerned locations in two states. Arguably, under the facts of Fort Mill, one should expect federal intervention in order to ensure that competing local concerns of

two states do not burden interstate commerce. However, the examiner believes that such would not be a valid distinction in this instance. First, the fact that Fort Mill involved locations in two states apparently was not part of the court's reasoning. Second, courts have rejected the idea that the FCC has jurisdiction over terminal equipment only when multiple states are involved. This is because wherever terminal equipment is located, it is usually used for interstate as well as intrastate communications. See, NARUC v. FCC, 746 F.2d 1492, 1498 (D.C. Ct. App. 1984).

ARCO involved Atlantic Richfield Company (ARCO), which operated extensive private microwave facilities (known as ARCOnet) providing voice and data capabilities between its offices throughout the country. Its Dallas and Plano offices were connected by point to point microwave facilities. ARCOnet was interconnected to the PSTN through telephone lines extended by the respective serving carrier to the Dallas and Plano offices, and connected by ARCO to PBXs at both locations. Bell was certificated to Dallas; General Telephone Company of the Southwest (General) was certificated to Plano. The dispute arose when ARCO severed most of its trunk connections with General, obtained additional trunks from Bell, and directly connected its microwave facilities between Dallas and Plano. ARCO claimed to do so due to dissatisfaction with the quality and reliability of General's interconnection services at Plano.

On complaint by General, this Commission held that Bell was providing telephone service outside its certificated area, and that the private benefit of the ARCOnet interconnection was outweighed by public policies favoring planning and avoidance of stranded investment by telephone companies. On appeal, the FCC reversed the Commission's decision, holding that it interfered with ARCO's federal right of interconnection. The FCC also concluded that claims of harm to General were unsubstantiated. General was alleged to incur stranded investment of approximately $300,000 out of a total Texas investment of $2,000,000,000. The FCC commented:

> While avoidance of stranded investment and disruption of the local exchange design process in theory represent areas of potential public detriment, claims of significant public detriment must be factually demonstrated and supported before they are allowed to defeat a customer's ability to

> interconnect and to use its equipment in a manner that it has determined best serves its communications requirements. . . . The Texas PUC itself found only the possibility of General's investment of $311,612 in facilities used by ARCO being stranded temporarily.

One might try to distinguish the present case from Fort Mill and ARCO on the grounds that, unlike in those cases, in this docket the customers only have an economic incentive to use the Telexpand for intrastate calls, and presumably it would be used in connection with interstate calls rarely, if at all. However, several decisions upholding the federal right of interconnection have observed that most calls made using terminal equipment are intrastate, rather than interstate. See, e.g., North Carolina II, 552 F.2d at 1044, n. 7. In that case, the court said: "We find it difficult to credit an argument which amounts to an assertion that Congress created a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions." Id. at 1046. In Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700 (1st Cir. 1977), the court stated: "We think that the clear import of the Communications Act, as it has been construed by the FCC and by the courts for many years, is that no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate telephone system measured against federal standards of reasonableness under § 201."

A stronger argument would be that Fort Mill and ARCO involved bypass of telephone company facilities, depriving the company of revenues from use of the facilities until such time as other demand for the facilities might arise. In contrast, in this docket Bell's facilities are not being bypassed. Rather, they are being used to serve the complainants' customers; Bell is simply being deprived of ability to collect revenues from them. Thus, Bell is precluded from seeking other uses for the facilities. Also, it must maintain the facilities as necessary to serve the complainants' customers. Finally, the use being made of the terminal equipment increases Bell's costs of serving the complainants' customers. This is particularly important since the enabling statutes for the FCC and this Commission require each agency to seek to promote efficient telecommunications service. 47 U.S.C. Section 151; PURA Section 18(a).

North Carolina II, 552 F.2d at 1048, generally discussed an alleged public detriment also at issue in the present case, i.e., loss of contribution, which in the long run would tend to result in higher basic telephone rates. The court was not impressed with that allegation:

> Apparently, the state commissions fear that increased substitution of independently provided terminal equipment for carrier-supplied equipment will reduce revenues and the corresponding amount of money available to subsidize other services and facilities.
>
> We hold that the registration program - as a jurisdictional matter - does not jeopardize state ratemaking prerogatives to subsidize favored types of service. The states remain free to approve the pricing of carrier-supplied terminal equipment above or below unit cost. The effect of the federal program will depend upon the extent to which independents invade the terminal equipment market and undersell the regulated price. But cross-subsidization can still be accomplished by differential charges for services where there is no competition. . . .
>
> Political expediency may encourage state commissions to defend their current option to bury subsidy costs in as many holes as possible, but this concern cannot be allowed to determine the allocation of jurisdictional competency between state and federal agencies. (Emphasis in original.)

However, the court noted the FCC's statement that it will authorize restraints on interconnection whenever a carrier files a petition and demonstrates that "compliance with the obligation . . . has already resulted in or will result in direct, substantial and immediate economic injury to [the] telephone system and detriment to the public interest." 552 F.2d at 1056.

Bell urges that this Commission has not been federally preempted from requiring connection of terminal equipment to the PSTN only at the customer's premises. However, the FCC has overturned similar requirements. In the Matter of American Telephone and Telegraph Company, 71 F.C.C.2d 1 (1979) (ARINC), involved a local tariff provision restricting the customer premises locations at which local exchange service would be made available. This provision was applied to deny to a customer facilities it requested to connect its private interstate communications system (consisting of microwave and private line links) to local exchange facilities. The customer wanted to use a combination of local exchange service and its private system to set up the equivalent of an FX line. In the Matter of American Telephone and Telegraph Company, 60

F.C.C.2d 939 (1976) (AT&T) concerned provisions in American Telephone and Telegraph Company's (AT&T) tariff limiting the connection of AT&T private lines with communications systems provided by a customer or another carrier to the premises at which the customer had a regular and continuing need to originate and terminate calls. In ARINC and AT&T, the FCC invalidated such restrictions as an impermissible infringement on the federal right to interconnect.

B. Examiner's Conclusions

The issue of whether the Commission has been preempted from requiring that a customer's FCC-registered terminal equipment be connected to local exchange lines only at his premises could have far-reaching consequences. The term "terminal equipment" includes, in addition to Telexpands, telephones and computers.

As mentioned previously, that issue is moot for purposes of this docket if the Commission agrees with the examiner that the complainants' customers are not in violation of the customer premises provision of Bell's tariff. The examiner has therefore not included a conclusion of law as to whether the Commission has been federally preempted from applying the customer premises requirement in this case. If the Commission disagrees with the examiner and concludes that the complainants' customers are in violation of the customer premises provision, the examiner recommends that the Commission consider if, in light of the evidence discussed in Section III. of the Examiner's Report, the private benefit to the complainants' customers of having their Telexpands connected to the PSTN at a location other than their premises is outweighed by the resulting public detriment. If the Commission decides that this is the case, and wishes to use that as the basis for its decision, the final order in this case should include additional findings of fact and conclusions of law supporting that decision.

If the Commission agrees with the examiner that the complainants' customers are not in violation of the customer premises requirement of Bell's tariff as presently written, that would not necessarily moot the federal preemption issue

for purposes of future proceedings. For example, Bell or the staff might propose tariff amendments clarifying the definition of "occupy" so as to prohibit a customer from having his Telexpand connected to a local exchange line at a location in the complainants' offices.

As noted previously, the examiner excluded from this case the issue of what language should be approved if the Commission decides that Bell's tariff should be changed to better account for the complainants' operations. The examiner's comments should not be considered as limiting the tariff amendments the parties can propose. However, based on the record in this docket, the examiner believes that there is another approach which would be less likely to lead to an appeal of the Commission's decision on grounds of federal preemption.

The basic problem in this docket is that, as currently written, Bell's tariff allows the complainants' customers to pay lower rates for intrastate calls than do other similarly situated customers, and as a result encourages use of an inefficient serving arrangement. It appears to the examiner that this problem could be addressed by amending Bell's tariff so that the rates the complainants' customers pay are equal to, or, allowing for the increased cost to serve, greater than those other customers pay. This approach would address the problem directly, would be within the Commission's intrastate ratemaking authority, and would not limit a customer's right to connect FCC-registered terminal equipment to the PSTN.

VI. Investment by Complainants and their Customers

Concern was expressed in this case as to the investment the complainants and their customers have each incurred in connection with the present arrangement. The complainants argue that one reason the Commission should grant their requested relief is that Bell knew about their planned business and failed to object to it until after they had invested a substantial sum in it. In response, Bell suggests that the complainants misled Bell's employees as to the nature of the business, so that Bell did not realize it would have objections until after it connected service to the complainants' customers.

Based on the evidence presented concerning these issues, the examiner concludes the following.

A. Complainants' Level of Investment

Although Metro-Net and Plex-Net are corporations, the owners are personally liable for some of the business debts that have been incurred.

Metro-Net and Plex-Net together have a contract with the manufacturer to buy a total of 2,500 Telexpands over a two-year period for $260 each. The limits of their liability under the contract are defined in two provisions of the contract: "Buyer may terminate this order other than for default only upon payment of all of seller's costs incurred with respect to this order, plus seller's normal gross profit on units cancelled"; and "Buyer also agrees not to resell any of the units."

Also, Metro-Net signed a declining termination agreement with Bell to cover the cost of entrance facilities (900 cable pair) related to its operations. Under that agreement, no payments are made while service is in place. The amount owed declines by 1/120 each month, so that if service is in place for 120 months, the amount owed is zero. Metro-Net also bought one jack per customer line for $40 each, and an administrative telephone system for $10,000. It leases a 1,050 square foot office, which contains, in addition to the Telexpands, some office furniture and equipment which Metro-Net has bought.

Metro-Net has not been operating at a profit. From October 1986 until July 1987, its gross income was $57,000. At the time of the hearing, Metro-Net served approximately 123 customer lines, compared to the estimated 350 to 500 customer lines it would need to serve to break even. It had four employees, and expected to have eight employees soon.

Plex-Net also signed a termination agreement with Bell. Plex-Net's 200 Telexpands are located in its Terminal office, but the business is run from Midland. Plex-Net and TeleMc, Inc., an equipment vending company owned by Mr.

McReynolds, share the Midland office. The Terminal and Midland offices contain some furniture and equipment. Plex-Net also has a $20,000 vehicle which Mr. McReynolds drives. It has one employee, and Plex-Net and TeleMc, Inc., share four other employees.

B. Customers' Level of Investment

Mr. Costello expressed concern about the nonrecurring charges the complainants' customers paid Bell to obtain the complainants' service, and those they will have to pay if such service is discontinued. He recommended that Bell be allowed to refuse to provide additional facilities to Metro-Net and Plex-Net, and that current Metro-Net and Plex-Net customers be "grandfathered".

The nonrecurring charges in question are as follows. An existing FSO or FX customer who began taking 1FB service at Metro-Net's or Plex-Net's buildings at that time paid Bell a service connection charge of $66.65. That figure consists of a service order charge of $36.00, a trip charge of $6.65, and a CO access charge of $24.00. If such a customer disconnected Metro-Net's service and was reinstated as an FSO customer, he would pay Bell approximately $240.85. That figure consists of $174.60 in connection with the private line, and another $66.65 service connection charge. If such a customer disconnected Plex-Net's service and was reinstated as an FX customer, he would pay Bell $360.60. That figure consists of $186.00 in connection with the private line, and $174.60 in connection with the FX point of termination. These figures do not include nonrecurring charges for Touch-Tone or custom calling. A new customer who chose not to take Metro-Net's service would have paid Bell the $240.85 charge; one who chose not to take Plex-Net's service would have paid Bell the $360.60 charge.

C. Examiner's Conclusions

In S.W. Bell Tel. Co. v. PUC, 615 S.W.2d 947, 957 (Tex. Civ. App. - Austin 1981, writ ref'd n.r.e.), the Court stated:

> We believe that no person has a vested right to any particular system of utility rates, but only a right shared with others in whatever legal or official rates are established by the governmental authority charged to do so, in this case the Public Utility Commission. The public generally, and all affected persons, also have a general right to the promulgation of rates that are, in this context, "just, fair and reasonable." PURA Section 38. No one has a vested right to any other rate. In the context of the present case, no person can have a vested right in any rate other than the last legal or official rate promulgated by the Commission.

The options in this case are: (1) terminating the current arrangement with the final order in this docket (urged by Bell); (2) terminating the current arrangement with the final order in this docket with respect to new customers, but grandfathering existing customers of the complainants (urged by the staff); (3) allowing the current arrangement to remain in effect regarding all customers until Bell's tariff is amended; and (4) allowing the complainants' operations to continue to grow without restriction. The examiner recommends the third option.

As discussed previously, the examiner concludes that the first option is not justified based on the current language of Bell's tariff.

Regarding the second option, grandfathering, the examiner believes that the nonrecurring charges which caused Mr. Costello concern should be compared with the savings the complainants' existing customers have enjoyed as a result of the complainants' service. As previously discussed, Bell's lost revenue as a result of the complainants' operations is approximately $100 per month per line due to Metro-Net's operations and $170 per month per line due to Plex-Net's operations. A Metro-Net or Plex-Net customer would not receive all of this as a discount, since unlike other Bell customers, he must pay a monthly charge to the complainants. Plex-Net charges $35 per month for Inward Only, $60 per month for Outward Only and $70 per month for Two Way. Metro-Net's charges are similar. The total amount of money a customer has saved as a result of taking the complainants' service will depend on his usage and on how long he has taken such service. However, the examiner believes that for most customers, the nonrecurring charges which caused Mr. Costello concern have been offset or more than offset by lower telephone bills.

Also, grandfathering the complainants' existing customers would have three disadvantages. First, it would perpetuate, to that limited extent, the problems resulting from the complainants' operations discussed in Section III. of this Report. Second, it would not generate enough revenue to allow Metro-Net, at least, to make a profit. Third, the complainants have only marketed their services to businesses expected to have a high volume of calls between the cities in question. They have not marketed their services to other businesses or to residential customers, in the belief that such customers' volume of calls is too low for it to be cost-effective for them to take the complainants' service. Grandfathering the complainants' existing customers would perpetuate differences in rates between these and other customers, while permanently barring the other customers from taking advantage of the discounts available to the complainants' customers.

With respect to the fourth alternative, one must feel concern when small entrepreneurs stand to lose an investment of the size involved in Metro-Net and Plex-Net. The evidence in this case suggests that with respect to Plex-Net, at least, some Bell employees knew about the complainants' operations and failed to object to them. Mr. McReynolds testified:

> In January 1986, I contacted Janice Keeth, who at that time was in SWB's marketing management staff in Midland. I spoke with Ms. Keeth twice. I fully explained to Ms. Keeth the nature of Plex-Net's service arrangement operations and provided her with the FCC registration number of the electronic device. Ms. Keeth responded to me that the service arrangement and operations I described were permitted under the SWB tariff. Later, on January 31, 1986, I visited with Patti Robison of SWB in my office and explained in detail to her the nature of my operations. At the conclusion of that visit we executed the contract for service . . .

This testimony was unchallenged. The examiner finds it to be credible.

The case for Metro-Net on this issue is weaker. Mr. Sutton testified that he lacks Mr. McReynolds' technical knowledge of the complainants' operations. He did not answer some of Bell's technical questions, and answered at least one inaccurately. Mr. Sutton suggested that the Dallas area Bell employees talk to Mr. McReynolds or to the Midland area Bell employees if they wanted more information about his business, which he described as being basically identical

to that of Plex-Net. He remarked in his testimony that he had no desire to tell a competitor how his equipment worked.

At some points the complainants appear to suggest that Bell intentionally misled them so that they would invest, only to have Bell try to drive them out of business. It seems unlikely that, with so little to gain, Bell would knowingly incur significant revenue losses and risk litigation solely to cause possible financial harm to the complainants. The examiner is persuaded that such did not occur.

The Bell personnel involved in processing orders for the complainants and their customers probably should have done a better job of speedily recognizing that a potential problem existed. They could have asked more probing questions of the complainants, or sought the advice of Bell legal and technical experts about areas of uncertainty earlier in the process. On the other hand, because the complainants' operations were new and complicated, considerable study and expertise might have been needed to understand them. Mr. Sutton, who had considerable telecommunications experience[7], had discussed the business with Mr. McReynolds, and was preparing to invest in and operate Metro-Net, did not achieve that understanding. Thus, there is a limit to how much one should demand of Bell's marketing employees in this instance. The examiner does recommend that Bell review its training of personnel involved in processing such orders to see if supplemental training in these areas is needed.

In any event, as noted by the complainants, this is not an action for money damages, which the Commission in any event has no power to grant. The issue is whether the Commission should, in light of the complainants' investment and Bell's failure to diagnose the problem before that investment was incurred, require that the current serving arrangement and rates be continued in perpetuity. The examiner believes that it should not. Such an outcome would

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7 Mr. Sutton was employed for sixteen years by Bell and seven years by Communications Corporation of America (CCA). Among other things, he was Vice President - Operations with CCA.

penalize the truly innocent persons involved in this case - Bell's general body of ratepayers - and would encourage inefficient use of the telephone network. Mr. Sutton and Mr. McReynolds[8] were experienced in telecommunications when they started their companies, and chose to undertake a business risk. The examiner cannot believe that they did not know there was at least a chance that the key provisions of Bell's tariff would be interpreted or amended in a manner detrimental to their businesses.

Under the examiner's recommendation in this case, the present serving arrangement and charges will continue until and unless changed by amendment of Bell's tariff. The examiner believes that the Commission should grant the complainants no further relief of that nature. If the complainants wish, they may seek relief in court against Bell for damages they might have incurred.

VII. Summary

The examiner finds that the effects of the complainants' operations include lost revenues for Bell, higher costs for Bell to serve the complainants' customers, and payment by the complainants' customers of lower telephone rates than those paid by other Bell customers who are similarly situated. She concludes that, under the current language of Bell's tariffs, the complainants are not resellers of local exchange service, IXCs, or answering services, and that their customers are not in violation of the customer premises provision. Under the examiner's recommendations, the federal preemption issue is moot.

The examiner recommends that the final order in this docket state that, under the current language of Bell's tariff, Bell may not refuse new, or

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8 Mr. McReynolds was employed for nine years by General and for three years by Continental Telephone Company of Texas. His positions with these companies included lineman, assistant foreman, rates and services manager, service manager, service center supervisor, customer service specialist, and division service facilities manager. In addition, he worked with CCA for four years, was president of Electronic Telephone Systems, Inc., for one year and has been president of TeleMc, Inc. since 1985.

disconnect existing, service to customers at the complainants' buildings, or impose access charges in connection with the complainants' operations, except for reasons not contrary to the conclusions of law reached in this case. The order should further state that it in no way limits any interested person's ability to propose, or the Commission's ability to approve, tariff amendments intended to address problems suggested by the evidence in this case, or the applicability of any such tariff amendments to the complainants' operations.

VIII. 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 19, 1987, Metro-Net filed a complaint against Bell in response to Bell's threatened refusal to process new orders for customers wanting EMS lines terminating at Metro-Net's offices. Plex-Net subsequently intervened.

2. Bell agreed to continue to process new orders for customers wanting lines terminating at the complainants' offices during the pendency of this docket.

3. All entities known by the parties or the Commission to be providing service similar to Metro-Net's received actual notice of this complaint. In addition to Metro-Net, this includes Plex-Net and Midessa. Midessa did not move to intervene.

4. The complainants' customers were not notified of this complaint or of proceedings in this docket, for reasons discussed in Section I. of the Examiner's Report.

5. All parties received more than four months notice of the hearing on the merits in this case.

6. The hearing on the merits was held from September 8 to 10 and September 21 to 23, 1987.

7. The nature of the complainants' operations, the geographic areas in which they operate and the services they offer to their customers are as described in Section II. of the Examiner's Report and subsections thereof.

8. The complainants can offer their services only to customers who receive service from Bell in the manner described in Section II. of the Examiner's Report and subsections thereof.

9. The complainants' customers pay Bell for the provision of certain services as described in Section II. of the Examiner's Report and subsections thereof.

10. As discussed in Section II.B. of the Examiner's Report, a substantial portion of the services the complainants offer their customers requires use of a Telexpand, which is terminal equipment registered by the FCC. The Telexpands are leased by the complainants' customers, contained in the complainants' offices in space leased to the customers by the complainants, and connected to the lines the customers lease from Bell.

11. As discussed in Sections II. and III. of the Examiner's Report and subsections thereof, the complainants' operations result in their customers being able to pay lower rates for telephone service received from Bell than do other similarly situated customers.

12. The complainants' operations result in a revenue loss to Bell of the magnitude discussed in Section III.A. of the Examiner's Report, and a decrease in the dollar amount of contribution provided by FX and FSO above the incremental cost of such services. In the long run this would tend to result in higher rates for basic telephone service.

13. For the reasons discussed in Section III.B. of the Examiner's Report, the complainants' operations result in an increased cost for Bell to serve the complainants' customers, and a less efficient utilization of Bell's network. They also tend to increase the need for Bell to add new facilities, and in one instance have already contributed to the need for Bell to do so.

14. For reasons discussed in Section III.C. of the Examiner's Report, the unpayphone feature is not of significant concern regarding the complainants' operations at this time.

15. As discussed in Section III.D. of the Examiner's Report, the problem of a person fraudulently using another's security code to make long distance calls is potentially greater regarding the codes which the complainants issue to their customers than other types of security codes, because the remotely accessed feature of the Telexpand causes the billing equipment to show the calls as having originated at the customer's location, making it difficult to investigate such fraud.

16. As discussed in Section III.E. of the Examiner's Report, difficulty in responding to emergency calls as a result of the complainants' operations appears not to be a significant problem.

17. For reasons described in Section III. of the Examiner's Report and subsections thereof, the evidence reveals no public interest benefits to the complainants' business, and significant public interest concerns.

18. The evidence indicates that Bell has no definition of the term "customer's premises" which it applies consistently in administering the customer premises provision of its tariff.

19. As discussed in Section IV.E. of the Examiner's Report, except regarding one customer, the complainants do not provide their services when a customer is unable to answer his own phone, and do not take messages for their customers.

20. The complainants and their customers have made an investment in the present arrangement of a magnitude described in Section VI. of the Examiner's Report and subsections thereof.

21. For reasons discussed in Section VI. of the Examiner's Report and subsections thereof, "grandfathering" the complainants' existing customers is not justified in this case.

22. For reasons discussed in Section VI. of the Examiner's Report and subsections thereof, the complainants' arguments concerning the size of their investment in their businesses and Bell's lateness in notifying them that it would have objections to such businesses do not justify a Commission order which would limit the right of any interested party to propose tariff amendments intended to address some of the problems apparent from the evidence in this case, or the applicability of such amendments to the complainants' operations.

B. Conclusions of Law

1. The Commission has jurisdiction over this complaint pursuant to PURA Sections 16(a), 18(b), 37 and 83.

2. Reasonable public notice of this complaint and of proceedings conducted in this docket was given, pursuant to P.U.C. PROC. R. 21.25 and 21.102.

3. Bell is a public utility and a telecommunications utility as those terms are defined in PURA Section 3(c).

4. The PURA Sections 32 and 46 requirements that utility rates and practices be contained in the utility's tariff should be interpreted in a manner which will effectuate the legislative intent that utility rates and practices be approved by the Commission, that the tariff serve to notify interested persons of the rates and practices which are in effect, and that such requirements help ensure that consumers in a customer class will be treated consistently.

5. PURA Sections 32 and 46 do not require that the tariff describe every action of a utility, no matter how obvious or trivial or how tenuous the relationship between the action and the utility's rates or services. In deciding if a utility's action is required to be described in its tariff, the Commission can consider the legislative intent behind PURA Sections 32 and 46 and the nature of the utility action.

6. Under PURA Sections 16(a) and 83, the Commission has the authority to interpret a utility's tariff.

7. In construing a tariff, the Commission may consider not only the express language of the tariff, but also principles of construction, rules of syntax, and accepted meanings of words. It is not limited to ordinary dictionary definitions of words, if the context suggests that a more narrow meaning was intended.

8. In interpreting a tariff, principles of statutory construction are generally more applicable than those of contract construction.

9. For the reasons discussed in Section IV.B. of the Examiner's Report, the complainants are not resellers of local exchange service, and have not violated the resale prohibitions of Bell's tariff.

10. For the reasons discussed in Section IV.C. of the Examiner's Report, the complainants are not IXCs, and Bell's access charge tariff is not applicable to their operations.

11. As discussed in Section IV.D. of the Examiner's Report and subsections thereof, the customer premises provision of Bell's tariff requires that terminal equipment may be connected to local exchange lines only at a customer's premises, except to the extent that Bell's tariffs provide otherwise.

12. As discussed in Section IV.D. of the Examiner's Report and subsections thereof, the space containing each customer's leased jack or Telexpand constitutes that customer's premises within the meaning of the customer premises provision of Bell's tariff.

13. As discussed in Section IV.D. of the Examiner's Report and subsections thereof, the complainants' customers are not in violation of the requirement described in Conclusion of Law No. 11.

14. As discussed in Section IV.D.3. of the Examiner's Report, the complainants are not competitors of Bell within the meaning of PURA Section 47, because while they compete for the same customers and revenues as Bell, they do not provide the same service.

15. As discussed in Section IV.E. of the Examiner's Report, the complainants are not answering services within the meaning of Bell's answering service tariff.

16. The evidence in this case shows neither the complainants nor their customers to be in violation of Bell's tariff at this time.

Respectfully submitted,

Elizabeth Hagan Drews
ELIZABETH HAGAN DREWS
ADMINISTRATIVE LAW JUDGE

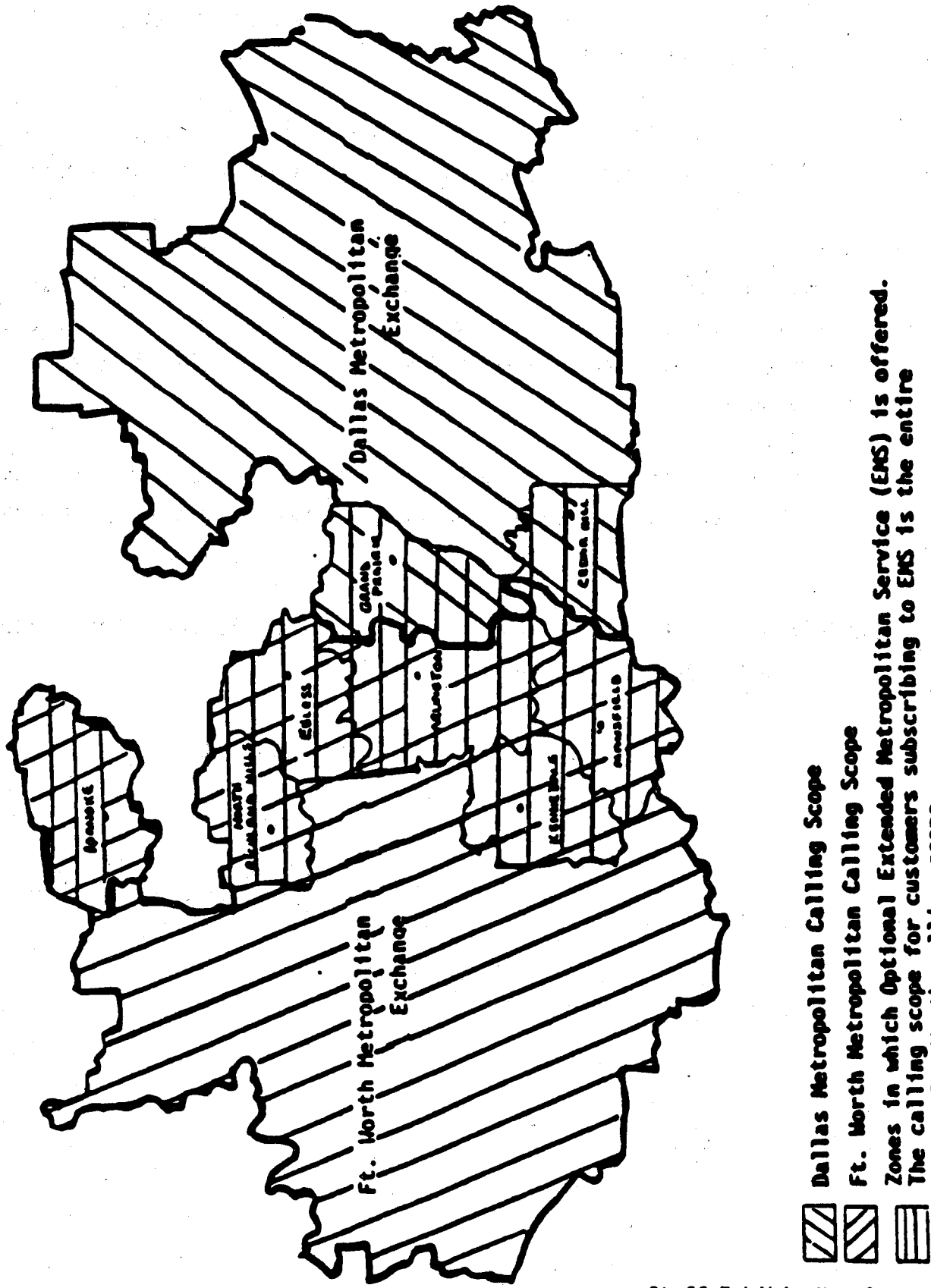
APPROVED on this the 27th day of April 1988.

Phillip A. Holder
PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

Southwestern Bell Telephone Company

Attachment 1

Illustration of Dallas/Ft. Worth Metropolitan Calling Scopes

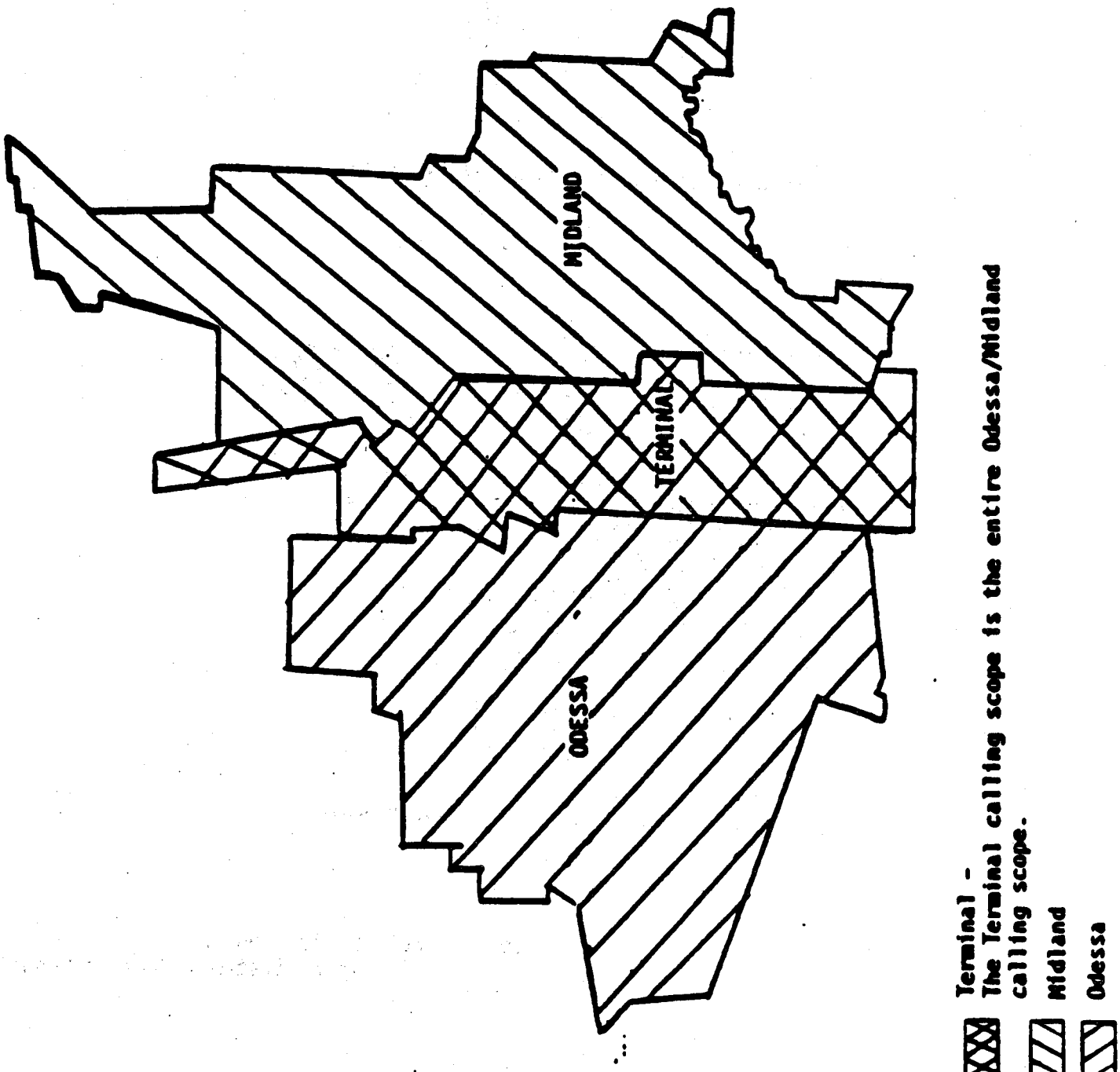


Sources: Bell Exhibit No. 19 (Springfield direct testimony)
Staff Exhibit No. 2 (Costello direct testimony)

Attachment 2

Southwestern Bell Telephone Company

Illustration of Odessa/Midland Local Calling Scopes



Sources: Bell Exhibit No. 19 (Springfield direct testimony)
Staff Exhibit No. 2 (Costello direct testimony)

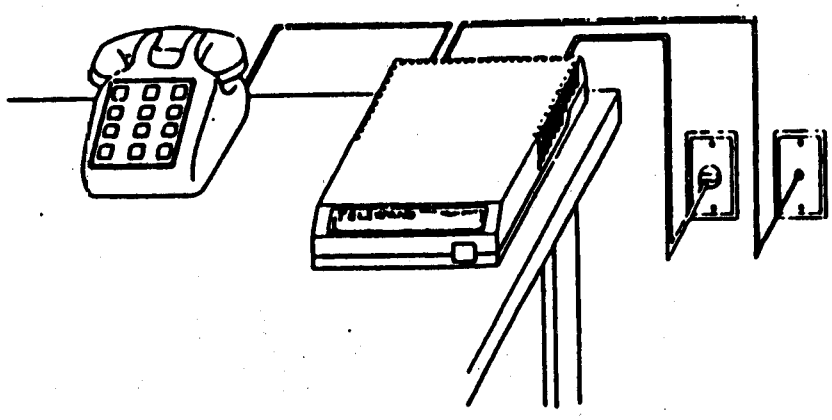


FIGURE 2. TYPICAL TELEXPAND INSTALLATION

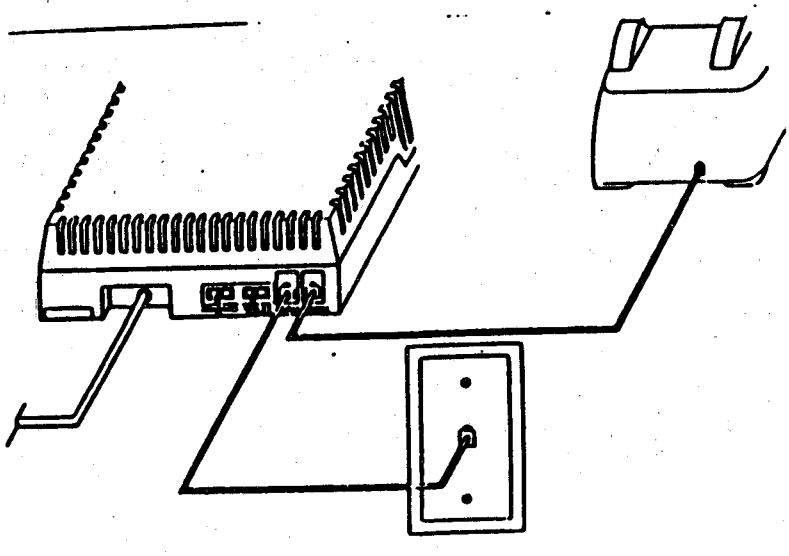
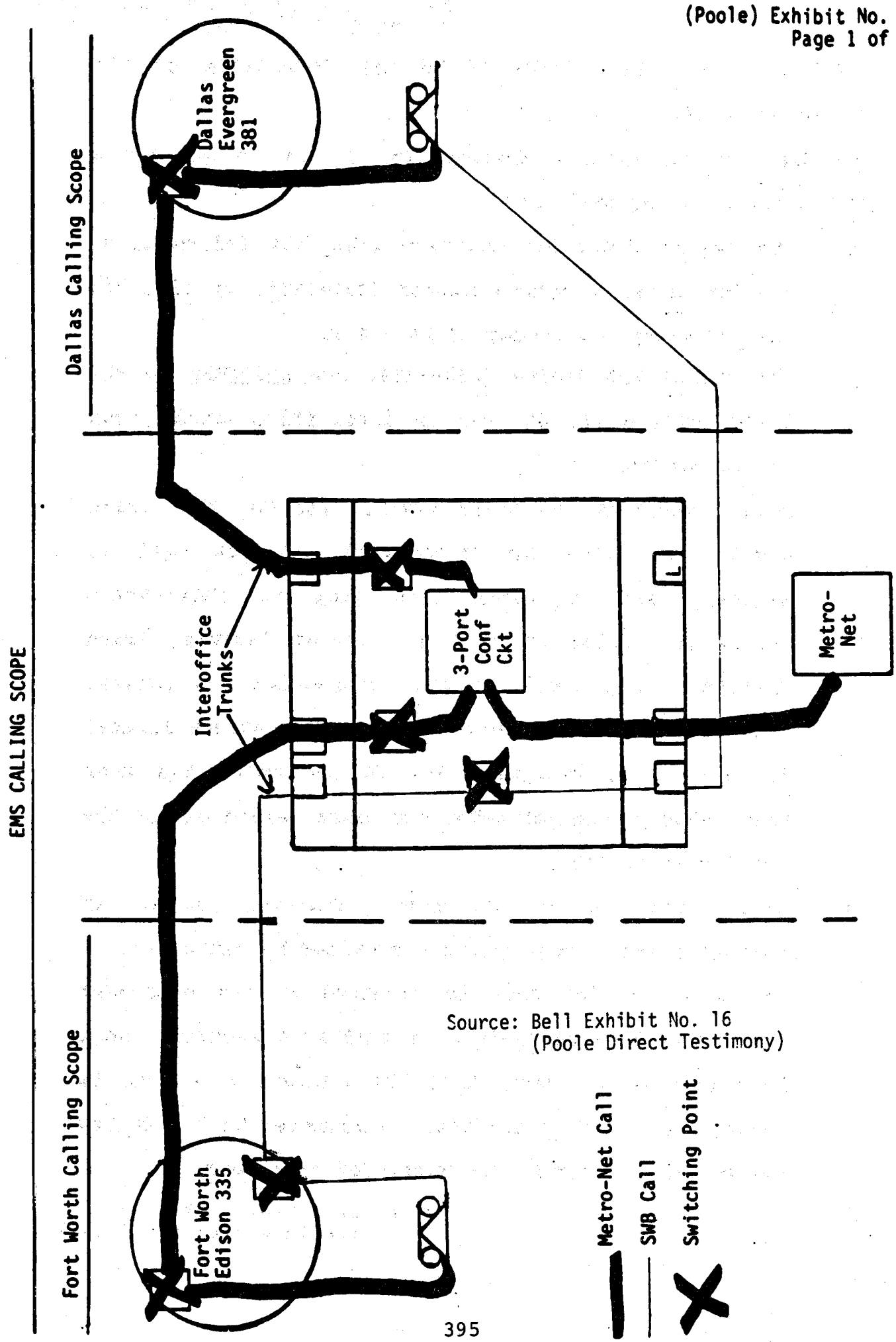


FIGURE 3. REAR VIEW OF TELEXPAND HOOK-UP

Source: Bell Exhibit No. 5
(Telexpand System 1 Owner's Manual)

Call Routing Diagram

(Poole) Exhibit No. 1
Page 1 of 1



Source: Bell Exhibit No. 16
(Poole Direct Testimony)

List of Steps to Complete Metro-Net and Bell FSO Call

Q. **WHAT ARE THE STEPS INVOLVED IN THE COMPLETION OF THE METRO-NET CALL?**

A. **As depicted on (Poole) Exhibit No. 1, the steps for a Metro-Net outgoing call are:**

1. **The Dallas Metro-Net customer uses his Dallas local calling scope telephone number (381-1234) to dial his own EMS telephone number of 263-1234.**
2. **The dialed EMS digits (263-1234) are SWITCHED to the Grand Prairie 263 CO over an interoffice trunk group for completion.**
3. **Upon receipt at the Grand Prairie 263 CO, the dialed digits (263-1234) are recognized and the call is SWITCHED over a local line loop to Metro-Net's equipment located at 3007 S. Carrier Parkway, Grand Prairie. An established call connection now exists, which was originated by the Metro-net customer located in the Dallas Evergreen 381 CO and which has been terminated to the Metro-Net equipment served out of the Grand Prairie 263 CO.**
4. **Next, the Dallas Metro-Net customer dials an authorization code previously provided by Metro-Net.**
5. **The authorization code is received by the Metro-Net equipment in Grand Prairie, and after a security check by Metro-Net to insure that the authorization code is valid, an authorization tone is returned to the Dallas Metro-Net customer by the Metro-Net equipment.**

Source: Bell Exhibit No. 16
(Poole direct testimony)

6. The Dallas Metro-Net customer now dials the Fort Worth telephone number. In this example, the dialed telephone number is 335-1234 (Fort Worth Edison 335 CO).

7. The dialed digits (335-1234) are received at the Metro-Net equipment and temporarily stored.

8. The Metro-Net equipment now provides a switch hook flash.[1]

9. This flash is detected in the Grand Prairie 263 CO as a request to establish a Three Way Call, which requires the activation of a 3-Port Conference Circuit. The Grand Prairie 263 CO now provides dial tone to the Metro-Net equipment, indicating that it is ready to receive additional dialed digits.

10. The Metro-Net equipment then sends the previously stored digits (335-1234) to the Grand Prairie 263 CO.

11. The Grand Prairie 263 CO recognizes the dialed digits (335-1234) as a Fort Worth Edison 335 telephone number and SWITCHES the call to Fort Worth Edison over an interoffice trunk group.

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[1] A switch hook flash simulates the momentary depressing and release of the switch hook on a telephone.

12. The Fort Worth Edison CO 335 receives the dialed digits (335-1234) and SWITCHES the call to the called party's premises. There are now, for all intents and purposes, two separate calls established. The first call is between the Dallas Metro-Net customer served by the Dallas Evergreen 381 CO and the Metro-Net equipment served by the Grand Prairie 263 CO. The second call is between the Metro-Net equipment and the called party served by the Fort Worth Edison 335 CO.

13. The Metro-Net equipment now provides a second switch hook flash. This flash is detected in the Grand Prairie 263 CO and the three-way call is established. The Metro-Net call has now been completed, establishing connections between 1) the Dallas Metro-Net customer served by the Dallas Evergreen 381 CO; 2) the Metro-Net equipment located in the Grand Prairie 263 CO; and 3) the called party served by the Fort Worth Edison 335 CO.

Q. HOW WOULD SWB COMPLETE THE SAME CALL FROM DALLAS EVERGREEN TO FORT WORTH EDISON?

A. SWB would complete the call either as a toll call or as an FSO call. My Exhibit No. 1 illustrates how SWB would complete the same call as an FSO call.

Q. WHAT ARE THE STEPS INVOLVED IN SWB'S COMPLETION OF THE CALL AS AN FSO CALL?

A. The steps involved in a SWB FSO call are:

1. **The Dallas SWB customer draws dial tone from the Grand Prairie 263 CO on the FSO Service Line, and dials the Fort Worth telephone number, 335-1234.**
2. **The dialed digits (335-1234) are SWITCHED by the Grand Prairie 263 CO to the Fort Worth Edison 335 CO over an interoffice trunk group.**
3. **The Fort Worth Edison CO receives the dialed digits and SWITCHES the call to the called party served by the Fort Worth Edison CO.**

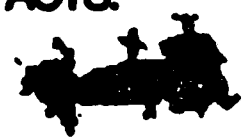
ADVERTISEMENT PROVIDED BY METRO-NET
IN RESPONSE TO SOUTHWESTERN BELL'S
FIRST REQUEST FOR INFORMATION NO. 30

IF YOU DON'T NEED OR USE METRO TELEPHONE SERVICE DON'T READ THIS AD

IF YOUR BUSINESS USES OR NEEDS
METRO TELEPHONE SERVICE YOU SHOULD KNOW:

- FACT: Metro Lines produce revenues
- FACT: Metro Lines save LD calls to Ft. Worth
- FACT: Metro Lines encourage Ft. Worth/Mid Cities customers to call
- FACT: If you pay more than $160/mo. for those facts —

Metro Net can save you money
and give you MORE FACTS.



Call Today For Free Analysis
Metro (Naturally) 263-9900

Source: Bell Exhibit No. 19
(Springfield direct testimony)

ADVERTISEMENT PROVIDED BY METRO-NET
IN RESPONSE TO SOUTHWESTERN BELL'S
FIRST REQUEST FOR INFORMATION NO. 30

DALLAS: WE THINK YOU HAVE ONE MORE CHOICE TO MAKE

You've selected your equipment!
You've chosen your long distance!
But have you considered your Metro Service?

We have, and we think you are paying too much. We also don't think you get enough flexibility of service for the rate you pay. We know how to correct this without changing your telephone number or the way you use it.
You can choose to save up to 60% and have more powerful utilization. We think you should have this choice. It's that simple. We think you should call us.

METRO 263-9900

Source: Bell Exhibit No. 19
(Springfield direct testimony)

ADVERTISEMENT PROVIDED BY PLEX-NET
IN RESPONSE TO SOUTHWESTERN BELL'S
FIRST REQUEST FOR INFORMATION NO. 34

Source: Bell Exhibit No. 19
(Springfield direct testimony)

NEWS MEDIA REPORT

Midland TX. Reporter Telegram 20 2-16-86

ATTENTION
BUSINESS MEN AND WOMEN OF MIDLAND AND ODESSA

Why pay those extravagant monthly telephone bills for having Terminal Texas 561-xxxx and 563-xxxx telephone numbers in your Midland and Odessa offices?

There is a better way and, most importantly, much less expensive way to accomplish the conveniences you are seeking for your business. Let's reduce your expenses now!

P.S. The pending Southwestern Bell Telephone Company requested rate increases before the Texas Public Utilities Commission provides for significant increases in private line, foreign exchange services.

Call today for more detailed information and demonstration of our services.

PLEX-NET, INC.

699-7203 or 561-8608

Source: Bell Exhibit No. 12

DOCKET NO. 7438

COMPLAINT OF METRO-NET, INC. AGAINST / PUBLIC UTILITY COMMISSION
SOUTHWESTERN BELL TELEPHONE COMPANY / OF TEXAS

ORDER

In public meeting in its offices in Austin, Texas, the Public Utility Commission of Texas finds that, after statutory notice was provided to the public and interested persons, the complaint in this case was processed by an examiner in accordance with Commission rules and applicable statutes. An Examiner's Report containing Findings of Fact and Conclusions of Law was submitted, which report, with the following modification, is hereby ADOPTED and made a part of this Order.

a. Finding of Fact Nos. 11 through 17 are DELETED as unnecessary to the result reached in this case.

The Commission further issues the following Order:

1. The request by Metro-Net, Inc., and Plex-Net, Inc. (the complainants) for an order prohibiting Southwestern Bell Telephone Company (Bell) from taking certain actions is hereby granted in part and denied in part, as reflected by the terms of this Order.

2. Based on the current language of the provisions of Bell's tariffs discussed in the Examiner's Report, Bell is hereby ORDERED not to refuse new, or to disconnect existing, service to the complainants' customers at the complainants' addresses, or to impose access charges in connection with the complainants' operations, except for reasons not contrary to the conclusions of law adopted herein.

3. This Order in no way limits the ability of any interested person to propose, or of the Commission to approve, amendments to Bell's tariffs intended to address problems suggested by the record in this case, the applicability of any such tariff amendments to the complainants' operations, or the evidence which may be presented in any proceeding to consider such proposed tariff amendments.

4. 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 20th day of May, 1988.

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

APPLICATION OF FORT BEND TELEPHONE COMPANY, INC. FOR TARIFF REVISION FOR PRIVATE PAY TELEPHONE SERVICE	I I I I	DOCKET NO. 7989

June 30, 1988

Fort Bend Telephone Company, Inc., Docket No. 7989, Examiner's Report adopted as modified, June 30, 1988. Application for authority to make available private pay telephone service was granted. Published notice acted as a ceiling on rates.

[1] RATEMAKING - COST OF SERVICE
NOTICE - PUBLIC NOTICE

The maximum amount of any rate increase that may be granted to a utility is the amount stated in its public notice, even when there is unanimous agreement that the requested increase contained in the public notice will not fully cover the utility's cost of service.

[2] RATEMAKING - COST OF SERVICE
NOTICE - PUBLIC NOTICE

The maximum level of initial rates established for a new utility service will be limited to the amount set forth in the utility's public notice.

DOCKET NO. 7989

APPLICATION OF FORT BEND TELEPHONE COMPANY, INC. FOR TARIFF REVISION FOR PRIVATE PAY TELEPHONE SERVICE	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Procedural History

On February 12, 1988, Fort Bend Telephone Company, Inc. (Fort Bend or the Company) filed an application to make private pay telephone service available beginning March 18, 1988. Private pay telephone service represents a new service offering for Fort Bend. The Commission's jurisdiction in this docket arises under Section 18(b) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988). By order of March 4, 1988, the examiner suspended implementation of the proposed tariff for 150 days ending August 15, 1988, or by superseding order of the Commission, and required Fort Bend to publish notice of the proposed offering for four weeks in each county containing territory affected by the application. The examiner also established a deadline for staff to file recommendations and provided that the case would be handled administratively, without a hearing, unless a hearing was requested by a party or by the Commission's General Counsel.

In February and March of 1988, Fort Bend completed four weeks of publication of notice in the following newspapers: "The Gulf Coast Tribune", which is of general circulation in the Counties of Fort Bend and Brazoria; "The Times", which is of general circulation in the Counties of Harris, Fort Bend and Waller; and "The Herald-Coaster", which is published at City of Rosenberg in the County of Fort Bend. Fort Bend Telephone Company, Inc. serves in the Counties of Fort Bend, Harris, Waller, and Brazoria. In response to the published notice, the Commission has received no protests or motions to intervene.

On May 4, 1988, the Commission's General Counsel filed a brief memorandum recommending approval of the application with the modifications proposed by staff, together with the staff rate analyst's conclusions as to the

reasonableness of the rates and the consistency of the methodology used to develop them with that used by the Commission in previous dockets involving private pay telephone service.

Fort Bend has acquiesced in all of the changes proposed by staff, and no one has requested a hearing in this docket.

II. Discussion

A. Published Notice as a Ceiling on Rates

[1] Fort Bend originally proposed to provide private pay telephone service for a monthly access charge of $32.40 plus $3.00 per month for optional billed number screening. The Company published these rates when it gave the newspaper notice described in the procedural section of this report. Staff's recommendation, in which the Company has acquiesced, is that the monthly access charge be set slightly higher at $32.50 per month. While it is the staff's conclusion that a monthly access charge of $32.50 is reasonable and results from the proper application of a ratesetting methodology used by this Commission in previous dockets involving private pay telephone service tariffs, the circumstance that the recommended rate is higher than the published rate arguably raises an issue that the Commission has also dealt with before. In Application of ABC Wells, Inc. for a Rate Increase within Brazoria County, Docket No. 5287, 9 P.U.C. BULL. 296 (January 25, 1984) the Commission held that the amount of any rate increase that may be granted to a utility is limited by the amount of its published request even where all parties are agreed that the published request will not fully cover the utility's cost of service. See also, Application of Gulf States Utilities Company for a Rate Increase, Docket No. 5560, 10 P.U.C. BULL. 405 (July 13, 1984); Application of Vacation Village Sewer Company for a Tariff Change, Docket No. 6149, 11 P.U.C. BULL. 363 (October 1, 1985).

Notice in ABC Wells, Inc., supra, was, however, a matter of statutory requirement under Section 43(a), and the case clearly dealt with a utility's request for a change in rates for all existing service rather than the establishment of an initial rate for a new service. It has never been established that, in the case of a new service, the utility's ratesetting request is covered by the provisions of Section 43 of the PURA which apply to a utility making "changes in its rates". If the initial establishment of a rate for a new service is not covered by Section 43, it would be possible to argue that Fort Bend's published notice does not act as a ceiling on rates because publication of the proposed rates was not a statutory requirement. The Commission could approve whatever initial rate Fort Bend now chooses to tariff, subject of course to the Commission's power to review Fort Bend's existing rates under Section 42 of the PURA.

If, on the other hand, the language of Section 43, where it speaks in terms of a utility's "making changes in its rates", is broad enough to encompass change in the form of an addition to a tariff of a rate for a new service, the Commission should arguably observe consistency with the body of cases holding that the published notice imposes a ceiling on that rate -- unless it now wishes to depart from that policy. In the event that it wishes to observe the existing policy and is persuaded that new service offerings are covered under Section 43, Fort Bend should be limited to a rate of $32.40 for the monthly access charge because that is the request it published.

B. Discussion of the Application and Examiner's Recommendation

Fort Bend's application consists of the applicable tariff sheets together with some prefiled testimony explaining the salient features of the tariff. The tariff sheets consist of a section setting forth the terms and conditions of service and a section setting forth the cost components of the proposed monthly access charge. The nature of the changes and additions recommended by the staff in the section on terms and conditions indicates that due care was taken to ensure that this tariff fully incorporates features designed for the protection of the public that have been litigated in previous dockets. See, for example, Application of San Marcos Telephone Company, Inc. for Private Pay Telephone Service, Docket No. 7180. Clearly, staff also scrutinized the cost

components and methodology relating to the development of the monthly access charge. (The optional billed number screening charge is simply based on a review of what other companies are charging for this service.) Since receiving staff's recommendations, Fort Bend has filed revised tariff sheets incorporating staff's changes. A copy of the proposed tariff sheets, as revised, is attached to this report as Exhibit A.

The examiner recommends that the Commission follow the precedent of Application of San Marcos Telephone Company, Inc., Docket No. 7180, finding that notice in this docket was not a matter of statutory requirement pursuant to Section 43(a) of the PURA and that, therefore, the published request does not impose a ceiling on the rate that may be established based on the staff's review. On this basis, the examiner would concur with the General Counsel and recommend approval of the application, as modified by staff recommendations, including a monthly access charge some ten cents higher than the published request. In passing, the examiner would note that while this ten-cent difference potentially raises some controversial regulatory issues, Fort Bend knows at this time of only one customer who is interested in providing private pay phone service in its service area. Thus, in monetary terms, this issue for this company in this docket constitutes a mere matter of nickels and dimes.

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 February 12, 1988, Fort Bend Telephone Company, Inc. (Fort Bend or the Company) filed an application to make private pay telephone service available beginning March 18, 1988.

2. Private pay telephone service represents a new service offering for Fort Bend.

3. In February and March of 1988, Fort Bend completed four weeks of

publication of notice in newspapers which are of general circulation in the counties in which it serves.

4. In its published notice, Fort Bend stated that, with regard to the monthly access charge for private pay phone service, it was proposing a charge of $32.40 per month.

5. A monthly access charge for private pay telephone service of $32.50 per month is reasonable for this company and has been calculated on the basis of a methodology that is consistent with that which has been implemented in similar dockets before this Commission.

6. An optional billed number screening charge of $3.00 per month is reasonable for this company based on a review of similar charges being imposed by other companies for this service.

7. Fort Bend's proposed tariff as revised by staff's recommendations contain reasonable provisions for the protection of the public.

B. Conclusions of Law

1. Fort Bend is a public utility as defined in Section 3(c)(2) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1988).

2. The Commission has jurisdiction over this matter pursuant to Section 18(b) of the PURA.

3. Section 43 of the PURA is not applicable in this proceeding because the proposed tariff represents a new service offering rather than a change in rates. Application of San Marcos Telephone Company, Inc. for Private Pay Telephone Service, Docket No. 7180, ____P.U.C. BULL. ___ (July 31, 1987).

4. Because this proceeding is a ratesetting proceeding that is not covered by Section 43(a) of the PURA, cases before this Commission holding that the published notice imposes a ceiling on rates are not applicable to this case; the Commission can approve the monthly access charge that is slightly higher

than that which was published without overturning the precedent of those cases in which a Section 43(a) proceeding was involved.

Respectfully submitted,

Cornelia M. Adams

CORNELIA M. ADAMS
HEARINGS EXAMINER

APPROVED on this the 27th day of May 1988.

Phillip A. Holder

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

jb

PAY TELEPHONE SERVICE

N

Private Pay Telephone Service

1. General

a. Private Pay Telephone Service is service furnished for connection with a customer-provided pay instrument. The customer-provided pay instrument shall be constructed, maintained and operated to work satisfactorily with facilities provided by the Company.

b. A maximum of one customer-provided pay instrument may be connected to any private pay access line.

c. Directory listings may be provided under the regulations of this tariff governing the furnishing of listings for business customers.

d. Service connection charges for business access line service call be applicable for Private Pay Telephone Service.

e. An instrument without dial and coin collecting device may be furnished on the same premises as the Private Pay Service. In order to protect the user's privacy, the additional instrument must be in view of the private pay telephone user.

f. Billed Number Screening will be provided, at the customer's option, at the rates shown in 4. following. The Company offers limited Billed Number Screening for calls that originate from the customer's private pay instruments. Calls accepted as collect and/or third number billed to the customer's private pay access line cannot be screened by the Telephone Company and will be billed the appropriate Long Distance Telecommunications charges.

g. The Telephone Company will not assure privacy of communications when customer-provided pay instruments are connected to the network.

h. Private Pay Telephone Service will not be provided in conjunction with foreign exchange service or rotary line service.

N

PAY TELEPHONE SERVICE

Private Pay Telephone Service (Continued)

2. Responsibility of the Customer

a. The customer shall be responsible for the installation, maintenance and operation of the customer-provided pay instrument used in connection with Private Pay Telephone Service.

b. The customer shall be responsible for the payment of all local and toll message charges including long distance directory assistance calls, third number billed, or accepted as collect by this type of service.

c. Customer-provided pay instruments used in connection with Private Pay Telephone Service must be registered in compliance with the Federal Communications (FCC) Part 68 Registration Program or connected behind an FCC-registered coupler.

d. Customer-provided pay instruments must have the following operational characteristics:

i. Must be able to access a Telephone Company-provided operator and all other operator services at no charge and without a coin.

ii. Must be able to access a Telephone Company-provided Directory Assistance.

iii. Must be able to access 911 Emergency Service, where available, at no charge and without using a coin. If 911 Emergency Service is not available, the customer must display on or in the immediate vicinity of the customer pay telephone a list of all telephone numbers of agencies providing emergency services to the premises of the customer provided pay telephone, and allow access without charge and without using a coin.

iv. Must allow the completion of local and toll calls.

v. Must comply with all applicable Federal, State and Local laws and regulations concerning the use of these telephones by disabled persons and the hearing impaired.

N

N

PAY TELEPHONE SERVICE

N

Private Pay Telephone Service (Continued)

2. Responsibility of the Customer (Continued)

d. Customer-provided pay instruments must have the following operational characteristics: (Continued)

vi. Must provide instructions (in close proximity to the instrument) for use including specific instructions for the above requirements, refunds and complaints, long distance access instruction, and must prominently display notice (in close proximity to the instrument) that the customer-provided pay instrument is not a Telephone Company instrument.

vii. Must provide and prominently display (in close proximity to the instrument) a notice that detailed toll billing records showing date and time of all calls, together with the called numbers, will be provided to the Private Pay Telephone Service customer, who shall be identified by name in said notice.

viii. The Private Pay Service customer shall sign an agreement to indemnify and hold the Company harmless from any and all loss, damage and expense occasioned by or arising out of claims for injury to persons or damage to property caused by or contributed to by the provision of detailed toll billing records to the Private Pay Telephone Service customer by the Telephone Company, including but not limited to, any disclosure of said detailed toll billing records by the Private Pay Service customer.

ix. A local telephone directory shall be placed in close proximity to each customer-provided pay telephone.

x. A Private Pay Telephone customer may not charge more for a local call or a directory assistance call than the rate charged by the Telephone Company.

N

PAY TELEPHONE SERVICE

Private Pay Telephone Service (Continued) N

3. Violation of Tariff

a. Where any customer-provided pay telephone is in violation of this tariff, the Telephone Company will promptly notify the customer of the violation and will take immediate action, including the disconnection of service, as is necessary for the protection of the telecommunications network and Telephone Company's employees.

b. The customer shall discontinue use of the customer-provided pay telephone or correct the violation and notify the Company that the violation has been corrected in writing within five (5) days after receipt of such notice.

c. Failure of the customer to discontinue such use or to correct the violation will result in the suspension of the customer's service until such time as the customer complies with the provision of this tariff.

4. Rates

	Monthly Rate	NRC
a. Private Pay Telephone Service Access Line	$32.50	(1)
b. Billed Number Screening	$ 3.00	(1)

(1) Service Connection Charges for business access lines will be applicable. N

FORT BEND TELEPHONE COMPANY, INC.

PRIVATE PAY TELEPHONE SERVICE

CALCULATION OF COST AND RATE FOR ACCESS LINE

	INPUT	DATA
LN1	Monthly Unseparated NTS Revenue Requirement	$30.59
LN2	Interstate Frozen Subscriber Plant Factor	0.272589
LN3	Intrastate Subscriber Plant Factor	0.330293
LN4	Private Pay Access Line Monthly Rate LN1-(LN1*LN2)-(LN1*LN3)	$12.15

CALCULATION OF COST AND RATE FOR USAGE ELEMENT

INPUT	DATA
LN1 Exchange Traffic Sensitive Annual Revenue Requirement	$1,823,085
LN2 Exchange Messages	41,583,200
LN3 Rate Per Message (LN1/LN2)	$0.0438
LN4 Average Number of Messages from Company-owned coin instruments	397
LN5 Traffic Sensitive Rate (LN3*LN4)	$17.39

Surrogate Private Pay Rate	
Nontraffic Sensitive Rate	$12.15
Traffic Sensitive Rate	$17.39
Total	$29.54
Contribution Level	1.10
Proposed Rate	$32.50

DOCKET NO. 7989

APPLICATION OF FORT BEND TELEPHONE COMPANY, INC. FOR TARIFF REVISION FOR PRIVATE PAY TELEPHONE SERVICE	§ § §	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 rules and statutes by an examiner who prepared and filed a report containing Findings of Fact and Conclusions of Law. The Examiner's Report is ADOPTED with the following modifications:

[2] 1. Fort Bend Telephone Company, Inc. (Fort Bend) is hereby LIMITED in this case to a rate of $32.40 for the monthly access charge because that is the maximum request it published.

2. Finding of Fact No. 5 of the Examiner's Report is hereby MODIFIED and shall read as follows:

> 5. A monthly access charge for private pay telephone service of $32.40 per month is reasonable for this company and has been calculated on the basis of a methodology that is consistent with that which has been implemented in similar dockets before this Commission.

3. Finding of Fact No. 7 of the Examiner's Report is hereby MODIFIED and shall read as follows:

> 7. Fort Bend's proposed tariff as revised by the staff recommendations consistent with this Order contains reasonable provisions for the protection of the public.

4. Conclusion of Law No. 4 is hereby DELETED.

The Commission further issues the following Order:

1. Fort Bend's application for authority to make available private pay telephone service is hereby GRANTED to the extent reflected by the terms of this Order.

2. Within 20 days after the date of this Order, Fort Bend shall file with the Commission five copies of all pertinent tariff sheets revised to incorporate all the directives of this Order and shall serve one copy upon each party of record. No later than 10 days after the date of the tariff filing by Fort Bend, parties shall file any objections to the tariff proposal and the general counsel shall file the staff's comments recommending approval or rejection of the individual sheets of the tariff proposal. No later than 15 days after the date of the tariff filing by Fort Bend all parties and the general counsel shall file in writing any responses to the previously filed comments of other parties. The Hearings Division shall by letter approve, reject, or modify each tariff sheet, effective the date of the letter, based upon the materials submitted to the Commission under the procedure established herein. The tariff sheets shall be deemed approved and shall become effective upon expiration of 20 days after the date of filing, in the absence of written notification of approval, rejection, or modification by the Hearings Division. In the event that any sheets are rejected, Fort Bend shall file proposed revisions of those sheets in accordance with the Hearings Division letter within 10 days after that letter, with the review procedures set out above again to apply. Copies of all filing and of the Hearings Division letter(s) under this procedure shall be served on all parties of record and the general counsel.

3. This Order shall become effective upon consideration and approval by the Public Utility Commission of Texas at its final orders meeting in this proceeding.

4. 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 not expressly granted herein are DENIED.

SIGNED AT AUSTIN, TEXAS on this the 30th day of June 1988.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: _____
JO CAMPBELL

SIGNED: _____
MARTA GREYTOK

ATTEST:

_____
PHILLIP A. HOLDER
SECRETARY TO THE COMMISSION
jb

APPLICATION OF DICKENS ELECTRIC COOPERATIVE, INC. FOR AUTHORITY TO CHANGE RATES	I I I	DOCKET NO. 7556

December 18, 1987

Dickens Electric Cooperative, Inc., Docket No. 7556, amended Examiner's Report adopted, as modified, December 18, 1987.

A 7.0% rate of return on the cooperative's $16,154,711 invested capital granted.

[1] MISCELLANEOUS
ELECTRIC

A cooperative's unapplied advance payments fund (for debt service payments to the Rural Electrification Administration) may be considered in determining its cash position.

[2] MISCELLANEOUS
ELECTRIC

The rate of return granted to a cooperative may be based, in part, upon the assumption that the cooperative would begin applying its unapplied advance payments fund (for debt service payments to the Rural Electrification Administration) to the interest portion of its debt service payments.

DOCKET NO. 7556

APPLICATION OF DICKENS ELECTRIC COOPERATIVE, INC. FOR AUTHORITY TO CHANGE RATES	§	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Procedural History

On June 23, 1987, Dickens Electric Cooperative, Inc. (Dickens, DEC, or the cooperative) filed a statement of intent to increase its rates $1,395,775, or 13.78%, over test year revenues. The cooperative's service area does not include any incorporated municipalities. The cooperative used a test year of January 1, 1986 to December 31, 1986. After being docketed, the case was assigned to Administrative Law Judge (ALJ) K. Crandal McDougall.

Dickens published notice of the proposed rate increase once each week for four (4) consecutive weeks in a newspaper of general circulation in each county containing service territory affected by the proposed change.

By order entered June 30, 1987, implementation of the rates was suspended for 150 days beyond the otherwise effective date of July 28, 1987 to December 25, 1987, pursuant to Section 43(d) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987). A prehearing conference was held on July 15, 1987, and appearances were made by representatives of the cooperative and the Commission staff. A prehearing schedule and hearing date were established.

On July 22, 1987, Texas Industrial Energy Consumers (TIEC) requested leave to intervene, stating as a show of justiciable interest that TIEC's members are customers of Dickens and would be affected by the proposed rate change. On July 27, 1987, the ALJ granted intervention to TIEC.

On September 1, 1987, TIEC filed a motion requesting a three (3) week extension of the procedural schedule. Based upon the pleadings of TIEC and the cooperative, the ALJ granted a one (1) week extension of all procedural dates.

On September 21, 1987, the ALJ denied a Dickens motion to compel answers to certain of its Requests for Information (RFI) served on TIEC. The RFIs in question inquired into the authority of Texaco, Inc., Amoco Production Company, TIEC, and TIEC's law firm to intervene. The ALJ ruled that since there was no dispute that Texaco and Amoco are customers of Dickens, an inquiry into whether the oil companies and TIEC were operating ultra vires was irrelevant.

On October 1, 1987, this docket was reassigned to the undersigned hearings examiner. The examiner presided over the hearing on the merits and has read the record in this case and serves as the lawful replacement for ALJ McDougall under Section 15 of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1987). The hearing on the merits was convened, as earlier scheduled, on October 5, 1987, but then immediately recessed until 9:00 a.m., October 7, 1987. The hearing lasted through October 8, 1987. Appearances at the hearing were entered by Campbell McGinnis representing DEC, Alton J. Hall, Jr. representing TIEC, and George Fleming representing the Commission staff. The parties attempted to reach stipulation on some issues, but were unable to do so and the case was fully litigated. All parties filed testimony and participated in the hearing.

The parties filed initial briefs on October 22, 1987 and reply briefs on November 2, 1987.

II. Jurisdiction

Dickens distributes, sells and furnishes electricity and as such is a public utility as the term is defined in Section 3(c)(1) of PURA. The Commission has jurisdiction over this proceeding pursuant to Sections 16(a), 17(e), 37 and 43(a) of PURA.

III. Description of Company

Dickens is a distribution cooperative providing electric utility service to approximately 5300 customers in rural portions of Dickens, Crosby, Garza,

Motley, King, Kent, and Stonewall counties in Texas. DEC's existing system includes 2500 miles of distribution lines, operated at 7.2/12.5 kV, and 56 miles of 69kV transmission line. Eight substations provide distribution power to DEC customers. DEC currently leases these facilities to Brazos Electric Cooperative, Inc., its wholesale supplier. DEC's last rate increase became effective on June 30, 1982.

IV. Quality of Service

Mr. Mel Eckhoff, utility specialist for the Commission, reviewed the cooperative's quality of service and found it adequate. Although the average annual outage for DEC for the period 1981-1985 is higher than the outage average for most cooperatives in the state, Mr. Eckhoff agreed with DEC that this fact is probably due to extreme storms and in part to its former power supplier (WTU), which Dickens replaced on April 1, 1987. Mr. Eckhoff expects the outage times to decline in the future if the new power supplier completes a new transmission line to serve Dickens, as expected (Staff Exhibit no. 7, Eckhoff, p. 4.)

Concerning Dickens' quality of service in customer-service related areas, staff consumer analyst Mr. Paul Irish testified that the cooperative's overall performance was adequate. During the test year, only one customer complaint against DEC was received by the Consumer Affairs Division. DEC's response was considered adequate and no fault on the part of DEC was found. (Staff Exhibit No. 6, Irish, p. 7.) DEC itself received 29 complaints during the test year, mostly in regard to billing. These were resolved without Commission involvement. (Staff Exhibit No. 6, Irish, pp. 7-8.)

Mr. Irish reviewed DEC tariffs which include its service rules and regulations. He recommended the following changes to DEC tariffs:

[NOTE: Mr. Irish's proposed additions are underlined and proposed deletions are bracketed.]

1) Section No. II, Sheet No. 24, Item 204.6, Deferred Payment Plan Fee:

"A deferred payment plan may include a 5.0% penalty for late payment but shall not include a finance charge. The five percent (5%) penalty may be charged for each late payment under a deferred payment agreement after the agreement is initiated."

2) Section No. III, Sheet No. 40, Item 324.3, Estimated Billing, Line 5:

"Usage as well as Demand may be estimated by the cooperative where there is good reason for doing so, such as inclement weather, personnel shortage, etc. provided an actual meter reading is taken every [six (6)] three (3) months.

3) Section No. III, Sheet No. 75, Item 351.2C(2), Disconnection After Reasonable Notice, Line 5:

"If mailed, the cut-of day may not fall on a holiday or weekend, but shall fall on the next working day after the [seventh] tenth day."

(Staff Exhibit No. 6, Irish, pp. 9-10.)

The changes in tariff language proposed by Mr. Irish were designed to bring the DEC tariffs in compliance with P.U.C. Substantive Rules. His recommendations were not challenged by DEC. The examiner concurs with the findings of Messrs. Eckhoff and Irish and adopts the recommendations of Mr. Irish for tariff revisions.

V. Invested Capital

Under Section 41(a) of PURA, rates shall be based upon the original cost of property used by and useful to a public utility in providing service. The components of invested capital are defined in P.U.C. SUBST. R. 23.21(c)(2).

Staff accountant Mr. Blake Herndon did not recommend any changes to DEC's invested capital figures other than for working cash allowance. Working cash allowance is in this instance a function of adjusted operation and maintenance

expense. Applying an operation and maintenance factor of .125, as permitted by P.U.C. SUBST. R. 23.21(c)(2)(B)(iii) to the adjusted operation and maintenance expense, which is discussed later in this report, gives a figure of $141,504 for working cash allowance.

Total invested capital equals $16,154,713, as follows:

Plant in Service	$19,888,939
Accumulated Depreciation	(4,151,687)
Net Plant in Service	$15,737,252
Construction Work in Progress	-0-
Working Cash Allowance	141,504
Materials and Supplies	189,663
Prepayments	86,322
LESS:	
Customer Deposits	-0-
Other Cost Free Capital	-0-
TOTAL INVESTED CAPITAL	$16,154,714

VI. Rate of Return

A. Financial Characteristics of Cooperatives in General and Definitions of Financial Terms

A cooperative's capital structure includes debt and equity. The primary source of debt capital for cooperatives historically has been long-term mortgage loans from the Rural Electrification Administration (REA), which administers federal loan funds. More recently, federal policy has favored inducing cooperatives to obtain financing from other sources by reducing the amount of REA debt capital available to less than a cooperative's total financing requirement and increasing the interest rate on REA loans from two to five percent. The Cooperative Finance Corporation (CFC) was formed under the auspices of REA in order to satisfy those financing needs of cooperatives which

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are not met by REA. CFC is a finance cooperative composed of member electric cooperatives. It obtains its funds by selling bonds at the going rate in normal commercial credit markets. These bonds are secured by mortgage notes issued to CFC by its members in exchange for loan funds advanced to members by CFC. Cooperatives are increasingly reliant on CFC funds.

A cooperative's return must cover its interest cost on outstanding debt, as well as on loan funds advanced during the period rates are in effect. In addition, it must allow the cooperative to satisfy financial performance standards defined in its debt obligations and mortgage indentures. The following such standards have been established:

	REA Default Levels	CFC Recommended Levels
Times Interest Earned Ratio (TIER)	1.5	2.0 - 3.0
Debt Service Coverage Ratio (DSC)	1.25	

These standards are calculated as follows:

$$\text{TIER} = \frac{\text{Patronage Capital Margins + Interest Expense}}{\text{Interest Expense}}$$

$$\text{DSC} = \frac{\text{Patronage Capital Margins + Interest Expense + Depreciation + Amortization Expense}}{\text{Sum of All Payments of Principal and Interest Made Annually}}$$

A cooperative's equity capital (known as patronage capital) represents the sum of its members' net operating margins. Such margins are the portion of rates which exceed the cost of providing electric service. Each cooperative begins operation with 100 percent debt. As the cooperative accumulates margins, it builds to the desired equity ratio. The REA recommends a minimum equity to assets ratio of 40 percent, and the CFC recommends an equity level of greater than 30 percent. The REA and CFC monitor these ratios closely to determine a cooperative's credit worthiness and ability to service debt.

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At the close of each year, total margins accumulated by a cooperative are allocated to each member based on that member's actual contribution to margins during the year. Margins so allocated are known as capital credits. The cooperative concept contemplates rotation of equity by retiring old capital credits as new ones accumulate. Such rotation is intended to ensure that each member bears an equal proportion of the equity capital burden over time. A cooperative's tax-exempt status is based on this concept. However, a cooperative can distribute such credits to its members only when its realized net margins exceed its equity maintenance and building requirements. With certain exceptions, the REA and CFC mortgages prohibit distributions of capital credits unless the cooperative has a 40 percent equity level.

Finally, because both TIER and DSC are calculated in part based on capital margins, projected income and expense levels can become quite important when making projections as to future TIER and DSC levels. Thus, not only projected capital expenditures (with the concomitant principal and interest payments) but also operating expenses are important factors.

B. Dickens' Financial Condition

1. TIER and DSC levels.

Between 1981 and 1985, Dickens' net TIER and DSC ratios remained below 2.0, which is below the CFC recommended levels and below the state and national medians for electric distribution cooperatives. [See Attachment No. 1 for a comparison of Dickens' TIER and DSC ratios with the medians.] In 1985, DEC's net TIER fell below the REA default level of 1.5. Since the REA determines a borrower's status by the two highest TIER values in a three year period, DEC avoided default. (Staff Exhibit No. 9, Grant, p. 5.)

During the test year 1986, Dickens had net TIER and DSC ratios of 2.52 and 2.03, respectively. The increase in these ratios, however, was due to the inclusion, in net margins, of non-cash Generation and Transmission Capital Credits (G&T credits) received during the test year from DEC's new power

supplier, Brazos. (Staff Exhibit No. 9, Grant, p. 5.) Dickens will not receive cash for these G&T capital credits until 1989. Furthermore, Dickens expects its G&T capital credits to be substantially reduced in 1989 and future years. (Coop Exhibit No. 2, Reece, p. 20.) While net ratios (including G&T capital credits) are appropriate for evaluation in terms of the REA default level and the CFC recommended levels, modified TIER and DSC ratios, calculated without capital credits, give better indications of Dickens' cash coverages for interest and debt service. Dickens' modified TIER and DSC ratios for 1986 were 1.12 and 1.30, respectively. These levels are significantly below the U.S. and Texas medians as shown in Attachment No. 1 to this report and reflect a significant drop in operating margins for DEC since 1984. (Also reflected in Attachment No. 1.)

2. Equity level.

Dickens' equity level at the end of the test year was 23.44% of total capitalization. This is considerably below the REA and CFC recommended levels, as well as the U.S. and state median levels of 38.98% and 33.83%, respectively. If G&T capital credits are excluded from the test year calculation of equity/capitalization, the percentage is only 20.7%. (Coop Exhibit No. 2, Reece, p. 18.) Dickens' equity level fell by 7.9% between 1980 and 1986, again, due to the decline in operating margins. (Staff Exhibit No. 9, Grant, p. 5.)

[1]
3. Cash position.

Despite Dickens' low TIER, DSC, and equity ratio, staff financial analyst Kentton Grant found that the cooperative's cash position was "more than adequate." (Staff Exhibit No. 9, Grant, p. 6.) Mr. Grant made this conclusion based on the existence of a fund maintained by Dickens with the REA for advance payment on outstanding debt. The fund is referred to as "unapplied advance payments" because the cooperative may use the money to pay principal or interest on its existing REA debt, or in certain instances, make prepayments on future REA notes; but unless the cooperative does so use the money it remains in the fund, unapplied, and grows at a rate of 5% annually. During 1984 and 1985, DEC

made payments to REA of approximately $400,000 each year in excess of its normal quarterly debt service payments. These excess payments went into the unapplied advance payment fund. DEC has not applied the fund to its debt service payments, but instead uses general funds to make those payments. DEC's balance in the unapplied fund was $911,298 as of June 30, 1987. (Staff Exhibit No. 9, Grant, p. 6.) By comparison, DEC's general fund balance as of that date was $1,039,941 (or 5.03% of Total Utility Plant). Mr. Grant points out that DEC could free up a great deal of its general funds by making at least the interest portion of its debt service payments from the unapplied fund.

C. Financial Objectives of Dickens

Dickens has identified four financial objectives:

1. To gradually achieve an equity ratio of 35% to 40%.

2. To continue refunding patronage capital credits on a 17-year cycle of rotation.

3. To reach and maintain an operating TIER of at least 2.5. (Coop Exhibit No. 2, Stover, p.5.)

4. To maintain a general funds level of 8% of the total utility plant (TUP). (Coop Exhibit No. 2, Reece, p. 29.)

Staff witness Grant evaluated these objectives and found the first two reasonable. Mr. Grant found that the objective for an operating TIER of 2.5 was high when compared to other electric distribution cooperatives. He did, however, identify the modified TIER projected for 1989 in DEC's RFP, 2.34, as reasonable.

Mr. Grant pointed out that the 1986 median value among Texas cooperatives for general funds was 5.48% and that Dickens has historically maintained an average general funds level of only 5.4% of TUP. Furthermore, because Dickens

could free up its general funds by utilizing its unapplied advance payments for debt service payments, Mr. Grant believes an 8.0% general funds level is too high. (Staff Exhibit No. 9, Grant, p. 11.) In its rebuttal testimony, DEC witness Carl Stover agreed that a lower general funds level as recommended by Mr. Grant of 5.5% of TUP is appropriate if an 8% rate of return (ROR) is granted and the unapplied fund is allowed to grow. (Coop Exhibit No. 8, Stover, p. 7.)

Mr. Grant testified that while a 17-year patronage capital rotation cycle was reasonable, he did not think DEC would be able to make the retirements it projected in its rate filing package (RFP) for 1988 and 1989 because of the REA's restriction of the dollar amount of capital credit rotation to 25% of the previous year's net margin if a cooperative does not have a 40% equity/assets ratio. At the hearing, however, Mr. Grant acknowledged that DEC's 1988 and 1989 projections for patronage capital rotation could be met even if the REA did impose the 25% restriction. By its projections, DEC will continue with its 17-year cycle of retirements. In 1987, $30,605 has actually been retired. Projections for 1988 and 1989 are to retire $198,666 and $169,164, respectively.

D. Staff's Recommendation for Return

Staff financial analyst Grant testified as to the proper ROR on invested capital for DEC. Mr. Grant explained that he analyzed DEC's proposed ROR in light of the cooperative's expected rate of growth and borrowing requirements through 1989. He paid special attention to DEC's TIER, DSC, and equity ratio.

Mr. Grant utilized the Staff's Cooperative Financial Planning Model to generate pro forma financial statements for Dickens for the three years following the test year (1987-1989). Using historical data from the test year and the first six months of 1987, he incorporated the following set of assumptions into the model:

1. DEC will implement new rates as of January 1, 1988. Its financial condition at that time is estimated by annualizing the ROR actually earned on the staff recommended rate base through

June 30, 1987, and projecting the general funds level existing on June 30, 1987, 5.034% of TUP.

2. The interest rate on new loans from CFC is assumed to be the current CFC long-term fixed interest rate of 8.75%.

3. DEC's growth in net plant will be 7.15%, 6.38%, and 5.72%, respectively, in 1987, 1988 and 1989, as estimated by DEC in its RFP. This is consistent with the construction work plan approved by REA for 1987-88.

4. Plant retirements will be $298,149, $332,570 and $210,753 in 1987, 1988 and 1989, respectively, as given to the staff by DEC in response to RFIs.

5. DEC will continue at a 90/10 borrowing status for REA/CFC loans.

6. While using the actual capital credit retirements of $30,605 made in 1987, it is assumed that future retirements will be restricted to 25% of the previous year's net margin excluding G&T and other capital credits.

7. The general funds level will be 5.5% of TUP at the end of 1988 and 1989.

8. G&T capital credits will be $1,038,000 in 1987, $1,244,000 in 1988, and $199,000 in 1989, as was projected by the cooperative. "Other" capital credits are estimated at 10% of the CFC interest expense projected for any given year (as in the RFP).

9. Non-operating revenues will vary as a percentage of the average general funds balance. A weighted interest rate of 6.42% was used to calculate this interest income.

10. A rate base value of $10 greater than the staff recommendation was used.

(Staff Exhibit No. 9, Grant, pp. 12-14.)

[2] Mr. Grant applied two sets of sensitivity analyses to the set of assumptions outlined above. The first assumed that the balance of unapplied advance payments would not be used for debt service payments, but rather allowed to continue growing at an annual rate of 5%, compounded quarterly. The second set of sensitivity analyses assumed that the unapplied fund would be used to pay all of the interest payments on DEC's 5% debt. In his testimony, Mr. Grant showed the results of applying a range of RORs with the second set of analyses, but showed only the application of an 8% ROR for the first set.

Applying an 8% ROR, as was requested by Dickens, to the first set of analyses (i.e., not utilizing the unapplied fund for debt service payments), performed with the basic assumptions listed above, yielded the following projections for financial indicators: 1) 1989 TIER and DSC ratios of 2.50 and 2.18, respectively, which is comparable to 1986 state and national median values; 2) 1989 modified TIER and DSC ratios (excluding capital credits) of 2.17 and 1.98, respectively, also comparable to 1986 median values; and 3) an equity ratio of 33.02% which is above the CFC recommended minimum level (the REA recommends 40%) and only slightly below the 1986 median values. (Staff Exhibit No. 9, Grant, p. 15.) [See Attachment No. 2 to this report for this staff schedule.] By the rebuttal testimony of one of its witnesses, DEC recommended adoption of this schedule. (Coop Exhibit No. 8, Stover, p. 7.)

Mr. Grant judged the 8% ROR reasonable, but recommended against it because he opposes the cooperative's investment in the unapplied fund with REA. Mr. Grant argues that DEC is incurring unnecessary opportunity costs by maintaining the fund and recommends that it begin to exhaust the fund over the next three years by paying the interest portion (not principal) of its quarterly debt service payments with monies from the unapplied fund. Mr. Grant points out that most interest-bearing temporary investments yield rates greater than 5%. He argues that DEC's members would be better served if the cooperative utilized the

unapplied fund and thereby freed general funds either for temporary investment at higher yielding interest rates, for new plant construction (which would reduce its need for future borrowing), or for refunding patronage capital credits if able to do so. (Staff Exhibit No. 9, Grant, pp. 7-8.)

Because he believes that maintaining a balance of unapplied advance payments with REA is not the most prudent form of investment, Mr. Grant's recommendation on behalf of the staff followed the second set of analyses. After applying a range of RORs from 6% to 8%, the rate of 6.5% was judged most appropriate and adopted by Mr. Grant as the staff recommendation.

The staff's recommendation projects the following financial indicators:

1) 1989 TIER and DSC ratios of 2.07 and 1.97, respectively, which is below 1986 median values;

2) 1989 modified TIER and DSC ratios (excluding capital credits) of 1.75 and 1.77, respectively, which is also below 1986 median values; and

3) an equity ratio of 31.02% or 31.23% (the discrepancy in the record for this calculation will be discussed shortly) which, while above the CFC recommended minimum, is below the REA recommended ratio and below the 1986 medians. [See Attachment No. 3 of this report for the staff's recommended schedule.]

Despite the lower financial indicators derived from a 6.5% ROR applied to the second set of analyses (as opposed to an 8% ROR applied to the first set, as discussed earlier), Mr. Grant testified that DEC's cash position was stronger under his recommendation due to the freeing of general funds by application of advance payments. The projected need for additional loan funds decreases in 1988 and 1989 from $969,586 and $1,046,792, respectively, in the first analyses to $875,736 and $831,294 in the staff recommendation. The projected level of cash available after debt service is projected to increase by $1,069,398 in the

staff recommendation over the amount projected in the first schedule. (Staff Exhibit No. 9, Grant, pp. 15-16.)

The staff's recommended schedule (Attachment No. 3 to this report) included a projected 1989 equity ratio of 33.18%. In response to questions from opposing counsel, Mr. Grant acknowledged at the hearing that this figure might be overstated because he had included the amount of unapplied advance payments used to pay the interest on debt service payments in "Other Assets" on the balance sheet which, he acknowledged, overstated "Total Margins and Equities" and the equity ratio. In response to questioning, Mr. Grant attempted to recalculate the equity ratio on the stand and derived a figure of 31.02%, but no evidence was presented by staff during the hearing to show the correct figure. Furthermore, while the examiner finds sufficient evidence to show that the interest paid from advance payments should not be included in equity, there is not sufficient evidence to show what is the proper accounting treatment for application of advance payments. By the testimony developed during the hearing, it appears that the balance sheet for the staff's recommended schedule is improperly balanced.

Mr. Grant developed special TIER and DSC calculations for evaluating Dickens' coverage ratios after application of advance payments for interest on debt service, as is assumed in the staff recommendation. He calculates a conventional modified TIER and DSC (which exclude capital credits from net margins), but then adds the amount of interest payments made from the unapplied fund to net margins. (Staff Exhibit No. 9, Grant, p. 17.) He testified that such an adjustment to modified TIER and DSC is appropriate because it gives a better indication of Dickens' cash coverage which is the purpose behind calculating modified TIER and DSC.

The staff's recommended 6.5% ROR applied to the recommended invested capital amount of $16,154,741 yields a dollar return amount of $1,050,056.

payroll taxes on the basis of the composite payroll allocator because the taxes are specifically payroll-related. DEC did not oppose this. The examiner agrees and adopts staff's recommendations.

B. TIEC's Challenge to Dickens' Cost of Service Study

TIEC contested several aspects of DEC's cost of service study. The staff did not take a position on those contested issues.

Dickens' assignment of a line loss percentage to the oil well producing class (15%) which is higher than that assigned to other classes served at secondary voltage (10.66%) was questioned by TIEC. Dickens did not present an explanation for this in its RFP or direct case, but attempted to do so in rebuttal. TIEC challenged the admissibility of DEC's line loss study, on grounds that it was improper rebuttal, as well as on discovery-related grounds. TIEC's objections were overruled. Because the examiner finds that Dickens failed to carry its burden of proof on the issue even with consideration of the evidence provided in rebuttal, the evidentiary point is moot.

DEC's line loss study purported to show that percentage line losses for the year 1986 are greater for the Bissett substation (12.69%) than for the Glenn substation (1.48%). DEC witness Carl Stover testified that the Bissett substation "primarily serves oil well load, whereas the Glenn substation serves essentially no oil well load." (Coop Exhibit No. 8, Stover, p. 3.) Mr. Stover did not know the percentage of oil well load at either substation, however, and DEC did not present any evidence to quantify the oil well loads or show that the higher line losses associated with Bissett were attributable to its oil well load. Furthermore, no evidence was offered by DEC to quantify the oil well loads or line losses associated with the other seven substations.

The only other evidence in the record regarding line losses was an exhibit introduced by TIEC which purports to show the monthly line losses associated with seven of Dickens' nine substations. (TIEC Exhibit No. 9, Stanley, Schedule R35-4.) There is, however, no evidence in the record to show the oil well load

E. Dickens' Recommendation for Return

In his rebuttal testimony, Dickens' witness, Carl N. Stover, Jr., recommended adoption of Mr. Grant's first schedule, shown in Attachment No. 2 of this report. Although the cooperative originally sought to maintain a general funds level of 8% of TUP, Mr. Stover testified in rebuttal that the 5.5% level was reasonable if DEC is able to maintain unapplied funds with REA as Mr. Grant's first schedule, shown in Attachment No. 2, assumes. (Coop Exhibit No. 9, Stover, p. 7.)

In rebuttal, DEC witnesses responded to Mr. Grant's concern over the opportunity costs involved in maintaining the unapplied fund which led Mr. Grant to recommend a 6.5% ROR in connection with a blueprint for gradually exhausting the fund. In addition, DEC witnesses argued that DEC maintains a more favorable TIER level by maintaining the unapplied fund.

The REA calculates an "interest credit" for a cooperative each quarter based on its outstanding balance of unapplied advance payments. The interest credit is then subtracted from the "interest due" on the quarterly payment. The dollar amount due remains the same, however. That is, the interest credit is added to the principal due on any particular payment. When the payment is received by REA, the balance of unapplied advance payments is then increased by an amount equal to the interest credit. Thus, the fund grows when it is not used for debt service payments (at 5% annually, but compounded quarterly). Furthermore, a cooperative's interest expense is directly reduced each quarter by the amount of the interest credit. (Staff Exhibit No. 9, Grant, p. 7.) This results in a more favorable TIER ratio for the cooperative.

DEC witness Mr. Robert Beam showed that because interest expense appears in both the numerator and the denominator of TIER calculations, the immediate reduction of interest expense has a multiplier effect on the TIER ratio. That is, a cooperative's current TIER ratio multiplied by 5% (current rate paid by REA on unapplied advance payments) will result in the threshold interest rate that an outside investment would have to yield in order for the cooperative --

staff recommendation over the amount projected in the first schedule. (Staff Exhibit No. 9, Grant, pp. 15-16.)

The staff's recommended schedule (Attachment No. 3 to this report) included a projected 1989 equity ratio of 33.18%. In response to questions from opposing counsel, Mr. Grant acknowledged at the hearing that this figure might be overstated because he had included the amount of unapplied advance payments used to pay the interest on debt service payments in "Other Assets" on the balance sheet which, he acknowledged, overstated "Total Margins and Equities" and the equity ratio. In response to questioning, Mr. Grant attempted to recalculate the equity ratio on the stand and derived a figure of 31.02%, but no evidence was presented by staff during the hearing to show the correct figure. Furthermore, while the examiner finds sufficient evidence to show that the interest paid from advance payments should not be included in equity, there is not sufficient evidence to show what is the proper accounting treatment for application of advance payments. By the testimony developed during the hearing, it appears that the balance sheet for the staff's recommended schedule is improperly balanced.

Mr. Grant developed special TIER and DSC calculations for evaluating Dickens' coverage ratios after application of advance payments for interest on debt service, as is assumed in the staff recommendation. He calculates a conventional modified TIER and DSC (which exclude capital credits from net margins), but then adds the amount of interest payments made from the unapplied fund to net margins. (Staff Exhibit No. 9, Grant, p. 17.) He testified that such an adjustment to modified TIER and DSC is appropriate because it gives a better indication of Dickens' cash coverage which is the purpose behind calculating modified TIER and DSC.

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utilizing that outside investment for debt service payment and for interest income as an offset to interest expense -- to maintain the same coverage ratio. If a cooperative had TIER of 2.0, it would require outside investments earning 10% (2.0 X 5.0%) to maintain its TIER level, for example. (Coop Exhibit No. 6, Beam, p. 2.)

As was discussed in the previous section of this report, Mr. Grant made an adjustment to the conventional calculation of modified TIER in order to include interest payments made from unapplied funds in the calculation. Mr. Beam testified that he found Mr. Grant's adjustment to modified TIER inappropriate. Mr. Grant added the interest payments to the projected margins in calculating TIER and DSC ratios. Mr. Beam testified that he had never seen any calculation of TIER and DSC that included provisions for the payment of interest from any source other than earnings. He argued that to do so would introduce uncertainty into business planning. (Id., p. 6.)

At the hearing, Mr. Grant was asked by counsel for Dickens to calculate the opportunity costs involved in maintaining the unapplied funds. Assuming a fund balance of $911,000 (the actual figure at the end of the test year was $911,298) and an interest rate on short-term CFC commercial paper of 7% (the going rate as of September 21, 1987), Mr. Grant calculated a rough estimate of $18,000 for opportunity cost (the actual figure would be $18,225). This figure, Mr. Grant testified, estimates the maximum opportunity cost in interest income suffered by DEC for foregoing the higher yielding investment opportunity. (The scenario assumed that only low-risk investments would be considered by the cooperative.)

In his prefiled direct testimony, Mr. Grant testified that one way for the cooperative to avoid opportunity cost would be to refund patronage capital credits. In his rebuttal testimony filed on behalf of DEC, Mr. Stover pointed out that DEC proposed to retire patronage capital credits faster than Mr. Grant proposed in his recommendation. (Coop Exhibit No. 8, Stover, p. 7.) The cooperative proposal would refund $217,430 more in patronage capital than would the staff proposal.

F. TIEC's Position

TIEC did not present any direct testimony on the issues of revenue requirement or rate of return, but did challenge some DEC witnesses on cross-examination regarding the cooperative's ability to refinance its debt and presented a position on this in its post-hearing brief. The examiner will address the matter here.

In its RFP, DEC identified $694,714 of its current debt as principal borrowed at an 11% interest rate from CFC. DEC witness Mr. Bailey Reece testified that the current CFC interest rate is "in the range of 8.75%". (Coop Exhibit #2, Reece, p. 9.) TIEC proposes that the Commission direct the cooperative to pursue the option of refinancing its debt (to obtain a lower rate of interest).

There is no evidence in the record to quantify the cost or benefit of such a refinancing. DEC witness Robert Beam testified that DEC would have to move to a variable rate if it were to refinance its 11% CFC loan and a one-time conversion fee equal to the difference in interest expense at the two rates would be assessed. Based on the evidence in the record, it appears that there are sufficient costs and risks associated with refinancing that it cannot be said that ordering a pursuit of the option is in the ratepayers' interest. Accordingly, the examiner recommends against this TIEC proposal.

G. Examiner's Discussion and Recommendation

The examiner recommends that the Commission adopt Mr. Grant's first schedule (shown in Attachment No. 2) which does not assume the application of advance payments and which applies an 8% ROR to invested capital. As was stated earlier, this schedule analyses was adopted by the cooperative in the rebuttal testimony of Mr. Stover. (Coop Exhibit No. 8, Stover, p. 7.)

The examiner finds several problems with the approach recommended by the staff in setting a ROR for Dickens, all of which derive from the staff's

decision to recommend a ROR based on the assumption that Dickens will begin gradually exhausting its advance payments fund with the REA. The immediate concern is that by adopting this approach the Commission will, in effect, be making investment and cash management decisions on behalf of a member-owned distribution electric cooperative.

Unlike customers of investor-owned utilities, the customers of an electric cooperative are its owners and the Commission's regulatory responsibility for overseeing the decisions of member-owned cooperatives is far less pronounced. The Board of Directors of Dickens Electric Cooperative is elected by the members. Presumably, if the customer-members are unhappy with present management policy of their cooperative, they will elect new directors to implement new policies. In evaluating Dickens' policy of maintaining unapplied advance payments with the REA, the examiner recommends that if the Commission finds a reasonable purpose or objective for the policy it should defer to the judgment of the cooperative's management and its members to whom management is ultimately responsible.

Dickens has shown that it is able to realize a more favorable TIER level by maintaining the advance payments fund. Given the importance of this financial indicator to lenders and the stated objective of DEC (which was found reasonable by the staff) to raise its TIER, it appears to the examiner that there is indeed a reasonable purpose for the policy. Despite the fact that Dickens is not earning the maximum return on its dollars, it is realizing a higher TIER than it would be realizing had it invested its roughly $911,000 in short-term CFC commercial paper as recommended by the staff. Furthermore, those CFC interest rates can be expected to fluctuate, making it difficult to quantify the opportunity costs involved with DEC's policy. It is reasonable, indeed desirable, for a cooperative to invest in secure, low-risk ventures and the evidence suggests that the risks involved with investment in the advance payments fund are very low.

On the witness stand, Mr. Grant quantified what he thought were the maximum opportunity costs involved with DEC's policy of maintaining the advance payments

fund. He calculated the figure to be $18,000. The difference in return dollars between the 8% ROR applied to the assumption that the fund would not be applied and the staff recommended 6.5% ROR applied to the assumption that the fund would be applied is roughly $243,000. While the examiner understands that the staff applies a range of RORs to its model and chooses the most reasonable rate based on the resulting match-up between the fall-out financial indicators and beginning financial criteria, she remains unconvinced that a reduction in return dollars of this magnitude is justified because DEC may be foregoing $18,000 in interest income. Mr. Grant testified several times that the 8% ROR was reasonable and would be his recommendation but for the presence of the unapplied advance payments fund. (Staff Exhibit No. 9, Grant, p. 15; TR. p. 202, 206.)

Another problem with the approach recommended by staff is that while DEC's revenue requirements will be lowered if it is assumed that the advance payments fund is applied and general funds are freed for operations expenses, this will only be true as long as the fund lasts. With staff's recommendation for the application of the fund for interest payments, the entire fund is projected to be exhausted by 1990. At that time, then, it would appear that DEC would need an increase in its revenue requirements and would be forced to come back to the Commission to request another rate increase. DEC's last rate increase prior to this filing was in June 1982. It appears that the rates recommended by the staff in this case may last only half as long.

Finally, the examiner recommends against staff's proposal because it is flawed with respect to its accounting treatment of interest paid from advance payments and incorrectly states the projected equity ratio, a key financial objective and indicator, over the planning horizon.

The examiner would recommend that in setting a reasonable return for DEC, if any adjustment is made for the presence of the unapplied fund it should be made in setting the general funds level assumption for the model. DEC has, in effect, exercised its management prerogative and chosen to maintain a lower general funds level, by deciding to maintain the unapplied fund. In its RFP, DEC maintained that it needed a general funds level of 8% of TUP. Mr. Grant

found this too high, particularly in light of the fact that DEC's unapplied funds level is almost as high as its general funds level, and the examiner agrees. Mr. Grant, therefore reduced the level of general funds assumed by the model to 5.5% of TUP and DEC has agreed that this is reasonable. While the examiner thinks the level could be lowered even further to bring the effective level in line with Texas medians, she defers to the consensus of judgment of the parties in this instance and recommends that the Commission adopt the first schedule developed by Mr. Grant and attached to this report as Attachment No. 2.

The projected financial indicators for the recommended 8% ROR are summarized here as follows:

	12/31/86	12/31/87	12/31/88	12/31/89	Tx. Median	U.S. Median
TIER	2.5157	3.1116	4.4204	2.4994	2.61	2.32
Modified TIER	1.1216	1.1366	2.3070	2.1692	2.13	2.13
Operating TIER	.09210	1.0214	2.1785	2.0354		
DSC	2.0274	3.1116	4.4204	2.4994	2.32	2.22
Modified DSC	1.3046	1.1366	2.3070	2.1692	2.13	2.07
Operating DSC	1.2006	1.0214	2.1785	2.0354		
Equity ratio	23.44%	25.87%	31.68%	33.02%	33.83%	38.98%

VII. Cost of Service

A. Purchased Power Expense

DEC witness Judy K. Lambert testified about the cooperative's adjustment of its purchased power expense. On April 1, 1986, DEC changed wholesale power suppliers and began purchasing its power from Brazos Electric Cooperative. Therefore, an adjustment to purchased power expense during the first three months of the test year had to be made in the RFP. Staff accountant Herndon

decided that a continuous twelve month period of power cost from the current power provider would be more representative of DEC's purchased power expense than estimating the first quarter of 1986. Therefore, he used the actual power cost incurred from April 1, 1986 through March 31, 1987. His methodology resulted in a staff decrease of $117,480 to DEC's adjustment. Staff's adjustment does increase purchased power expense by $463,154 over test-year figures. (Staff Exhibit No. 8, Herndon, p. 5.)

In her rebuttal testimony, Ms. Lambert argued that the staff's adjustment to purchased power expense was improper insofar as it uses out of test-year billing statistics. She testified that the use of out of test-year billing statistics would adversely affect cost allocation which is based on test-year usage. (Coop Exhibit No. 7, Lambert, p. 2.) In response to questioning at the hearing, Mr. Herndon admitted that a more perfect adjustment to the first three months would have made use of the test-year billing units, but believed that the difference between the two methodologies was immaterial. In its reply brief, General Counsel argued that Mr. Herndon's second methodology would "generate a more accurate result" and urged its adoption. (General Counsel's Reply Brief, p. 10-11.)

The examiner wishes to utilize the most precise methodology available based on the record in adjusting purchased power expense, and she is concerned about any possible adverse effects that the failure to use test-year billing units might have on cost allocations that were based on test year usage. Therefore, the numbers calculated for purchased power expense are based upon the same methodology proposed by Mr. Herndon, but using the billing statistics for the first three months of 1986, rather than 1987. The recommended purchase power expense is $7,762,960.

B. Operations and Maintenance

1. Payroll expense.

Mr. Herndon recommended an additional $6,481 reduction in DEC's negative reduction to its test-year payroll expense. While DEC annualized base salaries

as of December 31, 1986, Mr. Herndon annualized base salaries as of June 30, 1987, in order to incorporate certain known and measurable changes in personnel which occurred after the test year. The staff calculated an overtime factor differently than DEC. The staff divided test-year overtime by test year hourly base payroll. DEC used four-year averages and divided by total payroll rather than hourly base. The staff's methodology seems more reasonable because overtime is calculated by multiplying hourly base payroll by the overtime factor. (Staff Exhibit No. 8, Herndon, p. 6.) Because the examiner finds that the adjustments proposed by the staff do incorporate known and measurable changes in payroll expense and do use methodology more reasonable than that proposed by DEC, she will adopt staff's recommendation of an overall decrease in test-year payroll expense by $47,293, which provides a payroll expense of $742,155.

2. Uncollectible expense.

Uncollectible expense is a revenue related item and is calculated by multiplying total revenue requirement by an effective rate which is equal to the percentage ratio of bad debt to test-year revenues, in this case .146%. Applying the bad debt ratio of .146 to the examiner's recommended revenue requirement provides a total uncollectible expense of $16,524.

3. Other Operations and Maintenance expenses.

Dickens requested other operations and maintenance expenses in the following amounts:

Operations and Maintenance not adjusted	$ 449,238
Facilities Lease Credit	-0-
Worker's Compensation	9,211
General Liability Insurance	60,382
Umbrella Insurance	24,454
Employee Benefits	142,949
Directors and Attorneys, Ins.	9,437
Legislative Advocacy	-0-

Mr. Herndon included these amounts in his recommendation. The examiner concurs.

4. Summary.

The total recommended operations and maintenance expense for DEC is $1,454,350, which is comprised of the following:

Operations and Maintenance not adjusted	$ 449,238
Payroll	742,155
Facilities Lease Credit	-0-
Worker's Compensation	9,211
General Liability Insurance	60,382
Umbrella Insurance	24,454
Employee Benefits	142,949
Directors and Attorneys, Ins.	9,437
Uncollectible Expense	16,524
Legislative Advocacy	-0-
TOTAL	$1,454,350

C. Depreciation Expense

Mr. Eckhoff found the depreciation rates requested by DEC to be within the range accepted by the REA Bulletin 183-1 and to be reasonable. He did not recommend any changes in the requested depreciation rates, and the examiner concurs.

D. Taxes

1. Payroll taxes.

Mr. Herndon recommended an additional $723 decrease to DEC's negative adjustment to payroll taxes. The difference was due to the staff's use of the

1988 FICA rate (whereas DEC used the 1987 rate) and the difference in the payroll expense as calculated by the staff and explained above. (Staff Exhibit No. 8, Herndon, p. 8.) The examiner concludes that the 1988 FICA rate is a known and measurable change which will be in effect when DEC's new rates become effective. Therefore, she adopts the staff's recommendation.

2. P.U.C. Assessment.

The P.U.C. assessment rate is .1667%. Applying that rate to the examiner's recommended revenue requirement provides a total P.U.C. assessment expense of $18,845.

E. Return Dollars

The examiner's recommended rate of return of 8.0% applied to the recommended invested capital of $16,154,741 provides a total in return dollars of $1,292,379.

F. Summary

Total revenue requirement recommended is $11,307,245. It is comprised of the following:

Fuel	-0-
Purchased Power	$ 7,762,960
Operations and Maintenance	1,454,350
Depreciation and Amortization	647,020
Other Taxes	150,536
Interest on Customer deposits	-0-
Return	1,292,379
Revenue Requirement	$11,307,245

G. Adjusted Test-Year Base Rate Revenues

Of the $11,307,245 revenue requirement being recommended, $11,277,544 will have to be derived from base rate revenues from customers. Because of the recommended adjustment in purchased power expense, this would result in an adjustment to the purchased power component of the cost per kwh charged to customers. (Coop Exhibit No. 7, Lambert, p. 3.) That component, the base power cost, is calculated by dividing adjusted purchased power expense by the total kwhs sold. The recommended figure is:

$\frac{\$\ 7,762,960}{165,528,021} = \$.04898$. Any changes in base power costs above or below this base cost will be passed on to the customer through a monthly PCRF factor. (Coop Exhibit No. 2, Lambert, p. 2.)

Applying the recommended base power cost yields an adjusted figure for test-year base rate revenues of $10,469,870. This figure is lower than the $10,678,112 amount used both by Dickens and the staff in making recommendations, although the adjustments to purchased power expense proposed by the examiner were those recommended by the staff. The staff did not recalculate base rates and present revenues before deriving revenue deficiency in prefiled testimony, thereby understating its recommended increases. The examiner notes this, in part, to discourage comparisons between the system-wide rate increases recommended here with those recommended by the cooperative and the staff. All three recommendations are based on ratios with different numbers placed in the denominator to represent present revenues and therefore are not comparable. Using $10,469,870 as the correct figure representing present revenues, a more accurate comparison of the parties' proposals for revenue requirements and system-wide rate increases with the recommendation being made here by the examiner would appear as follows:

	Base Rate Revenue Requirement	Revenue Deficiency	System-wide Increase
Staff	$11,125,505-$10,469,840=	$655,635	$\frac{\$ 655,635}{\$10,469,870}$=6.26%
Coop	$11,485,386-$10,469,870=	$1,015,516	$\frac{\$ 1,015,516}{\$10,469,870}$=9.7%
Examiner's Recommendation	$11,277,544-$10,469,870=	$807,674	$\frac{\$ 807,674}{\$10,469,870}$=7.71%

VIII. Cost of Service Study

The purpose of a cost of service study is to assign the total cost of service for the cooperative to its various customer classes based on a methodology which allocates those costs according to class responsibility. The cost of service studies performed by DEC and the staff both followed the traditional development:

1. functionalization of costs according to their major function (transmission, distribution, customer and general support);

2. classification of costs as either demand, energy or customer-related; and

3. allocation of costs to the different customer classes according to the appropriate allocation factor.

(Staff Exhibit No. 10, Miphan, p. 2-3.)

A. Staff's Uncontested Adjustments

Staff rate analyst Ms. Somlak Miphan did recommend the use of different cost allocation factors than did DEC for certain expenses. She recommended that DEC's General Plants Account be allocated by a composite payroll allocator because payroll represents a weighted distribution of general support functions

among the different functional groups. DEC, which did not develop a composite payroll allocator in its study, allocated the General Plants Account according to a composite transmission and distribution allocator. (Staff Exhibit No. 10, Miphan, p. 3-4.) DEC did not oppose Ms. Miphan's recommendation, however. The examiner finds that the staff has shown that a composite payroll allocation factor will yield a fairer allocation of the General Plants Account and, therefore, adopts the staff recommendation.

Ms. Miphan also recommended use of a composite payroll allocator for the following Administrative and General (A and G) Expenses: Account 920 (salaries), Account 921 (office supplies and expenses), Account 925 (injuries and damages), Account 926 (employee pensions and benefits), and Account 932 (maintenance of general plant). DEC allocated these accounts by a total operation and maintenance (excluding A and G expenses) expense factor, but did not oppose staff's recommendation. The examiner agrees with Ms. Miphan that these expenses are more fairly allocated by reference to payroll than to O & M expenses. (Staff Exhibit No. 10, Miphan, p. 4.)

Ms. Miphan recommended that Account 923 (outside service employed) and Account 928 (Regulatory Commission expenses) be allocated on the basis of cost-of-service revenues, arguing that these expenses are related more to level of revenues than to operation and maintenance expenses which is how DEC allocated them. (Staff Exhibit No. 10, Miphan, p. 4.) DEC did not oppose the staff recommendation and the examiner concurs with it.

DEC allocated Account 924 (property insurance) and Account 408.1 (property taxes) on the basis of total gross plant. Ms. Miphan recommended use of a total net plant composite allocator because property insurance premiums and property taxes are typically based on net property values. (Staff Exhibit No. 10, Miphan, pp. 4-5.) DEC did not oppose this. The examiner concurs with Ms. Miphan's reasoning and adopts staff's recommendation.

DEC allocated payroll taxes on the basis of operations and maintenance expenses (excluding A and G expense). Ms. Miphan recommended allocation of

payroll taxes on the basis of the composite payroll allocator because the taxes are specifically payroll-related. DEC did not oppose this. The examiner agrees and adopts staff's recommendations.

B. TIEC's Challenge to Dickens' Cost of Service Study

TIEC contested several aspects of DEC's cost of service study. The staff did not take a position on those contested issues.

Dickens' assignment of a line loss percentage to the oil well producing class (15%) which is higher than that assigned to other classes served at secondary voltage (10.66%) was questioned by TIEC. Dickens did not present an explanation for this in its RFP or direct case, but attempted to do so in rebuttal. TIEC challenged the admissibility of DEC's line loss study, on grounds that it was improper rebuttal, as well as on discovery-related grounds. TIEC's objections were overruled. Because the examiner finds that Dickens failed to carry its burden of proof on the issue even with consideration of the evidence provided in rebuttal, the evidentiary point is moot.

DEC's line loss study purported to show that percentage line losses for the year 1986 are greater for the Bissett substation (12.69%) than for the Glenn substation (1.48%). DEC witness Carl Stover testified that the Bissett substation "primarily serves oil well load, whereas the Glenn substation serves essentially no oil well load." (Coop Exhibit No. 8, Stover, p. 3.) Mr. Stover did not know the percentage of oil well load at either substation, however, and DEC did not present any evidence to quantify the oil well loads or show that the higher line losses associated with Bissett were attributable to its oil well load. Furthermore, no evidence was offered by DEC to quantify the oil well loads or line losses associated with the other seven substations.

The only other evidence in the record regarding line losses was an exhibit introduced by TIEC which purports to show the monthly line losses associated with seven of Dickens' nine substations. (TIEC Exhibit No. 9, Stanley, Schedule R35-4.) There is, however, no evidence in the record to show the oil well load

at any of the substations. Also, DEC witness Judy Lambert testified at the hearing that the line loss assignments to the various classes were made without reliance on any loss study. (TR. p. 80.) The examiner finds the cooperative's evidence on this issue far less than persuasive. Based on the evidentiary record, the assignment of line loss percentages to the OWP class which are greater than those assigned to other classes of secondary voltage users appears arbitrary and without rational basis. Such an improper assignment to the OWP class leads to an overstatement of the kilowatts (kw) and kilowatt-hours (kwh) assigned which form the basis for the demand and energy allocation factors. (TIEC Exhibit No. 5, Stanley, p. 12-13; TR. p. 82.) This, in turn, leads to an improper revenue requirement allocation to the OWP class. Section 38 of PURA prohibits unreasonable discrimination in rates among classes. In light of the absence of support in the record for DEC's line loss assignment to the OWP class, the examiner recommends that all classes of secondary voltage customers be treated equally. So calculated, the average loss percentage for those classes is 12.064%. (Coop Exhibit No. 8, Stover, Sch. B.)

TIEC also challenged DEC's allocation of monthly demand responsibility among the classes. The allocation of the monthly demand responsibility was made to the Large Power, Oil Well Producing, and White River (a municipal water district), Irrigation, and Cotton Gin classes by using the sum of individual customer metered kw (or kwh per HP) adjusted for losses and a coincident factor. (Coop Exhibit No. 2, Lambert, p. 7.) Customers in the Farm and Home and Small Commercial classes are not metered, so DEC assigned all remaining system demand (that was not allocated to demand-metered customers) to these two classes. The Farm and Home and Small Commercial classes account for approximately 10% of the system load.

The examiner finds that DEC's allocation of monthly demand responsibility is reasonable because it directly assigns metered quantities to those classes for which metered-demand is available. Furthermore, it seems reasonable to assign the remaining demand to the unmetered residential and small commercial classes. The examiner recommends adoption of DEC's method of allocating monthly demand responsibility.

C. Summary

The results of the cost of service study being recommended by the examiner are shown in column 3 of the schedule contained in Attachment No. 4 to this Report. Column 11 shows the relative rates of return for each class. The results show that under present rates the Farm & Home & Irrigation classes, in particular, are being heavily subsidized by the Large Power & Cotton Gin classes.

IX. Rate Design

"Rate design" describes the allocation of revenue responsibility among the classes as well as the design of the actual rates for the classes.

All parties recognize that the single most important factor in allocating total revenue requirement is the cost of service study. (Coop Exhibit No. 2, Lambert, p. 12; Staff Exhibit No. 10, Miphan, p.5; TIEC Exhibit No. 5, Stanley, p. 6.) That is, rates should be primarily cost-based and thereby reflect each class' responsibility for the cost increase being experienced by the system as a whole, tempered by other factors identified by the parties such as economic conditions, the impact that an exceptionally large increase might have on a particular class, and sending proper price signals.

At the hearing, staff witness Somlak Miphan was asked by the examiner to prepare a schedule showing the staff's recommendation for revenue requirement allocation using staff's revenue requirement figures except ROR and applying instead an 8% ROR. Ms. Miphan later testified regarding the schedule. [Note: Ms. Miphan's testimony should not be construed as the staff's recommendation in this case because the staff's position throughout the case has been to recommend a 6.5% ROR. Her testimony does reflect staff's position on rate design should an 8.0% ROR be granted.]

The total revenue deficiency that Ms. Miphan was working with in developing the requested schedule was $689,714. As was explained in Section VII. G., the

examiner feels this number is understated because "present revenues" was not adjusted to account for the adjustments made to purchased power expense. Ms. Miphan recommended that the classes which had experienced a substantial cost of service revenue increase -- Farm & Home, Irrigation, Small Commercial, White River & Lighting -- receive a rate increase of 2.0 times the average system increase. She recommended that the Oil Well class receive an increase of 1.81 times the system increase. Finally, she recommended an increase of .25 times for the Large Power & Cotton Gin classes. (Tr. at 304-305.)

DEC proposes that no class receive an increase of more than 1.5 times the system increase and that the Large Power class receive .5 times the system increase. As support for its position, DEC argues that the Farm & Home class would be harder hit economically by a rate increase than would the Large Power class, but no evidence was offered to indicate support for the statement.

TIEC argues that the Large Power class should actually receive a decrease in its rates because the cost of service study shows that it has been paying more than its fair share.

The examiner's recommendation for revenue allocation is shown in Attachment No. 4. Under the recommendation, the Farm & Home, Irrigation, Small Commercial, White River & Lighting classes would receive an increase of 1.85 times the system increase. The Oil Well class would receive an increase of 1.46 times and, finally, Large Power & Cotton Gins would receive .5 times the system increase. The examiner submits that this is within the guidelines recommended by Ms. Miphan and, considering the size of the revenue deficiency which exists, results in a reasonable and fair allocation of the revenue requirement.

Finally, TIEC proposed two recommendations related to rate design which the examiner recommends not be adopted. TIEC proposed in its brief that DEC be required to include a primary discount in its PCRF. No direct testimony on this issue was presented by TIEC, but TIEC argues that because Dickens has acknowledged that the costs associated with serving primary voltage-users are lower, the Large Power class should receive a discount in the PCRF. The

examiner finds that making use of the cost of service study (including the difference in line loss factors assigned to primary and secondary customers) should adequately account for lower costs of providing service to primary users.

TIEC also recommended that the Commission eliminate DEC's proposed demand ratchet for the Large Power, Oil Well and White River Municipal Water District classes. DEC originally proposed an 80% demand ratchet which was the ratchet charged by its previous wholesale supplier. Staff recommended that the ratchet be reduced to 75% which is the current ratchet in the Brazos wholesale rate. (Brazos is DEC's current wholesale supplier.) DEC did not oppose this recommendation. The examiner recommends that the Commission adopt the staff recommendation in regard to the demand ratchet.

X. Findings of Fact and Conclusions of Law

The examiner recommends adoption of the following Findings of Fact and Conclusions of Law.

A. Findings of Fact

1. Dickens Electric Cooperative, Ind. (Dickens) is a member-owned cooperative public utility providing electric service to approximately 5300 customers in rural portions of Dickens, Crosby, Garza, Motley, King, Kent, and Stonewall counties.

2. On June 23, 1987, Dickens filed a statement of intent to increase its rates $1,395,775, or 13.78% over test-year revenues.

3. Dickens' Rate Filing Package (RFP) is based on test-year ending December 31, 1986.

4. After being docketed, the case was assigned to Administrative Law Judge (ALJ) K. Crandal McDougall.

5. Dickens published notice of the proposed rate increase once each week for four (4) consecutive weeks in newspapers of general circulation in each county containing service territory affected by the proposed change.

6. Dickens filed publisher's affidavits confirming publication of notice.

7. The implementation of the proposed rate increase was suspended until December 25, 1987, pursuant to an order dated June 30, 1987.

8. On July 27, 1987, Texas Industrial Energy Consumers (TIEC) was granted party status to this proceeding.

9. On October 1, 1987, this docket was reassigned to the undersigned hearings examiner who presided over the hearing on the merits and has read the record in this case.

10. The hearing on the merits was convened on October 5, 1987, but then immediately recessed until October 7, 1987. The hearing lasted through October 8, 1987.

11. It is reasonable and appropriate to include the changes to Dickens' service rules and regulations as recommended by the staff and adopted by the examiner for the reasons set forth in Section IV of this Examiner's Report.

12. Dickens' quality of service is adequate.

13. Dickens has total invested capital of $16,154,714, the components of which are:

Plant in Service	$19,888,939
Accumulated Depreciation	(4,151,687)
Net Plant in Service	$15,737,252
Construction Work in Progress	-0-
Working Cash Allowance	141,504
Materials and Supplies	189,663
Prepayments	86,322
LESS:	
Customer Deposits	-0-
Other Cost Free Capital	-0-
TOTAL INVESTED CAPITAL	$16,154,741

14. Dickens maintains an unapplied advance payments fund with the Rural Electrification Administration (REA).

15. For the reasons explained in Section VI. E. of this Examiner's Report, Dickens is able to realize a higher TIER by maintaining the unapplied fund with REA (assuming only low risk/secure investments are considered).

16. There exists a reasonable purpose for Dickens' policy decision to maintain an unapplied advance payment with REA, as explained in Section VI. G. of this Examiner's Report.

17. The long-term financial objectives of Dickens identified as reasonable by staff witness Kentton Grant in Section VI. C. of this report are reasonable, namely:

a. an equity ratio of 35% to 40%;
b. a 17-year capital credit rotation cycle; and
c. a modified TIER of 2.34.

18. The schedule contained in Attachment No. 3 to this Report shows the financial indicators resulting from an 9.0% ROR applied to the staff model without assuming the application of unapplied advance payments.

19. The projected financial indicators shown in Attachment No. 3 to this Report are those that Dickens will likely experience under the recommendation herein; they approximate the TIER and equity ratios found reasonable in Finding of Fact No. 17, as well as Texas and U.S. medians for TIER and equity ratios.

20. An 8.0% ROR applied to the staff model as shown in Attachment No. 3 is reasonable and should be adopted because it improves Dickens' financial condition without being unduly burdensome on consumers.

21. A ROR of 8.0% applied to Dickens' invested capital of $16,154,741 provides a total in return dollars of $1,292,379.

22. An adjustment to Dickens' test-year purchased power expense should be made in order to more accurately reflect Dickens' power cost from its current wholesale supplier.

23. Any adjustment to purchased power expense should not use out-of-test-year billing units for the reasons identified in Section VII. A. of this Report.

24. $7,762,960 is DEC's reasonable adjusted purchased power expense.

25. For the reasons contained in Section VII of this Report, an adjusted revenue requirement of $11,307,245 is reasonable and appropriate. This revenue requirement is comprised of the following:

Purchased Power	$ 7,762,960
Operations & Maintenance	1,454,350
Depreciation & Amortization	647,020
Other Taxes	150,536
Interest on Customer deposits	-0-
Return	1,292,379
Revenue Requirement	$11,307,245

26. Dickens' purchased power component of base rates should be adjusted to reflect the recommended adjustments in purchased power.

27. The base power cost per kwh sold should be $.046898.

28. Dickens' adjusted test-year base rate revenues are $10,469,870, resulting in a revenue deficiency of $807,674.

29. The staff's recommended adjustments to Dickens' cost of service study are reasonable and appropriate for the reasons given in Section VIII. A. of this Report and should be adopted.

30. For reasons set forth in Section VIII. B. of this Report, all classes of customers receiving power at secondary voltage should be assessed the same percentage of line loss for purposes of the cost of service study.

31. Dickens' allocation of monthly demand responsibility among the classes is reasonable and appropriate for purposes of the cost of service study.

32. Dickens' cost of service study, with the changes recommended by the staff and found reasonable by Finding of Fact No. 29, as well as with the change recommended in Finding of Fact No. 30, is an adequate basis upon which to design rates.

33. The revenue allocation and rate design contained in Attachment No. 4 is fair and reasonable for the reasons set forth in Section IX of this Report.

34. The cost of service study recommended by this Examiner's Report adequately accounts for the lower costs of providing service to primary users.

35. It is not necessary to order DEC to include a primary discount in its PCRF.

36. A demand ratchet of 75% is reasonable.

B. Conclusions of Law

1. Dickens is a public utility as that term is defined in Section 3(c)(1) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987).

2. The Commission has jurisdiction over this matter pursuant to Sections 16, 17(e), 37 and 43(a) of PURA.

3. Because Dickens does not provide service within any municipalities, the rates approved herein may be charged to all DEC customers.

4. Dickens' filing of a statement of intent to change its rates was in accordance with Section 43(a) of PURA.

5. The public notice given by Dickens complies with the requirements of Section 43(a) of PURA and P.U.C. PROC. R. 21.22(b).

6. The depreciation rates utilized by DEC are proper under the standards set by Section 27(b) of PURA.

7. Dickens has met its burden of proof under Section 40 of PURA and established that it has a revenue requirement of $11,307,245, of which $11,277,544 is the base rate revenue requirement to be collected under the rates approved herein.

8. The rates recommended herein will allow DEC to recover its reasonable operating expenses, together with a reasonable return on its invested capital, pursuant to Section 39 of PURA.

9. The rate design recommended by the examiner are reasonable and non-discriminatory and comply with the ratemaking mandates of Article VI of PURA and the Commission's rules.

10. The rates recommended herein are just and reasonable, not unreasonably preferential, prejudicial or nondiscriminatory, and in all other ways meet the requirements of Section 38 and 41 through 48 of PURA.

11. The undersigned examiner serves as the lawful replacement for ALJ McDougall under Section 15 of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1987).

SIGNED AT AUSTIN, TEXAS on this 30th day of November 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

Becky Bruner

BECKY BRUNER
HEARINGS EXAMINER

APPROVED on this 30th day of November 1987:

Phillip A. Holder

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

jb

PUBLIC UTILITY COMMISSION OF TEXAS

DICKENS ELECTRIC COOPERATIVE, INC.

HISTORICAL FINANCIAL DATA

	1980	1981	1982	1983	1984	1985	1986
OPERATING MARGIN	$115,622	($20,362)	$69,440	$57,438	$86,581	$33,030	($35,880)
NON-OPERATING MARGIN	$89,978	$114,670	$55,058	$72,058	$106,480	$83,273	$91,117
CAPITAL CREDITS	$3,139	$3,947	$8,048	$21,146	$16,614	$21,643	$633,340
NET MARGIN	$208,739	$98,255	$132,546	$150,642	$209,675	$137,946	$688,577
INTEREST EXPENSE	$127,775	$146,082	$188,394	$240,410	$295,985	$380,660	$454,285
DEBT SERVICE	$402,069	$406,097	$458,327	$517,185	$627,684	$758,992	$876,217
DEPRECIATION EXPENSE	$338,962	$376,991	$462,799	$529,537	$573,956	$589,522	$633,583
MARGINS & EQUITIES	$3,068,243	$3,134,747	$3,243,743	$3,362,740	$3,549,923	$3,649,876	$4,280,170
LONG-TERM DEBT	$6,721,967	$7,957,724	$9,610,018	$11,536,536	$11,784,172	$12,964,717	$13,978,002
CAPITALIZATION	$9,790,210	$11,092,471	$12,853,761	$14,899,276	$15,334,095	$16,614,593	$18,258,172
TIER	2.63	1.67	1.70	1.63	1.71	1.36	2.52
TIER W/O CAP. CREDITS	2.61	1.65	1.66	1.54	1.65	1.31	1.12
DSC	1.68	1.53	1.71	1.78	1.72	1.46	2.03
DSC W/O CAP. CREDITS	1.67	1.52	1.69	1.74	1.69	1.43	1.30
EQUITY/CAPITALIZATION	31.34%	28.26%	25.24%	22.57%	23.15%	21.97%	23.44%

	1986 US MEDIAN VALUE	1986 STATE MEDIAN VALUE
TIER	2.32	2.61
TIER W/O G&T CREDITS	2.13	2.13
DSC	2.22	2.32
DSC W/O G&T CREDITS	2.07	2.13
EQUITY/CAPITALIZATION	38.98%	33.83%

NOTE

MEDIAN VALUES ARE DERIVED FROM DATA ON THE 862 REA BORROWERS NATIONWIDE AND 72 REA BORROWERS IN TEXAS CLASSIFIED AS ELECTRIC DISTRIBUTION CO-OPS.

PUBLIC UTILITY COMMISSION OF TEXAS

COOP FINANCIAL PLANNING MODEL

Dickens Electric Cooperative, Inc.

ASSUMPTIONS OVER THE PLANNING HORIZON

	12/31/86	12/31/87	12/31/88	12/31/89
GROWTH IN NET PLANT	0.0000	0.0715	0.0638	0.0572
EXPECTED INT RATE ON CFC DEBT	0.0000	0.0875	0.0875	0.0875
GENERAL FUNDS TO TOTAL UTILITY PLANT	0.0399	0.0503	0.0550	0.0550
DEPRECIATION RATE	0.0313	0.0313	0.0313	0.0313
RATIO OF DEBT THAT IS REA 5%	0.0000	0.9000	0.9000	0.9000
WEIGHTED AVG COST OF EXISTING CFC DEBT	0.1089	0.1089	0.1089	0.1089
G & T CREDITS	610,578	1,038,000	1,244,000	199,000
PLANT RETIREMENTS	0	298,149	332,570	210,753
UNAPPLIED ADVANCE PYMTS.- 5% DEBT	889,112	934,412	982,020	1,032,054
THE NON-ZERO OBJECTIVE IS BINDING				
DESIRED EQUITY RATIO	0.0000	0.0000	0.0000	0.0000
DESIRED TIER	0.0000	0.0000	0.0000	0.0000
DESIRED ROR	0.0000	0.0335	0.0800	0.0800
CONSTANT DOLLAR RETURN	0.0000	0.0000	0.0000	0.0000

KEY FINANCIAL DATA

	12/31/86	12/31/87	12/31/88	12/31/89
DEBT BALANCE	13,978,002	15,384,176	15,914,658	16,509,385
TOTAL MARGINS AND EQUITIES	4,280,170	5,368,532	7,379,577	8,137,761
TOTAL CAPITALIZATION	18,258,172	20,752,708	23,294,235	24,647,146
DEBT RATIO	0.7656	0.7413	0.6832	0.6698
EQUITY RATIO	0.2344	0.2587	0.3168	0.3302
TOTAL	1.0000	1.0000	1.0000	1.0000
EQUITY MAINTENANCE	0	584,781	657,469	428,600
EQUITY LEVEL GROWTH	0	503,581	1,353,576	329,584
CAPITAL CREDITS TO BE ROTATED	29,362	30,605	18,097	193,843
INT. PAID FROM GEN FUNDS	454,285	529,921	593,247	634,952
TOTAL SOURCES REQUIRED	1,142,862	1,648,888	2,622,389	1,586,978
RETURN	418,405	541,254	1,292,378	1,292,378
INTEREST	454,285	529,921	593,247	634,952
OPERATING MARGIN	-35,880	11,333	699,131	657,426
NON-OPERATING REVENUE	91,117	61,054	76,240	84,991
G&T AND OTHER CAPITAL CREDITS	633,340	1,046,579	1,253,772	209,610
NET MARGIN	688,577	1,118,967	2,029,142	952,027
RATE BASE	16,154,723	16,154,723	16,154,723	16,154,723
ROR	0.0259	0.0335	0.0800	0.0800
ROE	-0.0084	0.0021	0.0947	0.0808
WEIGHTED AVG DEBT	0.0344	0.0369	0.0382	0.0394
TIER	2.5157	3.1116	4.4204	2.4994
TIER WO CAP CREDITS	1.1216	1.1366	2.3070	2.1692
OPERATING TIER	0.9210	1.0214	2.1785	2.0354
DSC	2.0274	2.4374	3.2458	2.1766
DSC WO CAP CREDITS	1.3046	1.3428	2.0313	1.9838
OPERATING DSC	1.2006	1.2789	1.9575	1.9056

DOCKET NO. 7556

BALANCE SHEET

	12/31/86	12/31/87	12/31/88	12/31/89
TOTAL UTILITY PLANT	20,233,233	21,766,063	23,261,140	24,878,544
ACCUMULATED DEPRECIATION	4,151,687	4,535,120	4,930,950	5,499,244
NET UTILITY PLANT	16,081,546	17,230,942	18,330,190	19,379,300
ENDING GENERAL FUNDS	806,305	1,095,704	1,279,363	1,368,320
GENERAL FUNDS EXCL ITEMS	406,047	415,209	420,057	425,291
INV IN ASSOC ORG - PAT CAP	737,517	1,784,096	3,037,868	3,247,478
OTHER ASSETS	1,139,838	1,139,838	1,139,838	1,139,838
TOTAL ASSETS	19,171,253	21,665,789	24,207,316	25,560,227
TOTAL MARGINS AND EQUITIES	4,280,170	5,368,532	7,379,577	8,137,761
LT DEBT - REA 2%	8,648,342	8,329,856	8,005,000	7,673,647
LT DEBT - REA 5%(NET)	4,615,599	6,160,029	6,922,645	7,749,201
LT DEBT - OTHER	714,061	894,291	987,012	1,086,537
OTHER LIABILITIES	913,081	913,081	913,081	913,081
TOTAL LIAB & EQUITY	19,171,253	21,665,789	24,207,316	25,560,227

STATEMENT OF OPERATIONS

	12/31/86	12/31/87	12/31/88	12/31/89
DEPRECIATION EXPENSE	633,583	681,582	728,399	779,047
INTEREST	454,285	529,921	593,247	634,952
OPERATING MARGIN	-35,880	11,333	699,131	657,426
NON-OPERATING REVENUE	91,117	61,054	76,240	84,991
CASH BEFORE DEBT SERVICE	1,143,105	1,283,891	2,097,017	2,156,415
DEBT SERVICE	876,217	956,149	1,032,351	1,087,017
INT. PAID FROM ADV.PYMTS.	0	0	0	0
CASH AFTER DEBT SERVICE	266,888	327,742	1,064,666	1,069,398

GENERAL FUNDS SUMMARY

	12/31/86	12/31/87	12/31/88	12/31/89
BEGINNING GENERAL FUNDS	0	806,305	1,095,704	1,279,363
CASH AFTER DEBT SERVICE	266,888	327,742	1,064,666	1,069,398
GENERAL FUNDS AVAILABLE	0	1,134,047	2,160,369	2,348,761
PURCHASE OF EXCLUDABLE ITEMS	0	9,162	4,848	5,234
CAPITAL CREDITS TO BE ROTATED	29,362	30,605	18,097	193,843
GENERAL FUNDS INVESTED	0	-1,423	858,062	781,365
TOTAL USE OF GENERAL FUNDS	0	38,344	881,007	980,441
ENDING GENERAL FUNDS	806,305	1,095,704	1,279,363	1,368,320

PLANT INVESTMENT & SOURCES OF FINANCING

	12/31/86	12/31/87	12/31/88	12/31/89
BEGINNING TOTAL UTILITY PLANT	0	20,233,233	21,766,063	23,261,140
TOTAL ADDITIONS	0	1,830,979	1,827,647	1,828,157
PLANT RETIREMENTS	0	298,149	332,570	210,753
TOTAL UTILITY PLANT	20,233,233	21,766,063	23,261,140	24,878,544
NEW DEBT - REA 5%	0	1,649,162	872,627	942,113
NEW DEBT - OTHER	0	183,240	96,959	104,679
TOTAL LOAN FUNDS REQUIRED	0	1,832,402	969,586	1,046,792
GENERAL FUNDS INVESTED	0	-1,423	858,062	781,365
TOTAL ADDITIONS	0	1,830,979	1,827,647	1,828,157

DOCKET NO. 7556

SCHEDULE II
Page 5 of 5 Pages

DEBT AND DEBT SERVICE SUMMARY

	12/31/86	12/31/87	12/31/88	12/31/89
REA 2%				
BEGINNING BALANCE	0	8,648,342	8,329,856	8,005,000
INTEREST	0	172,967	166,597	160,100
PRINCIPAL REPAYMENT	0	318,486	324,856	331,353
LT DEBT - REA 2%	8,648,342	8,329,856	8,005,000	7,673,647
REA 5%				
BEGINNING BALANCE (NET)	0	4,615,599	6,160,029	6,922,645
BEG. UNAPPLIED ADVANCE PYMTS.	0	889,112	934,412	982,020
BEGINNING BALANCE (GROSS)	0	5,504,711	7,094,441	7,904,665
CUMULATIVE NEW DEBT	0	1,649,162	2,521,789	3,463,902
INT. PAID FROM GEN FUNDS	0	271,165	328,930	368,752
INT. PAID FROM ADV.PYMTS.	0	0	0	0
INTEREST	0	271,165	328,930	368,752
PRINCIPAL REPAYMENT	0	59,431	62,403	65,523
LT DEBT - REA 5%(GROSS)	5,504,711	7,094,441	7,904,665	8,781,255
UNAPPLIED ADVANCE PYMTS.	889,112	934,412	982,020	1,032,054
LT DEBT - REA 5%(NET)	4,615,599	6,160,029	6,922,645	7,749,201
CFC-OTHER				
BEGINNING BALANCE	0	714,061	894,291	987,012
NEW DEBT, FIRST YEAR	0	183,240	182,341	181,364
NEW DEBT, SECOND YEAR	0	0	96,959	96,483
NEW DEBT, THIRD YEAR	0	0	0	104,679
INTEREST	0	85,789	97,720	106,100
PRINCIPAL REPAYMENT	0	3,010	4,237	5,155
LT DEBT - OTHER	714,061	894,291	987,012	1,086,537
TOTAL DEBT				
BEGINNING BALANCE	0	13,978,002	15,384,176	15,914,658
TOTAL LOAN FUNDS REQUIRED	0	1,832,402	969,586	1,046,792
INTEREST	454,285	529,921	593,247	634,952
PRINCIPAL REPAYMENT	421,932	380,928	391,496	402,031
DEBT BALANCE	13,978,002	15,384,176	15,914,658	16,509,385

PUBLIC UTILITY COMMISSION OF TEXAS

COOP FINANCIAL PLANNING MODEL

Dickens Electric Cooperative, Inc.

ASSUMPTIONS OVER THE PLANNING HORIZON

	12/31/86	12/31/87	12/31/88	12/31/89
GROWTH IN NET PLANT	0.0000	0.0715	0.0638	0.0572
EXPECTED INT RATE ON CFC DEBT	0.0000	0.0875	0.0875	0.0875
GENERAL FUNDS TO TOTAL UTILITY PLANT	0.0399	0.0503	0.0550	0.0550
DEPRECIATION RATE	0.0313	0.0313	0.0313	0.0313
RATIO OF DEBT THAT IS REA 5%	0.0000	0.9000	0.9000	0.9000
WEIGHTED AVG COST OF EXISTING CFC DEBT	0.1089	0.1089	0.1089	0.1089
G & T CREDITS	610,578	1,038,000	1,244,000	199,000
PLANT RETIREMENTS	0	298,149	332,570	210,753
UNAPPLIED ADVANCE PYMTS.- 5% DEBT	889,112	934,412	642,480	283,554
THE NON-ZERO OBJECTIVE IS BINDING				
DESIRED EQUITY RATIO	0.0000	0.0000	0.0000	0.0000
DESIRED TIER	0.0000	0.0000	0.0000	0.0000
DESIRED ROR	0.0000	0.0335	0.0650	0.0650
CONSTANT DOLLAR RETURN	0.0000	0.0000	0.0000	0.0000

DOCKET NO. 7556

SCHEDULE III
Page 2 of 5 Pages

KEY FINANCIAL DATA

	12/31/86	12/31/87	12/31/88	12/31/89
DEBT BALANCE	13,978,002	15,384,176	16,160,348	16,948,583
TOTAL MARGINS AND EQUITIES	4,280,170	5,368,532	7,466,555	8,414,298
TOTAL CAPITALIZATION	18,258,172	20,752,708	23,626,903	25,362,881
DEBT RATIO	0.7656	0.7413	0.6840	0.6682
EQUITY RATIO	0.2344	0.2587	0.3160	0.3318
TOTAL	1.0000	1.0000	1.0000	1.0000
EQUITY MAINTENANCE	0	584,781	743,528	548,602
EQUITY LEVEL GROWTH	0	503,581	1,354,496	399,141
CAPITAL CREDITS TO BE ROTATED	29,362	30,605	18,097	132,303
INT. PAID FROM GEN FUNDS	454,285	529,921	263,907	264,436
TOTAL SOURCES REQUIRED	1,142,862	1,648,888	2,380,028	1,344,481
RETURN	418,405	541,254	1,050,057	1,050,057
INTEREST	454,285	529,921	597,086	648,756
OPERATING MARGIN	-35,880	11,333	452,971	401,301
NON-OPERATING REVENUE	91,117	61,054	76,240	84,991
G&T AND OTHER CAPITAL CREDITS	633,340	1,046,579	1,253,731	209,434
NET MARGIN	688,577	1,118,967	1,782,942	695,725
RATE BASE	16,154,723	16,154,723	16,154,723	16,154,723
ROR	0.0259	0.0335	0.0650	0.0650
ROE	-0.0084	0.0021	0.0607	0.0477
WEIGHTED AVG DEBT	0.0344	0.0369	0.0383	0.0396
TIER	2.5157	3.1116	3.9861	2.0724
TIER WO CAP CREDITS	1.1216	1.1366	1.8863	1.7496
OPERATING TIER	0.9210	1.0214	1.7586	1.6186
DSC	2.0274	2.4374	3.0184	1.9733
DSC WO CAP CREDITS	1.3046	1.3428	1.8010	1.7787
OPERATING DSC	1.2006	1.2789	1.7269	1.6997

ATTACHMENT #3
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SCHEDULE III
Page 3 of 5 Pages

BALANCE SHEET

	12/31/86	12/31/87	12/31/88	12/31/89
TOTAL UTILITY PLANT	20,233,233	21,766,063	23,261,140	24,878,544
ACCUMULATED DEPRECIATION	4,151,687	4,535,120	4,930,950	5,499,244
NET UTILITY PLANT	16,081,546	17,230,942	18,330,190	19,379,300
ENDING GENERAL FUNDS	806,305	1,095,704	1,279,363	1,368,320
GENERAL FUNDS EXCL ITEMS	406,047	415,209	419,588	423,744
INV IN ASSOC ORG - PAT CAP	737,517	1,784,096	3,037,827	3,247,260
OTHER ASSETS	1,139,838	1,139,838	1,473,017	1,857,337
TOTAL ASSETS	19,171,253	21,665,789	24,539,984	26,275,962
TOTAL MARGINS AND EQUITIES	4,280,170	5,368,532	7,466,555	8,414,298
LT DEBT - REA 2%	8,648,342	8,329,856	8,005,000	7,673,647
LT DEBT - REA 5%(NET)	4,615,599	6,160,029	7,177,721	8,219,288
LT DEBT - OTHER	714,061	894,291	977,627	1,055,648
OTHER LIABILITIES	913,081	913,081	913,081	913,081
TOTAL LIAB & EQUITY	19,171,253	21,665,789	24,539,984	26,275,962

STATEMENT OF OPERATIONS

	12/31/86	12/31/87	12/31/88	12/31/89
DEPRECIATION EXPENSE	633,583	681,582	728,399	779,047
INTEREST	454,285	529,921	597,086	648,756
OPERATING MARGIN	-35,880	11,333	452,971	401,301
NON-OPERATING REVENUE	91,117	61,054	76,240	84,991
CASH BEFORE DEBT SERVICE	1,143,105	1,283,891	1,854,696	1,914,094
DEBT SERVICE	876,217	956,149	1,029,829	1,076,135
INT. PAID FROM ADV.PYMTS.	0	0	333,179	384,320
CASH AFTER DEBT SERVICE	266,888	327,742	1,158,046	1,222,280

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SCHEDULE III
Page 4 of 5 Pages

GENERAL FUNDS SUMMARY

	12/31/86	12/31/87	12/31/88	12/31/89
BEGINNING GENERAL FUNDS	0	806,305	1,095,704	1,279,363
CASH AFTER DEBT SERVICE	266,888	327,742	1,158,046	1,222,280
GENERAL FUNDS AVAILABLE	0	1,134,047	2,253,750	2,501,642
PURCHASE OF EXCLUDABLE ITEMS	0	9,162	4,379	4,156
CAPITAL CREDITS TO BE ROTATED	29,362	30,605	18,097	132,303
GENERAL FUNDS INVESTED	0	-1,423	951,911	996,863
TOTAL USE OF GENERAL FUNDS	0	38,344	974,387	1,133,322
ENDING GENERAL FUNDS	806,305	1,095,704	1,279,363	1,368,320

PLANT INVESTMENT & SOURCES OF FINANCING

	12/31/86	12/31/87	12/31/88	12/31/89
BEGINNING TOTAL UTILITY PLANT	0	20,233,233	21,766,063	23,261,140
TOTAL ADDITIONS	0	1,830,979	1,827,647	1,828,157
PLANT RETIREMENTS	0	298,149	332,570	210,753
TOTAL UTILITY PLANT	20,233,233	21,766,063	23,261,140	24,878,544
NEW DEBT - REA 5%	0	1,649,162	788,162	748,164
NEW DEBT - OTHER	0	183,240	87,574	83,129
TOTAL LOAN FUNDS REQUIRED	0	1,832,402	875,736	831,294
GENERAL FUNDS INVESTED	0	-1,423	951,911	996,863
TOTAL ADDITIONS	0	1,830,979	1,827,647	1,828,157

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SCHEDULE III
Page 5 of 5 Pages

DEBT AND DEBT SERVICE SUMMARY

	12/31/86	12/31/87	12/31/88	12/31/89
REA 2%				
BEGINNING BALANCE	0	8,648,342	8,329,856	8,005,000
INTEREST	0	172,967	166,597	160,100
PRINCIPAL REPAYMENT	0	318,486	324,856	331,353
LT DEBT - REA 2%	8,648,342	8,329,856	8,005,000	7,673,647
REA 5%				
BEGINNING BALANCE (NET)	0	4,615,599	6,160,029	7,177,721
BEG. UNAPPLIED ADVANCE PYMTS.	0	889,112	934,412	642,480
BEGINNING BALANCE (GROSS)	0	5,504,711	7,094,441	7,820,201
CUMULATIVE NEW DEBT	0	1,649,162	2,437,324	3,185,488
INT. PAID FROM GEN FUNDS	0	271,165	0	-0
INT. PAID FROM ADV.PYMTS.	0	0	333,179	384,320
INTEREST	0	271,165	333,179	384,320
PRINCIPAL REPAYMENT	0	59,431	62,403	65,523
LT DEBT - REA 5%(GROSS)	5,504,711	7,094,441	7,820,201	8,502,842
UNAPPLIED ADVANCE PYMTS.	889,112	934,412	642,480	283,554
LT DEBT - REA 5%(NET)	4,615,599	6,160,029	7,177,721	8,219,288
CFC-OTHER				
BEGINNING BALANCE	0	714,061	894,291	977,627
NEW DEBT, FIRST YEAR	0	183,240	182,341	181,364
NEW DEBT, SECOND YEAR	0	0	87,574	87,144
NEW DEBT, THIRD YEAR	0	0	0	83,129
INTEREST	0	85,789	97,310	104,336
PRINCIPAL REPAYMENT	0	3,010	4,237	5,109
LT DEBT - OTHER	714,061	894,291	977,627	1,055,648
TOTAL DEBT				
BEGINNING BALANCE	0	13,978,002	15,384,176	16,160,348
TOTAL LOAN FUNDS REQUIRED	0	1,832,402	875,736	831,294
INTEREST	454,285	529,921	597,086	648,756
PRINCIPAL REPAYMENT	421,932	380,928	391,496	401,985
DEBT BALANCE	13,978,002	15,384,176	16,160,348	16,948,583

ATTACHMENT #3
PAGE 5 of 5

PUBLIC UTILITY COMMISSION OF TEXAS
STAFF COST OF SERVICE STUDY
DICKENS ELECTRIC COOPERATIVE, INC.
DOCKET NO. 7556
PROPOSED BASE RATE REVENUE REQUIREMENT

SCHEDULE I
PAGE 1 OF 1

REVISED 11-19-87

(1) Customer Class	(2) Present Revenue ($)	(3) Staff C.O.S. at an equalized ROR ($)	(4) (%)	(5) Revenue Deficiency ($)	(6) (%)	(7) Staff Proposed Revenue Adjustment ($)	(8) (%)	(9) Staff Proposed Revenue Requirement ($)	(10) Adjusted Rate of Return (%)	(11) Relative Rate of Retu (.
Farm & Home	831,126	1,314,069	8.00	482,943	58.11	118,613	14.27	949,739	(0.95)	(0.12)
Irrigation	99,953	214,220	8.00	114,267	114.32	14,265	14.27	114,218	(6.46)	(0.81)
Small Commercial	287,148	387,172	8.00	100,024	34.83	40,980	14.27	328,128	2.08	0.26
Oil Wells	3,426,567	3,704,302	8.00	277,735	8.11	386,482	11.28	3,813,049	9.93	1.24
White River	185,965	225,165	8.00	39,200	21.08	26,540	14.27	212,505	3.87	0.48
Large Power	5,590,870	5,367,496	8.00	(223,374)	(4.00)	215,647	3.86	5,806,517	18.26	2.28
Cotton Gins	16,689	16,209	8.00	(480)	(2.88)	644	3.86	17,333	11.66	1.46
Lighting	31,552	48,912	8.00	17,360	55.02	4,503	14.27	36,055	(0.36)	(0.05)
Total System	10,469,870	11,277,544	8.00	807,674	7.71	807,674	7.71	11,277,544	8.00	1.00

DOCKET NO. 7556
ATTACHMENT #4

DOCKET NO. 7556

APPLICATION OF DICKENS ELECTRIC COOPERATIVE, INC. FOR AUTHORITY TO CHANGE RATES		PUBLIC UTILITY COMMISSION OF TEXAS

Supplemental Examiner's Report

The examiner in the above referenced docket files this Supplemental Examiner's Report to the Examiner's Report she issued on November 30, 1987, in order to note corrections to certain mistakes and to state her recommendations on the exceptions that have been filed.

Pages 5, 14, 34 and 35, and the cover letter to the Examiner's Report contains an incorrect figure for invested capital. The figure should be $16,154,741, not $16,154,714. Page 28 contains an error in the third full paragraph. The portion of the quote from DEC witness Stover should read: (Bissett) "primarily serves oil well load, whereas the Glenn substation serves essentially no oil well load." Finally on page 6, the CFC recommended TIER level is stated, in the chart, to be 2.5 - 3.5. This range was the same range for CFC recommended TIER levels stated by DEC witness Bailey Reece in his prefiled testimony (Coop Exhibit No. 2, Reece, p.10.) The examiner now finds that the testimony provided by Mr. Reece was incorrect on this point and the level of 2.0 - 3.0 as stated by staff witness Grant is accepted (Staff Exhibit No. 9, Grant, p.17.) Replacement pages making each of these corrections is included with this Supplemental Examiner's Report.

The examiner would also like to offer further analysis on two issues raised by TIEC exceptions, namely the issues of refinancing and of DEC's monthly demand allocation.

TIEC excepted to Finding of Fact No. 20 and Conclusions of Law No. 7-8 "insofar as they accept DEC's stated cost of debt and reject TIEC's recommendations regarding methods to reduce the interest component of that debt." The examiner renews her recommendation of the Findings of Fact and Conclusions of Law stated in the Examiner's Report, but would like to change her recommendation on TIEC's proposal that the Commission order DEC to examine and pursue refinancing as a means of reducing its revenue requirement. As was

stated in the Examiner's Report, TIEC did not present any direct testimony on the issue of debt capital or refinancing and there is no evidence in the record to quantify the costs or benefits associated with refinancing. Thus while the examiner does not find that the record supports the conclusion stated in TIEC's exceptions that DEC could realize $15,632.00 in savings from refinancing, she does agree that there is a possibility that DEC could realize savings on behalf of its members by refinancing, at a lower interest rate, the $694,714.00 in CFC loan monies upon which it is currently paying 11% interest.

The examiner reasoned in the Examiner's Report that because there was insufficient evidence to show that DEC would realize savings by refinancing its 11% debt, the Commission should not order such a pursuit. Upon further reflection, the examiner recommends that the Commission order DEC to investigate the possibility of realizing savings through refinancing and report its findings to the Commission. At that time, a decision can be made as to whether DEC should be ordered to actually pursue refinancing.

Accordingly, the examiner recommends the adoption of the following Finding of Fact (a) and Conclusion of Law (b):

a. There is a possibility that DEC could lower its interest expense by refinancing, at a lower interest rate, that portion of its current debt for which DEC is paying 11% interest.

b. DEC should be ordered to investigate the possibility of refinancing, as discussed in Finding of Fact No. a, and report to the Commission its findings and proposed course of action with regard to such refinancing within 30 days of the signing of the final Order in this case.

TIEC also excepted to Findings of Fact Nos. 31 and 32 insofar as they found DEC's allocation of monthly demand responsibility reasonable. The examiner would like to clarify her comments on page 29 of the Examiner's Report and offer further analysis on the issue of DEC's allocation of monthly demand

responsibility. As the examiner stated in the Examiner's Report, the allocation of monthly demand responsibility to the Large Power, Oil Well Producing, White River, Irrigation and Cotton Gin classes was made by using the sum of individual customer metered kw (or .746 kwh per HP) adjusted for line losses and a coincident factor. As stated in the Examiner's Report, customers in the Farm and Home and Small Commercial classes are not metered and DEC assigned all remaining system demand (that was not allocated to demand-metered customers) to those two classes.

The examiner's reasoning in evaluating this allocation of monthly demand responsibility however, neglects to acknowledge that the calculation of the monthly demand responsibility which is allocated to the metered classes must be adjusted by assumptions for line losses and coincident factors. Because the examiner found elsewhere in her report that DEC had improperly assigned percentage losses to the various classes and recommended adjustments to DEC's assignment of percentage line losses, she should have specified that the same recommended line loss factors should be employed in allocating monthly demand responsibility. The examiner has not had an opportunity to learn whether this will affect the cost of service study. The parties should be prepared to address this issue at the Final Order Meeting.

DEC does not know the coincident peak (CP) for demand on the system. It therefore estimated coincidence factors for the metered classes and adjusted the twelve (12) monthly non-coincident peak (NCP) demands of these classes (for which data was available) by coincidence factors. In developing coincidence factors, DEC assumed that the system peak would be driven by the Large Power and Oil Well class NCP demand. It based this assumption on the fact that 90% of the system's load is from these two classes.

Each month, DEC allocated the difference between total calculated demand and total actual demand to the Farm and Home and Small Commercial classes. During some months the demand responsibility for these classes was lowered and during others it was increased. Overall, the difference between total actual and total calculated demand was 3,150 kw. Although it appears that these two

classes received a decrease in their allocated demand responsibility, they merely received the portion of actual demand not allocated to the other classes under the method described above.

The examiner finds that DEC's method for allocating monthly demand responsibility was reasonable for the data it had available, although she recommends use of the line loss factors recommended in the Examiner's Report. Also, the examiner recommends that DEC begin collecting CP data in order to make more accurate demand allocations in the future.

Findings of Fact Nos. 31 and 32 should be adjusted as follows:

31. Dickens' method for allocating monthly demand responsibility among the classes is reasonable, but it should employ the line loss factors recommended in this report.

32. Dickens' cost of service study, with the changes recommended by the staff and found reasonable by Finding of Fact No. 29, as well as with the changes recommended in Findings of Fact Nos. 30 and 31, is an adequate basis upon which to design rates.

The examiner recommends rejection of all remaining exceptions filed by the parties and believes that no further supplementation of her Report is necessary.

Respectfully submitted,

Becky Bruner

BECKY BRUNER
HEARINGS EXAMINER

APPROVED on this the 16th day of December 1987.

Phillip A. Holder

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

DOCKET NO. 7556

APPLICATION OF DICKENS ELECTRIC COOPERATIVE, INC. FOR AUTHORITY TO CHANGE RATES	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In a public meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that, after statutory notice was provided to the public and interested persons the application in this case was processed by an examiner in accordance with Commission rules and all applicable statutes. An Examiner's Report together with certain amendments and supplements thereto containing Findings of Fact and Conclusions of Law was submitted, which report is hereby ADOPTED, as amended and supplemented, with the following modifications:

1. Finding of Fact No. 13 is amended to read as follows:

   13. The schedule attached to this Order showing the components of total invested capital is reasonable.

2. Finding of Fact No. 16 is DELETED.

3. Finding of Fact No. 17(c) is DELETED.

4. Findings of Fact Nos. 18-21 are DELETED.

5. Finding of Fact No. 25 is AMENDED to read as follows:

   25. The schedule attached to this Order showing the adjusted revenue requirement and its components is reasonable.

6. Finding of Fact No. 37 should read as follows:

   37. There is a possibility that DEC could lower its interest expense by refinancing, at a lower interest rate, that portion of its current debt for which DEC is paying 11% interest.

7. Finding of Fact No. 38 should read as follows:

38. A 7.0% ROR applied to the staff model assuming application of unapplied advance payments is reasonable as demonstrated by the staff analysis in Staff Exhibit No. 9.

8. Finding of Fact No. 39 should read as follows:

39. A 7.0% ROR will improve DEC's financial condition without being unduly burdensome on consumers.

9. Finding of Fact No. 40 should read as follows:

40. A ROR of 7.0% applied to DEC's invested capital of $16,154,711 provides a total in return dollars of $1,130,830.

10. Conclusion of Law No. 11 should read as follows:

11. DEC should be ordered to investigate the possibility of refinancing, as discussed in Finding of Fact No. 37, and report to the Commission its findings and proposed course of action with regard to such refinancing within 30 days of the signing of the final Order in this case.

The Commision further issues the following Order:

1. The application of Dickens Electric Cooperative, Inc. (DEC) for a rate increase is GRANTED in part, as reflected by the terms of this Order.

2. DEC shall rerun its cost of service study and schedule of class allocations as modified to reflect the cost of service and cost allocation changes ordered herein, using the revenue adjustments incorporated in this Order, and shall design rates in accord with

this Order. Within 20 days after the date of this Order, DEC shall file with the Commission five copies of all pertinent tariff sheets revised to incorporate all the directives of this Order and to generate the revenues prescribed in this Order, and shall serve one copy upon each party of record. No later than 10 days after the date of the tariff filing by DEC, parties shall file any objections to the tariff proposal and the general counsel shall file in writing the staff's comments recommending approval, modification or rejection of the individual sheets of the tariff proposal. No later than 15 days after the date of the tariff filing by DEC all parties and the general counsel shall file in writing any responses to the previously filed comments of general counsel and the parties. 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 procedure established herein. The tariff sheets shall be deemed approved and shall become effective upon expiration of 20 days after the date of filing, in the absence of written notification of approval, modification or rejection by the Hearings Division. In the event that any sheets are rejected, DEC shall file proposed revisions of those sheets in accordance with the Hearings Division letter within 10 days after the date of that letter, with the review procedures set out above again to apply. Copies of all filings and of the Hearings Division letter(s) under this procedure shall be served on all parties of record and the general counsel.

3. The revised and approved rates shall be charged only for service rendered in areas over which this Commission is exercising original jurisdiction, and said rates may be charged only for service rendered after the tariff approval date. Should the tariff approval date fall with DEC's billing period, it is authorized herein to prorate each customer's bill to reflect the

customer charge, demand charge, and energy consumption at the appropriate new rates.

4. DEC is Ordered to file a report with the Commission detailing and quantifying the costs and benefits of refinancing its 11 percent long-term debt. DEC should contact its lender and discover all options that are available for refinancing this debt and the report should verify that such contacts were made. All terms and conditions that would be associated with refinancing should be detailed. In the report, DEC should also inform the Commission of its desired course of action with regard to refinancing and the reasons for such. The report should be filed within the Commission within 30 days of the signing of this final order.

5. DEC is ordered to file a report explaining why the cost of service study and revenue allocation approved in this docket is appropriate. In particular, DEC should show why a negative relative rate of return for the Farm and Home, Irrigation and Lighting classes is appropriate and is not in violation of Section 38 of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987). The report should be filed within 60 days of the final approval of tariffs in this docket. After receipt of the report, the staff and any interested party may review it for the purposes of determining whether an inquiry into the reasonableness of DEC's rates under Section 42 of PURA is appropriate.

6. All motions and requests for any form of relief not expressly granted herein are denied for want of merit.

SIGNED AT AUSTIN, TEXAS on this the 18th day of December 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

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PUBLIC UTILITY COMMISSION OF TEXAS

SCHEDULE I

DICKENS ELECTRIC COOPERATIVE
DOCKET NO. 7556
REVENUE REQUIREMENT

DESCRIPTION	(COLUMN 1) TEST YEAR PER BOOKS	(COLUMN 2) COMPANY ADJUSTMENTS TO TEST YEAR	(COLUMN 3) COMPANY REQUESTED TEST YEAR	(COLUMN 4) STAFF ADJUSTMENTS TO REQUEST	(COLUMN 5) STAFF RECOMMENDED TEST YEAR
FUEL	$ 0	$ 0	$ 0	$ 0	$ 0
PURCHASED POWER	7,390,566	580,634	7,971,200	(208,240)	7,762,960
OPERATIONS AND MAINTENANCE	1,534,307	(73,078)	1,461,229	(7,116)	1,454,113
DEPRECIATION AND AMORTIZATION	633,583	13,437	647,020	0	647,020
OTHER TAXES	140,715	10,905	151,620	(1,354)	150,266
INTEREST ON CUSTOMER DEPOSITS	0	0	0	0	0
RETURN	428,571	863,877	1,292,448	(161,618)	1,130,830
REVENUE REQUIREMENT	10,127,742	1,395,775	11,523,517	(378,328)	11,145,188

PUBLIC UTILITY COMMISSION OF TEXAS

SCHEDULE IV

DICKENS ELECTRIC COOPERATIVE
DOCKET NO. 7556
INVESTED CAPITAL

DESCRIPTION	(COLUMN 1) TEST YEAR PER BOOKS	(COLUMN 2) COMPANY ADJUSTMENTS TO TEST YEAR	(COLUMN 3) COMPANY REQUESTED TEST YEAR	(COLUMN 4) STAFF ADJUSTMENTS TO REQUEST	(COLUMN 5) STAFF RECOMMENDED TEST YEAR
PLANT IN SERVICE	$ 19,888,939	$ 0	$ 19,888,939	$ 0	$ 19,888,939
ACCUMULATED DEPRECIATION	(4,151,687)	0	(4,151,687)	0	(4,151,687)
NET PLANT IN SERVICE	15,737,252	0	15,737,252	0	15,737,252
CONSTRUCTION WORK IN PROGRESS	344,294	(344,294)	0	0	0
WORKING CASH ALLOWANCE	151,499	(9,135)	142,364	(890)	141,474
MATERIALS AND SUPPLIES	189,663	0	189,663	0	189,663
PREPAYMENTS	86,322	0	86,322	0	86,322
LESS:					
CUSTOMER DEPOSITS	0	0	0	0	0
OTHER COST FREE CAPITAL	0	0	0	0	0
TOTAL INVESTED CAPITAL	$ 16,509,030	$ (353,429)	$ 16,155,601	$ (890)	$ 16,154,711
RATE OF RETURN			8.0000%	-1.0000%	7.0000%
RETURN			$ 1,292,448	$ (161,618)	$ 1,130,830

West Texas Utilities Company, Docket No. 8081. Examiner's report adopted August 31, 1988. Applicant's request for proposed transmission line in Dickens and Kent Counties granted.

Southwestern Public Service Company, Docket No. 8129. Examiner's report adopted August 31, 1988. Applicant's request for proposed transmission line and associated substation within Gaines County granted.

Texas-New Mexico Power Company, Docket No. 7807. Examiner's report adopted August 24, 1988. Applicant's request for proposed transmission line and associated substation within Collin County granted.

Midwest Electric Cooperative, Inc., Docket No. 8038. Examiner's report adopted August 24, 1988. Applicant's request for proposed transmission line and associated substation within Scurry County granted.

Magic Valley Electric Cooperative, Inc., Docket No. 8082. Examiner's report adopted August 24, 1988. Applicant's request for proposed transmission line and associated substation within Hidalgo County granted.

Houston Lighting and Power Company, Docket No. 8109. Examiner's report adopted August 24, 1988. Applicant's request for proposed transmission line and associated substations within Fort Bend and Brazoria Counties granted.