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Jo Campbell
Commissioner

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PUC BULLETIN

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APPLICATION OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST FOR APPROVAL OF EMERGENCY NUMBER SERVICE (911) TARIFF	§ § § §	DOCKET NO. 7016

December 2, 1987

Emergency Number Service Tariff of General Telephone Company of the Southwest approved as amended.

[1] MISCELLANEOUS - TELEPHONE

The liability of all entities involved in 911 systems and services is defined by statute, not tariff; thus it is not appropriate to include in a telephone company's tariff all statutory language regarding the limitations of liability of other entities participating in the creation and operation of a 911 service or defining terms not used in the tariff.

[2] RATEMAKING - RATE DESIGN - TELEPHONE - OTHER SPECIAL TARIFFS AND SERVICES

It is appropriate that no component for contribution be included in the costs used to determine the rates for the provision of 911 service.

DOCKET NO. 7016

APPLICATION OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST FOR APPROVAL OF EMERGENCY NUMBER SERVICE (911) TARIFF	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Procedural History

This docket originated on August 29, 1986, when General Telephone Company of the Southwest (GTSW or the company) filed its tariff for Emergency Number Service (911). This tariff set forth the provisions, rules and regulations, definitions of terms, rates and charges, and a list of subscribers associated with this offering. (At the time of the filing of this tariff, GTSW had no subscribers to the Enhanced 911 provisions.) On September 9, 1986, the Commission staff recommended that this tariff filing be docketed because of the concerns expressed by some of the cities served by GTSW regarding the limitation of liability provisions in the tariff. By order of September 21, 1986, the October 3, 1986, effective date of this tariff was suspended for 150 days until March 2, 1987, or until entry of a superseding order by the Commission. This docket was then assigned to the undersigned examiner.

Examiner's Order No. 1, signed October 8, 1986, required GTSW to give individual written notice to all municipalities and other governmental entities which are current or potential subscribers to this service offering. GTSW demonstrated compliance with this requirement by filing, on November 4, 1986, the affidavit of Ms. Gloria R. DeWitt, under whose supervision the notice was mailed on October 22, 1986. This examiner's order also established guidelines for discovery and deadlines for prefiling testimony and for filing motions to intervene; the procedural schedule was subject to change if motions to intervene and/or requests for a hearing were filed. The dates for prefiling testimony were extended at the request of GTSW and without objection of the staff.

Because motions to intervene were filed by several cities, a prehearing conference was held on December 11, 1986. Appearances were entered by

Ms. Angela Demerle and Mr. Patrick Craven for GTSW; Mr. Lawrence Jackson for the City of Coppell; Mr. Gary Chatham for the City of Plano; Ms. Karen Brophy for the City of Carrollton; Mr. Don Butler for the Cities of Carrollton, Coppell, Garland and Plano; Mr. Robert D. Andron for the Cities of Bryan and College Station; Mr. Woody Glover for the Smith County 911 Communications District; and Ms. Dineen Majcher for the Commission staff and the public interest. Various motions to intervene were granted, and a procedural schedule was established for moving the case to a hearing on the merits.

On January 15, 1987, the hearing on the merits convened. Appearances were entered by Ms. Angela Demerle for GTSW; Mr. Woody Glover representing Smith County 911 Communications District; Mr. Don Butler, on behalf of the Cities of Carrollton, Coppell, Garland and Plano; Mr. Gary Chatham for the City of Plano; Mr. Robert Andron for the City of Bryan; Ms. Catherine Locke for the City of College Station; and Ms. Dineen Majcher representing the Commission staff and the public interest.

Following a brief discussion among the parties off the record, Ms. Demerle announced on the record that the parties had reached an agreement regarding the procedure for resolving the issues in this docket. Since the Legislature was likely to consider legislation dealing with the question of liability in the provision of 911 emergency service during the regular session, the parties preferred that the Commission not rule on that question at that time. Instead, the parties agreed that the prefiled testimony of the witnesses would be admitted into the record without objection (and to that end, the motions to strike filed by general counsel; the Cities of Carrollton, Coppell, Garland and Plano; and GTSW were withdrawn by counsel) and cross-examination waived. The parties would then file their initial and reply briefs, and the examiner would enter an interim order by March 2, 1987, the date Commission jurisdiction over this docket originally expired. The parties agreed to meet again following the close of the legislative session, and the Commission's final action in this

docket would be taken by August 31, 1987. GTSW agreed to extend its effective date so that the end of the suspension period would fall on that date.

The examiner agreed to the procedure outlined by Ms. Demerle, and the pre-filed testimony of all the witnesses was marked and admitted into the record without objection or cross-examination. Staff witness David Featherston took the witness stand to correct two minor typographical errors in his testimony and to make a clarifying statement regarding one of his recommendations. There was no cross-examination of Mr. Featherston. The examiner set dates for the parties to file their initial and reply briefs, and the hearing was adjourned. By order entered January 16, 1987, the examiner recalculated GTSW's effective date so that the suspension period would terminate on August 31, 1987; the new effective date is April 3, 1987, and the examiner deemed GTSW to have extended its effective date until then. Based upon the order of suspension already entered in the docket, the effective date has been suspended until August 31, 1987, or until superseding order of the Commission.

By Examiner's Order No. 7, signed March 2, 1987, the proposed tariffs were ordered to be amended in several respects based on the testimony and evidence in the record, and were given interim approval following submission of corrected tariff sheets by GTSW. After the close of the regular legislative session, on June 22, 1987, the examiner sought information from GTSW on the status of this docket. In reply, on July 17, 1987, GTSW filed amended tariff sheets which incorporated the substance of the 911 legislation passed by the legislature (HB 911) and signed by the governor on May 28, 1987.

Examiner's Order No. 8, signed July 20, 1987, directed the parties to file responses to GTSW's filing, and specifically informed the parties that a failure to object to the amended tariff would be deemed agreement with it and with Commission approval of it. This order also instructed the parties to indicate in their responses whether additional hearings were required to resolve the issues in this docket. Responses were filed by the City of Bryan;

the Commission staff; and the Cities of Carrollton, Coppell, Garland, and Plano and the Smith County 911 Communications District. On July 31, 1987, GTSW filed its reply to the responses. None of the parties requested additional hearings. Thus the issues have been resolved on the basis of the record developed prior to the interim order in this docket (Examiner's Order No. 7) and the filings made by the parties on and after July 17, 1987.

II. Jurisdiction

The Commission has jurisdiction of the issues in this docket pursuant to Sections 16(a) and 18(b) of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987) and P.U.C. SUBST. R. 23.24.

III. Discussion

The parties to this docket filed their original and reply briefs according to the procedure agreed to by the parties and outlined in Examiner's Order No. 6. The briefs identify three areas of disagreement regarding the tariff filed by GTSW. First, several portions of the tariff need clarification, according to the testimony of staff witness Featherston. Second, the lack of a specific rate structure in the tariff is objectionable to intervenors, as discussed in the testimony of the witnesses for the Cities of Bryan and College Station. The third major issue, the proposed limitation of liability clauses, was the major area of disagreement in this docket at the time interim relief was being considered. GTSW's amended tariff sheets appear to obviate much of the controversy generated by the original filing. These three areas are discussed in greater detail below.

A. Description of GTSW's Proposed Emergency Number Service (911) Tariff

As described by GTSW witness Michael A. Jinright and staff witness David E. Featherston, Emergency Number Service, or 911 service, is an emergency service provided by a customer of GTSW to the general public. The customer is generally a local governmental unit (which will be defined and disussed further below). This customer receives emergency calls dialed to the 911 number by the public, and then transfers the calls to the proper jurisdiction which then dispatches the emergency vehicles and assistance to the correct address in order to respond to the emergency. GTSW itself does not provide 911 service; through its tariff, GTSW offers certain features and associated equipment for the customer's use in providing emergency number service. This offering includes central office switching facilities, outside plant facilities, and customer premise equipment to be used by the customer in answering, transferring and dispatching public emergency telephone calls dialed to 911.

Under this tariff, customers may enhance Basic 911 service with optional features such as Automatic Number Identification (ANI), Automatic Location Identification (ALI), Calling Party Hold, and Central Office Transfer in order to design their own emergency number service network. Once the customer has designed its network, GTSW conducts a cost study and negotiates with the customer to contract an individualized price. Since no specific rate structure is proposed in this tariff, 911 service will, for the most part, be provided on a customer-specific or individual case basis (ICB). When GTSW and a customer have agreed on a particular facility arrangement, the ICB rate structure will be listed in this tariff at the specific rates required in order to provide the particular facility arrangement requested by the customer. (GTSW Exhibit No. 2 at 2-3; and at 5; Staff Exhibit No. 2 at 2-3.)

GTSW's tariff defines the 911 customer as a municipality or other state or local governmental entity, or an authorized agent of one or more municipalities or other state or local governmental entities to whom authority has been law-

fully delegated. The customer must be legally authorized to operate the customer premise equipment and to have public safety responsibility for responding to telephone calls from the public for emergency police and fire service within the designated telephone central office serving area. GTSW does not (and will not) answer and/or forward such 911 calls, but only furnishes facilities which will enable the customer to respond to such calls utilizing its own personnel, usually located on the premises of the customer. (GTSW Exhibit No. 2 at 3-4.)

Mr. Jinright's testimony outlined the specific customer requirements associated with the provision of 911 service as proposed in this tariff:

1. The customer must answer all 911 service calls 24 hours a day, seven days a week.

2. The customer must assume full responsibility for dispatching the appropriate emergency agency within the 911 Designated Calling Area.

3. The customer must develop an appropriate method for responding to calls for non-participating agencies which may be directed to a 911 service Public Safety Answering Point (PSAP) by callers to 911.

4. The customer must subscribe to or provide telephone equipment and trunking capable of adequately handling the number of incoming 911 service lines recommended by GTSW to be installed.

(GTSW Exhibit No. 2 at 4-5.)

B. Statutory Authority for Creation of 911 Districts and the Provision of 911 Service

At the time this tariff was filed, the provision of 911 service was governed by four statutes. The 9-1-1 Emergency Number Act, Tex. Rev. Civ. Stat. Ann. art. 1432c (Vernon Supp. 1987) is applicable only to counties with a population of more than 2 million, plus certain adjacent territory as described in section 4 of this act. The Emergency Communication District Act, Tex. Rev. Civ. Stat. Ann. art. 1432d (Vernon Supp. 1987) applies only to counties with a population of more than 860,000, pursuant to section 4 of this act. The Emergency Telephone Number Act, Tex. Rev. Civ. Stat. Ann. art. 1432e (Vernon Supp. 1987) applies only to counties with a population of more than 75,000, and two or more contiguous counties which qualify individually under this act may join together to form a district under this act, as provided in section 4. Each of these acts provides that if a city that is part of a district annexes additional territory that is not part of the district, the annexed territory becomes part of the district.

In addition, the statements of purpose and policy in each of these acts is identical. The purpose underlying each of these acts is

> . . . to establish 9-1-1 as the primary emergency telephone number for use by certain local governments and to encourage units of local government and combinations of the units to develop and improve emergency communication procedures and facilities in a manner that makes possible the quick response to any person calling the telephone number 9-1-1 seeking police, fire, medical, rescue, and other emergency services. . . .

(Tex. Rev. Civ. Stat. Ann. art. 1432c, §2 (Vernon Supp. 1987); Tex. Rev. Civ. Stat. Ann. art. 1432d, §2 (Vernon Supp. 1987); Tex. Rev. Civ. Stat.

Ann. art. 1432e, §2 (Vernon Supp. 1987).) In furtherance of this purpose, the legislature articulated a public interest in shortening the time required for a citizen to request and receive emergency aid; recognized that there are thousands of different emergency telephone numbers throughout the state and that telephone exchange boundaries and central office service areas do not necessarily correspond to public safety and political boundaries; found that a dominant part of the state's population is located in rapidly expanding metropolitan areas that generally cross the boundary lines of local jurisdictions and often extend into two or more counties; and noted that provision of a single, primary, three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public safety efforts by making it less difficult to notify quickly public safety personnel. (Tex. Rev. Civ. Stat. Ann. art. 1432c, §2(1)-(4) (Vernon Supp. 1987); Tex. Rev. Civ. Stat. Ann. art. 1432d, §2(1)-(4) (Vernon Supp. 1987); Tex. Rev. Civ. Stat. Ann. art. 1432e, §2(1)-(4) (Vernon Supp. 1987).) Thus the legislature has expressed emphatically that it is in the public interest for 911 service to be provided.

These three statutes establish the methods by which 911 districts are to be created, governed, operated, and funded. The acts also make clear that it is the communication districts which provide 911 service. The districts, when created and confirmed, constitute public bodies corporate and politic, exercising public and essential governmental functions. Thus, a 911 district falls within the definition of "customer" found in GTSW's proposed tariff.

In addition, Tex. Rev. Civ. Stat. Ann. art. 1432f (Vernon Supp. 1987) created the Advisory Commission on State Emergency Communications and charged it with investigating the provision of emergency services in Texas in order to develop recommendations relating to the establishment of a 911 service; identifying all existing federal, state, local and private sources available for the implementation of a 911 service; and estimating the cost to local public agen-

cies to plan, implement and operate a 911 service. (Tex. Rev. Civ. Stat. Ann. art. 1432f, §§2-3 (Vernon Supp. 1987).) This act was to have expired May 31, 1987, and the advisory commission dissolved.

During the regular session of the 70th Legislature, HB 911 was passed; it was signed by Governor Clements on May 28, 1987. Among other things, this bill reenacted art. 1432f, added new definitions to it, and amended existing definitions. (SECTION 1, Sec. 1, HB 911.) This act also recreated the advisory commission and set forth in greater detail its powers and duties. The act further requires regional plans for 911 services and sets out the method by which such services are to be financed. The act amends the Civil Practice and Remedies Code by adding section 101.062, which adopts the definitions for "9-1-1 services" and "public agency" found in art. 1432f. Finally, HB 911 amends arts. 1432c, 1432d, and 1432e by setting a deadline of January 1, 1988 for creation of 911 districts, requiring the boards to solicit certain types of public comment and allowing districts to participate in regional plans. The one portion of this act critical to the resolution of the issues in this docket is discussed in Section III. C. 3. of this report.

C. Specific Tariff Provisions

As stated above, there were three main areas of disagreement with GTSW's proposed tariff for 911 service.

1. Corrections and Amendments to the Tariff

As discussed in the testimony of staff witness Featherston, there are a few items in GTSW's tariff which should be clarified or corrected. The first change recommended by Mr. Featherston was to delete the third paragraph under Rules and Regulations on Sheet 1 because it is the same as the third paragraph on Sheet 2. GTSW agreed that the paragraphs are a duplication and that the

deletion should be made. (Staff Exhibit No. 2 at Attachment 3; Reply Brief of GTSW at 1.)

Mr. Featherston also recommended that for clarity, the Rules and Regulations section of this tariff should state explicitly that 911 customers may provide their own 911 customer premise equipment. Again, GTSW agreed that this clarification should be made. (Staff Exhibit No. 2 at 4; Reply Brief of GTSW at 1.)

Third, the definitions of Basic 911 service and E911 (Enhanced 911) service provided in GTSW's responses to questions 6 and 7 of General Counsel's First RFI (Request for Information) should be incorporated into the definitions section of the tariff. In the proposed tariff, the definitions for these services read as follows:

> Basic 911--Provisions for Basic 911 do not include central office transfer, ANI [Automatic Number Identification] or ALI [Automatic Location Identification].
>
> Enhanced 911--Provisions for Enhanced 911 include central office transfer to the appropriate PSAP [Public Service Answering Point].

The definition of Basic 911 would be expanded to include the following:

> Basic 911 provides only for routing of all 911 calls from a given central office to a single Public Safety Answering Point (PSAP). This type of provision does not generally require any special equipment and is rated out of Section 6 of the General Exchange Tariff. There are a few optional features that can be provided to Basic 911 customers. These optional features are generally provided on a special assembly basis.

The definition of Enhanced 911 would include the following:

> Enhanced 911 (E911) is an expanded application that includes several special 911 features. One such feature is selected routing of 911 calls to a specific PSAP selected from among several within the 911 service area. Other features that may or may not be included are Automatic Number Identification (ANI), Automatic Location Identification (ALI), calling party hold, and central office transfer (fixed, manual, or selective).

(Staff Exhibit No. 2 at 4; and at Attachment 1, pp. 1-2.) Again, GTSW agreed to make the changes recommended by Mr. Featherston. (Reply Brief of GTSW at 1.)

The fourth amendment recommended by Mr. Featherston was to include in the Rates and Charges section of this tariff the explanation that incremental cost studies will be used to generate the rates and that the proposed rates are subject to Commission review. GTSW agreed to make this change also. (Staff Exhibit No. 2 at 4; Reply Brief of GTSW at 1.)

Mr. Featherston indicated one other concern with GTSW's proposed tariff, one that was shared by Ms. Catherine Locke, city attorney and witness for the City of College Station, and Mr. Robert D. Andron, city attorney and witness for the City of Bryan. These witnesses objected to GTSW's perceived attempt to require municipalities to answer police and other emergency calls outside their jurisdictions. (City of College Station Exhibit No. 1 at 2-3; City of Bryan Exhibit No. 1 at 2; Staff Exhibit No. 2 at 7.) At the hearing, however, Mr. Featherston made clear in his oral testimony that as long as the language in the tariff (Rules and Regulations, Sheet 3, paragraph 3) was clarified to indicate that Class Marking, Call Ring Down or some other arrangement could be made

by the city or governmental entity to take care of the jurisdictional concerns, the staff had no objection to that portion of the tariff. (Tr. at 12.)

Neither the initial brief of the Cities of Carrollton, Coppell, Garland and Plano nor that of the Cities of Bryan and College Station addressed this issue. GTSW, in its initial brief, suggested amending the tariff language in Rules and Regulations, Sheet 3, paragraph 3 to read as follows:

> Telephone Company serving boundaries and political subdivision boundaries may not coincide. Upon initiation of service by the customer, or any change in service, or any extension of service under this tariff, the customer will subscribe to Class Marking, Call Ring Down Service, or make some other arrangement with the applicable surrounding jurisdictions so that calls received on the customer's 911 Service that originate from all telephones served by the central offices within the 911 Designated Calling Area will be recieved and properly routed for appropriate response whether or not the calling telephone is situated on property within the geographical boundaries of the customer's public safety jurisdiction.

The reply briefs of the cities do not indicate whether these parties agree or disagree with the language proposed in GTSW's initial brief. This amendment to Rules and Regulations, Sheet 3, paragraph 3 clarifies GTSW's intent that the tariff does not require a governmental unit to respond physically to an emergency call from another jurisdiction. Since GTSW has no way to block calls originating outside the jurisdiction's boundaries, the jurisdiction therefore must have some procedure by which such calls are appropriately routed to the emergency service which can properly respond.

GTSW agreed that the changes suggested by Mr. Featherston should be made in the tariff; none of the intervenors expressed an opinion either way. Mr. Featherston's proposals for amending and clarifying the tariff were approved on an interim basis. GTSW's proposal for amending Rules and Regulations, Sheet 3, paragraph 3 was also approved on an interim basis. The examiner recommends that these changes be given final approval by the Commission.

2. Rate Structure for 911 Service

Mr. Jinright testified that no specific rate structure is being proposed in this tariff; instead, the tariff structure addresses the provision of features and associated equipment for the customer's use in the provision of 911 service. The features and equipment necessary for a particular customer's individual system will be priced on an individual case basis (ICB), which will be listed in the tariff being proposed at the specific rates required to provide the particular facility arrangement being requested by that customer. The reason for this ICB structure, according to Mr. Jinright, is that there are numerous options and equipment configurations available to customers of GTSW who wish to provide 911 service. In Mr. Jinright's opinion, it is neither practical nor feasible to include all possible configurations in one tariff filing. In addition, pricing associated with the equipment necessary to provide the various configurations would fluctuate so widely with the vendors' prices for components that GTSW would be constantly filing changes or updates to the tariff, which is clearly undesirable from GTSW's standpoint. (GTSW Exhibit No. 2 at 5-6.)

Staff witness Featherston explained that GTSW's determination of the price for special features and equipment will be done using an incremental cost study. Such a cost study is forward-looking in nature and examines the additional cost of producing additional units of output (or of providing additional units of service). Incremental cost studies attempt to identify those costs

that are directly attributable to the provision of the service. Ideally, in Mr. Featherston's opinion, there are two types of direct costs considered in an incremental cost study: capital costs (costs of money, depreciation, and income taxes) and operating expenses (maintenance, installation labor, ad valorem taxes, and administration costs). Mr. Featherston pointed out that the Commission has approved the use of incremental cost studies on numerous occasions, and he stated his belief that they are the appropriate costing methodology to use in this tariff. (Staff Exhibit No. 2 at 5.)

To develop the final rates for a particular customer, GTSW intends to add a contribution of at least 12 percent to the costs as calculated according to the incremental cost study. After the negotiations with the customer are completed and the bids are accepted, GTSW will file the rates and cost data with the Commission. It is Mr. Featherston's opinion that it is inappropriate for GTSW to add a contribution of at least 12 percent to the 911 costs, since GTSW provided no justification for this contribution level. This staff witness reasoned that since 911 service is designed primarily to serve and protect the general public, the Commission may want to price this service close to cost so that a greater number of people will have the opportunity to benefit from 911 emergency service. In addition, he pointed out that the costs and charges associated with 911 service will eventually be borne by the general body of ratepayers in the 911 jurisdiction by some sort of 911 surcharge. Mr. Featherston opined that a contribution cap in the range of 10 to 12 percent above cost would be adequate for this service. This is in line with the level of contribution approved by the Commission in Docket No. 6309 for GTSW's private pay telephone tariff and in Docket No. 6521 for GTSW's 976 service. (Staff Exhibit No. 2 at 5-6.)

Intervenor witness Andron seemed to object to GTSW stating that it did not undertake inspections or monitoring to discover errors, defects, and malfunctions, even though he acknowledged that GTSW's rates do not contemplate inspection and monitoring services. (City of Bryan Exhibit No. 1 at 3.) In addi-

tion, all intervenor cities objected in their initial briefs to GTSW's proposed rate structure, on the ground that it is totally open-ended and affords no certainty or readily ascertainable basis for the imposition of charges.

The Cities of Carrollton, Coppell, Garland and Plano and Smith Coounty 911 Communications District argue that the amount a customer pays for 911 service from GTSW will depend upon the sophistication, extent of effort, and negotiating ability of the governmental entity, since the determination of costs, by incremental cost studies or any other method, is not an exact science. Also, these intervenors argue, since there may be more than one way to effect the service (that is, more than one configuration of facilities and equipment); and since it will not be cost effective for any small governmental entity to engage the help it would need "to deal with the mysteries dished up by the phone company" (Brief of the Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District at 6); and since there will exist numerous examples of less expensive alternatives than the company's initial proposal, the governmental entity will essentially be at the mercy of GTSW.

These parties also assert in brief that GTSW's proposed cost-plus approach does not offer the same incentive to cut costs as does competition, and suggest that the Commission should use here the same method approved for Southwestern Bell Telephone Company (SWB). That would place a cap on the amount per customer served. (Initial Brief of Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District at 5-7.) The reply brief and the letter of July 27, 1987, filed by these parties requests that notice be taken of SWB's 911 tariff, particularly Section 5.5.5, in order to avoid questions as to charges to subscribers. These cities urge that potential customers should not be left to "the whim of GTSW by having to negotiate for whatever the Company feels inclined to dish out." (Reply Brief of Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District at 4.)

Neither the initial brief nor the response brief of the Cities of Bryan and College Station addressed directly the proposed costing methodology for this

tariff, although the initial brief did assert that by the use of the incremental cost method, GTSW should be able to calculate that portion of its operating expenses attributable to its own negligence. (Brief Submitted by Cities of College Station and Bryan, Intervenors at 3.)

Responding to the suggestion and request of the Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District, the company argues in its reply brief that there is no evidence in this case of the manner in which SWB's costs were developed in its 911 tariff, and that absent any evidence in this case that GTSW's costing method is unreasonable, GTSW should not be ordered to alter its proposal as to pricing. GTSW further points out that all rates derived for an individual governmental entity will be filed with and reviewed by the Commission. If problems arise, GTSW suggests, the proposal of the Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District should be submitted at that time. Finally, GTSW states its belief that most of its potential customers would prefer to have the opportunity of negotiating rates with the company than to be subjected to one tariffed rate which represents the projected average of all GTSW's costs of providing 911 service. (Reply Brief of GTSW at 3.)

There is no evidence in the record that the methodology used for development of SWB's pricing of 911 service is reasonable and appropriate for use with GTSW's 911 service. The request of the Cities of Carrollton, Coppell, Garland, and Plano and Smith County 911 Communications District that notice be taken of SWB's 911 tariff should have been made prior to the close of the evidentiary record at the hearing on the merits; coming in the reply brief and the letter filed July 27, 1987, the request is not timely. The request of these parties for such notice was denied in the order granting the interim relief, and it should be denied by the Commission in its final order.

The only evidence in the record regarding GTSW's proposed ICB pricing, based on customer-specific incremental cost studies, is the testimony of Mr.

Jinright and Mr. Featherston. This testimony establishes that the ICB pricing scheme, using incremental cost studies, is reasonable and appropriate. The only challenge to GTSW's proposal is Mr. Featherston's opinion that its proposed 12 percent contribution is too high for a service designed primarily to serve and protect the general public and his suggestion in testimony that there be a contribution cap in the range of 10 to 12 percent for this service. As pointed out by general counsel in brief, GTSW did not object to this recommendation. Furthermore, the examiner believes that GTSW has agreed with Mr. Featherston's position in its reply brief. (Brief of the General Counsel at 3; Reply Brief of GTSW at 1.)

The examiner also believes that the interests of the governmental entities will be protected by the pricing procedures contemplated by the tariff. Because of the virtually infinite variety of service configurations for 911 service, ICB pricing based on incremental cost studies is more accurate than projected average costs for this service, and thus is preferable. Since GTSW will file the rate proposal for each 911 customer with the Commission prior to implementing it, the 911 customer is assured of Commission review. The examiner infers from the testimony in the record that precisely because there will be Commission review of 911 service rate requests there is an incentive for GTSW to propose configurations which both meet the service requirements of the particular 911 customer and are the least costly method for doing so. Further, Commission review insures that persons with the necessary expertise in evaluating various service configurations and incremental cost studies will be available to those governmental entities unable to engage such services for themselves. In addition, while no costing methodology is exact, incremental cost studies are the most appropriate vehicles for determining the price for 911 service, and a 10 to 12 percent cap on the contribution level for this service appears reasonable. For these reasons, the examiner believes that GTSW's proposal for setting rates for 911 service, as amended by Mr. Featherston's recommendation of a cap on the contribution level, is reasonable. Since a cap must be a definite limit and not a range, the cap should be set at 12 percent. This

methodology was approved on an interim basis, and the examiner recommends that it be given final approval here.

3. Limitation of Liability Clauses Proposed by GTSW

By far the most controversial aspect of GTSW's proposed tariff for 911 service was its inclusion in the original filing of language which attempted to limit and/or disclaim any liability for the interruption or failure of 911 service. GTSW presented the testimony of Mr. William G. Mundy, who testified about the considerations underlying GTSW's inclusion of these provisions in its 911 service tariff (GTSW Exhibit No. 1). Ms. Catherine Locke and Mr. Robert D. Andron, witnesses for the City of College Station and the City of Bryan, respectively, presented testimony regarding their objections to these tariff provisions and their disagreement with Mr. Mundy's interpretation of Texas tort law. (City of College Station Exhibit No. 1 and City of Bryan Exhibit No. 1, respectively.) Staff witness Mr. Eddie M. Pope, then Acting General Counsel for Telecommunications, furnished extensive and detailed testimony about GTSW's proposal and the Commission's options (and the likely consequences of each option) with respect to that proposal. For a number of reasons (discussed at length in Examiner's Order No. 7), interim approval of the tariff, including the liability provisions as proposed by GTSW, was granted.

The provisions initially at issue are found in the Rules and Regulations section of the proposed tariff, and read as follows:

RULES AND REGULATIONS

. . .

[1] The equipment and facilities are furnished to the customer only for use in its efforts to receive reports of emergen-

cies by the public. The provision of such lines, equipment, and facilities shall not be interpreted, construed, or regarded as being for the benefit of, or creating any obligation of the Telephone Company toward or any right of action on behalf of, any third person or other legal entity.

. . .

[2] The rates charged for the lines, equipment, and facilities do not contemplate and the Telephone Company does not undertake inspection or monitoring to discover errors, defects, and malfunctions. The customer shall promptly notify GTSW in the event the lines, equipment, or facilities are not functioning properly.

(Section 46, Original Sheet No. 1.)

. . .

[3] This offering is solely for the provision of equipment and facilities for use by the local governmental unit; the provision of such equipment and facilities shall not be interpreted, construed, or regarded as being for the benefit of, or creating any Telephone Company obligation toward, or any right of action on behalf of, any third person or other legal entity.

. . .

[4] The Telephone Company's entire liability to any person for interruption or failure of 911 Service shall be limited by

the terms set forth in this section and other sections of this tariff.

(Section 46, Original Sheet No. 2.)

. . .

[5] The Telephone Company shall not be liable for any loss or damages arising out of errors, interruptions, defects, failures, or malfunctions of 911 Service, including any and all equipment and data processing system [sic] associated therewith.

(Section 46, Original Sheet No. 3.)

[6] The customer agrees that GTSW shall not be liable for any infringement or invasion of the right of privacy of any person or persons, caused or claimed to have been caused, directly or indirectly, by the installation, operation, failure to operate, maintenance, removal, presence, condition, occasion or use therewith, or by any equipment or facilities furnished by the Company in connection therewith, including, but not limited to, the identification of the telephone number, address or name associated with the telephone used by the party or parties accessing 911 Service hereunder.

[7] The customer agrees that GTSW shall not be liable for any and all loss, claims, demands, suits, or other action, or any liability whatsoever, whether suffered, made, instituted, or asserted by the customer or by any party or per-

son, for any personal injury to or death of any person or persons, or for any loss, damage or destruction of any property, whether owned by the customer or others or for any infringement or indirectly, by the installation, operation, failure to operate, maintenance, removal, presence, condition, occasion, or use of the 911 Service lines, features and the equipment associated therewith, or by any features and equipment furnished by the Company in connection therewith. The above shall include, but not be limited to, the identification of the telephone number, address, or name associated with the telephone used by the party or parties accessing 911 Service hereunder, and which arise out of the negligence or other wrongful act of the Company, the customer, its user, agencies, municipalities, or the employees or agents of any one of them.

(Section 46, Original Sheet No. 4.)

[8] GTSW shall not be liable for any other claim or suit, by a customer or any others, for damages arising out of mistakes, omissions, interruptions, delays or errors, or defects in transmission occurring in the course of furnishing facilities and equipment hereunder, except for acts constituting gross negligence on the part of GTSW in the installation and maintenance of the equipment.

(Section 46, Original Sheet No. 5.)

In its amended tariff, GTSW has removed those portions quoted above which have been designated by the examiner as paragraphs [5], [6], [7], and [8], and has inserted additional language in that portion designated by the examiner as

paragraph [4]. That paragraph now reads (with the new language underlined here for clarity):

[4] The Telephone Company's entire liability to any person for interruption or failure of 911 Service shall be limited by the terms set forth in this section and other sections of this tariff. GTSW, or its officers or employees, may not be held liable for any claim, damage, or loss arising from the provision of 9-1-1 service, unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

GTSW stated in the cover letter accompanying the filing of this amended tariff that the statutory language from the legislation had been inserted in the tariff. The response of the City of Bryan was that GTSW had not inserted the statutory language, or at least not the language which its counsel found in the copy of HB 911 which he was sent. This party asserted that GTSW's language expands on the statute's wording and gives GTSW a comfortable cushion against similar liability for municipalities, and urged that it GTSW is permitted to insert statutory language that it be "the real statutory language."

The Cities of Carrollton, Coppell, Garland and Plano and the Smith County 911 Communications District, represented by Don Butler, filed a response to the amended tariff requesting that the new language be expanded to include the limitations on liability applicable to the advisory commission and the governing body of a public agency, found in Section 4(b) of amended art. 1432f (pages 6 and 7 of Enrolled Bill, HB 911) and Section 2 of HB 91 which adds Section 101.62 to the Civil Practice and Remedies Code. Mr. Butler argued that the statutory definition of "public agency" which makes reference to cities, towns, counties, emergency communications districts, regional planning commissions or other political subdivisions or districts needs to be inserted at "some appro-

priate juncture" so that there will be no question as to the meaning of "public agency," similar to what he perceived GTSW's reasons to be for substituting "GTSW" for the statutory term "local exchange service provider."

Staff witness David Featherston reviewed the revised tariff sheets and found them reasonable and in line with the limits of liability addressed in HB 911; assistant general counsel Dineen Majcher agreed with his recommendation.

The portion of the act critical to the resolution of the issues in this docket reads as follows:

> SECTION 1. Sections 1, 2, 3, 4, 5, and 6, Chapter 909, Acts of the 69th Legislature, Regular Session, 1985 (Article 1432f, Vernon's Texas Civil Statutes), are reenacted and amended to read as follows:
>
> * * *
>
> Sec. 4. AGENCY COOPERATION; SERVICE PROVIDER LIABILITY; APPLICATION TO EMERGENCY COMMUNICATION DISTRICTS.
>
> (a) . . .
>
> (b) A service provider of telecommunications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, or an officer or employee of such a service provider or manufacturer may not be held liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct. A member of the advisory commission or the governing body of a public agency may not be held liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission causing the claim, damage, or loss violates a statute or ordinance applicable to the action.
>
> * * *

It appears that in the seventh paragraph of Sheet No. 2 (designated by the examiner as paragraph [4]), GTSW has inserted the statutory language from the first sentence of art. 1432f, §4(b), except that for the words "[a] service provider of telecommunications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, or an officer or employee of such a service provider or manufacturer," GTSW has substituted the words "GTSW, or its officers or employees." This substitution does not alter the substance, the meaning, or the application of the statutory limitation on liability, and, in fact, it makes clear the operation of that statute with respect to GTSW. The examiner cannot find any other part of the tariff where language from HB 911 has been added, and is thus unable to speak to the concern of the City of Bryan, except to observe that perhaps its counsel did not have the enrolled and signed version of HB 911.

[1] The Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District apparently do not object to this substitution of the specific term for the general one described above, but recommended, in essence, that the rest of art. 1432f, §4(b) be included in GTSW's tariff, as well as a statutory definition of the term "public agency," so that there is no question as to the meaning of that term. While the major dispute in this docket has been the limitation of liability for providing 911 service, it does not seem appropriate to clutter GTSW's tariff with language regarding the limitations on the liability of other entities participating in the creation and operation of a 911 service, or defining terms not used in the tariff ("public agency"). The liability of all entities involved in 911 is defined by statute, and it does not matter whether the statutory language appears in the tariff or not. That is an argument, of course, for leaving out the statutory language which GTSW seeks to include through its amended tariff filing. However, since this is GTSW's tariff, it seems appropriate and even helpful to include in it the statutory language regarding GTSW's liability as a local exchange service provider. It does not seem similarly helpful to include in GTSW's tariff all statutory provisions regarding the liability of all participants in 911 ser-

vices. The examiner therefore recommends that the proposal of the Cities of Carrollton, Coppell, Garland and Plano and Smith County 911 Communications District not be adopted.

Two other paragraphs (those designated as [1] and [3] by the examiner) should be scrutinized. In nearly identical language, these two paragraphs seek to cut off the (potential) rights of third parties by defining GTSW's obligations as going only to the 911 customer, that is, the governmental entity providing the 911 emergency service to the public. As discussed at some length in Examiner's Order No. 7, while it is not within this Commission's jurisdiction to determine the liability of various parties in potential tort litigation, the Commission does have the limited authority to approve limitation of liability clauses in a tariff, subject to review for reasonableness by the courts in actual damage or tort claims. This was the holding of the Commission in Applications of Central Power and Light Company and Southwestern Bell Telephone Company for Approval of Tariff Amendments, Docket Nos. 3198 and 3234, 7 P.U.C. BULL. 53 (August 4, 1981). It seems desirable to delineate clearly that GTSW does not offer 911 service to the general public and is not holding itself out as doing so, since this service can be obtained only by certain qualified customers, and the language in these two paragraphs serves to emphasize the distinction between the offering of equipment and facilities for providing 911 service (GTSW's role), and the actual provision of 911 services to the public by governmental entities. These two paragraphs should be approved as submitted in the original filing, as they were in the interim order.

With respect to the paragraph designated by the examiner as [2], City of College Station witness Catherine Locke, the city attorney for this intervenor, testified that GTSW is attempting to circumvent Texas law by trying to relinquish its responsibility for its lines and equipment. In her opinion, since only GTSW can provide and maintain lines and equipment, allowing GTSW to avoid legal responsibility for any failure to maintain its lines and equipment places the burden of liability on those who will have no ability to assure that the

responsibility for maintenance is carried out, namely, the jurisdiction. Mr. Andron testified that the tariff provision that GTSW's rates do not contemplate inspection and monitoring is fine, but he objects to GTSW attempting to remove itself from any and all responsibility for its equipment. If GTSW is allowed to do this, then in Mr. Andron's opinion the cities will certainly bear all the burden of any possible 911 problems perceived by the public. He believes that GTSW should not be allowed to do through an administrative agency what the courts and legislature currently do not permit and for good reason.

These intervenors want GTSW to monitor and inspect its 911 lines in order to insure that they are working properly at all times. The rates in the tariff clearly do not include such services, and in any event, GTSW's provision of 911 facilities and equipment should not be at any greater level of quality than that of the exchanges in which such service is offered, since the two are so inextricably connected. (Staff Exhibit No. 1 at 19.) The examiner infers, however, that if the 911 customer wishes to pay for monitoring and inspection of 911 lines, GTSW might be willing to perform that function. (Initial Brief of GTSW at 19.) This provision should be approved as filed.

Finally, GTSW had no objection to the general counsel's recommendation that it file annual reports on 911 claims with the Commission. (Id. at 22.) This proposal is reasonable and will provide the Commission with the data it needs to evaluate 911 service, and the examiner recommends that GTSW be required to file such information.

IV. Recommendation

Because the record in this case demonstrates the reasonableness of GTSW's Emergency Number Service (911) tariff as amended by the interim order and by GTSW's amended tariff sheets, the examiner recommends that the Commission give

final approval to this amended tariff. It is also recommended that the Commission require GTSW to file annual reports on 911 claims with the Commission.

V. Findings of Fact and Conclusions of Law

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

A. Findings of Fact

1. GTSW filed its proposed tariff for Emergency Number Service (911) on August 29, 1986. This tariff contains the provisions, rules and regulations, definitions of terms, rates and charges, and a list of subscribers associated with this offering. As of the date of filing, GTSW had no subscribers to th Enhanced 911 provisions.

2. Based on the recommendation of the Commission staff, the filing was docketed.

3. The operation of the schedule, otherwise effective on October 3, 1986, was suspended for 150 days until March 2, 1987, or until superseding order.

4. GTSW gave individual written notice to all municipalities and other governmental entities which are current or potential subscribers to this service offering.

5. The following entities were granted intervenor status: City of Coppell, City of Plano, City of Carrollton, City of Garland, City of Bryan, City of College Station, Smith County 911 Communications District, and Montgomery County 911 Emergency Communications District.

6. The hearing on the merits convened on January 15, 1987. At the hearing, the parties agreed that since the Legislature was likely to consider legislation dealing with the question of liability in the provision of 911 emergency service during the regular session, the parties preferred that the Commission not rule on that question at that time. Instead, the parties agreed that the prefiled testimony of the witnesses would be admitted into the record without objection (and to that end, the motions to strike filed by general counsel; the Cities of Carrollton, Coppell, Garland and Plano; and GTSW were withdrawn by counsel) and cross-examination waived. The parties would then file their initial and reply briefs, and the examiner would enter an interim order by March 2, 1987, the date Commission jurisdiction over this docket originally expired. The parties agreed to meet again following the close of the legislative session, and the Commission's final action in this docket would be taken by August 31, 1987. GTSW agreed to extend its effective date so that the end of the suspension period would fall on that date.

7. The operation of the schedule, now effective April 3, 1987, has been suspended until August 31, 1987.

8. By Examiner's Order No. 7, GTSW's proposed tariffs were ordered to be amended in several respects, and were given interim approval following submission of the amended tariff sheets by GTSW.

9. On July 17, 1987, GTSW filed revised tariff sheets which incorporated the substance of the 911 legislation passed by the legislature. Responses were filed by the City of Bryan, the Cities of Carrollton, Coppell, Garland, and Plano, and the Commission staff.

10. Emergency Number Service is an emergency service provided by a GTSW customer (generally a local governmental unit) to the general public.

11. This customer receives emergency calls dialed to the 911 number by the public, and then transfers the calls to the proper jurisdiction which then dispatches the emergency vehicles and assistance to the correct address in order to respond to the emergency.

12. GTSW does not provide 911 emergency service to the public.

13. Through its tariff, GTSW offers certain features and associated equipment for the customer's use in providing emergency number service.

14. GTSW's offering includes central office switching facilities, outside plant facilities, and customer premise equipment to be used by the customer in answering, transferring, and dispatching public emergency telephone calls dialed to 911.

15. Customers may enhance Basic 911 service with optional features such as Automatic Number Identification (ANI), Automatic Location Identification (ALI), Calling Party Hold, and Central Office Transfer in order to design their own emergency number service network.

16. Once the customer has designed its network, GTSW conducts a cost study and negotiates with the customer to contract an individualized price. No specific rate structure is proposed in this tariff, so 911 service will be provided on a customer-specific or individual case basis (ICB). When GTSW and a customer have agreed on a particular facility arrangement, the ICB rate structure will be listed in this tariff at the specific rates required in order to provide the particular facility arrangement requested by the customer.

17. GTSW's tariff defines the 911 customer as a municipality or other state or local governmental entity, or an authorized agent of one or more municipalities or other state or local governmental entities to whom authority has been lawfully delegated.

18. Under the tariff, the customer must be legally authorized to operate the customer premise equipment and to have public safety responsibility for responding to telephone calls from the public for emergency police and fire service within the designated telephone central office serving area.

19. GTSW does not (and will not) answer and/or forward 911 calls, but only furnishes facilities which will enable the customer to respond to such calls utilizing its own personnel, usually located on the premises of the customer.

20. GTSW' tariff sets forth specific customer requirements associated with the provision of 911 service:

a. The customer must answer all 911 service calls 24 hours a day, seven days a week.

b. The customer must assume full responsibility for dispatching the appropriate emergency agency within the 911 Designated Calling Area.

c. The customer must develop an appropriate method for responding to calls for non-participating agencies which may be directed to a 911 service Public Safety Answering Point (PSAP) by callers to 911.

d. The customer must subscribe to or provide telephone equipment and trunking capable of adequately handling the number of incoming 911 service lines recommended by GTSW to be installed.

21. The third paragraph under Rules and Regulations on Sheet 1 should be deleted because it is identical to the third paragraph on Sheet 2.

22. The Rules and Regulations section of this tariff should state explicitly that 911 customers may provide their own 911 customer premise equipment.

22. The originally-proposed definition of Basic 911 should be expanded to read as follows:

> Basic 911 provides only for routing of all 911 calls from a given central office to a single Public Safety Answering Point (PSAP). This type of provision does not generally require any special equipment and is rated out of Section 6 of the General Exchange Tariff. There are a few optional features that can be provided to Basic 911 customers. These optional features are generally provided on a special assembly basis.

23. The definition of Enhanced 911 should be changed to the following:

> Enhanced 911 (E911) is an expanded application that includes several special 911 features. One such feature is selected routing of 911 calls to a specific PSAP selected from among several within the 911 service area. Other features that may or may not be included are Automatic Number Identification (ANI), Automatic Location Identification (ALI), calling party hold, and central office transfer (fixed, manual, or selective).

24. The Rates and Charges section of this tariff should include the explanation that incremental cost studies will be used to general the rates and that the proposed rates are subject to Commission review.

25. Telephone company serving boundaries and political subdivision boundaries may not coincide. GTSW has no way to block calls originating outside a juris-

diction's boundary; thus, the jurisdiction must have some procedure by which such calls are appropriately routed to the emergency service which can properly respond. To make clear that the tariff does not require a governmental unit to respond physically to an emergency call from another jurisdiction, the original language in the Rules and Regulations section, Sheet No. 3, paragraph 3 should be amended to read as follows:

> Telephone Company serving boundaries and political subdivision boundaries may not coincide. Upon initiation of service by the customer, or any change in service, or any extension of service under this tariff, the customer will subscribe to Class Marking, Call Ring Down Service, or make some other arrangement with the applicable surrounding jurisdictions so that calls received on the customer's 911 Service that originate from all telephones served by the central offices within the 911 Designated Calling Area will be recieved and properly routed for appropriate response whether or not the calling telephone is situated on property within the geographical boundaries of the customer's public safety jurisdiction.

26. There are numerous options and equipment configurations available to customers of GTSW wishing to provide 911 service; it is neither practical nor feasible to include all possible configurations in one tariff.

27. In addition, pricing associated with the equipment necessary to provide the various configurations would fluctuate so widely with the vendors' prices for components that GTSW would constantly be filing changes or updates to the tariff, an undesirable situation.

28. The features and equipment necessary for a particular customer's individual system will be priced on an individual case basis (ICB), which will be

listed in the tariff at the specific rates required to provide the particular facility arrangement being requested by that customer.

29. GTSW's determination of the price for special features and equipment will be done using an incremental cost study, which is forward-looking and attempts to identify those costs directly attributable to the provision of the service.

30. Use of incremental costing has been approved by the Commission in the past, and is reasonable and appropriate for use with this tariff.

31. It is inappropriate for GTSW to add a contribution of at least 12 percent to the 911 costs, since it is designed primarily to serve and protect the general public. A contribution cap of 12 percent above cost is adequate for this service, and is in line with the level of contribution approved by the Commission for GTSW's private pay telephone tariff and its 976 service.

32. GTSW will file the rate proposal for each 911 customer with the Commission prior to implementing it; the 911 customer is assured of Commission review of the rates.

33. GTSW's liability in providing equipment and facilities for the provision of 911 emergency service by governmental entities is governed by statute.

34. It is appropriate and helpful to include in GTSW's tariff the statutory language regarding its liability in providing equipment and facilities for the provision of 911 emergency service by governmental entities.

35. It is not similarly helpful to include in GTSW's tariff all statutory provision regarding the liability of all participants in the creation and operation of a 911 service.

36. It is reasonable to set forth in the tariff a clear delineation of GTSW's role in 911 service by including language disclaiming any intent to create an obligation to or any right of action on behalf of any third person.

37. GTSW's rates for 911 service do not include monitoring and inspection of lines; that is the responsibility of the 911 customer.

38. It is not reasonable to require GTSW to inspect and monitor 911 lines without being paid for doing so.

39. Because the 911 system and the local exchange system are so inextricably connected, it is reasonable that GTSW's provision of 911 facilities and equipment should not be at any greater level of quality than that of the exchanges in which 911 service is offered.

40. It is reasonable to require GTSW to file annual reports on 911 claims in order that the Commission will have the data necessary to evaluate 911 service.

B. Conclusions of Law

1. The Commission has jurisdiction of the issues in this docket pursuant to sections 16(a) and 18(b) of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987) and P.U.C. SUBST. R. 23.24.

2. GTSW is a dominant carrier as defined in section 3(c)(2)(B)(ii) of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987), and is therefore a telecommunications utility subject to the jurisdiction of this Commission.

3. GTSW gave notice of this tariff filing in compliance with Examiner's Order No. 2, issued pursuant to P.U.C. PROC. R. 21.25(a)(3).

4. The Legislature has established a public policy favoring implementation of 911 emergency service and a procedure by which such service is to be provided. Tex. Rev. Civ. Stat. Ann. arts. 1432c, 1432d, 1432e, and 1432f (Vernon Supp. 1987), as amended in HB 911, signed May 28, 1987.

4. GTSW's liability for providing equipment and facilities to customers authorized to operate a 911 emergency service is governed by the amendment to Tex. Rev. Civ. Stat. Ann. art. 1432f, §4(b), enacted by HB 911.

5. GTSW's liability for providing equipment and facilities to customers authorized to operate a 911 emergency service is the same regardless of whether the statutory language appears in its tariff or not.

6. This Commission has the limited authority to approve limitation of liability clauses in a tariff, subject to review for reasonableness by the courts in actual damage or tort claims. Applications of Central Power and Light Company and Southwestern Bell Telephone Company for Approval of Tariff Amendments, Docket Nos. 3198 and 3234, 7 P.U.C. BULL. 53 (August 4, 1981).

7. GTSW should file revised tariff sheets reflecting the Commission's order in this docket, in accord with section 32 of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987).

8. Under sections 16(a) and 28(a)(1) of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987), the Commission may require GTSW to file annual reports on 911 claims.

Respectfully submitted,

Mary Ross McDonald

MARY ROSS McDONALD
ADMINISTRATIVE LAW JUDGE

APPROVED this 3d day of August 1987.

Phillip A. Holder

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

DOCKET NO. 7016

APPLICATION OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST FOR APPROVAL OF EMERGENCY NUMBER SERVICE (911) TARIFF	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In open meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above styled application was processed in accordance with applicable statutes and Commission rules by an administrative law judge who prepared and filed a report containing Findings of Fact and Conclusions of Law. The Commission hereby REMANDS the case with the following orders:

1. The Emergency Number Service (911) Tariff of General Telephone Company of the Southwest (GTSW) approved by the examiner on an interim basis in this docket and amended as to liability provisions on July 17, 1987, is hereby APPROVED on an INTERIM basis until superseding order of the Commission. The tariff sheets given interim approval are:

   Section 46, Original Sheet 1 (filed August 29, 1986)
   Section 46, First Revised Sheet 2 (filed July 17, 1987)
   Section 46, First Revised Sheet 3 (filed July 17, 1987)
   Section 46, First Revised Sheet 4 (filed July 17, 1987)
   Section 46, First Revised Sheet 5 (filed July 17, 1987)
   Section 46, Original Sheet 5A (filed April 14, 1987)
   Section 46, Original Sheet 6 (filed August 29, 1986)
   Section 46, Original Sheet 7 (filed August 29, 1986)

2. The April 3, 1987, effective date of the Emergency Number Service (911) Tariff is hereby EXTENDED for 90 days until

July 2, 1987, and the operation of the schedule is SUSPENDED for the statutory period of 150 days until November 29, 1987, or until superseding order.

3. This docket is remanded for the purpose of taking additional evidence on the issues of 1) the reasonableness of the costing scheme proposed by GTSW and the desirability of including prices in the tariff and 2) the reasonableness and desirability of including in the tariff the paragraphs identified in the Examiner's Report as [1] and [3].

SIGNED AT AUSTIN, TEXAS on this the 14th day of August 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: _____
DENNIS L. THOMAS

SIGNED: _____
PEGGY ROSSON

I respectfully dissent, and would adopt the Examiner's Report and proposed Order in this docket.

SIGNED: _____
JO CAMPBELL

ATTEST:

_____
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

FEATURES AND ASSOCIATED EQUIPMENT FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

GENERAL

GTSW, through this tariff, is offering the features and associated equipment for the provision of emergency number service. This offering includes the provision of lines and equipment to be used by the customer to answer, transfer, and dispatch public emergency telephone calls dialed to 911.

The provision of lines and equipment under this tariff is subject to the availability of equipment and facilities.

For purposes of this tariff, when reference is made to 911 service, this will include both Basic 911 Service and Enhanced 911 Service, unless otherwise specified.

The customer may be a municipality or other State or local governmental unit, or an authorized agent of one or more municipalities or other State or local governmental units to whom authority has been lawfully delegated. The customer must be legally authorized to operate the equipment and have public safety responsibility to respond to telephone calls from the public for emergency police and fire service within the designated telephone central office serving area.

RULES AND REGULATIONS

The offering is limited to the use of central office telephone number 911 as the emergency telephone number. Equipment to offer only one 911 Service will be provided within any government agency's locality.

The equipment and facilities are furnished to the customer only for use in its efforts to receive reports of emergencies by the public. The provision of such lines, equipment, and facilities shall not be interpreted, construed, or regraded as being for the benefit of, or creating any obligation of the Telephone Company toward or any right of action on behalf of, any third person or other legal entity.

The Telephone Company does not undertake to answer and forward 911 calls, but furnishes the use of its facilities to enable the customer to respond to such calls with the personnel of the customer on the premises of the customer.

The rates charged for the lines, equipment, and facilities do not contemplate and the Telephone Company does not undertake inspection or monitoring to discover errors, defects, and malfunctions. The customer shall promptly notify GTSW in the event the lines, equipment, or facilities are not functioning properly.

ISSUED AUG 2 9 1986 EFFECTIVE

By W. Scott Hanle, Vice President--Revenue Requirements
2701 South Johnson Street, San Angelo, Texas 76901

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

RULES AND REGULATIONS (Cont'd)

This tariff offering is a telephone exchange communications arrangement for one-way incoming service to an appropriate Public Safety Answering Point. Outgoing calls can only be made on a central office transfer basis where Enhanced 911 facilities are provided. Central office transfer is not provided with Basic 911 offering.

This offering is solely for the provision of equipment and facilities for use by the local governmental unit; the provision of such equipment and facilities shall not be interpreted, construed, or regarded as being for the benefit of, or creating any Telephone Company obligation toward, or any right of action on behalf of, any third person or other legal entity.

The Telephone Company does not undertake to answer and forward 911 calls, but furnishes the use of its facilities to enable the customer's personnel to accept such calls on the customer's designated premises.

Temporary suspension of 911 provisions is not provided.

Information consisting of the name, address, and telephone numbers of telephone subscribers is confidential and the customer agrees to maintain the confidentiality of these records and will establish controls to ensure that such information is used only for the purpose of responding to emergency 911 calls.

Any party residing within the 911 Designated Calling Area forfeits the privacy afforded by non-listed and non-published service to the extent that the telephone number and the address (and name of business accounts only) associated with the originating station location are furnished to the Public Safety Answering Point.

The Telephone Company's entire liability to any person for interruption or failure of 911 Service shall be limited by the terms set forth in this section and other sections of this tariff. GTSW, or its officers or employees, may not be held liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct. (T) (T)

Where facilities are available under this tariff for use in connection with customer-provided communications systems, the operating characteristics of such systems shall be such as not to interfere with any of the provisions offered by the Telephone Company. Such use is subject to the further provisions that the customer-provided systems do not endanger the safety of Telephone Company employees or the public; damage, require change in or alteration of, the equipment or other facilities of the Telephone Company; interfere with the proper functioning of such equipment or facilities; impair the operation of the

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

RULES AND REGULATIONS (Cont'd)

telecommunications system or otherwise injure the public in its use of the Telephone Company's facilities. Upon notice from the Telephone Company that the customer-provided system is causing or is likely to cause such hazard or interference, the customer shall make such change as shall be necessary to remove or prevent such hazard or interference. The customer shall be responsible for the payment of all Telephone Company charges for visits by the Telephone Company to the customer's premises where a service difficulty or trouble report results from customer-provided facilities. In instances where the trouble is determined (in a 30 minute time period) to be caused by customer-provided equipment or facilities, a service charge of $35.00 will be applicable. In instances where Telephone Company personnel are required to be at the customer's location for periods of time in excess of 30 minutes for purposes of testing, trouble-shooting, or any other work in connection with the customer's equipment or facilities, the customer shall be billed the actual cost for time, materials, etc., expended on that particular call out. (M) (M)

(D) (D)

Lines, equipment, and facilities provided under this tariff will be designed by the Telephone Company to provide at least the same level of service reliability and quality as local exchange telephone service in the exchanges where 911 Service is offered by the customer.

Telephone Company serving boundaries and political subdivision boundaries may not coincide. Upon initiation of service by the customer, or any change in service, or any extension of service under this tariff, the customer will subscribe to Class Marking, Call Ring Down Service, or make some other arrangement with the applicable surrounding jurisdictions so that calls received on the customer's 911 Service that originate from all telephones served by the central offices within the 911 Designated Calling Area will be received and properly routed for appropriate response whether or not the calling telephone is situated on property within the geographical boundaries of the customer's public safety jurisdiction.

Application for equipment and facilities necessary to provide 911 Service must be executed in writing by each customer and must be accompanied by satisfactory proof of authorization to provide 911 Service in the exchanges where provision of equipment and facilities are requested. If application for necessary equipment and facilities is made by an agent, the Telephone Company must be provided, in writing, with satisfactory proof of appointment of the agent by the customer. At least one local law enforcement agency must be included among the participating agencies in any 911 Designated Calling Area where provision of equipment and facilities is requested.

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

RULES AND REGULATIONS (Cont'd)

In addition to all other terms and conditions, the following customer requirements will apply:

The customer will answer all 911 Service calls on a 24-hour day, seven-day week basis.

The customer has the responsibility for dispatching the appropriate emergency agency within the 911 Designated Calling Area, or will undertake to transfer all 911 Service calls received to the governmental agency with responsibility for dispatching such services, to the extent that such services are reasonably available.

The customer will develop an appropriate method for responding to calls for non-participating agencies which may be directed to a 911 Service PSAP by calling parties.

The customer shall subscribe to, or provide, telephone equipment and trunking capable of adequately handling the number of incoming 911 Service lines recommended by the Telephone Company to be installed.

The customer may provide their own 911 customer premise equipment.

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FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

RULES AND REGULATIONS (Cont'd)

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(D)

DEFINITIONS

Basic 911

Basic 911 provides only for routing of all 911 calls from a given central office to a single Public Safety Answering Point (PSAP). This type of provision does not generally require any special equipment and is rated out of Section 6 of the General Exchange Tariff. There are a few optional features that can be provided to Basic 911 customers. These optional features are generally provided on a special assembly basis.

Enhanced 911

Enhanced 911 (E911) is an expanded application that includes several special 911 features. One such feature is selected routing of 911 calls to a specific PSAP selected from among several within the 911 service area. Other features that may or may not be included are Automatic Number Identification (ANI), Automatic Location Identification (ALI), calling party hold, and central office transfer (fixed, manual, or selective).

Call Party Hold

An optional feature of Basic 911 thus enables a PSAP attendant to contain control of a 911 call, even if the calling party hangs up.

Automatic Number Identification (ANI)

A feature by which the calling party's telephone number is forwarded to the 911 Tandem Office and displayed on Transfer and Display Units located at the respective Public Safety Answering Point. This feature is not available to multi-party customers with Operator Number Identification (ONI).

Automatic Location Identification (ALI)

A feature by which the name (business telephone subscribers only) and address associated with the calling party's telephone number is forwarded to the respective Public Safety Answering Point for display.

Forced Disconnect

A standard feature that allows a PSAP attendant to release a connection even though the calling party has not hung-up.

Class Marking

Class Marking allows calls placed to 911 emergency service to be directed to the emergency department of the city in which the caller resides or the call is blocked in the central office.

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

DEFINITIONS (Cont'd)

Call Ring Down Service - For communications between two points whereby a station, upon lifting the receiver, automatically rings another station.

Central Office Call Transfer Services: A standard feature available for each PSAP which provides the capability for an established E911 Service call to be transferred to another PSAP or to some other desired destination by a PSAP attendant. The following characteristics identify the three types of call transfer services which may be used with E911 Service.

Fixed transfer enables a primary or secondary PSAP attendant to transfer an incoming E911 Service call to a predesignated location by depressing a single button on the Display and Transfer Unit. The PSAP equipment automatically flashes and sends out a Speed Calling code associated with the desired agency. If the call is transferred to a PSAP equipped to receive and display ANI and ALI data, the ANI telephone number and the ALI address of the calling party is transferred also.

Manual transfer enables a primary or secondary PSAP attendant to transfer incoming E911 Service calls over exchange facilities to another telephone number by depressing a flash button on the Display and Transfer Unit or the switchhook on an answering key set and dialing either a 7-digit or 10-digit telephone number or a 2-digit Speed Calling code.

Selective transfer enables a primary or secondary PSAP attendant to transfer an incoming E911 Service call to another agency (associated through the DMS with the calling party's ANI telephone number) by depressing a single button, e.g., "Fire" on the Display and Transfer Unit. If the desired destination is a PSAP equipped to receive and display ANI and ALI data, the ANI telephone number and the ALI address of the calling party is transferred also. This type of transfer is only available when the SR Service Feature is provided.

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

DEFINITIONS (Cont'd)

Public Safety Answering Point (PSAP):

A municipality, or other State or local governmental unit, or an authorized agent of one or more municipalities or other State or local governmental units to whom authority has been lawfully delegated to answer telephone calls placed by dialing number 911.

RATES AND CHARGES

Special Service Arrangement Charges

If 911 provisional requirements cannot be met with regularly offered service arrangements, special arrangements will be furnished when practical by the Company at charges equivalent to the costs of furnishing such arrangements. These special charges will be applicable to such items as engineering and special program development associated with billing and data base management.

Costs as referred to in this section may include but are not limited to:

Cost of maintenance

Cost of operation

Depreciation on the installed cost of any facilities used to provide the special service arrangement based on the anticipated useful service life of the facilities with an appropriate allowance for the net salvage.

General Administration expenses, including taxes on the basis of average charges for these items.

Any other item of expenses associated with the particular special service arrangement.

An amount, computed on the cost installed of the facilities used to provide the special service arrangement, for return on investment.

Installed cost mentioned above includes cost of equipment and materials provided or used plus the cost of installing, including engineering, labor, supervision, transportation, right-of-way, and other items which are chargeable to the capital accounts.

FEATURES AND ASSOCIATED EQUIPMENT
FOR PROVISION OF EMERGENCY NUMBER SERVICE (911)

Special Service Arrangement Charges (Cont'd)

Special service arrangement rates are subject to review and revision conditioned upon changing costs.

Program Development Charges

These are charges applicable to the work necessary to design, develop, test, and maintain any special programming required to support 911 Service, its billing and its data base management. Rates are based on Telephone Company time and materials expended.

Records Conversion Charges

These are charges applicable to the work necessary to design, review, modify, and maintain any Telephone Company customer records keeping systems in order to support 911 Service, its billing and data base management. Rates are based on Telephone Company time and materials expended.

Quotation Preparation

The customer may request a quotation for all costs associated with the provision of the facilities needed to satisfy the customer's service requirements. A quotation so provided does not bind the Telephone Company to the rates set forth in the quotation. All rates for services or facilities to be provided by the Telephone Company will be determined in accordance with the guidelines in this tariff.

Changes to Orders

When a customer requests changes for a pending order for the provision of Emergency Service, the changes will be undertaken if they can be accommodated by the Telephone Company personnel and will be billed to the customer at the appropriate hourly charges.

Other Charges

The rates and charges associated with emergency number features and associated equipment are relative to each installation and are identified by customer.

THE FOLLOWING ARE E911 SUBSCRIBERS AND THEIR ASSOCIATED RATES.

CUSTOMER	NRC	MRC

DOCKET NO. 7016

APPLICATION OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST FOR APPROVAL OF EMERGENCY NUMBER SERVICE (911) TARIFF	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

SUPPLEMENTAL EXAMINER'S REPORT

I. Procedural History

In an Order dated August 14, 1987, the Commission granted interim approval of certain tariff sheets submitted in this filing, and remanded the case with instructions to take additional evidence on two issues. General Telephone Company of the Southwest (GTSW) agreed to an extension of its effective date for 90 days to accommodate the proceedings on remand.

A prehearing conference was convened on August 28, 1987, at which appearances were entered by Angela Demerle on behalf of GTSW; Woody Glover, representing 911 Network of East Texas (the new name of Smith County 911 Communications District); and Carole Vogel, assistant general counsel, representing the Commission staff and the public interest. No other persons entered an appearance on the record. A procedural schedule was established by agreement of the examiner and the participants; the examiner discussed generally the kind of testimony which the Commission might find helpful in deciding the remanded issues.

GTSW filed the direct testimony of Alan R. Arthur, Network Pricing and Economic Analysis Manager for GTSW. General counsel filed the testimony of Commission staff members Joseph E. Kirk, Assistant Director of the Telephone Division, and David Featherston, Manager of Telephone Rates and Tariffs. No other parties filed testimony.

The hearing on the merits of the remanded issues convened as scheduled on October 30, 1987, with appearances by Angela Demerle for GTSW and Carole Vogel on behalf of the Commission staff and the public interest. No other parties

appeared. By agreement, the prefiled testimony and exhibits of GTSW witness Alan R. Arthur and Commission staff witnesses Joseph E. Kirk and David Featherston were admitted into the record and cross-examination waived. Staff witness David Featherston answered the examiner's clarifying questions. No other party offered evidence. Finally, because of the schedule for Final Order Meetings at which the Commission could consider this docket, GTSW extended its effective date an additional 30 days until August 1, 1987; by virtue of a prior order suspending the operation of the schedule for the statutory period of 150 days, the suspension period ends December 29, 1987.

II. Issues on Remand

A. Scope

The Commission's discussion of the Examiner's Report at the open meeting of August 12, 1987, focused on the requests of the Cities of Carrollton, Coppell, Garland, and Plano, and the 911 Network of East Texas to modify GTSW's proposed tariff for 911 service to include a limitation on charges similar to that found in SWB's 911 tariff and to exclude certain language limiting GTSW's liability to third parties. As framed by the Commission in its Order, the issues on which additional evidence was to be taken are 1) the reasonableness of the costing scheme proposed by GTSW and the desirability of including prices in the tariff; and 2) the reasonableness and desirability of including in the tariff the paragraphs identified in the Examiner's Report as [1] and [3].

B. Discussion

Mr. Arthur testified that GTSW acquiesced in the requests to remove paragraphs [1] and [3] from the proposed 911 tariff; thus there is no further

discussion of the limitation of liability issue in this supplemental report. The examiner finds that, since any determination of tort liability would be made by a court and not by this Commission via tariff provisions, the removal of those paragraphs is reasonable. In its compliance tariff, GTSW should delete these paragraphs.

Mr. Arthur discussed in great detail the factors which make flexibility in configuring and pricing a 911 system essential, as well as the costing methodology used to derive the rates. He also pointed out important reasons why the Southwestern Bell tariff pricing approach is not appropriate for GTSW's service territory and why GTSW's proposed Individual Case Basis pricing is better.

Mr. Arthur believes that 911 customers (which are governmental entities) experience some conflict between their need for flexibility in pricing a 911 system and the security of knowing that they have purchased the best system for their money. In general, 911 systems are either centralized or distributed. Centralized systems were designed for large metropolitan areas before there was much intelligence in wire centers. In a centralized system, all central offices are wired to route automatically all 911 calls to the central tandem, which then assigns the proper routing to each call. This implies a very rigid and specific network. A distributed system, on the other hand, can be used in a wider range of population areas, because most, if not all, routing functions can be handled at the local central office.

In discussing the differences between centralized and distributed 911 systems, Mr. Arthur first pointed out that a centralized system assumes a certain population density which obviously does not exist in all areas of Texas. SWB originally tariffed its offering for exchanges over 100,000 lines, and later reduced this number to 50,000 lines. This density undoubtedly contributes to the cost averaging approach used by SWB. GTSW has only a few exchanges over 50,000 lines, and none over 100,000.

Second, a centralized system uses a large centralized computer with a state-wide data network to provide automatic location information (ALI) data. SWB has two such computers, one in Houston and one in Dallas, to serve the state of Texas, presumably because at the time this system was developed, computing costs were higher than telecommunications costs. In a distributed system, the ALI computer is located at or near the customer's premises, lowering the cost of the data network, since computing costs are now cheaper than telecommunications network costs. Also, customers may have a dedicated computer, or may share one with a neighboring customer.

Third, central offices are more intelligent than they once were, and can perform the same switching done by the centralized tandem. This allows for direct trunking, with no tandem serving as intermediary, which results in lower network costs. The resulting network is much more flexible: for example, calls may be transferred to secondary PSAPs using either central office transfer, ring-down circuits, or seven digit numbers.

Finally, a larger variety of services can be provided by the Customer Premise Equipment (CPE) now available. For example, there are answering consoles with one button operation for most emergency answering functions, such as ring-back, transfer, disconnect, etc. In order to be competitive (since this equipment can be purchased from other companies), GTSW must be able to provide the systems that meet the specific needs of the customers.

To the suggestion that the desired flexibility could be maintained if each component of any possible 911 system were tariffed and the customer allowed to choose from a menu clearly stated in the tariff, Mr. Arthur answered that this would be possible in theory only, because of major complications. Two of GTSW's major vendors, GEC/Canada and Hewlett Packard, have changed prices three times in the last two years; some prices went up and others went down. One vendor realigned its product line and now offers models that were not available when GTSW started offering 911 service. Some customers have requested products

or services not contemplated originally. These sorts of rapid price and product changes are typical of the computer industry and the CPE industry.

To an alternative proposal to tariff the more stable portion of the system, that is, the network and the routing, on a price per 1,000 lines in a manner similar to SWB's tariff, Mr. Arthur opined that this would not be feasible. First, there are many choices a customer makes which materially affect network costs. For example, whether to use central office transfer or ring-down circuits for secondary PSAPs, or whether to route selectively marginal offices or answer all calls from that office, whether they originate from the city or not. Second, fixed-rate-per-thousand-line pricing presupposes the densities that exist in large exchanges. Most of these metropolitan areas have 911 systems operational or are in the process of installing them, and from now on, GTSW will be working with areas of much lower densities. Finally, GTSW does price network and routing services out of the appropriate existing tariffs, whether it is the SWB Texas Private Line Service Tariff, GTSW's Texas General Exchange Tariff, or another tariff applicable to the service requested.

Generally, Mr. Arthur believes, the customer always benefits from a flexible pricing approach because the customer is always the one making the choices which affect cost. As an example of the benefit of the flexible ICB pricing, Mr. Arthur testified about a system GTSW is installing in Tom Green County. This system has a step-by-step office serving Tom Green and the adjacent county. GTSW could install outboard equipment (an attached computer) to block the non-Tom Green County calls at a cost of $25,000 to $45,000. The alternative is to send all calls to Tom Green County and let the dispatcher there do a one-button transfer to the adjacent county's sheriff's office. The customer decided that the volume of non-Tom Green County calls would be too small to justify the additional expense of the blocking equipment and chose to transfer the calls. Another example of customer benefit from flexible pricing is that four cities in Galveston County wish to share the cost of a single computer rather than each paying for one.

Concurring that 911 emergency number service is not a simple cut and dried system, Mr. Kirk explained that the size and complexity of the telephone system needed to provide the service varies dramatically depending on the area to be covered, the population density in that area, and the political relationships of the emergency services served by the system. In addition, there are many different levels of 911 service that present options available to any given customer; Mr. Kirk provided examples of how those levels of service increase in complexity, depending upon the service options ordered.

Pointing out that it is the ability to tailor 911 systems to a wide range of customer needs that would require an inordinate number of individually priced parts in a fixed rate tariff, Mr. Kirk warned that there is no guarantee that every configuration and contingency would (or could) be covered in such a tariff. As the technology develops and the demand increases, the prices of equipment unique to 911 are changing rapidly. He concluded that the flexible tariff with customer specific contracts appears to be the best answer for pricing this service.

He also acknowledged that a flexible tariff offers both advantages and disadvantages, but he believes there are some institutional safeguards serving to counterbalance the disadvantages. Mr. Kirk explained that in a fixed rate tariff, each price is designed to cover the average cost of a range of equipment or services, and a specific customer might require either more or less equipment or more or fewer services than represented by that average rate. If the range is relatively narrow, as it normally is, the rate charged is reasonable for the range of equipment or service offered. If the range is too broad, however, and if the customer requires equipments or services at either extreme of the range, there is a danger that the price charged is either much too high or much too low, relative to the value received.

Mr. Kirk agreed that with a customer specific tariff, the rates can be designed to cover more precisely the specific equipment and services ordered by each customer, but observed that the danger here is the opportunity for the

company to oversell its equipment and services. If the customer does not have the expertise to know exactly what is needed, and to resist a company's sales pitch, then a more elaborate, and thus more expensive, system than necessary might be ordered.

Customers can find assurance that their purchase decisions are well-informed because there is now a large body of knowledge and expertise to guide the user in the selection of a 911 system which did not exist even two years ago, according to Mr. Arthur. This information comes from the users and operators of the fully implemented 911 systems (both centralized and distributed) which are now in place, from the Advisory Commission on State Emergency Communications, from a variety of consulting firms, and from the Commission itself.

Mr. Kirk concurred with Mr. Arthur on this point, citing as an additional source of information the 911 Clearinghouse Committee formed by the Texas Advisory Commission on Intergovernmental Relations. Mr. Kirk explained that the 911 Clearinghouse is funded through a grant from the state's traffic safety program, and was formed as an interim measure to share information and expertise between existing and developing 911 districts until the new Advisory Commission on State Emergency Communications is fully operational. This latter agency is charged with the task of overseeing the development of 911 on a statewide basis over the next eight years, which will involve planning, financing, and administering 911 service in all areas of the state through a series of regional plans.

Second, as Mr. Arthur pointed out, there is the benefit of competition. On-site equipment can be purchased from suppliers other than GTSW, so it must price its systems competitively or it will soon be excluded from the market.

Third, the Public Utility Commission is the final authority on pricing, and can approve or reject each rate after it is filed and can respond to public

complaints. Mr. Arthur, Mr. Kirk and Mr. Featherston agreed that the review function of the Public Utility Commission is an important safeguard for the 911 customers. It is worth emphasizing that each customer specific arrangement will receive full staff review through the regular Commission tariff filing and review process. Mr. Featherston testified that after the incremental cost studies and any subsequent negotiations with a customer are completed, GTSW will file tariff pages with the applicable rates and detailed cost justification with the Commission as a tariff filing for the staff's review.

Ideally, when the tariffs are filed, GTSW and its customer will have already agreed on the proposed rates. (If not, they should at least be able to pinpoint specific problems or areas of disagreement.) The Commission staff will review the agreed-upon contract and will conduct a thorough review of the cost data to insure that the proposed rates cover the appropriate costs. The staff will also review the tariff sheets for content and clarity. As with any tariff filing, the review would usually be conducted administratively; however, the customer or another interested person might file an objection to the tariff or a request to intervene, which could lead to the docketing of the filing and possibly to a full contested case hearing. The Commission staff currently handles SWB's ESSX Custom Service and GTSW's ECENTREX Service in a manner similar to this, and Mr. Featherston testified that the staff has had no difficulty with this process.

Mr. Arthur provided justification for use of the incremental costing methodology; since that was discussed in the Examiner's Report, no additional discussion will be provided here. Mr. Featherston agreed with use of the incremental approach. Mr. Arthur provided for the record a detailed example of the way in which this methodology would work in pricing a particular item.

The evidence adduced at the hearing on remand in this docket fully supports the examiner's original recommendation to approve GTSW's proposed Individual Case Basis (ICB) pricing using an incremental costing approach. There is no evidence in this record supporting price limitations in GTSW's 911 tariff simi-

lar to those in SWB's tariff, as requested by the Cities of Carrollton, Coppell, Garland, and Plano, and the 911 Network of East Texas. In fact, Mr. Featherston testified that since SWB's tariff contains minimum order limits for certain features, SWB does not have the flexibility to offer 911 service to customers with limited needs and/or resources. Based on his conversations with representatives of SWB, Mr. Featherston opined that SWB has already sold all the 911 systems that are possible in light of its tariff constraints. He believes that in the near future, SWB is likely to request changes in its 911 tariff to give it more flexibility to offer the service to additional customers, although he does not know the exact terms and conditions which the revised SWB 911 tariff might contain.

[2] The one material change in GTSW's and the staff's recommendation was with respect to the contribution level in the rates for 911 services and facilities. In response to a Request for Information (RFI), GTSW clarified that 911 rates include a return component (sheet 6 of the tariff), not a contribution, which GTSW does not intend to include in its 911 rates. Mr. Featherston recommended that the interim tariff be modified to remove the contribution cap and that new language be included stating that no contribution will be added to the final calculated costs used to determine the rates for the provision of 911 service. The examiner agrees that this amendment should be made, since it makes clear that GTSW will not be supporting other services through a contribution component in 911 rates.

One other area needs clarification for the record. A return component is included in the costs for 911 equipment and services; the specific tariff language reads as follows:

> An amount, computed on the cost installed of the facilities used to provide the special service arrangement, for return on investment.

This return is calculated using the rate of return authorized in the final order in GTSW's last general rate case, Docket No. 5011. That authorized return is 12.71 percent, but GTSW rounds it to 12.75 percent. While the actual dollar difference in the rates resulting from use of the 12.75 percent rate of return instead of the 12.71 percent rate of return might be miniscule or even negligible, it seems appropriate, because of the public service aspect of 911 service, to require GTSW to use the rate of return actually ordered in the last general rate case, which is currently the return ordered in Docket No. 5011, and not to permit rounding. The examiner suggests that the tariff language be modified to require that the return shall not exceed the overall rate of return found reasonable by the Commission in GTSW's most recent general rate case. The tariff language should read as follows:

> An amount, not to exceed the overall rate of return found reasonable by the Public Utility Commission in the final order in the most recent rate case, computed on the installed cost of the facilities used to provide the special service arrangement, for return on investment.

III. Recommendation

The examiner recommends that the tariff sheets given interim approval should now be given final approval, with the following changes: GTSW should delete paragraphs [1] and [3], dealing with limitations on liability, from the compliance tariff. In the definition of costs, the section dealing with return should be amended to indicate that the return shall not exceed the overall rate of return found reasonable by the Commission in GTSW's most recent general rate case, as recommended above. Finally, the tariff should include a statement to the effect that no contribution will be added to the final calculated costs used to determine the rates for the provision of 911 service.

IV. Findings of Fact and Conclusions of Law

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

A. Findings of Fact

1. In an Order dated August 14, 1987, the Commission granted interim approval of certain tariff sheets submitted in this filing, and remanded the case with instructions to take additional evidence on two issues: 1) the reasonableness of the costing scheme proposed by GTSW and the desirability of including prices in the tariff; and 2) the reasonableness and desirability of including in the tariff the paragraphs identified in the Examiner's Report as [1] and [3].

2. General Telephone Company of the Southwest (GTSW) agreed to an extension of its effective date for 90 days to accommodate the proceedings on remand.

3. A prehearing conference was convened on August 28, 1987, at which appearances were entered by Angela Demerle on behalf of GTSW; Woody Glover, representing 911 Network of East Texas (the new name of Smith County 911 Communications District); and Carole Vogel, assistant general counsel, representing the Commission staff and the public interest. No other persons entered an appearance on the record.

4. The hearing on the merits of the remanded issues convened as scheduled on October 30, 1987, with appearances by Angela Demerle for GTSW and Carole Vogel on behalf of the Commission staff and the public interest. No other parties appeared. By agreement, the prefiled testimony and exhibits of GTSW witness

Alan R. Arthur and Commission staff witnesses Joseph E. Kirk and David Featherston were admitted into the record and cross-examination waived. No other party offered evidence.

5. At the hearing on remand, GTSW extended its effective date an additional 30 days until August 1, 1987; by virtue of the prior order suspending the operation of the schedule for 150 days, the suspension period will end on December 29, 1987.

6. GTSW acquiesced in the requests to remove paragraphs [1] and [3] from the proposed 911 tariff. Since any determination of tort liability would be made by a court and not by this Commission via tariff provisions, the removal of those paragraphs is reasonable. In its compliance tariff, GTSW should delete these paragraphs.

7. In general, 911 systems are either centralized or distributed.

8. Centralized systems were designed for large metropolitan areas, before there was much intelligence in wire centers. Such a system requires all central offices to be wired to route automatically all 911 calls to the central tandem, which then assigns the proper routing to each call.

9. Centralized systems assume a certain population density which does not exist in all areas of Texas, were installed at a time when telecommunications costs were less than computing costs, and predate the advent of sophisticated central offices and CPE.

10. Because of the sizes of the exchanges in which centralized systems were installed and the populations densities of those areas, fixed-rate-per-thousand pricing was appropriate.

11. GTSW has only a few exchanges over 50,000 lines and none over 100,000.

12. Distributed systems can be used in a wider range of population areas because most, if not all, routing functions can be handled at the local central office.

13. In a distributed system, the ALI computer is located at or near the customer's premises, lowering the cost of the data network; customers may have a dedicated computer, or share one with a neighboring customer.

14. Direct trunking is possible in a distributed system; no tandem is necessary and the result is lower network costs. The network is also much more flexible, allowing a variety of service options for 911 customers depending on their needs and budgets.

15. CPE equipment can now offer a larger variety of services; in order to be competitive, GTSW must be able to provide 911 systems that meet the specific needs of its customers.

16. Because of the developing technology and increasing demand, vendors have changed their prices often in the last few years.

17. Because of the variety and, in some cases, the complexity of 911 systems, a flexible tariff and individual case basis pricing is better than a fixed rate tariff which might not contain all contingencies or all possible configurations of equipment and services.

18. Fixed-rate-per-thousand line pricing presupposes the densities existing in large exchanges; however, most of these areas already have 911 systems in place or in the process of being installed.

19. In the future, GTSW will be working with areas of much lower population densities than those found in metropolitan areas.

20. GTSW prices network and routing services out of the appropriate existing tariffs.

21. Customers can find assistance in selecting 911 equipment and services from users and operators of fully implemented systems (centralized and distributed); from public entities such as the Advisory Commission on State Emergency Communications and the 911 Clearinghouse Committee of the Texas Advisory Commission on Intergovernmental Relations; and from the staff of the Public Utility Commission of Texas, which will review each GTSW customer specific tariff for 911 equipment and services.

22. The sources of information and assistance listed in Finding of Fact No. 21 are adequate to insure that GTSW does not oversell 911 equipment and facilities. Commission review of each customer specific tariff is adequate to insure that the incremental cost studies are done in accord with the tariff.

23. It is reasonable to permit ICB pricing for 911 equipment and facilities because of the rapid change in technology and pricing in the computer and CPE industries.

24. It is reasonable for GTSW not to include a cost component for contribution in the rates for 911 equipment and services because of the public service nature of the offering.

25. The tariff sheets given interim approval should be amended to reflect that GTSW will not include an element for contribution in its costs for 911 equipment and services.

26. The appropriate rate of return for GTSW to use in determining the costs for 911 equipment and services is the actual rate of return found reasonable by the Commission in the last general rate case for GTSW; it should not be rounded to any other number.

27. The tariff sheets given interim approval should be amended to indicate that the rate of return used in the determination of costs for 911 equipment and services shall not exceed the actual rate of return found reasonable by the Commission in the last general rate case for GTSW.

B. Conclusions of Law

1. Determinations of tort liability in the provision of 911 equipment and services would be made by a court of competent jurisdiction and not by this Commission via tariff provisions.

Respectfully submitted,

Mary Ross McDonald

MARY ROSS McDONALD
ADMINISTRATIVE LAW JUDGE

APPROVED this 12th day of November 1987.

Phillip A. Holder

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

DOCKET NO. 7016

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PUBLIC UTILITY COMMISSION
FILING CLERK

APPLICATION OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST FOR APPROVAL OF EMERGENCY NUMBER SERVICE (911) TARIFF	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In open meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above styled application was processed in accordance with applicable statutes and Commission rules by an administrative law judge who prepared and filed an Examiner's Report and a Supplemental Examiner's Report, both containing Findings of Fact and Conclusions of Law, which reports are hereby ADOPTED and made a part hereof, with the following exceptions:

1. Finding of Fact No. 31 in the Examiner's Report is not adopted.

2. Finding of Fact No. 36 in the Examiner's Report is not adopted.

The Commission further issues the following Order:

3. The Emergency Number Service (911) Tariff of General Telephone Company of the Southwest (GTSW) originally filed in this docket and later amended is APPROVED in part and REJECTED in part, in accord with the recommendations in the Examiner's Report and Supplemental Examiner's Report.

4. Within twenty (20) days after the date of this Order, GTSW SHALL file revised tariff sheets in accordance with the directives of this Order, and SHALL serve copies upon all parties of record and the general counsel. No later than ten (10) days after the date of the tariff filing by GTSW, the parties SHALL file their written comments recommending approval or rejection of the individual

sheets of the filed revised tariff. No later than fifteen (15) days after the date of the tariff filing by GTSW, the general counsel SHALL file in writing any responses of the Commission staff to GTSW's revised tariff filing, and SHALL file a memorandum recommending approval or rejection of the individual tariff sheets filed, explaining the reasons for the recommendations. 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 procedures established herein. The tariff sheets SHALL be deemed approved and SHALL become effective upon expiration of twenty (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 modified or rejected, GTSW SHALL file proposed revisions of those sheets in accordance with the Hearings Division letter within ten (10) days after the date of that letter, with the review procedures set out above once 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.

5. GTSW SHALL file annually with the Telephone Division of the Commission a report of all claims made against it regarding 911 service.

6. All motions, applications, and requests for entry of specific findings of fact and conclusions of law, and 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 2nd 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

REQUEST FOR DECLASSIFICATION OF DOCUMENTS COVERED BY PROTECTIVE ORDER ENTERED IN DOCKET NO. 6200 | DOCKET NO. 6588

September 25, 1987

[1] PROCEDURE - PREHEARING PROCEEDINGS - PRIVILEGED DOCUMENTS/PROTECTIVE ORDERS

For protective orders that do not provide an exemption from discovery, there is no requirement that the documents contain information of a kind that could be subject to an absolute privilege against disclosure. The proper test is not whether the information is of a kind that could be the subject of an absolute privilege against disclosure; the test is whether the information is proprietary and subject to having its value or substance expropriated quite apart from its legitimate use in connection with regulatory matters.

[2] PROCEDURE - PREHEARING PROCEEDINGS - PRIVILEGED DOCUMENTS/PROTECTIVE ORDERS

Under the Texas Open Records Act, any document entered as an exhibit may be presumed to have formed the basis, or part of the basis, for the decision in a contested case. It should be maintained by the Commission as part of the public record unless it falls within one of the exceptions set forth in Section 3(a) of the Texas Open Records Act.

[3] PROCEDURE - PREHEARING PROCEEDINGS - PRIVILEGED DOCUMENTS/PROTECTIVE ORDERS

A document claimed to be proprietary should be released from the terms of a protective order limiting its distribution if the document:

(1) is not proprietary, or
(2) is proprietary, but
    - was admitted as an exhibit in a contested case, and
    - does not fall within one of the exceptions to the Texas Open Records Act; or
(3) is arguably proprietary and otherwise subject to protection, but
    - there is no demonstration that conditions on access are necessary to protect the interest asserted.

[4] PROCEDURE - PREHEARING PROCEEDINGS - PRIVILEGED DOCUMENTS/PROTECTIVE ORDERS

The party seeking protection clearly has the burden of proving that the documents in question are proprietary. As part of that burden, it would be incumbent on the party seeking protection to demonstrate the nature of the interest and the way in which it would be harmed by unrestricted access. Section 14a of the APTRA gives the Commission the authority to fashion an order based on the requirements of justice. Rule 166b speaks in terms of, "on motion specifying the grounds," the court "may" make an order, "necessary", "in the interest of justice." The statutory language quoted implies that even where a document is arguably proprietary and otherwise subject to protection, there needs to be a showing that an appropriate

order is actually needed to protect the interest asserted. On this basis, the Commission could certainly dismiss any claim based merely on conclusory statements that something was proprietary.

DOCKET NO. 6588

REQUEST FOR DECLASSIFICATION OF DOCUMENTS COVERED BY PROTECTIVE ORDER ENTERED IN DOCKET NO. 6200	I I I I	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Introduction and Procedural History

On March 22, 1985, Southwestern Bell Telephone Company (SWB) filed a petition for authority to change rates together with a motion requesting entry of a protective order identical to that entered in SWB's previous rate case Docket No. 5220. Under the terms of the order, which was adopted substantially unchanged as ALJs' (Administative Law Judges') Order No. 6 in Docket No. 6200, any party may designate as proprietary and confidential any document that that party produces. Upon a party's designation of a document as proprietary and confidential, access to it is restricted to the other parties' legal counsel and to those persons chosen by the parties as their experts in the subject area relating to the document. So that access to the document can be controlled, a reading room is designated, and persons wishing to view the document have to go to the reading room and sign a confidentiality agreement before the document will be made available to them. (The order specifies the hours that the room is to be open, that it shall be in Austin, and so on.) By signing the confidentiality agreement, a person agrees not to use or disclose the information contained in the document for purposes of "business or competition" or for purposes other than "this proceeding or other proceedings before this Commission, or resulting proceedings before any judicial tribunal." Documents would not circulate, but would remain in the room at all times. Only legal counsel would be authorized to take away a copy of a document, and then only a single copy with "confidential" stamped on its face. Records would be kept of those provided with such copies, and further duplication or reproduction would be prohibited. Notes taken from the documents would also be subject to restrictions specified in the order. Upon completion of Docket No. 6200 and completion or exhaustion of all judicial appeals, all such copies and notes would have to be returned to, or else destroyed in the presence of, the party who produced the original.

As a further precaution against unrestricted viewing, the protective order provides that a party may request a ruling from the Commission that, on the ground the making of copies would expose him to an unreasonable risk of harm, not even one copy may be made. The order provides that the burden is on the party requesting the restriction to prove the risk of harm. Such documents would be labelled "highly sensitive" to distinguish them from those merely labelled "confidential."

Paragraph 9 of the protective order suggests a mechanism for ultimately releasing documents from its terms. Paragraph 9 states:

> This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or to appeal any finding that specific information is Confidential Information or should be subject to the protective requirements of this Order. Any information designated by any party as privileged or proprietary may be referred to the ALJs for ruling, after hearing, whether said material should be so classified.

The details of this mechanism are more fully described in ALJs' Order No. 5, which in pertinent part states:

> All parties disputing any party's claim that particular documents should be covered by the protective order shall file a list of said documents no later than the last day of the hearing on the merits of Southwestern Bell's request for rate change.
>
> The party claiming the proprietary nature of the disputed documents shall file a statement of its contentions regarding disputed documents, setting forth with specificity the nature of privilege asserted for each document, no later than seven days from the date of the close of the hearing on the merits.
>
> At the close of Southwestern Bell's rebuttal case on the merits of its request for rate change, the hearing will be recessed. The hearing will be reconvened no later than ten days after the recess, to take evidence on the proprietary nature of the disputed documents.
>
> The party alleging protected status has the burden of proving the proprietary nature of disputed documents.
>
> If, after hearing, documents are found not to be proprietary, those documents will be released from the provisions of the protective order.

Both the protective order (ALJs' Order No. 6) and ALJs' Order No. 5 were issued on April 19, 1985. Among other matters, ALJs' Order No. 5 concerns objections of the

following parties to entry of the protective order: MCI Telecommunications Corporation (MCI), the Cities, State Purchasing and General Services Commission (State Purchasing or SP), and Office of Public Utility Counsel (OPC). The ALJs' order overruling these objections was appealed to the Commissioners and these appeals were subsequently denied by operation of law.

In April and June of 1985, SWB voluntarily declassified some documents, placing papers indicating that the documents were declassified directly in the binders containing responses to requests for information.

The hearing on the merits in Docket No. 6200 was concluded on November 8, 1985. Pursuant to the mechanism described in ALJs' Order No. 5 and Paragraph 9 of Order No. 6, MCI filed a motion on November 4, 1985, requesting the release of certain documents from the terms of the protective order. The documents that MCI requested be released consisted of the following:

1. MCI Exhibits 25, 27, 55C, and 88B;
2. Consumer's Union Exhibits 39 and 57; and
3. State Purchasing Exhibits 25C, 37A, 37B, 51, 51A, 52, 52A, 109, and 165A.

MCI Exhibit 27 was not admitted into evidence in Docket No. 6200. It was submitted as an offer of proof. MCI Exhibit 55C was also not admitted into evidence.

By order of November 12, 1985, the ALJs[1] severed from the cause in Docket No. 6200 the issue of releasing certain documents from the terms of the protective order. The severed issue was assigned Docket No. 6588 and a new procedural schedule was established, superseding the specification in Order No. 5 that the hearing commence "no later than ten days after the recess" of the hearing on the merits in Docket No. 6200. Under this new schedule, the ALJs extended the time for entering upon a hearing on the protected status of documents by some four months. The ALJs also extended the time for parties to file lists of documents to be considered for release and for parties to file responses to such requests.

---

1. Ms. Deborah Miller and Ms. Shelia Bailey are the ALJs to whom reference is made.

On November 22, 1985, pursuant to this new schedule, OPC filed its request for release of documents, indicating its desire that all classified material be released from the protective order. Notwithstanding the blanket request, OPC specifically requested release of the following documents:

1. MCI Exhibits 25, 27, and 88B;
2. Consumer's Union Exhibits 37, 39, 40, 50, and 57;
3. State Purchasing Exhibits 25B, 25C, 37A, 37B, 51, 51A, 52, 52A, 109, and 165A;
4. AT&T-C Exhibits 10 and 11;
5. OPC Exhibits 121, 122, 128-130, 146-154, 182, 213, 307, and 321;
6. Staff Exhibits 13 and 18B; and
7. SWB Exhibits 34C and 104.

All these are documents classified as confidential by SWB. It may be noted that OPC's list overlaps with MCI's in respect of most of the documents listed in items 1, 2, and 3.

On November 22, 1985, OPC also filed an interim appeal of the ALJs' November 12 order, requesting: 1) that certain language setting out issues to be considered in Docket No. 6588 be stricken from the order; 2) that the Commission indicate that SWB has the burden of proof on issues; 3) that certain aspects of the scheduling be modified; 4) that SWB be encouraged to voluntarily declassify documents; and 5) that the ALJs' order to prefile notices of intent to cross-examine witnesses be reversed. The time for ruling on the appeal was extended, and, on December 20, 1985, the Commission denied the appeal except for a minor scheduling change occasioned by the oversight of a state holiday in the ALJs' scheduling.

On December 9, 1985, MCI filed a motion protesting the four-month delay in the proceedings on the ground that the protective order in Docket No. 6200 was preventing discovery in connection with other pending litigation. MCI also included in the motion objections to the way in which the ALJs in the November 12 order had characterized the issues in Docket No. 6588. On December 10, 1985, the ALJs denied the motion, commenting that the protective order in no way prevented discovery in other dockets.

On December 13, 1985, State Purchasing filed the list of documents that it was requesting be released from the protective order. This list overlaps entirely with OPC's except that there are two documents requested by OPC that were not requested by State Purchasing.

Also on December 13, 1985, MCI appealed the ALJs' December 10 order. This appeal was subsequently denied by operation of law.

On December 17, 1985, AT&T Communications of the Southwest, Inc. (AT&T-C) filed a motion to intervene in Docket No. 6588.

Also on December 17, 1985, OPC filed a second list of documents to be considered for release from protective order. The list is very long. It identifies approximately 50 items, without cross-references to exhibit numbers, according to the OPC RFIs to which they pertain. In addition, it identifies approximately thirty items without reference either to an exhibit number or an RFI. Upon closer examination, a number of these items turned out to have already been voluntarily declassified. A few turned out never to have been classified, and still others turned out to have been previously ruled upon in Docket No. 6200 by final and unappealable orders.

Also on December 17, 1985, MCI filed a supplemental request, adding to its list certain pages and appendices from its rate design brief which contain information taken from MCI Exhibit 25. These pages and appendices were submitted under seal because the source of the information was under seal. It is noted that MCI Exhibit 25 is included on MCI's original list.

On January 7, 1986, AT&T-C filed its statement of position asserting its rights under Rule 507 of the Texas Rules of Evidence and Sections 3a(1), (4), and (10) of the Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a to protect access to the following exhibits:

1. MCI Exhibits 25 and 55C; and
2. State Purchasing Exhibits 52 and 52A.

Also on January 7, 1986, SWB filed its statement of position commenting that the "purpose of the hearing will be to determine whether, under Rule 507 of the Texas Rules of

Evidence, the documents requested to be released from the protective order constitute trade secrets that should be protected from public disclosure." The statement of position identifies documents and sets forth SWB's position as to each of these documents. In some cases, SWB indicates its willingness to declassify all or parts of documents sought for declassification.

On January 28, 1986, OPC filed a third request for release of documents, adding to its list SWB's response to OPC RFI (Request for Information) No. E-700.

On February 26, 1986, SWB filed a stipulation entered into between AT&T-C and MCI agreeing to the release of MCI Exhibits 25 and 55C, except for information on certain lines of those documents showing "the number of terminations and attempts on the 1ESS machines." The stipulation sets forth the lines on which this information appears and provides that these lines shall be "masked and deleted," with the documents otherwise being released from the protective order. The stipulation further reflects MCI's withdrawal of any request for release of the deleted portions and any request for release of State Purchasing Exhibits 52 and 52A. Although the stipulation was signed only by AT&T-C and MCI, all of the other parties, including the Commission's General Counsel and SWB, indicated in some fashion their endorsement of the proposed disposition of the various documents, with MCI Exhibits 25 and 55C to be released under the conditions specified, and State Purchasing Exhibits 52 and 52A to be withdrawn from consideration in connection with this docket.

In February of 1986, SWB voluntarily declassified a number of documents by placing in the binders containing responses to requests for information papers declassifying the responses.

On March 18, 1986, SWB filed a letter stating that it was declassifying the following exhibits:

- State Purchasing Exhibit 25B-2
- State Purchasing Exhibit 25C
- MCI Exhibit 88B

On March 18, 1986, the hearing on the merits in Docket No. 6588 was convened before Administrative Law Judge Mary Ross McDonald with appearances entered by Messrs. Tim

Gonzales, Gary Buckwalter, and Jim Golden for SWB, Mr. Ray Besing for MCI, Mr. Geoffrey Gay for OPC, Mr. Scott McCollough for State Purchasing, Mr. Mark Royer for AT&T-C, and Mr. Eddie M. Pope for Commission staff. At the outset of the hearing, the parties waived cross-examination and agreed to the admission of all of the prepared testimony submitted in the case, consisting of the testimony of the following witnesses for SWB:

Mr. Eugene Springfield,
Mr. J. B. Ellis,
Mr. Ronald Jennings,
Mr. Andrew Jones,
Mr. Eduardo Mestre,
Mr. Terry Brantley,
Mr. Ronald Hall,
Mr. Michael Grove,
Mr. John Finn,
Mr. Ed Mosher,
Mr. Jim Hager,
Mr. David Cole,
Mr. Oscar McNeil, and
Mr. Chris Bowers;

and the following witnesses for OPC:

Dr. Carol A. Szerszen
Mr. Clarence L. Johnson

The testimony submitted by SWB included the rebuttal testimony of Messrs. Finn, Grove, Jennings, and Ellis. No other testimony or evidence was offered at the hearing. Despite the waiver of cross-examination and agreement on the admissibility of testimony, the parties made clear that they were not agreeing to any settlement of their outstanding differences. The parties did, however, note that they wished to include State Purchasing Exhibit 51 in paragraph 2 of the stipulation entered into between AT&T-C and MCI, meaning that they wished to withdraw State Purchasing Exhibit 51 from consideration in connection with this docket. In May and June of 1986, the parties filed briefs and reply briefs. To its January 7 statement of position claiming a privilege under Rule 507 of the Texas Rules of Evidence

(TRE), SWB added in its brief references to the Texas Open Records Act, the federal Freedom of Information Act, and Federal Communications Commission (FCC) rules and regulations.

Docket No. 6588 has been reassigned from ALJ McDonald to the undersigned examiner. The undersigned examiner represents that she has reviewed the record in this case and serves as the replacement for the ALJ pursuant to P.U.C. PROC. R. 21.141 and Section 15 of the APTRA.

The following sections of this report include a statement of jurisdiction, a list of documents according to their present status in the case, a discussion of the statutory criteria that are controlling in this docket, and a generic discussion of affiliate information followed by the discussion and recommendations concerning individual documents including the documents containing affiliate information. SWB and OPC had different ways of grouping documents for discussion purposes. In organizing this material, the undersigned examiner found it convenient for purposes of discussing OPC's position on affiliate information to address its argument more or less as a body. In respect of other groups or categories of documents it appeared equally or more convenient to discuss the merits of particular arguments in the context of discussing the individual documents. The organization of the report should not suggest to the reader that all of the information under consideration in this docket is affiliate information, although most of it is.

The documents discovered in the course of Docket No. 6200 fill row upon row of library shelving. Cross References to RFI numbers were generally essential for the undersigned examiner, who was not previously familiar with the intricacies of Docket No. 6200, just to be able to locate documents. Cross references to both RFI and Exhibit numbers were also generally essential for her to be able to track the history of particular documents, which in some cases had been previously ruled upon by final and unappealable orders in Docket No. 6200. In addition, cross-references helped her to locate the discussion of particular documents in direct testimony, rebuttal testimony, motions, pleadings, briefs, and reply briefs submitted by multiple parties with different styles of designating or referring to documents. Developing a road map to just the documents that had been specifically placed in issue in this docket was very time-consuming. The undersigned examiner did not consider that it was appropriate to undertake that kind of painstaking investigation and examination for documents that had not been specially noted in some

manner, notwithstanding OPC's blanket request for release of all documents entered under the protective order. Performing the necessary groundwork to determine which items, out of all the massive discovery, belonged on this list would have consumed even more time. It might have proved an easier task for someone intimately familiar with Docket No. 6200; on the other hand, it might not have. The very party making the blanket request would have had exactly the kind of familiarity with Docket No. 6200 that the undersigned examiner lacked, and yet it must not have found it an easy or insignificant task to list and cross-reference documents--or surely it would have provided the examiner with such assistance, particularly as, by letter to all parties of January 28, 1987, she did ask for it if only with regard to the documents described verbally in OPC's December 1985 release request.

II. Statement of Jurisdiction

The Commission's jurisdiction in Docket No. 6200 arose under Section 18 of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1985). This docket is an incident of the protective order issued in that docket.

III. List of Documents According to Present Status

Exhibits/Classified/under Consideration

Docket 6200 Exhibit No.	RFI No.	Description
OPC Ex. 122	OPC RFI F-1049	SBMS PS Info
OPC Ex. 128		Inc. St. for SBP
OPC Ex. 129	OPC RFI F-708	Silver Pages Info
OPC Ex. 130	OPC RFI F-1295	Silver Pages Info
OPC Ex. 146	OPC RFI F-76g	Info on SBP and Other SBC Subs
OPC Ex. 147	OPC RFI F-76i	Affiliate Info/ROE '84-'87
OPC Ex. 148	OPC RFI F-76g	Affiliate Info/Revs + Exp. '84-'87
OPC Ex. 149	OPC RFI F-89	Affiliate Info/Bal. Sheet + Inc. St.
OPC Ex. 150	OPC RFI F-76i	Affiliate Info/ROE '84-'87
OPC Ex. 151	OPC RFI F-1297	SWB Telecom
OPC Ex. 152	OPC RFI F-1296	SBMS Info
OPC Ex. 153	OPC RFI F-1296	SBMS Info
OPC Ex. 154	OPC RFI F-1298	SBC Asset Management
OPC Ex. 213		SBP Net Income
OPC Ex. 307	OPC RFI F-1299	SBC/New Ventures
OPC Ex. 321	OPC RFI F-1306-8	Mast Acquisition
OPC Ex. 321	OPC RFI F-1311	Salomon Bros. Report
OPC Ex. 321	OPC RFI F-1321	Hart-Scott-Rodino Filing
SWB Ex. 34c	AT&T-C's 3rd RFI Nos. 1 & 2	Info on Switched Access
CU Ex. 50	CU RFI 12	Rate of Return for SWBYP
AT&T-C Ex. 10	AT&T-C's 3rd RFI No. 1	Switched Access Minutes of Use
GC Ex. 13	GC RFI VII-A-1	1984 Inc. St. for SBP subs

Not Exhibits/Classified/under Consideration

OPC RFI No.	Description
E-349	Training Manual
E-350	Training Manual
E-354	Course Catalog
I-375	Info on SBC Subs
J-419	Lobbyist Info
E-525	Training Manual
Q-650	Settlement Agreement
E-700	Bellcore 5-year Plan
F-710	Settlement Agreement
F-771	Cost of Directory Covers
I-788	Mo/Reps for Other SBCs
E-818	Custom Calling Rep.
F-820	Rev. & Exp from Dir.
A-846	Liquidity True-up Cl.
F-969	Info on Coupons
G-973	Subscriber Loops
G-974	Directory Asst.
G-979	Pr. Line Cost Study
AT&T-C Ex. 11 (not admitted)	Rev. from Equal Access

Exhibits/Requested for Declassification/Voluntarily Declassified

Docket 6200

Exhibit No.

SWB Ex. 104
OPC Ex. 104
OPC Ex. 121
OPC Ex. 182
OPC Ex. 307
SP Ex. 25B
SP Ex. 25C
SP Ex. 37A, Tabs 3, 4, and 5/SP RFI 33
SP Ex. 37B, Tabs 1 and 2/SP RFI 33
SP Ex. 51A
SP Ex. 109
SP Ex. 165A, Tabs 3, 4, and 5
CU Ex. 37
CU Ex. 39
CU Ex. 40
CU Ex. 57
MCI Ex. 25, with specific deletions
MCI Ex. 27
MCI Ex. 55C, with specific deletions
MCI Ex. 88B
GC Ex. 18B/GC RFI V-A-11

Not Exhibits/Requested for Declassification/Voluntarily Declassified

OPC RFI No.	Date Declassified
E-60	6-14-85
E-75	6-14-85
F-90	4-23-85
F-93	6-14-85
F-94	6-23-85
F-95	4-23-85
I-140	4-23-85
I-141	4-23-85
I-155	6-14-85
J-164	6-12-85
L-180	2-25-86
Q-227, Tab 1	
Q-227, Ex. 3	
Q-227, Tab 5 - App. B, C, D, E, F, & G	
L-434	2-25-86
Q-470	6-14-85
G-537	6-14-85
G-539	
G-540, Tabs 2, 3, & 4	
M-593	2-25-86
Q-657	6-14-85
Q-803	2-25-86
A-845	2-25-86
E-856	2-21-86
E-895	2-25-86
F-1047	2-25-86
Cities 1st RFI No. 19, Tabs 2 & 4	

Documents Never Classified/Requested in Docket No. 6588 by OPC

OPC RFI No.
G-977
G-538
Q-835

Documents Requested in Docket No. 6588 by OPC for Declassification, but Previously Ruled on in Docket No. 6200 by ALJ Order Nos. 13 and 27:

RFI No.	Description
OPC RFI E-59	Bellcore Minutes
OPC RFI Q-224	Flight Logs
OPC RFI E-815	Notes & Memos Re: Bellcore Board Meetings

(OPC's motions to compel discovery of these documents were previously denied by ALJ's Order No. 13, appeal denied by operation of law, and ALJ's Order No. 27, not appealed.)

Documents Withdrawn from Consideration by

Agreement of Parties

SP Ex. 51
SP Ex. 52
SP Ex. 52A

IV. Opinion

A. Statutory Criteria

1. Discussion of Section 14a of APTRA and Rule 166b of the Texas Rules of Civil Procedure

Many of the briefs in this docket including that of the Commission's General Counsel suggest that, for the protective order issued in Docket No. 6200 to be upheld with respect to specific documents, a party must in all cases successfully defend a claim of privilege under Rule 507[2] of the Texas Rules of Evidence. This is not the statutory requirement, however. It would be the requirement if the order in Docket No. 6200 exempted certain documents from discovery, but the order does not do this.

Sections 14a(a)(1) and 14a(b) of the APTRA permit an agency to place such conditions on the inspection and copying of documents as may be "just," subject to the limitations provided for discovery under the Rules of Civil Procedure. Rule 166b of the Texas Rules of Civil Procedure is the rule applicable to "forms and scope of discovery; protective orders and supplementation of responses." Section 3 of that rule sets forth the exemptions for matters that would otherwise be discoverable. Clearly, in order for a matter to be exempt from discovery, it must be the subject of a privilege. Examples of exemptable matters would be work product of an attorney or "any matter protected from disclosure by privilege."

Thus, if SWB, or any other party, were claiming an exemption from discovery as to certain documents, it would be incumbent on SWB, or that party, to prove that the documents contained information of a kind subject to an absolute privilege against disclosure. (Even then, under Rule 507, the agency might order discovery subject to a

---

2. Rule 507 of the Texas Rules of Evidence is the rule pertaining to trade secrets. It provides that a person has a certain limited privilege to refuse to disclose a trade secret owned by him. The privilege may be claimed by him or by his agent or employee. For the full text of Rule 507 and the commonly cited definition of trade secret taken from the Restatement of the Law, Torts (1939), please see Appendix A. Included in Appendix A is a brief description of an additional criterion for whether a matter may be considered trade secret which is cited in the brief filed by the Commission's General Counsel.

protective order of some kind.) Owing to the nature of the protective order requested and issued in Docket No. 6200, however, no such exemption from discovery has been claimed or granted.

Section 4 of Rule 166b of the Texas Rules of Civil Procedure stands separate and apart from Section 3 pertaining to exemptions. In pertinent part, Section 4 provides as follows:

> On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from . . . invasion of . . . property rights. Specifically, the court's authority as to such orders extends to, although is not necessarily limited by, any of the following:
>
> a. . . . .
>
> b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.
>
> c. ordering that results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted (emphasis added).

[1] Thus, for orders that do not provide an exemption from discovery, there is no requirement that the subject documents contain information of a kind that could be subject to an absolute privilege against disclosure. The proper test is not whether the information is of a kind that could be the subject of an absolute privilege against disclosure; arguably, the test is whether the information is proprietary and subject to having its value or substance expropriated quite apart from its legitimate use in connection with regulatory matters.

The example of the Bellcore training manuals provides a demonstration of the unfairness that may result from taking the view that a matter has to be a trade secret in order to be afforded any kind of consideration in a protective order. As one might expect, the Bellcore training manuals that are used in the courses that are open to the public contain no secret formula or "sensitive" business information. On the other hand, some people are willing to pay money to attend seminars at which these course materials are distributed. Absent payment for the course, these particular texts would not normally be available to members of the general public.

With respect to the training manuals, counsel for OPC writes:

> OPC cannot contemplate anyone being patient enough to sit and thoroughly review the voluminous training material, which is the main reason why OPC sees no competitive harm in declassifying that material. . . . It is preposterous to think that Bellcore or SWB face any competitive harm in someone wanting to sit in a voluminous room day after day reading textbooks simply to avoid taking and paying for a Bellcore course.

If the issue is fundamentally one of property rights, it is enough that someone has the option to avoid "taking and paying" for a Bellcore course to make this material appropriate for inclusion in the kind of protective order at issue here. It is unfair to condition the right to control distribution of a training manual (which need not be read "day after day" in a voluminous room if it were simply photocopied) on whether the training manual contains trade secret information. Even if a training manual does not contain information rising to the stature of a trade secret, there can be a legitimate interest in controlling such a document's distribution.

There is a property interest at stake and, where the manual is not an exhibit in the case, no countervailing public interest is served in making these manuals part of the public record. Indeed, under Section 13(f) of the APTRA, these manuals are not part of the record. Moreover, OPC's own argument undercuts any notion that these manuals are vital to put before the public. Outside of someone intent on avoiding "taking and paying" for a course, it is difficult to see who would benefit from the release of this material.

2. Discussion of the Texas Open Records Act

The protective order entered in Docket No. 6200 allows SWB, and any other entity, to segregate confidential, proprietary, or trade secret information in such a way as to try to make it inaccessible to persons who would wish to consult this information for purposes of expropriating its value in ways not related to regulation. The order does not prevent anyone possessing the requisite professional involvement in the proceedings from having access to the material. Nevertheless, apart from the access afforded to those who are professionally involved in representing the public interest before the Commission, members of the public effectively have no access to material covered under the order. Clearly, this raises a problem insofar as material covered under the order forms the basis, or part of the basis, for

an official act or deliberative process because there is in the general public with respect to government affairs a "right to know" which is codified in the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1987). This right is not an unqualified right, however. Section 3(a) of the Act sets forth the exceptions that provide the statutory criteria for determining whether certain documents that may presently be covered under the protective order should be released to the public.

In pertinent part, Section 3(a) of the Texas Open Records Act (TORA) provides as follows:

> All information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:
>
> (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;
>
> . . .
>
> (4) information which, if released, would give advantage to competitors or bidders;
>
> . . .
>
> (10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision;

[2] Under the Texas Open Records Act, any documents entered as exhibits in Docket No. 6200 may be presumed to have formed the basis, or part of the basis, for the decision in that docket. They should be maintained by the Commission as part of the public record unless they fall within one of the exceptions set forth in Section 3(a) of the Act.

Section 7(a) of TORA contemplates that the Commission would initially determine what it considers to fall within an exception to Section 3 of TORA for purposes of referring the matter to the Attorney General in the event of an actual Open Records Act request. Section 7(a) of TORA provides as follows:

> If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act . . . , the

governmental body within a reasonable time, no later than 10 days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception . . . (emphasis added).

Thus, while the Commission's determination that an exhibit fell within an exception to TORA would not be final, that initial determination would constitute an essential part of the process of dealing with an Open Records Request in the event that an exhibit was still under seal. Moreover, the Commission's determination that an exhibit under seal did not fall within an exception to TORA would be final in the sense that, unless appealed, the exhibit would be released. This would also be true of a determination by the Commission that, even though an exhibit fell within an exception to TORA, it was so fundamental to understanding the issues in a contested case that it should be released notwithstanding the exception. That the Commission would have this discretion under TORA is a view that has been advanced by the Hon. James R. Meyers, Assistant Special Counsel to the Texas Railroad Commission, in remarks before the Administrative Law Section of the Texas Bar on January 14, 1987.

3. Summary of Statutory Discussion and Discussion of Burden of Proof

[3] Under the analysis suggested in Sections III.B.1 and III.B.2 of this report, a document should be released from the terms of the protective order if it:

(1) is not proprietary, or

(2) is proprietary, but
- was admitted as an exhibit in Docket No. 6200, and
- does not fall within one of the exceptions to the Texas Open Records Act; or

(3) is arguably proprietary and otherwise subject to protection, but
- there is no demonstration that conditions on access are necessary to protect the interest asserted.

There is also room to argue that some documents falling within an exception to the Texas Open Records Act are, nevertheless, candidates for release on grounds that the Commission has discretion, and good cause, to release to the public documents that are fundamental to understanding or supporting the decision in a contested case.

[4] The party seeking protection clearly has the burden of proving that the documents in question are proprietary, and the order states this. (The order does not, by the way, state that the party seeking protection must show that the documents contain trade secrets.) As part of that burden, it would be incumbent on the the party seeking protection to demonstrate the nature of the interest and the way in which it would be harmed by unrestricted access. Section 14a of the APTRA gives the Commission the authority to fashion an order based on the requirements of justice. Rule 166b speaks in terms of, "on motion specifying the grounds," the court "may" make an order, "necessary," "in the interest of justice." The statutory language quoted implies that even where a document is arguably proprietary and otherwise subject to protection, there needs to be a showing that an appropriate order is actually needed to protect the interest asserted. On this basis, the Commission could certainly dismiss any claim based merely on conclusory statements that something was proprietary.

B. Information Relating to Affiliates

1. OPC's Position in its Brief

In its brief, OPC urges that the Commission order the blanket declassification of all information gathered in Docket No. 6200 dealing with SWB's non-regulated affiliates[3] because of general concerns about Southwestern Bell Corporation (SBC) using SWB Telephone Co. to subsidize such entities. OPC states:

> These concerns should motivate the Commission to declassify SWB affiliate information so that the Commission itself as well as all interested parties can properly monitor SWB's affiliate relationships by maintaining continuing records of SBC's quickly changing affiliate structure from rate case to rate case. Unless the Commission, OPC, and other parties are able to maintain ongoing records of the SBC subsidiaries, we will all be forced to deal with them on a case-by-case basis, which will deprive us all of the comprehensive and long-range view necessary to keep proper track of them. This can only be accomplished by declassifying these documents in this case so that copies can be retained by all parties after the close of this case and used again in SWB's future rate cases.

3. For a diagram of SWB affiliates, please see Appendix B.

A basic counter-argument to OPC is that OPC is mistaken when it asserts that no one has the ability to oversee SBC subsidiaries on a consistent basis. Under Sections 28(a)(1) and 67 of the PURA, Commission staff has ample authority to engage in the kind of ongoing oversight of affiliates advocated by OPC. In addition, given the flexibility inherent in drafting protective orders, there is nothing to prevent the inclusion of a provision giving an entity like OPC continuing access to information even beyond the months or years of access afforded during the prosecution and appeal of a rate case. The purpose of the protective order is to prevent proprietary information from being freely expropriated for reasons unrelated to regulation. It is not the purpose of the protective order to hamper the work of an entity like OPC.[4] Some of OPC's concerns could probably be addressed by including different provisions for OPC in future orders.

One problem with the OPC's position is that ordering blanket declassification necessarily implies that declassification is being ordered without regard to impact on SBC. Indeed, OPC seems unconcerned with impact on SBC. In its brief, OPC observes:

> If beyond fulfilling its statutory duty with respect to local telephone service, SBC wants to sell Yellow Pages in Australia or resell cellular mobile services in California, it must do so with the clear understanding that it must first satisfy the regulatory demands of this Commission and that those demands may impose on it reporting and disclosure requirements not faced by its fully unregulated competitors in the rest of the world.

What this implies is that SBC competes at its own risk because it is on notice that it can always be ordered to publicly disclose kinds or classes of information that other businesses would regard as, and be entitled to keep, proprietary and confidential. The problem this raises is that discovery in a rate case could arguably become a means, not just of monitoring SBC, but of actively preventing it from competing effectively.

Ordering the blanket release of affiliate information in this docket for public policy reasons would have ramifications for future dockets insofar as SWB's future ability to obtain protective orders is concerned. Certainly it would be inconsistent to enter a protective

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4. A large portion of OPC witness Clarence L. Johnson's testimony consists of observations on the ways in which protective orders, and particularly the designation of documents as highly sensitive under such orders, impedes OPC in working with affiliate information.

order covering affiliate information in any future docket if blanket disclosure under the rationale urged by OPC in its brief is ordered in this docket.

2. Testimony of OPC Witness Dr. Carol A. Szerszen

OPC witness Dr. Carol A. Szerszen takes the position that none of the documents containing affiliate information is detailed enough to be of any real use to competitors. She does not address the merits of specific documents; rather she addresses her remarks to "balance sheets, income statements, and projected financial results," and this list comprehends all of the affiliate information that OPC obtained through discovery with the possible exception of those materials, such as documents relating to the Mast acquisition, that are specifically addressed in the testimony of Mr. Clarence Johnson. Although, in effect, she argues for the release of all of the affiliate information, it is on the ground that the information would not be valuable to competitors. To release the information based on the testimony of Dr. Szerszen would arguably not have the ramifications of releasing the information for the public policy reasons urged in OPC's brief and by Mr. Johnson. Such a determination would take impact on SBC into account, but would find that there was none.

It is also arguable that this distinction is more theoretical than practical. There is nothing in the testimony to suggest how, or at what point, affiliate information might become detailed enough to be of use to competitors, or why the information obtained during discovery would not have been in this form, or have risen to this level of complexity. One might ask whether any information capable of being described as balance sheets, income statements, or projected financial results could ever be in a form, or of a complexity, to interest competitors in Dr. Szerszen's opinion.

One might also observe that the implication that the information would be of use to ratepayers does not clearly mesh with the idea that that same information would not be of use to competitors. It may be the case that these two conceptions of the data are reconcilable, but, certainly upon first consideration, they would seem to be at odds.

SWB rebuttal witnesses Jennings and Ellis clearly take issue with Dr. Szerszen as to the usefulness of the data, noting also that equivalent information about one's competitors would not be publicly available.

C. Examiner's Recommendations

The undersigned examiner makes the following recommendations with regard to specific documents.

OPC Exhibit 122/OPC RFI F-1049

The response to OPC RFI F-1049 consists of financial statements and financial information relating to the various partnerships in which Southwestern Bell Mobile Systems (SBMS) is involved. SBMS is in the business of providing wholesale and retail cellular service. It also sells or rents cellular equipment and provides some cellular systems with consulting and related services. It is in partnership with others because of the way entry into the cellular market is controlled by the Federal Communications Commission (FCC). The FCC allocates two cellular licenses to each "market." A market is defined as a metropolitan statistical area. One license is reserved for companies that directly, or indirectly, have a wireline presence in that market. The other license can be awarded to anyone regardless of whether that entity provides wireline service. In many markets, the carriers who would be eligible for the wireline license have agreed that it is in all of their interests to become partners and, as a partnership, have obtained the wireline license. As the licensee, the partnership provides the cellular network. Access to the network is provided at retail, or at wholesale to various resellers who may include individual members of the partnership.

The response to OPC RFI F-1049 consists of balance sheet data that would reveal such information as the extent of the land options held by various partnerships and the amount of their assets and liabilities. SWB witness Jerry W. Brantley indicates in his testimony that this information would be of use to the non-wireline, or "other," competitor at the network level in terms of deciding how to price its service. In addition, Mr. Brantley notes that this information is the subject of non-disclosure agreements among the partners.

This information is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 128

OPC Exhibit 128 which is discussed in the testimony of SWB witness Ronald M. Jennings consists of six pages of financial information, including a consolidated income statement for Southwestern Bell Publications, Inc. (SBP) and separate income statements for SBP subsidiaries.

SBP is the parent corporation of SWB Media, Inc., Southwestern Bell Yellow Pages, Inc., AD/VENT GRAFX Inc., AD/VENT Information Services, Inc. In addition AD/VENT Information Services, Inc. is the parent of AD/VENT Information Services International which engages in such enterprises as marketing Yellow Pages in Australia. SBP is a subsidiary of Southwestern Bell Corporation (SBC).

Release of OPC Exhibit 128 would make available to competitors of SBP in the publishing industry information regarding SBP operations, gross revenues, uncollectibles, expense levels (including salary and benefit expense), net income, total assets, and current liabilities.

This information is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 129/OPC RFI F-708

This material consists of Silver Pages financial information. Release of this information could influence current or potential competitors of SBP to enter the Texas market with similar directories, without the investment involved in researching the market for this product. This information, which is discussed in the testimony of Mr. Jennings is proprietary, and it falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 130/OPC RFI F-1295

This material which is discussed in the testimony of Mr. Jennings consists of additional information regarding Silver Pages and the profitability of the senior citizens directory

market. It is proprietary, and it falls within the exception in the Texas Open Record Acts for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 146/OPC RFI F-76g
OPC Exhibit 148/OPC RFI F-76g

This material states operating incomes for all SBC subsidiaries as well as projected operating income for SBP for the years 1985 through 1987. If declassified, this information would provide competitors with insights into SBP's plans, perceptions, and financial forecasts. In addition, this information could be useful to competitors in assessing the financial strength of the various SBC subsidiaries and determining whether to enter a particular market. These documents are discussed in the testimony of Mr. Jennings and SWB witness Andrew E. Jones, III.

This information is proprietary, and it falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit Nos. 147 & 150/OPC RFI F-76i

This material reflects the actual and projected return on equity for the various SWB affiliates for 1984 through 1987. According to SWB witness Andrew E. Jones, III, access to this information would provide a competitor with a means of determining the profitability of each SBC subsidiary. It could also provide insight into SBC's ability to respond to changed conditions in the marketplace or the economy and possibly be of help to a competitor in shaping its own business plans, such as when to introduce a new product. This information is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. Nonetheless, as pointed out by OPC in its reply brief at pp. 3 and 4, it does appear that certain data consisting of the specific 1984 equity returns of the non-regulated SBC subsidiaries, which is contained within the response to OPC RFI F-76i, was voluntarily declassified during the hearing in Docket No. 6200. Thus the information should remain classified with the exception of this material.

OPC Exhibit 149/OPC RFI F-89 and OPC RFI I-788

This information, which is discussed in the testimony of Mr. Jones, includes balance sheets and income statements for SBC's subsidiaries. Release of this information could give competitors insight into SBC's pricing policies and help them to determine the level at which SBC subsidiaries would be forced to operate at a loss. It would also reveal sources of other income, such as interest income, which could provide insight into SBC's financial condition and its ability to weather economic downturns or loss of market share due to increased competition. It would provide information to competitors regarding SBC's liquidity which in turn could reflect SBC's ability to respond quickly to changes in the marketplace. It would provide accounts receivable data reflective of the size of SBC's customer base. It would provide information regarding levels of inventory which could indicate whether a subsidiary is filling customer orders without delay or lagging behind, inviting competition.

This information is proprietary and it falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 151/OPC RFI F-1297

This material, which is discussed in the testimony of SWB witness Ronald W. Hall, relates to OPC's request for projections of revenues and expenses together with supporting documentation for SWB Telecommunications, Inc. (Telecom) for 1985 through 1987. Telecom sells telecommunications equipment in a highly competitive market. Often, price is the only basis on which vendors compete because they are all offering the same equipment. Release of OPC Exhibit 151 would be of advantage to Telecom's competitors because it would enable them to estimate Telecom's profit margins. This information, to which access is restricted within Telecom itself, is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 152 and 153/OPC RFI F-1296

This material, which is discussed in the testimony of Mr. Brantley, consists of revenue and expense projections for SBMS, together with backup data supporting the projections.

Information relating to SBMS generally could be of use to businesses competing with SBMS or planning to compete with SBMS, especially at the retail level. This information is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 154/OPC RFI F-1298

This material relates to OPC's request for projections of revenues and expenses for SBC Asset Management, Inc. for each of the first three years in which it is expected to produce positive net income. This material is discussed in the testimony of Mr. Jones. Mr. Jones notes that this is information regarding profit margins, sources of income, and expectations of future growth and he observes that this is the kind of information that would be of advantage to competitors. While this information is of a kind that would generally be considered proprietary and of interest or advantage to competitors, there is no discussion in the testimony of the nature of SBC Asset Management Inc.'s business, or whether it actually competes for business as the publishing and cellular subsidiaries do. In the event that it were the exclusive function of SBC Asset Management, Inc. to manage the assets of SBC and SBC subsidiaries, the exception in the Texas Open Records Act for information advantageous to competitors would appear to be irrelevant because SBC Asset Management, Inc. would not be competing with anyone for customers. Because this material was admitted as an exhibit in Docket No. 6200, it would need to come within an exception to the Texas Open Records Act in order to retain its protected status. The examiner recommends release of OPC Exhibit 154 under Section 3(a) of the Texas Open Records Act on the grounds that there is an inconclusive showing that this information falls within an exception to that Act.

OPC Exhibit 213

OPC Exhibit 213 is a document stating net income for SBP. It does not provide line item detail. According to SWB witness Ronald M. Jennings, even though line item detail is not provided, the net income figures, if joined with other data, could be used to build a financial profile of SBP. Although arguably proprietary, this information in and of itself does not appear to be complete enough to be useful to competitors. There is no showing that the other data needed to build a financial profile of SBP is a matter of public record.

The undersigned examiner recommends that this exhibit be released from the protective order because it has not been demonstrated that this particular document requires protection.

OPC Exhibit 307/OPC RFI F-1299

This material consists of the response to OPC's request for information about the "new ventures" referred to by Mr. Zane Barnes at a meeting of security analysts in April of 1984. Although SWB declassified some of this information on February 25, 1986, due to passage of time, the testimony of SWB witness James B. Ellis otherwise supports the proprietary nature of the documents.

Information relating to possible new ventures would reflect whether SBC was, or was not, interested in acquiring specific companies. One likely consequence of releasing such information, assuming stock in the target company were publicly traded, is that stock market speculators would run up the price of the stock in anticipation of merger activity. According to Mr. Ellis, it is in SBC's best interest to be able to control the timing of public disclosures about merger and acquisitions activity because of the variety of ways in which speculation in a stock can affect acquisition strategies.

Mr. Ellis also notes that if this type of information, which would reflect on negotiations with specific companies, could be made public without SBC's consent, many companies would find it undesirable to enter into negotiations with SBC. These negotiations are often the subject of non-disclosure agreements; such agreements would be rendered worthless if SWB could not even obtain an order limiting distribution of this information. It is the undersigned examiner's recommendation that OPC Exhibit 307 should remain confidential except for those parts declassified by SWB.

The declassified information consists of a list attached to the RFI response contained in the RFI response binders on file in SWB's "voluminous room." The list describes a variety of ventures numbered 1 through 27; it reflects the cancellation of a number of projects as well as start-up costs and potential net income, where determined, for those projects which SBC has actually undertaken.

OPC Exhibit 321/OPC RFIs F-1306, 1307, 1308, and 1311

The response to OPC RFI F-1306 consists of copies of all agreements relating to the acquisition of Mast Advertising and Publishing by SBC. The response to OPC RFI F-1307 consists of the purchase price, payment terms, financing, and other information relating to the acquisition. Southwestern Bell witness James B. Ellis notes that SBC's competitors in the publications area have made numerous attempts to obtain information regarding SBC's acquisition of Mast. Thus far, SBC has worked hard to keep this information from being generally disseminated. This is not the type of information that is generally made available by businesses.

It is arguable that this information is no longer sensitive because the Mast acquisition is an historical event. In his testimony, OPC witness Clarence Johnson implies that this is probably the case. Mr. Ellis nevertheless contends that the information should continue to be protected because the Mast documents reflect long range plans that are still in the process of being implemented, which would be of use to companies that compete with Mast. Mr. Johnson's response to this is that Mr. Ellis has not identified which parts of the documents reflect long range plans.

Mr. Johnson's testimony focuses on the public interest attaching to the Mast acquisition rather than impact of disclosure, or lack of it, on SBC. The prefiled testimony of OPC relating to OPC Exhibit 321 reads as follows:

Q. Why did OPC request information regarding the Mast acquisition?

A. For three reasons really. Press reports of the magnitude of the sale price indicated that the transaction might be relevant to our analysis of a reasonable return. Furthermore, we believed that SBC's evaluation of the goodwill benefits associated with Mast directories might help us to analyze goodwill benefits relevant to SWB Publications. Finally, we believed the information might be relevant in determining whether SBC is seeking to evade regulatory recognition of local exchange-related revenues. Mr. Ellis' testimony contains a number of generalizations characterizing this material as "corporate strategies" and "business plans." To the extent that SBC's plans and strategies seek to avoid regulatory recognition of directory and yellow pages revenue to the detriment of ratepayers, ratepayers should be made aware of those "strategies."

The substance of Mr. Johnson's argument appears to be that if the documents reveal certain actions or behavior detrimental to the interests of ratepayers, the documents should be released. If it were OPC's conclusion that the documents, in fact, reveal improprieties, it would be possible to argue that even though the exhibit contains proprietary information that would be of advantage to competitors, it should be released notwithstanding any exception in the Texas Open Records Act. In this case, however, Mr. Johnson does not state a conclusion one way or another.

SWB's testimony is convincing that the information is proprietary and would be of advantage to competitors. It should therefore remain classified.

OPC Exhibit 321/OPC RFI F-1308

OPC RFI F-1308 requested the amount of the Mast acquisition price attributable to goodwill. The response to this RFI, per Southwestern Bell witness James E. Ellis, was that the amount of goodwill, if any, is yet to be determined. The undersigned examiner does not know why this item was included on OPC's list as there was no claim that the response was proprietary.

OPC Exhibit 321/OPC RFI F-1311

This material consists of the Salomon Brothers' analysis of the Mast acquisition. Release of this information would be of considerable interest to competitors because of the insight it would provide into the acquisition strategy of SBC. Release of this information would have a very detrimental impact on the future relationship between SBC and Salomon Brothers. Salomon Brothers acts as financial advisor to buyers and sellers of companies or divisions of companies. It presents buyers with properties which, based on its knowledge of the buyer, might be of interest to that buyer. Similarly, Salomon Brothers may present sellers with a list of potential buyers, graded A, B, or C, from most desirable to least desirable. The use of confidentiality agreements is typical during the negotiations between buyers and sellers. If Salomon Brothers became aware that SBC was effectively precluded from keeping the information exchanged with buyers or sellers confidential, it would have to place SBC on its least desirable list and advise clients not to deal with SBC unless it were the only potential prospect. Release of this information would also affect the relationship with Salomon Brothers insofar as it would reveal proprietary data bases developed by Salomon Brothers.

Pursuant to Rule 166(b) of the Texas Rules of Civil Procedure, it is appropriate to include the investment banker's analysis in the particular protective order at issue. In addition, this material falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC Exhibit 321/OPC RFI F-1321

This material consists of filings made with the Federal Trade Commission (FTC) and the Department of Justice (DOJ) to enable the FTC and the DOJ to examine the antitrust implications, if any, of the Mast acquisition. This material is not available to the public under the Freedom of Information Act. Release of this information would be of interest to competitors insofar as it indicates strategy that might be employed by SBC in future acquisitions or by companies in competition with SBC. SBC was not the only suitor for Mast, and disclosure of this information would have some bearing on why SBC was able to make a successful acquisition when other companies were not. Pursuant to Rule 166(b) of the Texas Rules of Civil Procedure, it is appropriate to include this material in the protective order at issue. In addition, this material falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC witness Clarence Johnson notes that SBC is at liberty to disclose the Hart-Scott-Rodino Act filings if it chooses and that, in a PUC docket involving Central Power and Light Co., copies of Hart-Scott-Rodino Act filings involving Halliburton Corporation were provided without request for protective orders. The implication is that SBC is "overprotective" in regard to confidential information. Even so, it does not necessarily follow, just because SBC could disclose information if it chose to, that it should be ordered to do so in this docket.

SWB Exhibit 34C/AT&T-C's 3rd RFI Nos. 1 & 2

SWB Exhibit 34C includes:

1. switched access service minutes-of-use data for December 1984;

2. an analysis of originating and terminating switched access service minutes-of-use for each end office converting to equal access in 1985; and

3. a speculative estimate of revenues that might result from such equal access conversions.

This information was classified partly because it provides data relating to identified or identifiable customers. It was classified also because it provides data relating to named interexchange carriers. Disclosure of this information would have no direct impact on SWB. The damage, if any, would be to the interexchange carriers or to the business customers who could be identified through the data. Although none of these entities with the exception of MCI is before the Commission urging nondisclosure, it is probably unreasonable to expect that they would be, considering the lack of notice and burden of monitoring proceedings for purposes of objecting to such disclosure.[5]

The examiner's recommendation is that the information be released only where the identities of customers and interexchange carriers can be masked or deleted. As for the remaining information as to which it is not possible to mask the identity of the customer or the interexchange carrier, the examiner recommends that it be deemed confidential. As confidential information it would fall within the exception in the Texas Open Records Act for information deemed confidential and would remain under protection.

In the alternative, the examiner would recommend that SWB be ordered to notify the individuals involved and advise them that this information will be released under the Texas Open Records Act unless they intervene in these proceedings. Adoption of this alternative would involve a remand.

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5. In its brief at p. 11, MCI notes its objections to disclosure of this information stating:

> With knowledge of the end office minutes for other carriers, their switch locations and capacity, AT&T can specifically target markets and use its considerable power to assure that its competitors remain small. Accordingly, end office minutes fall squarely within the exemption set forth in the Texas Open Records Act § 3(a)(4), since they represent information which would give competitive advantage to AT&T over its relatively weak, and in some cases struggling, competitors.

CU Exhibit 50/CU RFI-12

Consumer's Union Exhibit 50 states the rate of return for SWB Yellow Pages, Inc. (SWBYP). Release of this information would provide insights into SWBYP's cost structure and could attract publishers to the Yellow Pages market. This information is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

AT&T-C Exhibit 10/AT&T-C's 3rd RFI No. 1

This material consists of a document entitled "Additional ICAC Revenues Realized Due to Equal Access Conversions Test Year Ending 12/31/84," and it is discussed in the testimony of SWB witness Eugene F. Springfield who also discusses SWB Exhibit 34C/ AT&T-C's 3rd RFI Nos. 1 & 2. The same general discussion applies to both AT&T-C Exhibit 10 and SWB Exhibit 34C, and the examiner's recommendation is the same as for SWB Exhibit 34C, namely that the information be released where the identity of the customer or interexchange carrier can be masked, with the remaining data to retain its protected status.

GC Exhibit 13/GC RFI VII-A-1

This exhibit provides income statement data about SBC's subsidiaries. Release of this information would give competitors insight into the subsidiaries' profit margins and pricing strategies which could enable them to underbid product or service contracts. It would also enable competitors to determine the portion of a subsidiary's sales derived from outside markets versus intercompany sales. This information is proprietary and it falls within the exception in the Texas Open Records Act for information advantageous to competitors. It should therefore remain classified.

OPC RFI E-349, OPC RFI E-350, and OPC RFI E-525

These items consist of Bellcore training manuals. They are used in conjunction with courses offered to employees within the Bell system and to persons outside the Bell system in exchange for a fee. Bellcore's course material is proprietary to Bellcore and was not made an exhibit in Docket No. 6200. The Texas Open Records Act does not give the general public any right of access to this course material. It should remain classified.

OPC RFI E-354

This item consists of a course catalog dated December 1, 1984 setting forth and describing all of the courses offered by the Bellcore Technical Education Center. According to SWB witness Richard E. Mosher, while 80 percent of the courses described in the catalog are offered to persons outside the Bell system, the remaining 20 percent are not offered outside the Bell system for various business reasons. In some cases, the course titles and descriptions indicate areas in which the owner companies are training people to prepare for the offering of new services. In other cases, the course titles and descriptions indicate the direction in which efforts will be concentrated for managing and planning SWB's network. While the undersigned examiner suspects that a catalog dating back to December of 1984 may too old to be of much use to competitors in the telecommunications industry, she cannot find that any public right to know attaches to this course catalog and would therefore recommend that those with a proprietary interest in this catalog be left in control of its distribution.

OPC RFI I-375

The classified portions of this material, which is discussed in the testimony of Mr. Jones as well as in the response to RFI I-375, consist of ending monthly balances for common stock, preferred stock, long-term debt, paid-in capital, and retained earnings for SBC subsidiaries other than SWB Telephone Co. This is not information that has been disclosed, or been required to be disclosed, in SEC (Securities Exchange Commission) filings, nor would equivalent information about companies that compete with various SBC subsidiaries normally be available for SBC's use. This kind of information is useful to competitors because it reflects on the profitability and financial strength of the different subsidiaries. This could aid competitors in planning business strategy. This information is proprietary and it was not an exhibit in Docket No. 6200. It should remain classified.

OPC RFI J-419

This material consists of information about paid lobbyists. Although arguably this information is proprietary, there does not appear to be any testimony supporting its classified status, and there is none referred to in SWB's comprehensive brief. Because of the lack of supporting testimony, the undersigned examiner would conclude that it is not necessary to continue to classify this material.

OPC RFI Q-650, OPC F-710, and OPC RFI A-846

The response to OPC RFI Q-650 consists of the settlement agreement entered into between SWB and AT&T at the time of AT&T's breakup. OPC RFI F-710 consists of a similar settlement agreement entered into between SBC and AT&T. The parties to these agreements also entered into agreements not to disclose the terms of these settlements. The response to OPC RFI A-846 consists of information regarding SWBT's accounting for exposure to claims by AT&T under the liquidity true-up provision of the plan of reorganization.

As the entire reason why this information should not be released to the public, SWB offers, per the testimony of SWB witness Andrew Jones, the following:

> The information provided in response to these information requests contains data that was covered in nondisclosure settlement agreements with AT&T.

The explanation of why these documents are subject to the nondisclosure agreements comes not from SWB but from AT&T, which is clearly the real party in interest in respect of keeping these documents confidential. As AT&T indicates in its brief, the reason for the nondisclosure agreements surrounding the settlements is that, at the time of AT&T's breakup, AT&T was involved in negotiating settlements with all seven regional Bell holding companies and did not want the terms of the settlement with any one regional Bell holding company to influence the settlements with other regional Bell holding companies. At the time of filing its brief, AT&T was still involved in a reorganization dispute with one regional Bell holding company. Although AT&T's reliance in its brief on the inadmissability at trial of settlement agreements is misplaced (because settlement agreements are discoverable under Rule 166b(2)(f) of the Rules of Civil Procedure), the undersigned examiner is of the opinion that Rule 166b can be read in such a way as to provide AT&T with the confidentiality in relation to the general public which it seeks for these documents, provided, of course, that AT&T be construed as the "movant," under the circumstances, for purposes of the rule. Neither of these documents was admitted as an exhibit in Docket No. 6200. The examiner's recommendation is that the agreements should remain classified.

OPC RFI E-700

This document is entitled "Bellcore as a Business," Bell Communications Research, Inc. Business Plan Analysis for 1985-1990. Bellcore is the research and development arm of the regional Bell operating companies who are its co-owners. It markets its work product to both owners and non-owners. In this effort, Bellcore is in direct competition with other companies. Its five-year business plan includes an assessment of its strengths and weaknesses in dealing with its clients, the continued viability of various Bellcore products and services that have been marketed, the desirability of further funding for various projects, and the alternatives to Bellcore products and services which competitors offer. Distribution of this document is highly restricted within Bellcore.

Based on the fact that Bellcore markets its products and services in competition with others to owners as well as non-owners, the undersigned examiner finds that it would be of advantage to competitors of Bellcore to have access to Bellcore's marketing research and strategies as reflected in this document. This information is clearly proprietary to Bellcore, and it was not admitted as an exhibit in Docket No. 6200. It should therefore remain classified.

OPC witness Clarence L. Johnson addresses this material in his testimony. He states:

> As a final observation, I am somewhat puzzled as to why it is in the interests of either ratepayers or the regional holding companies to "protect" Bellcore from competitors who may potentially be capable of supplying the same services at a lower cost. Bellcore was created to serve the BOCs and regulatory authorities should not encourage the BOCs to put Bellcore's self-interests ahead of least-cost telephone service.

Mr. Johnson is essentially suggesting that it is not in the public interest to protect certain property rights of Bellcore if competitors could indeed use Bellcore's proprietary information to their advantage to produce and offer goods or services more cheaply than Bellcore. In this instance, however, "protecting Bellcore from competitors" is no different in principle than maintaining sanctions to protect storeowners from shoplifters. It is certainly not a matter of protecting Bellcore in the sense of giving it some unfair advantage not enjoyed by others; quite the contrary.

Two of the fundamental reasons for protecting property rights could perhaps be expressed as fairness and future investment. Although Mr. Johnson indicates that he is not concerned with Bellcore's "self-interest," clearly it would be unfair to Bellcore to give Bellcore's property away to its competitors for the express purpose of helping those competitors lower their costs and gain market share at Bellcore's expense. In addition, it would establish a powerful disincentive to invest in the future in anything that could be so freely expropriated.

OPC RFI F-771

This material itemizes the expenses involved in producing directory covers for Texas. Release of this information would help competitors to identify any inefficiencies in SBP's operations, or inefficiencies in their own operations, or both. This information is proprietary, and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI I-788

This material, which is discussed in the testimony of Mr. Jones, consists of monthly financial reports for SBC subsidiaries other than SWB Telephone Co. for January 1984 through April 1985. It would be of use to competitors in assessing the financial strength and pricing policies of the various subsidiaries and planning business strategy. This information is proprietary and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI E-818

This response consists of reports on two marketing trials of new custom calling central office features that were offered to local exchange customers for a limited time. The reports were prepared by Bellcore and paid for in part by SWB. As the reason for keeping the reports confidential, SWB witness Richard E. Mosher states, "Exposure of this data on the public record would give an unearned advantage to the competitors of Southwestern Bell and the other operating companies who funded this work." The undersigned examiner recommends release of this information from the terms of the protective order on grounds that the reasons asserted for keeping this information confidential are either not convincing

or not adequately supported. The idea that "exposure of this data on the public record would give an unearned advantage" to "other operating companies who funded this work" is nonsense. The assertion that SWB has competitors who would benefit from release of this information can be dismissed because it is not adequately supported. SWB may have some competition in terms of providers of software and customer-premises equipment who can achieve the same result for the customer that SWB achieves using central office programming. If SWB had an argument involving these kinds of competitors in mind, it needed to make it in order to sustain its burden of proof.

OPC RFI F-820

This material, which is discussed in the testimony of Mr. Jennings, sets out SBP's revenues and expenses in 1985 relating to directories and other publications outside of SWB's five-state service area. The information would be of advantage to competitors to use as a benchmark for comparison with their own operations. The information is proprietary, and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI F-969

This material, which is discussed in the testimony of Mr. Jennings, consists of information on coupons included with Yellow Pages directories, including total net revenue. Release of this information would offer a potential competitor knowledge about the profitability of a similar venture without the competitor's having to conduct extensive and costly research. This information is proprietary, and it was not on exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI G-973

This response consists of information relating to subscriber loops developed by Bell Communications Research. According to SWB witness James J. Hager, it was costly and difficult to develop and reflects a broad range of industry knowledge and cost allocation theory refined over many years. According to Mr. Hager, the underlying methodology could be applied by other entities to analyze their directly assignable costs in relation to services they offer, and it is a property that could be marketed to such entities. The information is proprietary, and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI G-974

This information, which is discussed in the testimony of Mr. Hager, consists of a directory assistance cost study. This information would be of advantage to entities wishing to provide directory assistance. Access to this information would spare such entities research and development costs, including the cost of developing their own computer programs and methodology. In addition, the methodology and computer programs associated with the study are properties that can be marketed to such entities. This information is proprietary and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

OPC RFI G-979

The proprietary items contained in this response consist of the interLATA private line incremental cost study and the intrastate private line nonrecurring incremental cost study. According to SWB witness James J. Hager, this information could be used by MCI, GTE Sprint, and other competitors to develop new and profitable pricing plans. It could also be used by such entities to evaluate the engineering requirements of providing private line service. This material was developed at the expense of SWB and Bell Communications Research. Release of this information would represent a windfall to MCI, GTE Sprint, and other such entities who would otherwise have to compile their own data base or seek to purchase this type of information. This information is proprietary, and it was not an exhibit in Docket No. 6200. It should therefore remain classified.

AT&T-C EX. 11 (not admitted)

With regard to AT&T-C Exhibit 11, SWB witness Springfield states:

> It is Southwestern Bell's opinion that the information shown on this exhibit is sufficiently summarized such that the confidential classification may be removed. However, because this was a controversial document in Docket No. 6451, Southwestern Bell would defer to the Administrative Law Judges' discretion regarding its classification.

On this state of the record, which does not reflect that any contrary action regarding this document was taken in Docket No. 6451, the undersigned examiner recommends that the document be released from the terms of the protective order.

D. Summary of Recommendations

The undersigned examiner's recommendations may be summarized as follows:

1. In addition to those documents or parts of documents that have been voluntarily declassified, the following documents should be declassified:

   OPC Exhibit 154/response to OPC RFI F-1298
   OPC Exhibit 213
   Response to OPC RFI J-419
   Response to OPC RFI E-818
   AT&T-C Exhibit 11 (not admitted)

   Pursuant to the terms of the protective order issued in Docket No. 6200, the parties would therefore be authorized to retain any copies and notes made from such documents and make such further use of the information as they deem fit.

2. SWB should be ordered to file, within a reasonable time from the entry of a final order in this docket, copies of SWB Exhibit 34(C) and AT&T-C's Exhibit 10/response to AT&T-C's 3rd RFI Nos. 1 and 2 with the names of customers and interexchange carriers masked or deleted, and with the data itself masked where a customer or interexchange carrier is identifiable from the data by third parties.

3. The exhibits from Docket No. 6200 appearing on the following list should be unsealed and made available to the public pursuant to Section 3(a) of the Texas Open Records Act, Tex. Civ. Rev. Stat. Ann. art. 6252-17a (Vernon Supp. 1987):

   SWB Ex. 104
   OPC Ex. 104
   OPC Ex. 121
   OPC Ex. 154
   OPC Ex. 182
   OPC Ex. 213
   OPC Ex. 307

SP Ex. 25B
SP Ex. 25C
SP Ex. 37A, Tabs 3, 4, and 5
SP Ex. 37B, Tabs 1 and 2
SP Ex. 51A
SP Ex. 109
SP Ex. 165A, Tabs 3, 4, and 5
CU Ex. 37
CU Ex. 39
CU Ex. 40
CU Ex. 57
MCI Ex. 25, with specific deletions
MCI Ex. 27
MCI Ex. 55C, with specific deletions
MCI Ex. 88B
GC Ex. 18B

This list consists of documents entered as exhibits in Docket No. 6200 which have either been voluntarily declassified or which would be ordered declassified under the proposed order in this docket.

V. Findings of Fact and Conclusions of Law

A. Findings of Fact

1. Docket No. 6588 is an incident of the protective order issued in Docket No. 6200.

2. Under the terms of the protective order entered in Docket No. 6200, any party may designate as proprietary and confidential any document that that party produces. Upon a party's designation of a document as proprietary and confidential, access to it is restricted to the other parties' legal counsel into those persons chosen by the parties as their experts in the subject area relating to the document.

3. So that access to protected document can be controlled, the order referred to in Finding of Fact No. 1 provides that a reading room shall be designated, and persons wishing to view the document would have to go to the reading room and sign a confidentiality agreement before the document would be made available to them.

4. By signing the confidentiality agreement referred to in Finding of Fact No. 3, a person would agree not to use or disclose the information contained in the document for purposes of

"business or competition were for purposes other than "this proceeding or other proceedings before this Commission, or resulting proceedings before any judicial tribunal."

5. Under the protective order entered in Docket No. 6200, documents would not circulate, but would remain in the room referred to in Finding of Fact No. 3 at all times. Only legal counsel would be authorized to take away a copy of a document, and then only a single copy with "confidential" stamped on its face.

6. Records would be kept of those provided with such copies as are referred to in Finding of Fact No. 5, and further duplication or reproduction would be prohibited.

7. Notes taken from protected documents would also be subject to restrictions specified in the order.

8. Upon completion of Docket No. 6200, and completion or exhaustion of all judicial appeals, all copies and notes made from protected documents would have to be returned to, or else destroyed in the presence of, the party who produced the original.

9. The parties to Docket No. 6588 consist of Southwestern Bell Telephone Company (SWB), the Commission's General Counsel, the Office of Public Utility Counsel (OPC), MCI Telecommunications Corporation (MCI), the Cities, and State Purchasing and General Services Commission (State Purchasing or SP).

10. Pursuant to the terms of the protective order entered in Docket No. 6200, the parties have requested that various documents be released from the terms of that order.

11. A number of the documents that were originally classified in Docket No. 6200 and which were requested for declassification have since been voluntarily declassified by SWB. For a listing of the documents requested for declassification by one or another of the parties to this docket according to its present status, pending the final order in this docket, refer to Section III of the Examiner's Report, which is incorporated herein by reference.

12. The protective order at issue in this docket does not exempt any matter from discovery.

13. The protective order entered in Docket No. 6200 does not prevent anyone possessing the requisite professional involvement in the proceedings from having access to documents. Nevertheless, apart from the access afforded to those who are professionally involved in representing the public interest before the Commission, members of the public who were not involved in the proceedings in Docket No. 6200 effectively have no access to material covered under the order.

14. The protective order entered in Docket No. 6200 states that the party seeking protection has the burden of proving that the documents in question are proprietary.

15. The protective order entered in Docket No. 6200 does not state that the party seeking protection must show that the documents contain trade secrets.

16. The response to OPC RFI F-1049, which is OPC Exhibit 122, consists of financial statements and financial information relating to the various partnerships in which Southwestern Bell Mobile Systems (SBMS) is involved.

17. The information referred to in Finding of Fact No. 16 would reveal the extent of land options held by the various partnerships with which SBMS is involved, and the amount of their assets and liabilities. This information would be of advantage to the competing cellular licensee in terms of deciding how to price its service.

18. The information referred to in Finding of Fact No. 16 is the subject of nondisclosure agreements among the partners.

19. The information referred to in Finding of Fact No. 16 is proprietary.

20. OPC Exhibit 128 consists of six pages of financial information, including a consolidated income statement for Southwestern Bell Publications, Inc. (SBP) and separate income statements for SBP subsidiaries.

21. Release of OPC Exhibit 128 would make available to competitors of SBP in the publishing industry information regarding SBP operations, gross revenues, uncollectibles, expense levels (including salary and benefit expense), net income, total assets, and current liabilities.

22. The information contained in OPC Exhibit No. 128 is proprietary and would be advantageous to SBP's competitors.

23. The response to OPC RFI F-708, which is OPC Exhibit 129, consists of Silver Pages financial information.

24. Release of the information referred to in Finding of Fact No. 23 could influence current or potential competitors of SBP to enter the Texas market with directories similar to Silver Pages, without the investment involved in researching the market for this product.

25. The information contained in OPC Exhibit 129 is proprietary.

26. The information contained in OPC Exhibit 129 would be of advantage to SBP's competitors.

27. The response to OPC RFI F-1295, which is OPC Exhibit 130, consists of additional information regarding Silver Pages and the profitability of the senior citizens directory market.

28. The information referred to in Finding of Fact No. 27 is proprietary.

29. The information referred to in Finding of Fact No. 27 would be of advantage to competitors of SBP in the publications industry.

30. The response to OPC RFI F-76g, which is contained in OPC Exhibits 146 and 148, consists of information regarding operating incomes for all SBP subsidiaries, as well as projected operating income for SBP, for the years 1985 through 1987.

31. If declassified, the information referred to in Finding of Fact No. 30 would provide competitors with insights into SBP's plans, perceptions, and financial forecasts.

32. The information referred to in Finding of Fact No. 30 would be useful to competitors in assessing the financial strength of the various SBP subsidiaries and determining whether to enter a particular market.

33. The information referred to in Finding of Fact No. 30 is proprietary.

34. The response to OPC RFI F-76i, which is OPC Exhibit Nos. 147 and 150, consists of information reflecting the actual and projected returns on equity for the various SWB affiliates for 1984 through 1987. Not all of the data contained in the response to OPC RFI F-76i is in issue in this docket, however, that part which sets forth the specific 1984 returns of the non-regulated SBC subsidiaries was voluntarily declassified during the hearing in Docket No. 6200.

35. Access to the information referred to in Finding of Fact No. 34 would provide a competitor with a means of determining the profitability of each SBC subsidiary.

36. Access to the information referred to in Finding of Fact No. 34 could provide a competitor with insight into SBC's ability to respond to changed conditions in the marketplace or in the economy and possibly could be of help to a competitor in shaping its own business plans, such as when to introduce a new product.

37. The information referred to in Finding of Fact No. 34 is proprietary.

38. The responses to OPC RFIs F-89 and I-788, which are contained in OPC Exhibit 149, consists of balance sheets and income statements for SBC subsidiaries.

39. Release of the information referred to in Finding of Fact No. 38 could give competitors insight into SBC's pricing policies and help them to determine the level at which SBC subsidiaries would be forced to operate at a loss.

40. Release of the information referred to in Finding of Fact No. 38 would reveal to competitors sources of other income, such as interest income, which could provide insight into SBC's financial condition and its ability to weather economic downturns or loss of market share due to increased competition.

41. Release of the information referred to in Finding of Fact No. 38 would provide competitors with information regarding SBC's liquidity, which in turn could reflect SBC's ability to respond to changes in the marketplace.

42. Release of the information contained in Finding of Fact No. 38 would provide competitors with accounts receivable data reflective of the size of SBC's customer base.

43. Release of the information referred to in Finding of Fact No. 38 would provide competitors with information regarding levels of inventory which could indicate whether a subsidiary is filling customer orders without delay or lagging behind, inviting competition.

44. The information referred to in Finding of Fact No. 38 is proprietary.

45. The response to OPC RFI F-1297, which is OPC Exhibit 151, relates to OPC's request for projections of revenues and expenses together with supporting documentation for SWB Telecommunications, Inc. (Telecom) for 1985 through 1987.

46. Telecom sells telecommunications equipment in a highly competitive market. Often, price is the only basis on which venders compete because they are all offering the same equipment.

47. Release of OPC Exhibit 151 would be of advantage to Telecom's competitors because it would enable them to estimate Telecom's profit margins.

48. Access to the information referred to Finding of Fact No. 45 is restricted within Telecom itself.

49. The information referred to in Finding of Fact No. 45 is proprietary.

50. The response to OPC RFI F-1296, which is OPC Exhibit 152, consists of revenue expense projections for SBMS, together with backup data supporting the projections.

51. Information relating to SBMS generally, including that contained in OPC Exhibit 152, could be of use to businesses competing with SBMS or planning to compete with SBMS, especially at the retail level.

52. The information referred to in Finding of Fact No. 50 is proprietary.

53. The response to OPC RFI F-1298, which is OPC Exhibit 154, relates to OPC's request for projections of revenues and expenses for SBC Asset Management, Inc. for each of the first three years in which it is expected to produce positive net income.

54. Although Southwestern Bell witness Andrew Jones III observes that the information referred to in Finding of Fact No. 53 is the kind of information that would be of advantage to competitors, there is no discussion in the testimony of the nature of SBC Asset Management Inc.'s business, or whether it actually competes for business as the publishing and cellular subsidiaries do. In the event that it were the exclusive function of SBC Asset Management, Inc. to manage the assets of SBC and SBC's subsidiaries, SBC Asset Management, Inc. would not be competing with anyone for customers.

55. OPC Exhibit 213 is a document stating net income for SBP. It does not provide line item detail.

56. Although arguably proprietary, the information referred to in Finding of Fact No. 55, in and of itself, does not appear to be complete enough to be useful to competitors, and there is no showing that the other data needed to render this document useful is publicly available.

57. The response to OPC RFI F-1299, which is OPC Exhibit 307, consists of the response of OPC's request for information about the "new ventures" referred to by Mr. Zane Barnes at a meeting of security analysts in April of 1984.

58. Information relating to possible new ventures would reflect whether SBC was, or was not, interested in acquiring specific companies.

59. One likely consequence of releasing the information referred to in Finding of Fact No. 57 is that stock market speculators would run up the price of stock in the target company in anticipation of merger activity.

60. It is in SBC's best interest to be able to control the timing of public disclosures about merger and acquisitions activity because of the variety of ways in which speculation in a stock can affect acquisition strategies.

61. If the type of information contained in OPC Exhibit 307, which reflects on negotiations with specific companies, could be made public without SBC's consent, many companies would find it undesirable to enter into negotiations with SBC. Such negotiations are often the subject of nondisclosure agreements, and such agreements would be rendered worthless if an order limiting distribution of this information could not be obtained.

62. The information referred to in Finding of Fact No. 57 is proprietary.

63. The information referred to in Finding of Fact No. 57 is confidential.

64. Southwestern Bell has declassified some of the information contained in OPC Exhibit 307. The declassified information consists of a list attached to the RFI response contained in the RFI response binders on file in SWB's "voluminous room." The list describes a variety of ventures numbered one through twenty-seven; it reflects the cancellation of a number of projects and well as start-up cost and potential net income, where determined, for those projects which SBC has actually undertaken.

65. The responses to OPC RFI's F-1306, 1307, 1308, and 1311, which are contained in OPC Exhibit 321, consist of copies of all agreements relating to the acquisition by SBC of Mast Advertising and Publishing.

66. The response to OPC RFI F-1307 consists of the purchase price, payment terms, financing, and other information relating to the acquisition of Mast Advertising and Publishing.

67. SBC's competitors in the publications area have made numerous attempts to obtain information regarding SBC's acquisition of Mast Advertising and Publishing.

68. SBC has worked hard to keep the information contained in OPC Exhibit 321 from being generally disseminated.

69. The information contained in OPC Exhibit 321 is not the type of information that is generally made available by businesses.

70. The information contained in OPC Exhibit 321 is proprietary.

71. The information contained in OPC Exhibit 321, while it relates to an historical event, also reflects long range plans that are still in the process of being implemented, and knowledge of these plans would be useful to companies that compete with Mast Advertising and Publishing.

72. OPC RFI F-1308, which is included in OPC Exhibit 321, requests the amount of the Mast Advertising and Publishing acquisition price attributable to goodwill. The response of SWB to this RFI was that the amount of goodwill, if any, is yet to be determined.

73. The response to OPC RFI F-1311, which is included in OPC Exhibit 321, consists of the Salomon Brothers' analyses of the Mast Advertising and Publishing acquisition.

74. Release of the information referred to in Finding of Fact No. 73 would be of considerable interest to competitors because of the insight it would provide into the acquisition strategy of SBC.

75. Release of the information referred to in Finding of Fact No. 73 would have a very detrimental impact on the future relationship between SBC and Salomon Brothers.

76. If Salomon Brothers became aware that SBC was effectively precluded from keeping the information exchanged with buyers or sellers confidential, it would have to place SBC on its least desirable list and advise clients not to deal with SBC unless it was the only potential prospect.

77. Release of the information referred to in Finding of Fact No. 73 would affect SBC's relationship with Salomon Brothers insofar as it would reveal proprietary data base developed by Salomon Brothers.

78. The information referred to in Finding of Fact No. 73 is proprietary.

79. The response to OPC RFI F-1321, which is included in OPC Exhibit 321, consists of filings made with the Federal Trade Commission (FTC) and the Department of Justice (DOJ) to enable the FTC and the DOJ to examine the antitrust implications, if any, of the Mast Advertising and Publishing acquisition.

80. The material referred to in Finding of Fact No. 79 is not available to the public under the Freedom of Information Act.

81. Release of the information referred to in Finding of Fact No. 79 would be of interest and advantage to competitors insofar as it indicates strategy that might be employed by SBC in future acquisitions or by companies in competition with SBC.

82. Southwestern Bell Exhibit 34C consists of switched access minutes-of-use data.

83. Southwestern Bell Exhibit 34C was classified partly because it provides data relating to identified or identifiable customers. It was also classified because it provides data relating to named interexchange carriers.

84. Disclosure of SWB Exhibit 34C would have no direct impact on SWB. The damage, if any, would be to the interexchange carriers or to the business customers who could be identified through the data.

85. Although, with the exception of MCI, none of the entities who could be damaged by the disclosure of SWB Exhibit 34C is before the Commission urging nondisclosure of this exhibit, it is probable unreasonable to expect that they would be, considering the lack of notice and burden of monitoring proceedings for purposes of objecting to such disclosure.

86. With reference to SWB Exhibit 34C, in some cases, it may be possible to mask or delete the identities of the customers and interexchange carriers in such a way that the information could be released without revealing the identity of the specific customer or interexchange carrier. In other cases, this may not be possible.

87. The response to Consumers Union RFI 12, which is Consumers Union Exhibit 50, states the rate of return for SWB Yellow Pages, Inc. (SWBYP).

88. Release of the information contained in Consumers Union Exhibit 50 would provide insight into SWBYP's cost structure and could attract publishers to the yellow pages market.

89. The information contained in Consumers Union Exhibit 50 is proprietary.

90. AT&T-C's 3rd RFI No. 1, which is AT&T-C Exhibit 10, consists of a document entitled "Additional ICAC Revenues Realized Due to Equal Access Conversions Test Year Ending 12/31/84."

91. Like SWB Exhibit 34C, AT&T-C Exhibit 10 was classified, not because disclosure of this information would have any direct impact on SWB, but because it would reveal data relating to identified or identifiable customers or interexchange carriers.

92. In some cases, the identities of the customers or interexchange carriers identified or identifiable in AT&T-C Exhibit 10 could be masked or deleted. In other cases, it may not be possible to mask or delete the identities of the specific customers or interexchange carriers.

93. The response to GC RFI VII-A-1, which is GC Exhibit 13, provides income statement data about SBC subsidiaries.

94. Release of the information contained in GC Exhibit 13 would give competitors insight into the SBC subsidiaries' profit margins and pricing strategies. This could enable competitors to underbid product or service contracts offered by SBC subsidiaries.

95. Release of GC Exhibit 13 would enable competitors to determine the portion of a subsidiary's sales derived from outside markets versus intercompany sales.

96. The information contained in GC Exhibit 13 is proprietary.

97. The responses to OPC RFI's E-349, E-350, and E-525 consist of Bellcore training manuals.

98. The manuals referred to in Finding of Fact No. 97 are used in conjunction with courses offered to employees within the Bell system and to persons outside the Bell system in exchange for a fee.

99. Bellcore's course material is proprietary to Bellcore and was not made an exhibit in Docket No. 6200.

100. OPC RFI E-354 consists of a course catalog dated December 1, 1984, setting forth and describing all of the courses offered by the Bellcore Technical Education Center.

101. While eighty percent of the courses described in the catalog referred to in Finding of Fact No. 100 are offered to persons outside the Bell system, the remaining twenty percent are not offered outside the Bell system for various business reasons.

102. In some cases, the course titles and descriptions appearing in the response to OPC RFI E-354 indicate areas in which the owner companies are training people to prepare for the offering of new services. In other cases, the course titles and descriptions indicate the direction in which efforts will be concentrated for managing and planning SWB's network.

103. The catalog referred to in Finding of Fact No. 100 is proprietary to Bellcore.

104. The classified portions of the response to OPC RFI I-375 consists of ending monthly balances for common stock, preferred stock, long-term debt, paid-in capital, and retained earnings for SBC's subsidiaries other than SWB Telephone Company.

105. The information referred to in Finding of Fact No. 104 is not information that has been disclosed, or been required to be disclosed, in Securities Exchange Commission filings, nor would equivalent information about companies that compete with various SBC's subsidiaries normally be available for SBC's use.

106. The kind of information contained in the response to OPC RFI I-375 is useful to competitors because it reflects on the profitability and financial strength of the different subsidiaries. This could aid competitors in planning business strategy.

107. The information referred to in Finding of Fact No. 104 is proprietary and it was not made an exhibit in Docket No. 6200.

108. The response to OPC RFI J-419 consists of information about paid lobbyists.

109. Although arguably the information referred to in Finding of Fact No. 108 is proprietary, there does not appear to be any testimony supporting its classified status, and there is none referred to in Southwestern Bell's comprehensive brief.

110. The response to OPC RFI Q-650 consists of the settlement agreement entered into between SWB and AT&T at the time of AT&T's breakup.

111. OPC RFI F-710 consists of a settlement agreement between SBC and AT&T similar to that referred in Finding of Fact No. 110.

112. The parties to the agreements referred to in Findings of Fact Nos. 110 and 111 entered into agreements not to disclose the terms of those settlements.

113. The response to OPC RFI A-846 consists of information regarding SWBT's accounting for exposure to claims by AT&T under the liquidity true-up provision of the plan of reorganization.

114. The reason for the nondisclosure agreements referred to in Findings of Fact Nos. 110 and 111 is that, at the time of AT&T's breakup, AT&T was involved in negotiating settlements with all seven regional Bell holding companies and did not want the terms of the settlement with any one regional Bell holding company to influence the settlements with other regional Bell holding companies.

115. At the time of filing it brief, AT&T was still involved in a reorganization dispute with one regional Bell holding company.

116. AT&T is the real party in interest in terms of desiring to keep the settlement agreements referred to in Findings of Fact Nos. 110 and 111 confidential.

117. Neither of the settlement agreements referred to in Findings of Fact Nos. 110 and 111 was admitted as an exhibit in Docket No. 6200.

118. The response to OPC RFI E-700 consists of a document entitled "Bellcore as a Business," Bell Communications Research, Inc. Business Plan Analysis for 1985-1990.

119. Bellcore is the research and development arm of the regional Bell operating companies who are its co-owners.

120. Bellcore markets its work product to both owners and non-owners. In this effort, it is in direct competition with other companies.

121. The document referred to in Finding of Fact No. 118 includes an assessment of Bellcore's strength and weaknesses in dealing with its clients, the continued viability of various Bellcore products and services that have been marketed, the desirability of further funding for various projects, and the alternatives to Bellcore products and services which competitors offer.

122. Distribution of the document referred to in Finding of Fact No. 118 is highly restricted within Bellcore.

123. Bellcore has competitors to whom the document referred to in Finding of Find No. 118 would be of advantage.

124. The document referred to in Finding of Fact No. 118 is proprietary to Bellcore.

125. The response to OPC RFI F-771 itemizes the expenses involved in producing directory covers for Texas.

126. Release of the information referred to in Finding of Fact No. 125 would help competitors identify inefficiencies in SBP's operations, or inefficiencies in their own operations, or both.

127. The information referred to in Finding of Fact No. 125 is proprietary, and it was not made an exhibit in Docket No. 6200.

128. The response to OPC RFI I-788 consists of monthly financial reports for SBC subsidiaries other than SWB Telephone Company for January 1984 through April 1985.

129. The information referred to in Finding of Fact No. 128 would be of use to competitors in assessing the financial strength and pricing policies of the various SBC subsidiaries and in planning business strategy.

130. The information referred to Finding of Fact No. 128 is proprietary and it was not made an exhibit in Docket No. 6200.

131. The response to OPC RFI E-818 consists of reports on two marketing trials of new custom calling central office features that were offered to local exchange customers for a limited time.

132. The reports referred to in Finding of Fact No. 131 were prepared by Bellcore and paid for in part by SWB.

133. As the reason for keeping the reports referred to in Finding of Fact No. 131 confidential, SWB witness Richard E. Mosher states, "Exposure of this data on the public record would give an unearned advantage to the competitors of Southwestern Bell and the other operating companies who funded this work."

134. The record in Docket No. 6588 does not support a finding that SWB Telephone Company has competitors.

135. SWB's statement referred to in Finding of Fact No. 133 that "Exposure of this data on the public record would give an unearned advantage" to "other operating companies who funded this work" is meaningless.

136. The response to OPC RFI F-820 sets out SBP's revenues and expenses in 1985 relating to directories and other publications outside of SWB's five-state service area.

137. The information referred to in Finding of Fact No. 136 would be of advantage to competitors to use as a benchmark for comparison with their own operations.

138. The information referred to in Finding of Fact No. 136 is proprietary, and it was not made an exhibit in Docket No. 6200.

139. The response to OPC RFI F-969 consists of information on coupons included with Yellow Pages directories, including total net revenue.

140. Release of the information referred to in Finding of Fact No. 139 would offer a potential competitor knowledge about the profitability of a similar venture without the competitor's having to conduct extensive and costly research.

141. The information referred to in Finding of Fact No. 139 is proprietary, and it was not made an exhibit in Docket No. 6200.

142. The response to OPC RFI G-973 consists of information relating to subscriber loops developed by Bell Communications Research.

143. The information referred to in Finding of Fact No. 142 was costly and difficult to develop and reflects a broad range of industry knowledge and cost allocation theory refined over many years.

144. The methodology underlying the information referred to in Finding of Fact No. 142 could be applied by other entities to analyze their directly assignable costs in relation to services they offer, and it is a property that could be marketed to such entities.

145. The information referred to Finding of Fact No. 142 is proprietary, and it was not made an exhibit in Docket No. 6200.

146. The response to OPC RFI G-979 consists of a directory assistance cost study.

147. The information referred to in Finding of Fact No. 146 would be of advantage to entities wishing to provide directory assistance.

148. Access to the information referred to in Finding of Fact No. 146 would spare companies wishing to provide directory assistance research and development costs, including the cost of developing their own computer programs and methodology.

149. The methodology and computer programs associated with the study referred to in Finding of Fact No. 146 are properties that could be marketed to companies wishing to provide directory assistance.

150. The information referred to in Finding of Fact No. 146 is proprietary, and it was not made an exhibit in Docket No. 6200.

151. The proprietary items contained in the response to OPC RFI G-979 consist of the interLATA private line incremental cost study and the intrastate private line nonrecurring incremental cost study.

152. The information referred to in Finding of Fact No. 151 could be used by MCI, GTE Sprint, and other competitors to develop new and profitable pricing plans.

153. The information referred to in Finding of Fact No. 151 could be used by MCI, GTE Sprint, and other competitors to evaluate the engineering requirements of providing private line service.

154. The material referred to in Finding of Fact No. 151 was developed at the expense of SWB and Bell Communications Research.

155. Release of the information referred to in Finding of Fact No. 151 would represent a windfall to MCI, GTE Sprint, and other competitors who would otherwise have to compile their own data base or seek to purchase this type of information.

156. The information referred to in Finding of Fact No. 151 is proprietary, and it was not made an exhibit in Docket No. 6200.

157. AT&T-C Exhibit 11 was not admitted as an exhibit in Docket No. 6200.

158. AT&T Exhibit 11 is sufficiently summarized that its confidential classification may be removed.

159. The record in Docket No. 6588 does not reflect any action that may have been taken in Docket No. 6451 regarding AT&T-C Exhibit 11.

B. Conclusions of Law

1. The Commission's jurisdiction in Docket No. 6200 arose under Section 18(b) of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1985).

2. The Commission's jurisdiction in this docket, which is an incident of the protective order issued in Docket No. 6200, also arises under Section 18(b) of the PURA.

3. The information contained in OPC Exhibit 122/OPC RFI F-1049 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

4. The information contained in OPC Exhibit 128 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

5. The information contained in OPC Exhibit 129/OPC RFI F-708 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

6. The information contained in OPC Exhibit 130/OPC RFI F-1295 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

7. The information contained in OPC RFI F-76g/OPC Exhibits 146 & 148 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

8. The information contained in OPC RFI F-76i/OPC Exhibit Nos. 147 & 150 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; except for the data pertaining to the specific 1984 equity returns of the non-regulated SBC subsidiaries, which was voluntarily declassified, it should remain classified.

9. The information contained in OPC Exhibit 149/OPC RFI F-89 and OPC RFI I-788 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

10. The information contained in OPC Exhibit 151/OPC RFI F-1297 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

11. The information contained in OPC RFI F-1296/OPC Exhibits 152 and 153 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

12. OPC Exhibit 154/OPC RFI F-1298 should be released under Section 3(a) of the Texas Open Records Act on the grounds that there is no showing that this information, which was introduced as part of the record in Docket No. 6200, falls within an exception to that Act.

13. OPC Exhibit 213 should be released from the terms of the protective order because there is an inadequate showing that this document requires protection pursuant to Rule 166(b) of the Texas Rules of Civil Procedure.

14. OPC Exhibit 213 should be released from the terms of the protective order because it was an exhibit in Docket No. 6200 and has not been shown to fall within an exception to the Texas Open Records Act.

15. The confidential nature of OPC Exhibit 307/OPC RFI F-1299, with the exception of the data voluntarily declassified by SWB, should be protected pursuant to Rule 166(b) of the Texas Rules of Procedure and pursuant to the exceptions for proprietary information and confidential information contained within the Texas Open Records Act.

16. The information contained in OPC Exhibit 321/OPC RFIs F-1306, 1307, 1311, and 1321 should be protected pursuant to Rule 166(b) of the Texas Rules of Civil Procedure, and it falls within the exception in the Texas Open Records Act for information advantageous to competitors.

17. Pursuant to Section 14a(a)(1) and 14a(b) of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1986), it is appropriate for the Commission to order that SWB Exhibit 34c/AT&T-C Exhibit 10/AT&T-C 3rd RFI Nos. 1 and 2 be released only where the identities of the customers or interexchange carries can be masked or deleted.

18. It is appropriate to deem confidential the identities of the customers and interexchange carriers reflected in SWB Exhibit 34c/AT&TC Exhibit 10/AT&T-C 3rd RFI Nos. 1 and 2.

19. The information contained in CU Exhibit 50/CU RFI No. 12 is proprietary and falls within the exception in the Texas Open Records Act for information advantageous to competitors; it should therefore remain classified.

20. The information contained GC's Exhibit 13/GC's RFI VII-A-I is proprietary and falls within the exception in the Texas Open Records Act for information advantegous to competitors; it should therefore remain classified.

21. The information contained in RFIs E-349, E-350, E-354, I-375, E-525, E-700, F-771, I-788, F-820, F-969, G-973, G-974, and G-979 is proprietary.

22. The Bellcore training manuals and other materials referred to in Conclusion of Law No. 21 are not collected, assembled, or maintained by this Commission pursuant to law or ordinance or in connection with the transaction of official business within the meaning of Section 3(a) of the Texas Open Records Act.

23. OPC RFI J-419 should be released because, although this information is arguably proprietary, there has been no showing in connection with this docket that conditions on access are necessary to protect an asserted interest.

24. Pursuant to Section 14a(a)(1) and 14a(b) of the APTRA, it is appropriate for the responses to OPC RFIs Q-650, F-710, and A-846 to remain subject to the terms of the protective order entered in Docket No. 6200.

25. The settlement agreements referred to in Conclusion of Law No. 24 are not collected, assembled, or maintained by this Commission pursuant to law or ordinance or in connection with the transaction of official business within the meaning of Section 3(a) of the Texas Open Records Act.

26. Although arguably proprietary, the response to OPC RFI E-818 should be released from the terms of the protective order entered in Docket No. 6200 because there is an inadaquate showing that conditions on access are necessary to protect the interests asserted.

27. AT&TC Exhibit 11, which was not admitted as an exhibit in Docket No. 6200, should be released from the terms of the protective order because there is no showing in connection with this docket that it requires protection.

Respectfully submitted,

Cornelia M. Adams
CORNELIA M. ADAMS
HEARING EXAMINER

APPROVED on this the 15th day of May, 1987.

Phillip A. Holder
PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

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APPENDIX A

Rule 507. Trade Secrets

> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Definition of Trade Secret from Restatement of the Law, Torts (1939):

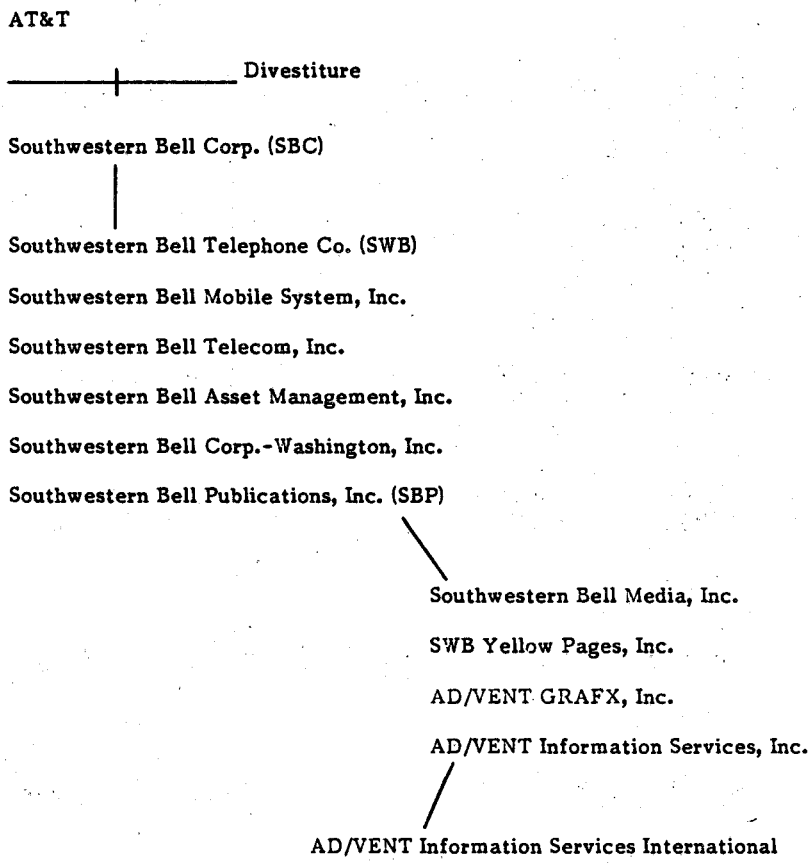
> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him (sic) an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see §759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally, it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalog, or a list of specialized customers, or a method of bookkeeping or other office management. . .
>
> An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Seventh Criterion for Trade Secret Cited in General Counsel's Brief:

> (7) A party claiming the trade secret privilege must show that specific harm would result from disclosure. (Open Records Decision 203)

(The undersigned examiner does not disagree that the criterion urged by General Counsel is legally required, or conceptually appropriate, where the issue is one of preventing a matter from being discoverable by the parties to a suit. In this case, however, discovery is not the issue. The matters claimed to be proprietary have been discovered to the parties.)

APPENDIX B


AT&T
Divestiture
Southwestern Bell Corp. (SBC)
Southwestern Bell Telephone Co. (SWB)
Southwestern Bell Mobile System, Inc.
Southwestern Bell Telecom, Inc.
Southwestern Bell Asset Management, Inc.
Southwestern Bell Corp.-Washington, Inc.
Southwestern Bell Publications, Inc. (SBP)
Southwestern Bell Media, Inc.
SWB Yellow Pages, Inc.
AD/VENT GRAFX, Inc.
AD/VENT Information Services, Inc.
AD/VENT Information Services International

DOCKET NO. 6588

REQUEST FOR DECLASSIFICATION OF DOCUMENTS COVERED BY PROTECTIVE ORDER ENTERED IN DOCKET NO. 6200	I I I I	PUBLIC UTILITY COMMISSION OF TEXAS

PROPOSED
ORDER

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

1. In addition to those documents or parts of documents that have been voluntarily declassified by the party who produced them, the following documents are RELEASED from the terms of the protective order entered in Docket No. 6200:

   OPC Exhibit 154/response to OPC RFI F-1298
   OPC Exhibit 213
   Response to OPC RFI J-419
   Response to OPC RFI E-818
   AT&T-C Exhibit 11 (not admitted)

   Pursuant to the terms of the protective order issued in Docket No. 6200, the parties may retain any copies and notes made from such documents.

2. Within thirty (30) days from the date of this order, Southwestern Bell Telephone Company (SWB) SHALL file with the Commission copies of SWB Exhibit 34C and AT&T-C's Exhibit 10/response to AT&T-C's 3rd RFI Nos. 1

and 2 with the names of customers and interexchange carriers masked or deleted, and with the data itself masked where a customer or interexchange carrier is identifiable from the data by third parties. This document SHALL be maintained by the Commission's Division of Central Records as part of the exhibit file in this docket.

3. The exhibits from Docket No. 6200 appearing on the following list SHALL be unsealed and SHALL be made available to the public in connection with that docket in accordance with Section 3(a) of the Texas Open Records Act, Tex. Civ. Rev. Stat. Ann. art. 6252-17a (Vernon Supp. 1987):

SWB Ex. 104
OPC Ex. 104
OPC Ex. 121
OPC Ex. 154
OPC Ex. 182
OPC Ex. 213
OPC Ex. 307
SP Ex. 25B
SP Ex. 25C
SP Ex. 37A, Tabs 3, 4, and 5
SP Ex. 37B, Tabs 1 and 2
SP Ex. 51A
SP Ex. 109
SP Ex. 165A, Tabs 3, 4, and 5
CU Ex. 37
CU Ex. 39
CU Ex. 40
CU Ex. 57
MCI Ex. 25, with specific deletions
MCI Ex. 27
MCI Ex. 55C, with specific deletions
MCI Ex. 88B
GC Ex. 18B

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 in this order are DENIED.

SIGNED AT AUSTIN, TEXAS on this the ____ day of _____, 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: _____
DENNIS L. THOMAS

SIGNED: _____
PEGGY ROSSON

SIGNED: _____
JO CAMPBELL

ATTEST:

_____
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

mg

DOCKET NO. 6588

REQUEST FOR DECLASSIFICATION OF DOCUMENTS COVERED BY PROTECTIVE ORDER ENTERED IN DOCKET NO. 6200	I I I I	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

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

1. In addition to those documents or parts of documents that have been voluntarily declassified by the party who produced them, the following documents are RELEASED from the terms of the protective order entered in Docket No. 6200:

   OPC Exhibit 154/response to OPC RFI F-1298
   OPC Exhibit 213
   Response to OPC RFI J-419
   Response to OPC RFI E-818
   AT&T-C Exhibit 11 (not admitted)

   Pursuant to the terms of the protective order issued in Docket No. 6200, the parties may retain any copies and notes made from such documents.

2. Within thirty (30) days from the date of this order, Southwestern Bell Telephone Company (SWB) SHALL file with the Commission copies of SWB Exhibit 34C and AT&T-C's Exhibit 10/response to AT&T-C's 3rd RFI Nos. 1

and 2 with the names of customers and interexchange carriers masked or deleted, and with the data itself masked where a customer or interexchange carrier is identifiable from the data by third parties. This document SHALL be maintained by the Commission's Division of Central Records as part of the exhibit file in this docket.

3. The exhibits from Docket No. 6200 appearing on the following list SHALL be unsealed and SHALL be made available to the public in connection with that docket in accordance with Section 3(a) of the Texas Open Records Act, Tex. Civ. Rev. Stat. Ann. art. 6252-17a (Vernon Supp. 1987):

SWB Ex. 104
OPC Ex. 104
OPC Ex. 121
OPC Ex. 154
OPC Ex. 182
OPC Ex. 213
OPC Ex. 307
SP Ex. 25B
SP Ex. 25C
SP Ex. 37A, Tabs 3, 4, and 5
SP Ex. 37B, Tabs 1 and 2
SP Ex. 51A
SP Ex. 109
SP Ex. 165A, Tabs 3, 4, and 5
CU Ex. 37
CU Ex. 39
CU Ex. 40
CU Ex. 57
MCI Ex. 25, with specific deletions
MCI Ex. 88B
GC Ex. 18B

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 in this order are DENIED.

SIGNED AT AUSTIN, TEXAS on this the 25th day of September, 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: Dennis L. Thomas
DENNIS L. THOMAS

SIGNED: Marta Greytok
MARTA GREYTOK

SIGNED: Jo Campbell
JO CAMPBELL

ATTEST:

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

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APPLICATION OF GULF STATES UTILITIES COMPANY FOR APPROVAL OF EXPERIMENTAL RIDER TO SCHEDULES LPS AND LIS | DOCKET NO. 7309

May 13, 1987

Examiner's Report adopted. Experimental rate approved for GSU industrial customers possessing the potential ability to engage in cogeneration.

[1] RATEMAKING - RATE DESIGN - ELECTRIC - FUEL ADJUSTMENTS AND PASSTHROUGHS

Commission substantive rules do not require that a voluntary non-cost based incentive rate contain a fuel factor.

[2] RATEMAKING - RATE DESIGN - ELECTRIC - FUEL ADJUSTMENTS AND PASSTHROUGHS

An energy charge component of a non-cost based incentive rate which does not constitute a cost based mechanism designed to ratably pass the utility's fuel costs to the customer, but rather is intended to replicate the fuel costs which the customer would have incurred had the customer constructed a cogeneration facility and engaged in self-generation, is not prohibited by either PURA Section 43(g) or SUBST. R. 23.23(b)(2)(c).

[3] RATEMAKING - RATE DESIGN - ELECTRIC - RATE DIFFERENTIALS

A discriminatory rate which is founded upon a substantial and reasonable ground of distinction among targeted classes or customers, in satisfaction of the "rule of reasonableness" established by judicial precedent, does not violate the broad rate structure criteria set forth in PURA Sections 38 and 45.

[4] MISCELLANEOUS - ELECTRIC

An incentive rate designed to dissuade industrial customers from engaging in cogeneration is not violative of PURA Section 16(g), in the context of a utility with excess capacity and declining load, where loss of additional industrial load will adversely affect the general body of ratepayers

DOCKET NO. 7309

APPLICATION OF GULF STATES UTILITIES COMPANY FOR APPROVAL OF EXPERIMENTAL RIDER TO SCHEDULES LPS AND LIS	PUBLIC UTILITY COMMISSION OF TEXAS

EXAMINER'S REPORT

I. Procedural History

On December 31, 1986, Gulf States Utilities Company (GSU) filed an application seeking authority to implement a proposed Schedule SUS Experimental Rider to Schedules LPS and LIS for Industrial Service to Qualifying Thermal Energy Users, and seeking approval of an associated contact amendment to be utilized to incorporate Schedule SUS as an applicable rate under the existing service agreements between GSU and customers electing to take power under Schedule SUS. Contemporaneously with the filing, GSU requested approval of the filing on an interim basis, pending the Commission's issuance of a final order in this matter.

The Commission has jurisdiction over GSU's application pursuant to Sections 16(a), 17(e) and 37 of the Public Utility Regulatory Act (PURA or the Act), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987).

By order dated January 21, 1987, the February 4, 1987, implementation of the proposed tariff revision was suspended until July 6, 1987, being the full suspension period permitted under the terms of P.U.C. SUBST. R. 23.24(i) and P.U.C. PROC. R. 21.4.

Pursuant to P.U.C. PROC. R. 21.83, a prehearing conference was conducted on February 2, 1987, with the undersigned examiner presiding. Appearances were made by Mr. Donald Clements on behalf of GSU and Mr. George Fleming on behalf of the Commission staff. Although no movants for intervention made appearance at the prehearing conference, statements in support of GSU's application were made by Mr. Art Spencer on behalf of Chevron Corporation, and Mr. Ron Kostelny on behalf of Mobil Chemical. During the conference, a schedule was established for discovery and the prefiling of testimony. The hearing on the merits of

GSU's request for both interim and permanent approval of the filing was scheduled for April 13, 1987.

By examiner's order dated February 3, 1987, GSU was directed to provide written notice of this proceeding to each of the parties to GSU's pending general rate case and to publish notice of the application once a week for two consecutive weeks in newspapers of general circulation in each county in Texas in which GSU provides utility service. On April 13, 1987, GSU filed publishers' affidavits reflecting publication of notice of GSU's filing and of the pendency of this proceeding in thirty newspapers of general circulation in GSU's Texas service area. Additionally, on April 13, 1987, GSU filed a copy of the written notice which GSU mailed to all parties to Docket No. 7195 on February 20, 1987 as well as a copy of a corrected notice which GSU mailed to all parties to Docket No. 7195 on March 20, 1987. On April 29, 1987, GSU filed a sworn affidavit attesting to the provision of notice to the parties to Docket No. 7195 on February 20, 1987 and March 20, 1987.

On April 6, 1987, the Office of Public Utility Counsel (OPC) filed a motion to intervene, which motion was granted by examiner's order dated April 9, 1987.

The hearing on the merits was conducted on April 13, 1987, with the undersigned examiner presiding. Appearances were made by Mr. Donald Clements on behalf of GSU and Mr. George Fleming on behalf of the Commission staff. Statements in support of GSU's application were again made by representatives of Chevron U.S.A. and Mobil Chemical. OPC did not make appearance at the hearing. After presentation of the respective cases of GSU and the Commission staff, the parties were directed to submit post-hearing briefs in lieu of closing argument and the hearing was adjourned. Post-hearing briefs were filed by GSU and the Commission's general counsel on April 20, 1987, and a reply brief was timely filed by GSU on April 24, 1987.

By order dated April 22, 1987, the parties were directed to file briefs by no later than April 27, 1987, on the issue of whether use of GSU's weighted average cost of gas in the steam rate energy charge, for the purpose of

mirroring the variable fuel costs which an industrial customer would incur if it built a cogeneration facility, constituted a violation of PURA Section 43(g)(1). Supplemental briefs were filed on that issue on April 27, 1987 by GSU and general counsel.

On April 24, 1987, OPC filed a motion to consolidate this proceeding with Docket No. 7195 or alternatively, to reopen the record to permit OPC to present direct testimony and develop cross-examiantion consistent with a Statement of Position which was untimely filed by OPC on April 24, 1987. The OPC Statement of Position is attached hereto as Examiner's Exhibit No. 3. OPC's motion was denied by examiner's order dated April 29, 1987.

II. Overview

Schedule SUS, attached hereto as Examiner's Exhibit No. 1, is an incentive rate which GSU proposes to offer to those customers within the Large Power Service (LPS) and Large Industrial Service (LIS) classes whose electrical and thermal energy requirements are such that cogeneration constitutes a potentially viable alternative to the continued purchase of those customers' total electrical energy requirements from GSU. According to GSU witness Donald Hamilton, Manager of Industrial Services and Cogeneration, GSU has lost 430 MW of industrial load to date as a consequence of cogeneration and approximately 185 MW of additional load is subject to loss due to cogeneration projects which are in advanced planning or engineering stages. Mr. Hamilton testified that GSU has identified a total of approximately 1800 MW of industrial capacity requirements within its service area which could potentially be served through cogeneration. The proposed SUS rider is designed to provide qualifying industrial customers with prices for power which are competitive with the power costs which those customers would experience if they chose to construct a cogeneration facility, thereby lessening the incentive for those customers to drop off of GSU's system and engage in cogeneration.

According to staff witness George Mentrup, GSU's concern over possible industrial load loss to cogeneration is warranted. In making this assessment,

Mr. Mentrup notes that GSU has already experienced load loss to cogeneration, that many of GSU's LPS and LIS customers are electric intensive, high load factor customers with access to natural gas supplies, that some industrial customers are actively considering switching to cogeneration in the near future, and that LIS and LPS rates are likely to rise in the future.

According to GSU witness James Thornton, Director of Rate Research, it is economically more advantageous for GSU to recognize the reality of cogeneration by providing service to potential cogenerators under the discounted SUS rate than to do nothing because, with the SUS rider GSU can maintain a greater revenue level than would be received were a major portion of that load lost to cogeneration. Mr. Thornton's testimony reflects that, based upon currently applicable LIS and LPS rates, adoption of Schedule SUS would reduce GSU's Texas revenues by $13,900,000 annually. However, should GSU not implement Schedule SUS, Mr. Thornton's testimony reflects a projected annual loss of $12,900,000 as a consequence of industrial load lost to cogeneration. GSU takes the position that any revenue reduction attributable to Schedule SUS is preferable to the permanent loss of industrial load.

If Schedule SUS is approved, GSU will not experience an immediate revenue loss as a consequence of implementation of Schedule SUS because the SUS rates will not actually commence until the period of time deemed necessary for each SUS customer to construct a cogeneration facility has passed. According to Mr. Thornton, any Schedule SUS related losses will be borne solely by GSU's stockholders and, in the event Schedule SUS is approved, GSU will not seek the recovery of any future SUS related revenue losses from its ratepayers. According to Mr. Thornton, in future rate proceedings GSU will restate its revenues as if all Schedule SUS load were being and had been billed at the LPS or LIS rates which would be applicable in the absence of Schedule SUS.

GSU has requested expedited consideration of the merits of the Schedule SUS filing and expedited consideration has been given in light of GSU's assertions that immediate implementation of the tariff is urgently needed to preclude loss of additional load.

III. Description of Schedule SUS

GSU proposes to offer Schedule SUS on an experimental basis, limiting the period in which a customer can subscribe to the offering to a one year period following the approval date of the rider. Any LPS or LIS customer with a minimum process steam requirement of 10,000 pounds per hour or the thermal energy equivalent thereof qualifies for the Schedule SUS rate.

The Schedule SUS incentive rates do not immediately apply upon subscription to the rate by a qualifying customer. Rather, Schedule SUS requires that GSU and the customer agree upon a commencement date which reflects the reasonably achievable in-service date of a satisfactory self-generation facility, had the customer elected to proceed with a cogeneration project.

A qualifying customer must execute an amendment to its existing service agreement with GSU as a precondition to subscription to Schedule SUS. The text of the proposed service agreement amendment is attached hereto as Examiner's Exhibit No. 2. Under the terms of the proposed amendment, the customer must extend its existing service agreement for a period of no less than three years and no more than ten years. In the event that a customer desires to revert from Schedule SUS rates to standard LIS or LPS rates prior to the expiration of the agreed period, the service agreement amendment provides that the customer may do so without penalty if twelve months advance notice is given. If less than twelve months notice is given, the customer must pay the difference between past billings under Schedule SUS and the LPS or LIS rate which would otherwise have been applicable.

In the event that a customer desires to terminate the service agreement in its entirety, the service agreement amendment permits a customer to do so by making payment for the value of future charges for contract power for the remaining term of the agreement, provided that at least twelve months notice of intent to terminate the service agreement is given. If less than twelve months notice is given, the customer must also pay the difference between past billings

under Schedule SUS and the GSU rate schedule which otherwise would have been applicable.

Schedule SUS rates are not cost based rates. Rather, they are based upon the economics of installing a gas turbine driven electric generator with a heat recovery steam generator and in some instances, the further installation of an extraction turbine. Schedule SUS rates will vary among customers because each customer has different levels of electric demand and different ratios of electric demand to steam demand which would necessitate installation of differing sizes and types of cogeneration equipment with differing cost characteristics, were each customer actually to cogenerate. Schedule SUS rates are designed to account for those as well as other cost variables.

The optimal size of the theoretical cogeneration facility which serves as the model for calculating a customer's monthly Schedule SUS rate is determined in part by the customer's monthly average peak demand and in part through the use of a sizing factor. The manner of calculation of the sizing factor is set forth in the proposed service agreement amendment. For customers with an average ratio of electric energy demand to steam energy demand of 230 KWH per 1,000 pounds of steam (MLB) or less per month, the sizing factor is determined by dividing the customer's minimum actual peak energy demand for the previous year by that customer's average actual peak energy demand for the previous year. For customers with an average ratio of electric energy demand to steam energy demand in excess of 230 KWH/MLB per month, the sizing factor is calculated using minimum and average steam demand rather than minimum and average electric demand. Schedule SUS provides for periodic review of a customer's sizing factor, and provides that the factor may be subsequently adjusted should the operating conditions upon which the sizing factor is based materially change.

Once the customer's sizing factor is determined, the customer's average peak demand during each billing period is multiplied by the sizing factor to determine the size of the customer's load during that billing period which would be served by the theoretical cogeneration facility. Any consumption in excess of the load which would be generated by the theoretical

facility during the billing period is billed at the standard LIS or LPS rates which would be applicable in the absence of Schedule SUS. It should be noted that because both of the factors which determine the size of a customer's theoretical cogeneration facility are variables, the size of the customer's theoretical cogeneration facility can potentially vary from month to month. Schedule SUS therefore assumes that, for any given billing period, the customer has constructed the optimal size cogeneration facility to serve the load experienced by the customer during that billing period.

The SUS rate is comprised of both a demand charge and an energy charge. The SUS demand charge, referred to in the tariff as the Steam Rate Billing Load Charge, is intended to simulate the initial investment and periodic maintenance investment costs associated with the construction of a cogeneration facility. The pricing differential at various load levels reflects the customer costs related to the size of the cogeneration facility that would have been installed but for the customer's decision to utilize the SUS rider. The demand charge is comprised of two rate elements: a rate per KW and a flat dollar charge. Mr. Thornton testified that the flat dollar charge is designed to smooth out the transition from one load size to the next.

Schedule SUS has two separate demand rate schedules. Schedule A is applicable to customers who can demonstrate and contract for an average ratio of electrical energy to steam energy of 230 KWH/MLB or less per month. Schedule B is applicable to customers with electrical energy to steam energy ratios of more than 230 KWH/MLB. According to Mr. Hamilton, the purpose of having two sets of demand rate schedules is to recognize economic efficiency differences between cogeneration facilities designed to produce different electrical energy to steam energy ratios. Schedule B rates assume the addition of extraction turbines to the standard gas turbine/heat recovery steam generator configuration upon which Schedule A rates are predicated.

Under the terms of the tariff, the SUS demand charge will remain constant for the first three years that a customer is served under the rider, and then increase by 1.5 percent each year thereafter. According to Mr. Hamilton, the

annual increase is intended to reflect the increased cost of operation and maintenance associated with a gas turbine due to wear and tear and required periodic maintenance.

The SUS energy charge, referred to in the tariff as the Steam Rate Energy Charge, is intended to simulate the cost of fuel and the efficiency of the theoretical cogeneration unit which a customer would likely construct, were the customer to cogenerate. The energy charge is essentially a function of the heat rate of the theoretical cogeneration facility and of GSU's weighted average cost of gas. GSU's weighted average cost of gas is intended to represent the likely natural gas price per MMBtu which a cogenerator would have to pay. Depending upon the size of the customer's billing load and the customer's electric energy to steam energy ratio, Schedule SUS specifies a particular heat rate value to be utilized in calculating the customer's SUS energy charge. The heat rate value reflects the number of MMBtu needed to generate one MWH of electricity. Once the heat rate value is selected, the customer's energy charge is calculated by multiplying the customer's total MWH of consumption for the month by the heat rate value, and then again by GSU's weighted average cost of gas for the prior month.

The various heat rates specified in Schedule SUS are intended to reflect typical heat rates associated with different configurations and sizes of generating facilities which would be utilized by the customer. As the size of the SUS load increases, the heat rate improves, reflecting the greater efficiency of larger generating facilities in converting fuel energy input into electric and steam energy output. Under the terms of the rider, a customer's initial heat rate will increase by 1.25 percent, 1.5 percent and 2 percent at the beginning of the second, third and fourth years, respectively. The heat rate will then be reset to the initial value for the fifth, ninth and thirteenth year of SUS billing. According to Mr. Hamilton, the periodic increase in the heat rate is intended to reflect the declining efficiency of a gas turbine over time, and the periodic resetting of the heat rate at its initial value is intended to simulate the refurbishment of a gas turbine after periodic maintenance.

Finally, it should be noted that Schedule SUS contains a minimum charge provision. The combined total SUS demand and energy charges can never be less than the monthly KWH billable under SUS rates times GSU's system average fuel cost per KWH for the preceding month, plus 8 mills per KWH. This pricing floor is intended to insure that the incentive rates achievable under SUS never fall below GSU's incremental costs of generating power.

IV. Discussion of Contested Issues

The Commission staff supports the need for GSU to implement an incentive rate designed to prevent the loss of GSU's industrial load to cogeneration. However, the staff has not endorsed Schedule SUS due to staff witness Mentrup's concerns that the filing may be deemed inconsistent with Commission Substantive Rules and that the proposed SUS rate may be deemed to be anti-competitive or unreasonably discriminatory in application. Beyond those legal concerns, staff witness Hughes has recommended that several technical modifications be made to the filing in the event Mr. Mentrup's concerns do not constitute a bar to approval of the filing. The broad threshold legal issues raised in the testimony of staff witness George Mentrup are discussed below, followed by discussion of the technical issues raised by Mr. Hughes.

A. Legal Issues

1. P.U.C. SUBST. R. 23.23(b)(2)(c)

Mr. Mentrup has expressed concern that schedule SUS is not subject to a fixed fuel factor and has expressed uncertainty as to whether the SUS charge should be viewed as constituting a fuel factor. To the extent that the SUS energy charge is considered to be a fuel factor, Mr. Mentrup argues that it is inconsistent with P.U.C. SUBST. R. 23.23(b)(2)(c), which provides as follows:

> (C) The utility shall recover its known and reasonably predictable fuel costs through a fixed fuel factor. The utility's fixed fuel factor shall be established during a general rate case, fuel reconciliation proceeding or interim fuel proceeding as designated in

subparagraphs (D) and (E) of this paragraph, and shall be determined by dividing the utility's known or reasonably predictable fuel cost, as defined in subparagraph (B) of this paragraph, by the corresponding kilowatt-hour sales during the period in which the factor will be in effect. If, due to unique circumstances, such a calculation is not appropriate for a particular utility, a different method of calculation may be used. When approved by the Commission, the utility's fixed fuel factor:

(i) may be designed to account for seasonal differentiation of fuel costs, and

(ii) shall be designed to account for system losses and for differences in line losses corresponding to the voltage level of service.

The inconsistency noted by Mr. Mentrup lies partly in the fact that the rule does not appear to condone "fuel-type-differentiated" fuel factors, and partly in the fact that the charge is allowed to vary from month to month, and is not set in a general rate case or fuel proceeding.

GSU takes the position that the SUS energy charge does not violate P.U.C. SUBST. R. 23.23(b)(2)(c), but that should the Commission deem that it does, a good cause exception should be granted pursuant to P.U.C. SUBST. R. 23.2. In the examiner's opinion, it is not necessary to address the good cause issue because Mr. Mentrup's concern is based upon the erroneous premise that the energy charge is in some fashion a fuel factor or the equivalent thereof.

[1] It is important to emphasize that though the SUS rate is structured in a familiar format with a demand and an energy component, the SUS rate is not a cost based rate. Unlike a fuel factor, the energy component of the SUS rate is not designed to pass through to SUS customers the fuel costs which GSU incurs in providing service to those customers. Rather, the energy charge is designed to replicate the fuel costs which an SUS customer would have incurred had the customer actually constructed a cogeneration facility and generated the power with a gas fired turbine. Use of GSU's weighted average cost of gas is intended solely to approximate a cogenerator's likely gas costs. Clearly, the SUS energy charge does not operate like a fuel factor nor does it serve the intended purpose of a fuel factor. With respect to concern that the SUS rate contains no fuel factor, the examiner simply notes that he can find no Commission

requirement that a voluntary non-cost based incentive rate contain a fuel factor.

[2] The examiner finds that, as the SUS energy charge does not purport to constitute a cost based mechanism designed to ratably pass GSU's fuel costs through to SUS customers, it violates neither the Act nor the Commission's Substantive Rules and therefore does not constitute a legal impediment to implementation of the proposed SUS rate.

2. PURA Sections 38 and 45

A second legal issue raised by Mr. Mentrup is whether Schedule SUS constitutes the grant of an unreasonable preference or advantage by GSU or causes unreasonable prejudice or disadvantage, within the meaning of Section 45 of the Act, and whether Commission approval of Schedule SUS would be violative of Section 38 of the Act, which requires that rates not be unreasonably preferential, prejudicial, or discriminatory.

Staff witness George Mentrup testified that he could foresee no disadvantage to members of any non-industrial GSU rate classes as a consequence of approval of Schedule SUS, and the examiner concurs in that conclusion. However, with regard to industrial classes, Mr. Mentrup expressed concern that certain customers within the LIS and LPS classes could be competitively disadvantaged, since industrial customers who do not qualify for the Schedule SUS incentive rate due to inability to meet the minimum thermal load requirements of the SUS rider, and industrial customers for whom Schedule SUS would not be economically attractive unless normal LIS or LPS rates increase to a certain level, would pay higher rates for utility service than those who qualify for the Schedule SUS incentive rate.

The proposed rider clearly discriminates among industrial customers, given that a preferential rate is provided to those customers which meet the minimum thermal load requirement specified in the rider. The question is whether the discrimination among LPS and LIS customers inherent in the SUS rider falls

within a permissible range of unequal treatment. Whether or not the discrimination falls within that range hinges upon whether the ability of the targeted customers to utilize cogeneration as an alternative means of meeting their electrical energy requirements constitutes a substantial and reasonable ground of distinction among industrial customers.

In the examiner's opinion, use of cogeneration potential as a basis for distinguishing among LIS and LPS customers is reasonable and works no unreasonable prejudice or disadvantage to LIS or LPS customers. As noted by GSU witness James Thornton, any economic advantage to customers who qualify for service under schedule SUS does not result because of the proposed tariff, but rather from the cogeneration alternative that is presently available to those customers, regardless of whether Schedule SUS is approved or disapproved. To the extent that the proposed SUS rider is viewed as conferring upon certain industrial customers an economic advantage, it is not an unreasonable advantage since, in the event the incentive rate is not approved, the record reflects that some industrial customers will likely avail themselves of an advantage equivalent to that afforded by Schedule SUS through resort to cogeneration. So long as cogeneration is in fact a viable option for industrial customers taking service under Schedule SUS, and so long as the Schedule SUS rate reasonably approximates the cost of cogenerating electricity, the examiner believes that any preference or advantage conferred by Schedule SUS is justifiable.

The Commission recently addressed the issue of the reasonableness of discrimination inherent in incentive rates in Docket No. 6350, Application of El Paso Electric Company for Authority to Change Rates (January 31, 1986). In the final Order in that docket, the Commission found that a proposed economic recovery rider (ERR) available only to certain industrial classes does not unreasonably discriminate if the evidence demonstrates: (1) that the utility system and the general body of ratepayers are benefitted by maintaining the existing industrial load; (2) that such load is in serious danger of substantially shrinking or disappearing altogether; (3) that unusually high industrial electric rates are a major economic factor which elevate this possibility of serious load loss; and (4) that approval of the ERR would

increase the probability that needed industrial load will continue operating on the utility's system. While the Commission's holding pertained to discrimination among classes, it appears fully analogous to discrimination among customers within the same class as well, especially where there exists a relevant distinguishing characteristic among class members.

The evidence of record demonstrates that each of the criteria set out in Docket No. 6350 has been met. GSU witness James Thornton testified regarding the benefit to GSU and the general body of ratepayers of maintaining existing industrial load. Staff witness George Mentrup, recognizing the desirability of maintaining GSU's industrial load, testified that it would be prudent for GSU to devise as many ways as possible to retain existing load. GSU witness Donald Hamilton testified in detail regarding the substantial loss of industrial load which has occurred to date as well as future load loss which will occur should additional industrial customers resort to cogeneration. Mr. Mentrup testified that GSU's concern regarding loss of industrial load through cogeneration is justified. Further, Mr. Mentrup cited the fact that LIS and LPS rates will likely increase in the future as a major factor contributing to loss of load to cogeneration. It is apparent from the testimony of Mr. Thornton and Mr. Hamilton that approval of the proposed SUS rider will increase the probability that load attributable to industrial customers who have the potential to cogenerate will be retained on GSU's system.

[3] The record in this case reflects that, while the proposed SUS rider is preferential and discriminatory in application, it is not unreasonably so. There is no evidence of record demonstrating that the rider would in fact work any real prejudice or disadvantage to any customers within any GSU rate classification. The examiner finds that the discrimination inherent in the SUS rider is founded upon a substantial and reasonable ground of distinction in satisfaction of the "rule of reasonableness" established by judicial precedent, that the facts of this case satisfy the four-prong reasonableness test established by Commission precedent in Docket No. 6350, and that the unequal treatment of LPS and LIS customers based upon their potential ability to cogenerate is not only permissible but is in fact appropriate from a public

policy standpoint. The examiner concludes that approval of the proposed SUS rider would not violate the broad rate structure criteria set forth in Sections 38 and 45 of the Act.

[4] The examiner notes in passing that neither the Commission staff nor OPC has argued that Schedule SUS is violative of PURA Section 16(g), which provides that the Commission shall make and enforce rules to encourage the economical production of electric energy by qualifying cogenerators. The examiner assumes that this argument was not raised due to the belief that cogeneration does not constitute economical production of electric energy in the context of a utility with excess capacity and declining load, and the examiner concurs in that assessment.

B. Technical Issues

With respect to the technical aspects of the filing, staff witness Harold Hughes has recommended that the Commission make five specific modifications to Schedule SUS, each of which is opposed by GSU. The recommendations are as follows:

a. The SUS heat rates should only apply to customers with steam requirements close to 265 psig-411°F. A separate heat rate schedule should be prepared for customers with higher pressure and temperature requirements.

b. Schedule B rates should not be used.

c. The sizing factor should not be used.

d. Schedule SUS should contain a minimum demand requirement.

e. Schedule SUS rates should not apply to customers with demand requirements below 10 MW.

A discussion of each of these recommendations and the examiner's analysis of the evidence relating thereto follows.

1. Heat Rates

According to Mr. Hughes, the heat rates contained in Schedule SUS should apply solely to customers with steam requirements close to 265 psig-411°F, and a separate heat rate schedule should be prepared for customers with higher pressure and temperature requirements. Mr. Hughes reached this opinion on the basis of operating data published by General Electric regarding three General Electric gas turbine models which Mr. Hughes indicates are in wide use within the cogeneration industry. Utilizing published heat rate curves for those turbine models, as well as data published by General Electric concerning fuel chargeable to power for those turbine models at different steam pressures and temperature, Mr. Hughes calculated what he believes to be representative heat rates which would be experienced at different load levels, assuming high temperature and pressure steam requirements (895 psig-830°F) and low temperature and pressure steam requirements (265 psig-411°F). On the basis of his calculations, Mr. Hughes concluded that while the SUS heat rates proposed by GSU are appropriate for low pressure and temperature steam requirements, the heat rates are too low for use by customers with high pressure and temperature steam requirements. Accordingly, Mr. Hughes suggests that separate SUS heat rate values be calculated for use where customers require high pressure and temperature steam conditions, in order to insure that the fuel costs associated with the theoretical cogeneration facilities which those customers would deploy are not understated.

GSU asserts that the Schedule SUS heat rates are appropriate under both low pressure and temperature steam conditions and high pressure and temperature steam conditions. Acccording to GSU witness Hamilton, Mr. Hughes' calculations overstate the heat rates levels which would be achieved under high temperature and pressure steam conditions due to Mr. Hughes' failure to consider that customers with high steam demand would utilize supplemental firing. Mr. Hamilton testified that supplemental firing involves the addition of raw fuel to the hot gases flowing from the combustion turbine to the heat recovery steam generator, resulting in a very efficient way of producing steam and the achievement of lower heat rates. Mr. Hamilton noted that the General Electric

fuel chargeable to power data upon which Mr. Hughes relied in making his calculations provide separate tables for use, assuming unfired boilers or supplemental firing, respectively. Indeed, a review of the tables in question reflects that, assuming the use of supplemental firing, the fuel chargeable to power for the three sample turbines under high pressure and temperature steam conditions approximating 895 psig-830°F will generate heat rates applicable to various load levels which are actually lower than the heat rates produced assuming the use of unfired boilers under low pressure and temperature steam conditions. Mr. Hamilton testified that GSU conducted a survey of its industrial customers at which time their steam requirements were furnished to GSU. According to Mr. Hamilton, after checking each customer's ratio of electric energy requirements to steam energy requirements, it was apparent that the ratios ranged from near 230 KWH/MLB to 110 KWH/MLB. Mr. Hamilton testified that the most economical way to serve those requirements in most cases would involve supplemental firing, and the SUS heat rates accordingly assume the use of some supplemental firing. On cross-examination, Mr. Hughes conceded that many of GSU's customers with high steam demand would utilize supplemental firing, but noted that he did not utilize data pertinent to supplemental firing in performing his calculations due to his understanding that the SUS rate was based upon a very simple configuration falling within the unfired boiler category. According to General Counsel in his post-hearing brief, it was not clear to the staff that GSU assumed the use of some supplemental firing until GSU presented its rebuttal case.

In the examiner's opinion the evidence of record supports the heat rates proposed by GSU in Schedule SUS and does not reflect the need for a separate heat rate schedule for customers with high pressure and temperature steam requirements.

2. Schedule B Rates

Mr. Hughes has recommended that the Schedule B rates, which are designed for use with LPS and LIS customers with electric energy to steam energy ratios in excess of 230 KWH/MLB, should not be utilized because numerous cogeneration

publications reflect that gas turbines with waste heat boilers are not sound economic choices for cogenerating in instances where electric energy to steam energy ratios exceed 225 KWH/MLB. According to Mr. Hughes, in such instances a cogenerator would install a reciprocating engine. However, GSU asserts that Schedule B is indeed appropriate and is designed to take into account industrial customers which would install a combined cycle unit utilizing both gas turbine and steam turbine driven electric generators. According to Mr. Hamilton, GSU's previously referenced industrial survey reflects the existence of a number of GSU customers with electric energy to steam energy ratios which were larger than could be achieved through use of an unfired gas turbine. In reviewing the equipment configuration which would provide the means of meeting higher energy demand to steam demand requirements, GSU determined that the optional configuration would involve the addition of an extraction turbine to the standard gas turbine heat recovery steam generator configuration. According to Mr. Hamilton, that configuration results in the occurance of slightly higher capital costs and slightly better heat rates. Mr. Hamilton further testified that those customers which would potentially use the Schedule B rates have high pressure steam requirements which cannot be met using a reciprocating engine. That assertion was not challenged by the Commission staff.

Mr. Hamilton testified that a review of the Schedule B demand rates and heat rates will reveal that Schedule B contains higher demand rates and lower heat rates than Schedule A, and that those differentials are intended to reflect the use of combined cycle units to meet the needs of customers with electric energy to steam energy ratios exceeding 230 KWH/MLB. On cross-examination, Mr. Hughes testified that he was unaware that Schedule B was intended to reflect the use of combined cycle units. When asked if he felt that the Schedule B rates would be appropriate in light of that fact, Mr. Hughes indicated that he would certainly have to take another look.

Based upon the evidence of record, the examiner finds that the SUS rates embodied in Schedule B are reasonable, appropriate and necessary in order to properly reflect the costs of operating a theoretical combined cycle

cogeneration unit to meet the energy needs of those GSU customers with electric energy to steam energy ratios exceeding 230 KWH/MLB.

3. Sizing Factor

Mr. Hughes has recommended that the sizing factor concept incorporated within Schedule SUS be rejected on the basis that it does not produce a fair representation of how a cogenerator would operate. In Mr. Hughes' view, a cogenerator would not likely operate its cogeneration facility in instances where the cogenerator's peak demand falls below approximately 75 percent of the unit's rated capacity, due to the rapidly declining efficiencies of cogeneration equipment at low loads. Rather, in such instances Mr. Hughes asserts that the cogenerator would purchase its power requirements from the utility at standby power rates. Accordingly, Mr. Hughes suggests that Schedule SUS be modified to require that the customer and GSU agree upon a fixed size unit, and that any demand above 105 percent of the unit's rated capacity be considered purchased on a standby rate, and that in any month where demand is less than 75 percent of the unit's rated capacity, the customer should be required to purchase all of its power at the standard LIS or LPS firm power rate.

GSU opposes Mr. Hughes' proposal to eliminate the sizing factor. According to Mr. Hamilton, it is inappropriate to attempt to predict in advance how a cogenerator would choose to operate its facility since there are many operational constraints which would influence how the cogenerator operated the facility at any given time but, to the extent one does so, a cogenerator would likely operate the facility at the optimum economic output of the facility, regardless of whether the energy output is consumed by the customer or sold to a utility.

GSU argues that it is not unreasonable to use a percentage of a customer's total energy usage for a sizing factor, as opposed to the staff recommendation that a fixed-size electrical generator be used for each individual customer. Mr. Hamilton testified that the sizing factor proposed by GSU allows a consistent methodology to be applied to all customers by sizing the electrical

generator in a manner which effectively allows its full capacity to be utilized to meet the customer's energy demand. According to Mr. Hamilton, individual negotiations with each customer over the size of the theoretical electric generator would increase some of the risk to the cogenerator inherent in the selection of a fixed size electrical generator without increasing the benefits to GSU or its ratepayers. In the examiner's opinion, were a fixed size generator to be used, the rate would have to recognize that realistic operation of the facility would dictate that GSU purchase excess power from the cogenerator, as necessary, at avoided cost. Use of the sizing factor proposed by GSU would appear to afford flexibility for a customer's business to expand or contract, which is a benefit which the customer would not have if it chose to cogenerate, while avoiding the need for the SUS rate to compensate for a customer's sale of theoretical excess power to GSU when the customer's load level drops. The variable sizing factor proposed by GSU appears to benefit both the SUS customer and GSU without disadvantaging either.

The examiner finds that, while the sizing mechanism proposed by Mr. Hughes is not necessarily unreasonable, adoption of his proposal would require wholesale revision of the current SUS rate structure and of the terms and conditions under which a customer could initiate and terminate the rate. As the examiner finds the current sizing factor proposed by GSU to be reasonable, it would appear preferable to utilize the sizing factor proposed by GSU rather than to require substantial restructuring of the proposed SUS rate in order to replace a reasonable sizing factor with another reasonable but very diffferent sizing factor. The examiner therefore recommends use of the sizing factor currently embodied in Schedule SUS.

4. Minimum Demand

Mr. Hughes has recommended that--"a minimum demand should be set in the tariff to qualify for the SUS rate"--based upon his belief that a cogenerator would not operate its cogeneration facility when the cogenerator's demand drops below 75 percent of the rated capacity of the cogeneration facility. Although the exact intent of this recommendation is not totally clear from Mr. Hughes

testimony, it appears that the recommendation is merely a restatement of Mr. Hughes' proposal that a customer be required to pay standard firm power rates in any month where the customer's demand falls below 75 percent of the rated capacity of a fixed size surrogate generating unit. As the examiner has recommended use of the sizing factor proposed by GSU, as opposed to the use of a fixed size surrogate unit, the examiner does not recommend adoption of this proposal.

5. Minimum Load Requirement

According to Mr. Hughes, there are sharply changing economies of scale for cogeneration units of between 1 MW and 10 MW in size. Within this range, as the size of the unit decreases, the installation costs per KW increase rapidly. Mr. Hughes asserts that as Schedule SUS has only two rate bands for loads smaller than 10 MW (less than 5 MW and 5 MW to 10 MW), Schedule SUS does not accurately reflect those changing economies of scale. Noting that none of the potential cogenerators identified by GSU have demand requirements of less than 10 MW, Mr. Hughes suggests that Schedule SUS not be offered to customers with demand requirements falling below that level.

Although the examiner agrees with Mr. Hughes' assertions regarding the rapid changes in economies of scale for cogeneration units of between 1 and 10 MW, and the inability of only two rate bands for loads smaller than 10 MW to reflect those changes as accurately as might be possible, the examiner does not recommend adoption of Mr. Hughes' recommendation that Schedule SUS not be offered to customers with demand requirements falling below 10 MW.

The primary reason for rejecting Mr. Hughes' recommendation is that limitation of the SUS rate to customers with demand levels in excess of 10 MW will not cure the failure of the below 10 MW SUS rate bands to track cogeneration costs at that level with total accuracy, nor will it eliminate the need for rate bands below 10 MW. Under Schedule SUS, the applicable SUS rate varies from month to month. The appropriate rate band applicable in any given month is a function of the customer's average demand for the billing period

times the appropriate sizing factor, the sizing factor being in most instances the ratio of the customer's mimimum peak demand for the prior year and the customer's average peak demand for the prior year. The wider the disparity between a customer's historical minimum peak demand and average peak demand, the lower the sizing factor for that customer. Consequently, under Schedule SUS, a customer with a low sizing factor may in fact have monthly minimum or average demand levels well in excess of 10,000 KW yet fall within the below 10,000 KW rate bands for billing purposes under Schedule SUS. Similarly, a customer with varying monthly demand levels may in any given month fall above or below the below 10,000 KW rate band levels depending upon the customer's average demand level for the month and the customer's sizing factor. Thus, limiting the applicability of Schedule SUS to customers with demand levels exceeding 10 MW does not really serve any purpose given that customers with demand levels in excess of 10 MW will still utilize the below 10 MW rate bands at various times.

GSU takes the position that the SUS rate should be available to all LIS and LPS customers which meet the minimum process steam or thermal energy requirements established by the SUS rider, regardless of the size of the customer's electric load and that each customer should be permitted to make its own determination as to whether Schedule SUS would constitute a beneficial rate. Finding that there is no substantial justification for limiting the applicability of the SUS rate to customers with demand levels in excess of 10 MW, given that customers with demand levels well in excess of 10 MW will still utilize the below 10 MW rate bands, the examiner recommends that Mr. Hughes' proposal not be adopted.

With respect to Mr. Hughes' underlying concern regarding the accuracy of the below 10 MW rate bands, it appears to the examiner that even if cogeneration costs are not modeled as accurately as possible in that range, little if any harm can result from that fact, given Mr. Hamilton's testimony that, in that range, the SUS rates would be higher than GSU's standard rates under any scenario, and further given that Schedule SUS is a voluntary rate. It does not appear that the problem is severe enough to warrant creation of numerous

additional rate bands to capture the rapid cost variations at the below 10 MW level, nor does the problem warrant rejection of the proposed tariff.

C. OPC's Statement of Position

OPC filed a statement of position in this docket which raises a number of issues which the examiner has not attempted to address in detail, for three reasons. First, the statement was not timely filed by OPC, having been filed substantially after the close of the hearing. At the hearing, the examiner committed to the issuance of an expedited report in this docket. The failure of OPC to raise the issues contained in the statement of position in a timely fashion has deprived the examiner of the time necessary to address each of OPC's arguments in detail in this report. Second, the untimely filing of the statement of position has similarly precluded general counsel and GSU from responding to the arguments raised therein. Third, as OPC did not make appearance at the hearing, OPC's arguments generally lack any evidentiary support. The statement of position is attached hereto as Examiner's Exhibit No. 3, in order that the Commission may be fully cognizant of OPC's arguments against Commission approval of Schedule SUS. However, based on the record in this docket, the examiner is not persuaded that any of the arguments raised merit disapproval of GSU's filing.

OPC argues that GSU's vulnerbility to load loss is due to the company's inefficient generation costs, and that if significant disallowances occur in GSU's pending rate case, GSU's prospective rates will be within a close range of cogeneration costs, thereby making Schedule SUS unnecessary. However, the record reflects that there is a significant danger that GSU will experience load loss in the near future. As final Commission action in Docket No. 7195 will not occur for many months, and the bottom line of such Commission action is by no means predictable at this time, it appears that GSU's pursuit of this filing on an expedited basis to minimize the potential for load loss to cogeneration in the near term is a prudent course of action.

OPC asserts that GSU may be proposing this filing as a political tactic aimed at decreasing opposition to the inclusion of River Bend-related costs in GSU's rates. However, there is no evidentiary support for this contention and the examiner's opinion on that matter would constitute no more than rank speculation.

OPC argues that the filing is discrimintory, and therefore violates PURA Section 38. In support of this argument, OPC notes that Schedule SUS is not a cost based rate, that different industrial customers with identical load shapes will pay different rates if they have different ratios of steam to electricity requirements, or if each customer's absolute amount of steam and electrical load is different, and that use of GSU's WACOG in combination with a hypothetical heat rate to calculate the energy charge will result in SUS customers paying less than the equivalent cost of service paid by other LIS customers. The examiner notes that each of these contentions is true.

However, it is not unreasonable to offer incentive rates to certain industrial customers based upon their potential ability to cogenerate, where the facts demonstrate that failure to prevent those customers from cogenerating would cause substantial harm to GSU. The ability to cogenerate is in this instance a valid and reasonable basis for discriminating among industrial customers, for the reasons discussed earlier in this report. Further, if it is reasonable to offer incentive rates to customers based upon their ability to cogenerate, the question of whether the incentive rate is cost based or not would appear irrelevant to the discrimination issue. Finally, Schedule SUS establishes a consistent methodology for calculating the rates applicable to each SUS customer, based upon the costs which each customer would likely incur to cogenerate. SUS customers with different ratios of steam energy to electric energy or different amounts of steam and electric load will pay different rates under Schedule SUS, because those factors affect the size, configuration and cost of the cogeneration units which customers would install.

OPC argues that the SUS rate is anticompetitive and therefore in violation of PURA Sections 38 and 46. The examiner has discussed the Section 38 arguments

earlier in this report. However, with respect to PURA Section 46, The examiner cannot determine the relevance of that section to an argument regarding anti-competitive conduct. The examiner assumes that OPC intended to reference PURA Section 47, which provides that a utility may not discriminate against any person or corporation that performs services in competition with the utility, nor may the utility engage in any practice that tends to restrict or impair such competition. OPC argues that, to the extent that cogenerators are in competition with the utility for the production of electricity, the proposed rate constitutes predatory pricing. This argument is wholly without merit. First, a customer is not in competition with the utility until it actually chooses to cogenerate. Second, the offering of an inducement to a customer not to cogenerate does not in any fashion restrict or impair the ability of that customer to cogenerate should it desire to do so. Third, from the standpoint of current cogenerators, retention of load by the purchasing utility is probably beneficial because it increases the chance that the utility will experience some avoided capacity costs.

OPC argues that Schedule SUS is not just and reasonable because it contains no apparent protection against "tariff-hopping" by industrial customers. However, this assertion is incorrect. The service agreement amendment which an SUS customer must execute contains penalties for failure to provide at least one year's notice of intent to drop off schedule SUS.

OPC argues that Schedule SUS presents difficult problems for the regulatory process in terms of verifying the steam/KWH needs of customers, and that the tariff is therefore an open invitation for the Company to select rates that are based upon GSU's perception of competitive threat regardless of the avoided cost of the customer. In response to this argument, the examiner can only note that any tariff is susceptible to misapplication if a utility has the intent to do so. However, any such action by GSU would directly violate PURA Section 46 and subject the utility and its personnel to civil penalties and possible criminal penalties, pursuant to the terms of PURA Sections 72 and 73.

OPC argues that this filing constitutes piecemeal ratemaking. While the examiner concedes that it would have been more efficient to address this filing in conjunction with the pending GSU rate case, it appears from the record that GSU's Schedule SUS proposal was not finalized at the time GSU's rate case was initiated. PURA does not prohibit a utility from pursuing multiple filings during the pendency of a rate proceeding. The examiner notes that the issue of consolidation of this docket with GSU's pending rate case was raised by the examiner at the initial prehearing conference in this matter. GSU opposed consolidation on the basis that expedited consideration of the filing was urgently needed, the Commission's general counsel opposed consolidation, and representatives of Chevron U.S.A. and Mobil Chemical made protest statements urging that no consolidation occur. While there is some validity to the argument that multiple proceedings before the Commission are burdensome to the parties, this filing is not in the examiner's opinion violative of either PURA Section 42 or P.U.C. PROC. R. 21.69.

OPC argues that the energy charge for the SUS rate violates P.U.C. SUBST. R. 23.23(b)(2)(c) and PURA Sections 43(g)(1) and (2). For the reasons discussed previously in this report, the examiner finds this argument to be without merit. The examiner would note, however, that OPC did not file a brief on this issue as directed in the examiner's April 22, 1987, order.

In summary, although OPC has not fully developed the arguments contained in its statement of position, or supported those arguments with evidence, it appears to the examiner that none of the arguments presented are sufficiently probative to warrant rejection of GSU's filing.

V. Recommendation

Based upon the evidence of record, the examiner finds that there is an immediate danger that GSU will experience load loss to cogeneration in the near future unless GSU takes concrete steps to prevent that loss from occurring. The examiner finds that implementation of Schedule SUS will greatly assist in preventing the loss of future load to cogeneration. The mechanics of the tariff

and the associated service agreement appear to the examiner to be reasonable and the examiner finds that there is no legal bar to approval of the tariff as filed.

The examiner further finds that, although approval of the tariff will result in a loss of revenues to GSU, failure to approve the tariff will result in an even greater loss of revenues to GSU. As GSU's shareholders will bear the burden of all SUS related revenue losses, and as GSU will not seek recovery of any such losses in future rate proceedings, GSU's non-industrial ratepayers can be harmed by this filing only to the extent that the revenue losses negatively impact GSU's financial integrity. The examiner finds in that regard that the retention of industrial load through implementation of Schedule SUS will likely have less overall negative impact on GSU's financial integrity than will failure to approve schedule SUS.

The examiner therefore recommends that the Commission approve schedule SUS and the associated service agreement amendment, as filed, effective immediately upon the entry of a final order in this matter. However, the examiner further recommends that the Commission direct, by its final order in this matter, that no revenues losses associated with implementation of schedule SUS may be recovered from GSU ratepayers in any future GSU rate proceeding.

VI. Findings of Fact and Conclusions of Law

The examiner further recommends adoption of the following findings of fact and conclusions of law:

A. Findings of Fact

1. Gulf States Utilities Company (GSU) is an public utility providing electrical service within its certificated service area, under Certificate of Convenience and Necessity No. 30076.

2. On December 31, 1986, GSU filed an application seeking authority to implement a proposed Schedule SUS Experimental Rider to Schedules LPS and LIS for Industrial Service to Qualifying Thermal Energy Users, and further seeking approval of a proposed contract amendment to existing service agreements between GSU and customers electing to take power under Schedule SUS.

3. The effective date of the proposed tariff revision was suspended for 150 days until July 6, 1987, or superseding order of the Commission.

4. GSU mailed individual notice of this filing to all parties to Docket No. 7195 on February 20, 1987, as well as a corrected notice on March 20, 1987, as evidenced by the sworn affidavit of Linda Werner, legal stenographer for Donald M. Clements, Jr., Manager-Business and Regulatory Law for GSU. GSU published notice of the filing and of the pendency of this proceeding in thirty newspapers of general circulation within GSU's Texas service area, as evidenced by affidavits of publication on file with the Commission.

5. The Office of Public Utility Counsel (OPC) requested and was granted intervenor status in this docket.

6. A prehearing conference was conducted on February 2, 1987, and the hearing on the merits of GSU's request for both interim and permanent approval of its filing was conducted on April 13, 1987.

7. The hearing on the merits was conducted on April 13, 1987. OPC did not make appearance at the hearing.

8. Schedule SUS is a non-cost based incentive rate available to any LPS and LIS customer with a minimum process steam requirement of 10,000 pounds per hour or the thermal energy equivalent thereof.

9. Schedule SUS is designed to provide industrial customers having the potential to cogenerate with prices for power which are competitive with the power costs which the customers would experience if they chose to construct a

cogeneration facility, thereby lessening the incentive for those customers to drop off GSU's system and engage in cogeneration.

10. GSU has lost 430 MW of industrial load to date to cogeneration and has identified 185 MW of additional load which is subject to loss due to cogeneration projects which are in advanced engineering or planning stages.

11. GSU has approximately 1800 MW of industrial capacity which can potentially be served through cogeneration.

12. GSU's concerns regarding loss of industrial load to cogeneration are warranted.

13. Implementation of Schedule SUS will cause GSU to experience some loss of revenues, but failure to implement Schedule SUS will result in an even greater loss of revenues for GSU.

14. GSU will not experience an immediate revenue loss as a consequence of implementation of Schedule SUS because the SUS rate will not actually commence until the period of time deemed necessary for each SUS customer to construct a cogeneration facility has passed.

15. GSU intends that any revenue losses incurred by GSU as a consequence of adoption of Schedule SUS will be borne solely by GSU shareholders and will not be recovered in future rate proceedings.

16. Customers will be permitted to subscribe to Schedule SUS solely during the first twelve months following approval of the rate.

17. A qualifying customer must execute an amendment to its existing service agreement with GSU as a precondition to subscription to Schedule SUS.

18. The service agreement amendment requires a customer to extend its existing service agreement for a period of no less than three years and no more than ten

years and provides penalties for termination of Schedule SUS with the provision of less than one year's advance notice.

19. Schedule SUS rates are based upon the economies of installing a gas turbine driven electric generator with a heat recovery steam generator and, in some instances, the further installation of an extraction turbine.

20. Schedule SUS rates will vary among customers because each customer has different levels of electric energy and different ratios of electric energy to steam energy which would necessitate installation of differing sizes and types of cogeneration equipment with differing cost characteristics, were each customer actually to cogenerate.

21. The optimal size of the theoretical cogeneration facility which serves as the model for calculating a customer's monthly Schedule SUS rate is determined in part by the customer's monthly average peak demand and in part through the use of a sizing factor.

22. A customer's sizing factor, which is a function of a customers minimum actual peak energy demand to average actual peak energy demand for the prior year, or in some instances the ratio of minimum steam demand to average steam demand for the prior year, is subject to periodic review and adjustment should the operating condition upon which the sizing factor is based materially change.

23. Schedule SUS assumes that for any given billing period the customer has constructed the optimal size cogeneration facility to serve the load experienced by the customer during that billing period.

24. A customer's average peak demand during each billing period is multiplied by the sizing factor to determine the size of the customer's load during the billing period which would be served by the cogeneration facility. All consumption above that level is billed at the otherwise applicable LIS or LPS rates.

25. The SUS rate is comprised of a demand charge and an energy charge.

26. The SUS demand charge, which is comprised of a rate per KW and a flat dollar charge, is designed to simulate the initial investment and periodic maintenance costs associated with construction of a cogeneration facility.

27. Schedule SUS has two separate demand schedules: one for customers with an average ratio of electrical energy to steam energy of 230 KWH/MLB or less per month and one for customers with ratios in excess of 230 KWH/MLB per month.

28. The SUS demand charge remains constant for three years and then increases by 1.5 percent each year thereafter to simulate the increased cost of operation and maintenance associated with turbine wear and tear and periodic maintenance.

29. The SUS energy charge is a function of the heat rate of the theoretical cogeneration unit and GSU's weighted average cost of gas (WACOG).

30. GSU's WACOG is used solely as a representation of the likely natural gas price per MMBtu which a cogenerator would pay.

31. Schedule SUS specifies the use of particular heat rate values, depending upon the size of the customer's billing load and the customer's electric energy to steam energy ratio.

32. The customer's energy charge is calculated by multiplying the customer's total MWH of consumption for the billing period by the appropriate heat rate value and then again by GSU's WACOG.

33. A customer's initial heat rate will increase by 1.25 percent, 1.5 percent and 2 percent at the beginning of the second, third and fourth years, respectively, and then will be reset to the initial value for the fifth, ninth and thirteenth year of SUS billing in order to reflect the declining efficiency of a gas turbine overtime and the periodic refurbishing of a gas turbine after periodic maintenance.

34. Schedule SUS contains a minimum charge provision which provides that the combined total SUS demand and energy charges can never be less than the monthly KWH billable under SUS rates times GSU's system average fuel cost per KWH for the preceding month, plus 8 mills per KWH.

35. The SUS energy charge is not a fuel factor because it is designed to replicate the fuel costs which an SUS customer would have incurred had a customer constructed a cogeneration facility and is in no way designed to pass through to SUS customers the fuel costs which GSU incurs in providing service to those customers.

36. Although Schedule SUS contains no fuel factor, there is no commission requirement that a voluntary non-cost based incentive rate contain a fuel factor.

37. The SUS energy charge is not an automatic fuel adjustment clause within the meaning of PURA Section 43(g)(1) because it does not constitute a cost based mechanism for rateably passing GSU's fuel costs through to SUS customers.

38. The structure of the SUS energy charge does not constitute a legal impediment to implementation of Schedule SUS.

39. Schedule SUS would cause no significant disadvantage to members of any non-industrial GSU rate classes.

40. Use of cogeneration potential as a basis for distinguishing among LIS and LPS customers is reasonable and works no unreasonable prejudice or disadvantage because any economic advantage to customers who qualify for service under Schedule SUS does not result because of the proposed tariff but rather, from the cogeneration alternative that is presently available to those customers.

41. So long as cogeneration is in fact a viable option for industrial customers taking service under Schedule SUS, and so long as the Schedule SUS rate

reasonably approximates the cost of cogenerating electricity, the preference or advantage conferred to qualifying customers by Schedule SUS is justifiable.

42. GSU and its ratepayers are benefitted by maintaining existing industrial load.

43. There is a serious danger that GSU's industrial load will shrink substantially.

44. The likely increase in LIS and LPS rates in the near future is a major economic factor contributing to the possibility of serious load loss.

45. Approval of Schedule SUS will increase the probability that load attributable to industrial customers who have the potential to cogenerate will be retained by GSU's system.

46. The discrimination inherent in the SUS rider is founded upon a substantial and reasonable ground of distinction.

47. Mr. Hughes' recommendation that SUS heat rates should apply only to customers with steam requirements close to 265 psig-411°F, and that a separate heat rate schedule should be prepared for customers with higher pressure and temperature requirements should not be adopted because his calculations fail to consider that supplemental firing would be used by many customers, resulting in heat rates within the range proposed by GSU.

48. The heat rates proposed by GSU do not reflect the need for a separate heat rate schedule for customers with high pressure and temperature steam requirements.

49. Mr. Hughes' recommendation that Schedule B rates not be approved should not be adopted because Schedule B rates appropriately model the higher capital costs and lower heat rates which would result from use of a combined cycle unit to meet electric energy and energy requirements exceeding 230 KWH/MLB.

50. Although use of a combined cycle unit is appropriate to meet the requirements of customers with electric energy to steam energy ratios exceeding 230 KWH/MLB, Mr. Hughes failed to take that fact into consideration in formulating his recommendation.

51. The sizing factor proposed by GSU is reasonable because it affords flexibility for a customer's business to expand or contract, which is a benefit the customer would not have if it chose to cogenerate, yet it avoids the need for the SUS rate to compensate for a customer's sale of theoretical excess power to GSU when the customer's load level drops. The variable sizing factor thus benefits both GSU and the SUS customer without disadvantaging either.

52. Although both are reasonable, the sizing factor proposed by GSU is preferable to that proposed by Mr. Hughes, because Mr. Hughes' proposal would require substantial restructuring of the proposed SUS rate.

53. Mr. Hughes' recommendation that a minimum demand charge be contained in Schedule SUS should not be adopted because it is inextricably tied to Mr. Hughes' fixed-size generating unit proposal which the examiner has recommended not be approved.

54. Mr. Hughes' proposal to limit applicability of the SUS rate to customers with demand levels in excess of 10 MW should not be adopted because the recommendation fails to correct the lack of totally accurate cogeneration cost tracking in the 1 MW to 10 MW rate bands contained in Schedule SUS.

55. The problem of inaccurate modeling of cogeneration costs within the 1 MW to 10 MW range is not serious enough to warrant creation of numerous additional rate bands to capture rapid cost variations at the below 10 MW level, nor does the problem warrant rejection of the proposed tariff.

56. The SUS rate should be available to all qualifying LIS and LPS customers regardless of the size of their electric load.

57. Schedule SUS does not hamper the ability of GSU's customers to cogenerate should they desire to do and does not adversely affect current cogenerators.

58. The terms of Schedule SUS and the associated service agreement amendment are just and reasonable.

59. Schedule SUS and the associated service agreement amendment should be approved, as filed.

60. The Commission should require that any revenue losses associated with Schedule SUS not be recoverable in future GSU rate proceedings.

B. Conclusions of Law

1. Gulf States Utilities Company (GSU) is a public utility as defined in Section 3(c)(1) of the Public Utility Regulatory Act (the Act), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1987).

2. The Commission has jurisdiction over the matters raised in GSU's filing pursuant to Sections 16(a), 17(e) and 37 of the Act.

3. Implementation of the proposed tariff revision was properly suspended for 150 days pursuant to P.U.C. SUBST. R. 23.24(i) and P.U.C. PROC. R. 21.4.

4. GSU has provided notice of this proceeding in substantial compliance with the notice requirements established by the examiner under authority of P.U.C. PROC. R. 21.25(a)(3).

5. The proposed Schedule SUS Experimental Rider is not unreasonably preferential, prejudicial or discriminatory, but rather is sufficient, equitable and consistent in application, within the intended meaning of Section 38 of the Act.

6. The proposed Schedule SUS Experimental Rider does not constitute an automatic adjustment or pass-through of fuel or other costs within the intended meaning of Section 43(g)(1) of the Act.

7. The Schedle SUS Experimental Rider is not in conflict with the requirements of P.U.C. SUBST. R. 23.23(b)(2)(c).

8. GSU's implementation of the Schedule SUS Experimental Rider does not constitute the grant of an unreasonable preference or advantage to any corporation or person within any classification, nor does it subject any corporation or person within any classification to any unreasonable prejudice or advantage. The filing therefore does not conflict with Section 45 of the Act.

9. Implementation of the Schedule SUS Experimental Rider will not work any discrimination against any person or corporation performing services in competition with a public utility nor will it tend to restrict or impair such competition, within the intended meaning of Section 47 of the Act.

10. The Schedule SUS Experimental Rider and associated service contract amendment are just and reasonable within the meaning of Section 38 of the Act and should be approved.

Respectfully submitted,

MARK W. SMITH
ADMINISTRATIVE LAW JUDGE

APPROVED on this the 30th day of April 1987.

PHILLIP A. HOLDER
DIRECTOR OF HEARINGS

nsh

EXAMINER'S EXHIBIT NO. 1

GULF STATES UTILITIES CO.
Electric Service
Texas

SECTION NO.:	III
SECTION TITLE:	Rate Schedules and Charges
SHEET NO.:	51
EFFECTIVE DATE:	Proposed
REVISION:	0
APPLICABLE:	Entire Texas Service Area
PAGE:	1 of 6

Schedule SUS

EXPERIMENTAL RIDER TO SCHEDULE LPS AND LIS
FOR INDUSTRIAL SERVICE TO QUALIFYING THERMAL ENERGY USERS

I. Applicability

This rider is applicable under the Regular Terms and Conditions of the Company to existing customers who qualify for service under Schedules LPS or LIS, on or prior to the date this rider is approved by the regulatory authority having jurisdiction thereof. The customers must have minimum process steam requirements of 10 M#/hour or the thermal energy equivalent. These minimum requirements exclude all such requirements satisfied by cogeneration facilities that are operational or will be operational or satisfied by other steam or heat that has been or will be used to generate electrical power internally. Other riders to Schedules GS, LGS, LPS and/or LIS are applicable only to that portion of the customer's load served under such Schedules.

II. Availability

Requests for service under Schedule SUS will only be accepted for a period of twelve months following the approval date of this rider.

III. Determination of Total Electric Contract Power and Total Billing Load

The total contract power under Schedule SUS will be determined in accordance with the "Determination of Contract Power and Billing Load" provision contained in the respective rate Schedules LPS or LIS. The establishment of the total billing load within the "Determination of Contract Power and Billing Load" provision shall be modified such that the total billing load shall be the greater of actual created KW, as adjusted by the power factor provision, or 75 percent of contract power.

IV. Determination of Monthly Billing

A. Billing Determinants Under Steam Rate

1. Contracted Sizing Factor (SF): The SF will be subject to a periodic review by the Company and will be adjusted if the operating conditions upon which the SF is based have materially changed.

2. Billing Load: The monthly Steam Rate Billing Load calculated by multiplying the monthly measured KWH used by the contracted sizing factor (SF) divided by the period hours:

$$\text{Steam Rate Billing Load} = \frac{\text{KWH} \times \text{SF}}{\text{Period Hours}}$$

3. Energy: The monthly KWH for billing the Steam Rate calculated by multiplying the monthly measured KWH used by the contracted sizing factor (SF):

$$\text{Steam Rate KWH} = \text{KWH} \times \text{SF}$$

4. The monthly measured KWH used in the above Billing Load and Energy shall exclude KWH associated with Schedule MSS.

B. Billing Determinants Under Applicable Firm Electric Rate Schedule

1. Billing Load: The monthly maximum KW load for billing under the applicable firm electric rate schedule is calculated by subtracting the monthly Steam Rate Billing Load from the Total Billing Load, as established in Section III, Determination of Total Electric Contract Power and Total Billing Load.

The monthly maximum KW load, calculated as described above, will be the basis for determining contract power and billing load under the applicable firm electric rate schedule. The interval for measuring the monthly maximum KW load (ie., 15-minute or 30-minute) will be as defined by the applicable firm electric rate schedule. All other provisions of the applicable firm electric rate schedule will remain in force and unchanged.

2. Energy: The monthly KWH used, for billing the energy charge under the applicable firm electric rate schedule, is calculated by subtracting the monthly Steam Rate KWH from the monthly measured KWH.

C. Net Monthly Bill shall be the sum of the following:

1. Billing Determinants billed under the applicable firm electric rate schedule.

2. a. Steam Rate Billing Load Charge

Total Monthly Steam Rate Billing Load		Rate Schedule A		Rate Schedule B	
At Least	But Less Than	$/KW	$ Constant	$/KW	$ Constant
	5,000 KW	27.70	0	31.00	0
5,000 KW	10,500 KW	23.70	20,088	25.32	33,393
10,500 KW	15,500 KW	17.70	83,092	19.20	97,669
15,500 KW	19,500 KW	15.80	112,535	13.58	187,131
19,500 KW	20,500 KW	15.80	112,535	13.58	187,131
20,500 KW	22,500 KW	11.80	194,533	13.58	187,131
22,500 KW	23,000 KW	11.80	194,533	12.28	219,740
23,000 KW	23,500 KW	0.09	469,706	12.28	219,740
23,500 KW	24,000 KW	0.09	469,706	0.10	506,000
24,000 KW	24,500 KW	0.09	469,706	0.10	506,000
24,500 KW	25,500 KW	0.09	469,706	0.10	506,000
25,500 KW	26,500 KW	0.09	469,706	0.10	506,000
26,500 KW	27,500 KW	0.09	469,706	0.10	506,000
27,500 KW	28,500 KW	0.09	469,706	0.10	506,000
28,500 KW	29,500 KW	0.09	469,706	0.10	506,000
29,500 KW	31,500 KW	0.09	469,706	0.10	506,000
31,500 KW	32,000 KW	15.00	0	0.10	506,000
32,000 KW		15.00	0	16.00	0

Rate Schedule A is applicable to customers who can demonstrate and contract for an average ratio of electrical energy to steam energy (or equivalent steam energy) of 230 KWH/Mlb or less per month.

Rate Schedule B is applicable to customers who can demonstrate and contract for an average ratio of electrical energy to steam energy (or equivalent steam energy) in excess of 230 KWH/Mlb per month.

The charges contained under Rate Schedules A and B will remain constant for a customer's first 3 years of service under the rider, after which the charges will escalate at a rate of 1.5 percent annually.

b. Steam Rate Billing Load Charge Calculation

Total Steam Rate Billing Load Charge =
(Billing Load x $/KW) + $ Constant

Schedule SUS (Cont.

3. Steam Rate Energy Charge

a. Fuel Heat Rate Schedule (FHRS)

Total Monthly Steam Rate Billing Load		Fuel Heat Rate Schedule (MMBtu/MWH)	
At Least	But Less Than	A	B
	5,000 KW	7	6.7
5,000 KW	10,500 KW	7	6.7
10,500 KW	15,500 KW	7	6.7
15,500 KW	19,500 KW	7	6.6
19,500 KW	20,500 KW	7	6.5
20,500 KW	22,500 KW	6.9	6.4
22,500 KW	23,000 KW	6.8	6.3
23,000 KW	23,500 KW	6.8	6.2
23,500 KW	24,000 KW	6.7	6.2
24,000 KW	24,500 KW	6.6	6.1
24,500 KW	25,500 KW	6.5	6
25,500 KW	26,500 KW	6.4	5.9
26,500 KW	27,500 KW	6.3	5.8
27,500 KW	28,500 KW	6.2	5.8
28,500 KW	29,500 KW	6.1	5.8
29,500 KW	31,500 KW	6	5.8
31,500 KW	32,000 KW	6	5.8
32,000 KW		6	5.8

Fuel Heat Rate Schedule A is applicable to customers which have contracted for Rate Schedule A of the Steam Rate Billing Load charge.

Fuel Heat Rate Schedule B is applicable to customers which have contracted for Rate Schedule B of the Steam Rate Billing Load Charge.

The initial FHRS will increase by 1.25%, 1.5% and 2% at the beginning of the second, third and fourth years respectively after billing at the initial FHRS one year. The FHRS will reset to the initial value for the fifth, ninth and thirteenth year of SUS billing.

b. Natural Gas Price (NGP) will be the Gulf States Utilities Company Weighted Average Cost of Gas ($/MMBtu) from the month preceding the Schedule SUS billing month.

c. Energy Charge Calculation

$$\text{Total Steam Rate Energy Charge} = \frac{\text{Steam Rate KWH} \times \text{FHRS} \times \text{NGP}}{1000}$$

d. The combined total billing for the Steam Rate Billing Load Charge and the Steam Rate Energy Charge shall not be less than the current billing month steam rate KWH times the Company's System Average Fuel Cost (¢/KWH) from the preceding month, plus 8 mills per KWH.

Schedule SUS (Cont.)

V. Definitions

A. Total Electric Contract Power
The total monthly amount of power served to the customer as adjusted under the Determination of Contract Power and Billing Load provision contained in the respective Schedules LPS or LIS, as well as any applicable adjustment associated with service under Schedule MSS or Schedule PM.

B. Firm Electric Contract Power
The total firm electric contract power under the applicable rate for firm service billing.

C. Thermal Energy
The energy used in the production process of plant products, excluding heat energy or steam that has been or will be used to generate electrical power. The thermal energy consumed in transferring heat energy to process streams for the production of Customer's products, excluding thermal energy converted to electric energy.

D. Period Hours
The total hours in a billing month.

E. Contracted Sizing Factor
A factor to determine the optimum size of the electrical generator based on the customer's actual thermal and electric energy usage.

F. Company's System Average Fuel Cost
The result, to the nearest one hundredth of a mill, of dividing the System Fuel Costs by the System Sales.

Where:

System Fuel Cost - is determined for the immediately preceding month and consists of the total cost of fossil and nuclear fuel used in Company's generating stations plus Company's share of such fuel used in jointly owned or leased plants, plus the net energy cost of energy purchases (exclusive of capacity and demand charges) on an economic dispatch basis, plus the actual identifiable fossil and nuclear fuel costs associated with inter-system purchases, plus non-fuel costs associated with purchased economic power as defined below, less the cost of fossil and nuclear fuel recovered through inter-system sales (including fuel costs related to economic dispatch basis inter-system sales).

Schedule SUS (Cont.)

System Sales - are the KWH sold in the immediately preceding month determined by the sum of (a) Company's net generation, and (b) inter-system purchases, including economy energy received, less (c) inter-system sales, including economy energy delivered and, less (d) system losses.

Non-fuel purchased economic power costs - All non-fuel costs incurred in buying economic power and having such power delivered to the Company's system. Such costs include, but are not limited to, capacity or reservation charges, adders, and any transmission or wheeling charges associated with the purchase. Purchased economic power is power or energy purchased over a period of twelve months or less where the total cost of the purchase is less than the Company's total avoided variable cost and the purchase is not necessary to meet reserve requirements. The Company's system reserve capacity criteria is that established by the Southwest Power Pool and is subject to change from time to time. At the present, the Company's minimum reserve criteria is to maintain an 18% reserve margin.

VI. Meters

A. Electric Meters
The service under this Schedule shall be supplied through a single electric service meter. Service not supplied under this Schedule shall be metered separately.

VII. Conditions of Service

An amendment to the existing firm power contract to provide Schedule SUS service is required. In order to receive service under Schedule SUS, the customer must extend the term of the existing service contract by the period of time agreed in the Amendment. Actual Schedule SUS service will not commence immediately following amendment execution. The Company and the Customer will agree to terms which will specify this commencement date based upon the reasonably achievable in-service date of a satisfactory self-generation facility, should that option have been chosen instead of this rider.

Certain items pertinent to the application of Schedule SUS will be established by the executed amendment to the firm power contract. These are the Contracted Sizing Factor, the Rate Schedule (A or B), the Fuel Heat Rate Schedule (A or B), the conversion factor for converting thermal energy to equivalent steam energy, and the Electric/Thermal Energy Ratio.

The customer on a monthly basis must provide a record of thermal energy actually used. The information contained in the record must be of such that the Company can verify the reasonability of the reported usage.

AMENDMENT DATED _____
TO EXISTING AGREEMENT FOR ELECTRIC SERVICE DATED _____
BETWEEN GULF STATES UTILITIES COMPANY (COMPANY)
AND _____ (CUSTOMER)
FOR EXPERIMENTAL RIDER SCHEDULE SUS

I. TERM

This Amendment incorporates Experimental Rider Schedule SUS (Schedule SUS) as an applicable rate under Customer's existing Agreement for Electric Service (Agreement) dated _____. The term of the existing Agreement must be extended by a minimum of three years or up to a maximum of ten years to implement Schedule SUS.

This Amendment does not supersede any of the obligations under the existing Agreement except to modify billing of Rate Schedule LIS or LPS service to comply with Schedule SUS for the period this Amendment is in effect and to extend the term of the Agreement for a period of _____ months from its current expiration date of _____ and continuing thereafter from year to year unless written notice to the contrary is given by either party to the other at least one year prior to the expiration of the term of the Agreement or of any renewal thereof.

The billing provisions of Schedule SUS will be effective beginning with the _____ billing period of 19____ and shall continue thereafter until written notice to the contrary is given by the Customer to the Company as provided for in this Amendment.

The Schedule SUS in effect at the time this Amendment is signed will be used for the term of this Amendment and any renewals thereof.

II. MISCELLANEOUS

The following factors are pertinent to the application of Schedule SUS: the Contracted Sizing Factor, the Fuel Heat Rate Schedule (A or B), the Conversion Factor for converting thermal energy to equivalent steam energy, and the Electric/Thermal Energy Ratio.

1. Definitions: Mlbs. or M# is 1000 pounds
   MMBTU is 1,000,000 BTU
   MW is 1,000 kilowatts

2. Electric/Thermal Energy Ratio: This ratio will determine whether a Customer is eligible for Rate Schedule A or B of Schedule SUS and is calculated by the Customer's actual billing KWH divided by the Customer's actual Mlbs. of steam used in the same time period. If this ratio is less than or equal to 230 KWH/Mlbs., Rate Schedule A is applicable. If this ratio is greater than 230 KWH/Mlbs., Rate Schedule B is applicable. If Customer's Electric/Thermal Energy ratio exceeds 460, a maximum of 460 KWH/Mlbs. will be

eligible for billing as steam rate billing demand under Schedule SUS. The Electric/ Thermal Energy Ratio will be reviewed by Company and adjusted when operating conditions have changed.

3. Contracted Sizing Factor: This factor will determine the optimum size of the electrical generator the Customer would have utilized. This factor will be calculated in one of two methods:

   a. For Rate Schedule A

   $$\frac{\text{Minimum Actual Peak KW for Preceding 12 Months}}{\text{Average Actual Peak KW for Preceding 12 Months}}$$

   b. For Rate Schedule B

   $$\frac{\text{Min. Measured Mlbs. per Mth. for Preceding 12 Mths.}}{\text{Avg. Measured Mlbs. per Mth. for Preceding 12 Mths.}}$$

   (If steam is not used, then the thermal energy used must be capable of producing at least 10 Mlbs./Hr. of 50 PSIG, 325 degree Fahrenheit steam.)

   For this application, Rate Schedule _____ will be used and the Contracted Sizing Factor will be _____ initially and will be reviewed periodically subject to adjustment per Section IV of Schedule SUS. If the Customer gives the Company thirty-day notification of an impending plant shutdown or if force majeure conditions exist as outlined in "Terms and Conditions Applicable to Electric Service," the affected billing period month will be excluded from the Contractual Sizing Factor review.

4. Conversion Factor for Converting Thermal Energy to Equivalent Steam Energy: If the Customer does not produce or meter steam for thermal energy requirements, a Conversion Factor will be applied to his measured thermal energy to calculate end-use thermal energy. The Customer must provide the Company with monthly thermal energy meter readings and Company shall be allowed to witness meter calibrations. The Conversion Factor for this application is _____ and is to be applied to _____ _____.

5. Fuel Heat Rate Schedule (FHRS): This Schedule A or B corresponds to the appropriate Rate Schedule A or B the Customer is qualified for. For this application, Rate Schedule _____ will be used for FHRS.

III. TERMINATION

A. The Customer is allowed to terminate all of the obligations agreed to in this Agreement as amended by either of the following methods:

1. By: (a) giving written notice less than twelve months prior to the date when Customer desires that its obligations under the Agreement shall cease, and (b) making a payment(s) for the value of future charges for Contract Power for the remaining term of the Agreement as stated in Section IV.B. of this Amendment, and (c) making a payment(s) for the difference between the billings under Schedule SUS and the rate schedule applicable absent Schedule SUS as stated in Section IV.A. of this Amendment.

2. By: (a) giving written notice at least twelve months prior to the date when Customer desires that its obligations under the Agreement shall cease, and (b) making a payment(s) for the value of future charges for Contract Power for the remaining term of the Agreement as stated in Section IV.B. of this Amendment.

B. Customer is allowed to terminate the billing provisions of Schedule SUS by either of the following methods:

1. By: (a) giving written notice less than twelve months prior to the date when Customer desires that its obligations under the billing provisions of Schedule SUS shall cease and (b) resuming service for the remaining term of the Agreement under the applicable rate schedule, and (c) making a payment for the difference between the billing under Schedule SUS and rate schedule applicable absent Schedule SUS as stated in Section IV.A. of this Amendment.

2. By: (a) giving written notice at least twelve months prior to the date when Customer desires that its obligations under the billing provisions of Schedule SUS shall cease and (b) resuming service for the remaining term of the Agreement under the applicable rate schedule.

C. For termination of this Agreement as amended or termination of the billing provisions of Schedule SUS, the Contract Power shall be determined by the applicable method (1 or 2) stated below:

1. Until the end of the three year extension of the term of the Agreement, the Contract Power will be determined by Rate Schedule LIS or LPS, whichever is applicable under the Agreement prior to this Amendment, or replacement rate schedules approved by the Public Utility Commission of Texas.

2. After the end of the three year extension and for the remainder of the term of the Agreement including renewals, Contract Power will be determined by (a) or (b) below: (a) If customer requests termination of the Agreement as amended while the customer is billed under Schedule SUS, the Contract Power will be determined by the KW billed at firm electric rate schedules as described in Section IV.B.1 of the Schedule SUS. (b) If Customer terminates billing provisions of Schedule SUS as provided herein, the Contract Power shall be determined in

accordance with the provisions of the rate schedule applicable for service after Customer terminates billing provisions of Schedule SUS.

IV. PAYMENTS FOR TERMINATION

A. The Payment for the difference between the billings under Schedule SUS and the rate schedule applicable absent Schedule SUS is calculated as described in this paragraph. The Payment shall be the sum of (1) and (2), where (1) is the Difference between (a) the total cost of service to Customer calculated according to Schedule LIS or LPS (including all billing provisions) which would have been applicable absent Schedule SUS, and (b) the total cost of service to Customer calculated under Schedule SUS, where both (a) and (b) are calculated for either the Period between the date when billing under Schedule SUS is requested to cease and the date when billing according to Schedule SUS commenced, or the Period of Twelve months preceding the date when billing in Schedule SUS is requested to cease, whichever period is shorter, and (2) is accrued interest on the Difference, calculated at a rate equal to the bank prime rate as stated in the Federal Reserve Statistical Release for the Period. The Payment may be made either in one lump sum at the end of the first full month after billing according to Schedule SUS ceases, or as Customer and Company agree, provided that, if Payment is not made in one lump sum, additional interest shall accrue at the interest rate stated in this paragraph until Payment and additional accrued interest are completely paid off.

B. Payments made by the Customer in satisfaction of termination of the Agreement as amended or termination of the billing provisions of Schedule SUS as stated in Section III. of this Amendment can be made by the following applicable methods:

1. By continuing to make monthly payments to Company for the charges for Contract Power for the remaining term of the Agreement.

2. By making a lump sum payment to Company at the end of the first full month after the date when Customer's obligations under the Agreement cease or by making one or more lump sum payments in amounts and at times agreed by the parties. The lump sum payments shall be computed to have a present value equal to the sum of the present values of each of the future payments for Contract Power for which Customer is obligated. Present values shall be computed as of the date that Customer's obligations under the Agreement cease, using as a discount rate a rate equal to the time weighted average of the bank prime loan rate for the twelve months prior to the date when Customer's obligations under the Agreement cease, as such prime rates are stated in the Federal Reserve Statistical Releases for the period.

3. Customer's payment obligations for Contract Power under this Agreement may be offset, in part or completely, by demand payments, for the same time period as the Agreement, made pursuant to one or more replacement service agreements for firm, interruptible, standby or other electric service to which the parties agree. To the extent that Customer's payment obligations for Contract Power under this Agreement are only partially offset by demand payments of a replacement agreement, Customer shall make payment for the non-offset part of its obligations by one or a combination of the methodologies as stated in Section IV.B.1 or IV.B.2 of this Amendment.

V. OTHER

The Company has the option to supply to the Customer steam or thermal energy of characteristics and reliability that are mutually agreeable to Customer and Company. If the Customer agrees to purchase steam or thermal energy from the Company, this Amendment will be replaced with a negotiated contractual arrangement whereby the Customer will be made economically neutral by purchasing steam or thermal energy from the Company. "Economically neutral" is defined as a steam or thermal energy price charged by the Company whereby the Customer's cash flow will not be different due to the Customer's steam or thermal energy purchases from the Company. If the Customer chooses not to purchase steam or thermal energy from the Company, the billing provisions of this Amendment and Schedule SUS will no longer apply eighteen months after Company makes a proposal to supply steam or thermal energy.

Both parties agree that Schedule SUS is to apply to circumstances where a reasonable economic option for Customer's energy needs can be demonstrated.

This Amendment and the provisions therein and Schedule SUS and the provisions therein are agreed to by both parties.

ACCEPTED FOR CUSTOMER:	ACCEPTED FOR COMPANY:
By_____	By_____
Title_____	Title_____
Date_____	Date_____

EXAMINER'S EXHIBIT NO. 3

DOCKET NO. 7309

APPLICATION OF GULF STATES UTILITIES COMPANY FOR SUS EXPERIMENTAL RIDER	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS

PUBLIC COUNSEL'S STATEMENT OF POSITION

NOW COMES the Office of Public Utility Counsel (OPC) and files this Statement of Position in lieu of testimony and briefs which would have otherwise been submitted but for the fact that OPC was effectively precluded from participation in Docket No. 7309 because of inadequate notice and preoccupation with GSU's rate case, Docket No. 7195, which is where the issue of rate schedule SUS should be raised. OPC would show:

1. GSU's vulnerability to loss of load is due, for the most part, to the Company's inefficient generation costs. Potential cogenerators are aware of the expected rates when River Bend and the Cajun buyback are recognized in GSU's rates. The need for the incentives cannot be determined until the Commission's actions with respect to River Bend and the buyback are known. If significant disallowances occur, then GSU's prospective rates will be within a close range of cogeneration costs. This would be likely to preclude the need for the SUS tariff. In light of the business risks of cogeneration for industrial customers, it is not necessary for the Commission's ratemaking treatment of River Bend and the buyback to result in rates equal to cogeneration costs, but rather the significant question is the magnitude of

the variable between GSU's costs and cogeneration costs.[1/] If GSU is engaging in the creation of tariffs as a political tactic aimed at decreasing opposition to the inclusion of River Bend-related costs in rates, the Commission should emphatically reject such an attempt.

2. OPC takes the position that the SUS tariff is discriminatory, and therefore in violation of Sec. 38, PURA. In support of this position, OPC would point out that:

a. the proposal has no cost-of-service basis. The rate is based (hypothetically) upon the customer's costs, not the utility's costs. Departure from the framework of the utility's cost of service represents a precedent with far-reaching implications. GSU would argue against any attempt to base its total revenue requirement upon the market price of electricity, and certainly would label such a recommendation as "changing the rules in the middle of the game." The same holds true for tariffs based upon customers' avoided costs.

b. Under GSU's proposal, LIS customers with identical load shapes will pay different rates for the same service if: (i) the customers have different ratios of steam to electricity requirements, or (ii) the absolute amount of steam/electrical load is different.

c. Use of WACOG and a hypothetical heat rate will result in SUS customers paying less than the equivalent cost of service paid by other LIS customers.

[1/] GSU alleges that the rates must be implemented immediately to avoid cogenerators from leaving the system now. OPC suspects that any cogenerator that is willing to make irreversible cogeneration decisions now, without any knowledge of the future level of GSU's rates, would probably make the investment regardless of the existence of the SUS tariff.

3. OPC believes that the SUS rate is anticompetitive and therefore in violation of Secs. 38 and 46, PURA. In support of this position, OPC would point out that:

a. If SUS customers produce identical products using different processes, those customers will face different rates based upon the steam/kWh ratios for those processes. GSU would likely argue that this economic advantage exists regardless of the existence of the tariff. But, GSU fails to mention that it is the Company's own high-cost supplier's position that has created the economic condition. GSU's response is to discriminate against certain of its industrial customers who are less capable of exploiting the situation. Moreover, this argument ignores the probability that the tariff will create incentives for industrial customers to invest in processes which maximize the SUS discount that is available, to the detriment of GSU's other customers.

b. The SUS rate is systematically biased against small LIS/LPS customers, even if the customers use the same technology and have the same load shape as larger SUS customers. This creates anticompetitive barriers to market entry by increasing the minimum size of efficient entry as a competitor.

c. To the extent that cogenerators are in competition with the utility for the production of electricity, the proposed rate constitutes predatory pricing and is, therefore, inconsistent with Sec. 46, PURA.

4. The SUS tariff does not produce just and equitable results among customers and classes of customers. There is no apparent protection against "tariff-hopping" in which industrial customers shift back to rates based upon GSU's overall embedded cost, if and when those rates become competitive with cogeneration. It is fundamentally unfair to permit selected steam customers

to avoid the cost of GSU's solid fuel production plants if those customers can demand to take service from those plants at some future time when escalating gas prices make the solid fuels economic. The Company's testimony states an objective of reducing risks to the industrial customers without transferring those risks to other customers. (DEH-5) However, if industrial customers can choose gas-only tariffs whenever they like, it is clear that GSU's other customers are immunizing steam customers against the risk associated with reliance upon gas fuel.

5. The new tariff presents difficult problems for the regulatory process in terms of verifying the steam/kWh need of customers. This is an open invitation for the Company to select rates that are based upon GSU's perception of competitive threat regardless of the avoided cost of the customer.

6. The proposed rate constitutes piecemeal ratemaking and therefore contravenes the rate change provision of Sec. 43, PURA. This argument is even more significant in light of the pending full rate case (Docket 7195) in which GSU could have presented this tariff. A full rate case under Sec. 43 is intended to review all of the Company's rates and tariffs as well as all of the revenue effects pertaining thereto. OPC does not understand why GSU could not have filed this tariff change as a part of its rate case—particularly when GSU has been working on these tariff proposals for several years. GSU's separate tariff filing is a blatant attempt to evade the requirements of §21.69, PUC Rules Prac. Proc. (pertaining to Docket 7195), which states:

> Any utility filing an application, petition, or statement of intent to change its rates in a major rate proceeding must file all of its evidence, including the prepared testimony of all of its witnesses and exhibits, on the same date that such application, petition, or statement of intent to change its rates is filed with the commission.

7. OPC's position is that the energy charge for the SUS rate violates PUC Rule 23.23(b)(2)(C), pertaining to the fuel factor; and it further violates Sec. 43(g)(1) and (g)(2), PURA, by permitting monthly fuel rate changes without a hearing. The Company suggests that a good cause exception should be applied to the fuel rule provision, however, the use of a "good cause" exception does not cure the conflict with Sec. 43(g) of the statute. OPC would note that an exception to average fuel pricing on the basis of "competitive" reasons has precedental implications for all electric utilities. CP&L previously attempted to obtain approval of a "steam user" tariff very similar to this one, only to withdraw it when faced with opposition from OPC and other parties on similar grounds as stated in this pleading. Certainly, other electric utilities affected by cogeneration and loss of load are watching this docket very carefully to determine the ease with which a good cause exception is available. In Docket 6765, the examiners overruled a request for a good cause exception requested by OPC and the Staff with regard to depreciation because of the potential for general application of the exception. The examiners stated:

> Thus, while the general counsel and OPC argue a good cause exception, they are in reality requesting a major rule change which would become the norm rather than the exception. When such a change in policy has far reaching consequences for other utilities, the examiners believe it is more appropriate to proceed by rulemaking rather than by adjudicatory hearing to formulate policy. The examiners note that the Texas Appellate Court in Deffenbach recognized the usefulness of a rulemaking proceeding when the agency is faced with an action which would affect more than a limited group of persons.
> E.R. at p. 263.

The Commission should apply its reasoning consistently and for that reason must reject a good cause exception here.

Finally, OPC's review does not indicate that GSU has previously plead for a good cause exception nor has GSU's witnesses presented evidence which explicitly addresses the question of a good cause exception. In particular, GSU has not presented evidence on the uniqueness of the circumstances it faces compared to other utilities, such as HL&P and CP&L.

Respectfully submitted,

Geoffrey M. Gay
Assistant Public Counsel
State Bar No. 07774300
Office of Public Utility Counsel
8140 Mopac
Westpark III, Suite 120
Austin, Texas 78759
512/345-9900

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was hand delivered/mailed this 24th day of April, 1987 to Mr. Don CLements, Gulf States Utilities Company, P.O. Box 2951, Beaumont, TX 77704 and Mr. Lambeth Townsend, General Counsel, Public Utility Commission of Texas.

Geoffrey M. Gay
Acting Public Counsel

DOCKET NO. 7309

APPLICATION OF GULF STATES UTILITIES COMPANY FOR APPROVAL OF EXPERIMENTAL RIDER TO SCHEDULES LPS AND LIS	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER

In public meeting at its offices in Austin, Texas, the Public Utility Commission of Texas finds that the above styled application was processed in accordance with applicable statutes by an administrative law judge who prepared and filed a report containing Findings of Fact and Conclusions of Law, as well as subsequent amendments thereto, which Examiner's Report, as amended, is ADOPTED and made a part hereof, with the following typographical corrections:

a. Page 4, paragraph 1, line 8 - the figure $13,900,000 is changed to $3,091,202.

b. Page 4, paragraph 1, line 9 - the figure $12,900,000 is changed to $13,900,000.

c. Page 6, paragraph 2, line 3 - the word "peak" is deleted.

d. Page 6, paragraph 3, line 2 - the word "peak" is deleted.

e. Page 29, Finding of Fact No. 24, line 1 - the word "peak" is deleted.

f. Page 32, Finding of Fact No. 49, line 4 - the word "steam" is added following the fourth word on that line.

The Commission further issues the following Order:

1. The application of Gulf States Utilities Company for approval of Schedule SUS Experimental Rider to Schedules LPS and LIS for

Industrial Service to Qualifying Thermal Energy Users, and of an associated amendment to agreements for electric service is GRANTED as filed.

2. Gulf States Utilities Company's tariff sheets comprising the Schedule SUS Experimental Rider, which are attached to the Examiner's Report as Examiner's Exhibit No. 1, are hereby APPROVED effective the date this Order is signed.

3. Gulf States Utilities Company SHALL NOT seek the recovery of any revenue losses associated with implementation of the Schedule SUS Experimental Rider in any present or future rate proceeding before this Commission.

4. This Order is deemed effective upon the date of signing.

5. All motions, applications and requests for specific findings of fact and conclusions of law, if not expressly granted herein, are DENIED for want of merit.

SIGNED AT AUSTIN, TEXAS on this the 13th day of May 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

SIGNED: _____
DENNIS L. THOMAS

SIGNED: _____
PEGGY ROSSON

SIGNED: _____
JO CAMPBELL

ATTEST: _____
PHILLIP A. HOLDER
SECRETARY OF THE COMMISSION

nsh

MEMORANDUM DECISIONS

ELECTRIC

City of Austin, Docket No. 7838. Examiner's Report adopted May 20, 1988. City of Austin's CCN and Pedernales Electric Cooperative, Inc.'s CCN are amended to reflect the exception to the service area boundary of PEC in Travis County.

Rio Grande Electric Cooperative, Inc., Docket No. 7938. Examiner's Report adopted May 20, 1988. Rio Grande Electric Cooperative, Inc.'s CCN and Central Power and Light Company's CCN are amended to reflect the exception to the service area boundary of CP&L in Maverick County.

West Texas Utilities Company, Docket No. 6746. Customer deposit tariff revision dismissed without prejudice, December 16, 1987.

Pedernales Electric Cooperative, Inc., Docket No. 7785. Complaint of Jim Benner dismissed without prejudice, December 2, 1987.

TELEPHONE

Southwestern Bell Telephone Company, Docket No. 7836. Proposed billing services tariff revision dismissed without prejudice, January 19, 1988.

Southwestern Bell Telephone Company, Docket No. 7731. Complaint seeking refund of overcharges pursuant to P.U.C. SUBST. R. 23.45 dismissed on March 10, 1988, based upon withdrawal by complainant.

Southwestern Bell Telephone Company, Docket No. 6934. Dismissed by Examiner's Order dated June 12, 1987, based on withdrawal of complaint by ValuLine of Brazosport, the complainant.