No. COA23-424

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; VILLAGE OF BALD HEAD ISLAND, Complainant; PUBLIC STAFF-NORTH CAROLINA UTILITIES, Intervenor; BALD HEAD ISLAND CLUB, Intervenor; BALD HEAD ASSOCIATION, Intervenor, Appellees, v. BALD HEAD ISLAND TRANSPORTATION, INC., Respondent; BALD HEAD ISLAND LIMITED, LLC, Respondent; and SHARPVUE CAPITAL, LLC, Intervenor, Appellants.	From The North Carolina Utilities Commission

****

APPELLANTS' BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES iv

ISSUES PRESENTED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 3

STATEMENT OF THE FACTS 3

1. Bald Head Island 3

2. The regulated ferry and tram operations 3

3. The unregulated parking and freight barge businesses 4

4. The Village of Bald Head Island 5

5. The proposed sale to SharpVue Capital, LLC 6

ARGUMENT 6

I. STANDARD OF REVIEW 6

II. THE COMMISSION UNLAWFULLY ATTEMPTED TO EXPAND ITS JURISDICTION BY ASSERTING AUTHORITY OVER NON-UTILITY BUSINESSES 7

A. Background of the Commission 7

B. The Commission cannot exercise jurisdiction over non-utilities 8

C. The Commission's jurisdiction does not extend to operations it deems "integral and necessary" 14

D. The Commission's jurisdiction was not properly invoked in any event 18

III. THE COMMISSION'S LEGAL ANALYSIS WAS ERRONEOUS 20

A. The Commission cannot unilaterally expand its jurisdiction to regulate a business type that is important to the vitality of the Village 20

B. The Commission misapplied the law relating to marketplace competition..... 22

C. The Commission erred in using conditions of a settlement contrary to its terms 26

IV. THE COMMISSION'S FINDINGS AND CONCLUSIONS WERE NOT SUPPORTED 30

A. The Commission relied on hypothetical facts rather than record evidence 30

B. The Commission mischaracterized drivers of vehicles on the freight barge as would-be ferry passengers 32

C. The Commission's findings do not support the conclusion that there is a need for regulation 34

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 38

CERTIFICATE OF SERVICE 39

APPENDIX:

N.C. Gen. Stat. § 62-2 .....App. 1-3

N.C. Gen. Stat. § 62-3 .....App. 4-10

N.C. Gen. Stat. § 62-69 .....App. 11

N.C. Gen. Stat. § 62-73 .....App. 12

N.C. Gen. Stat. § 62-94 .....App. 13-14

N.C. Gen. Stat. § 62-153 .....App. 15

N.C. Gen. Stat. § 62-160 .....App. 16

N.C. Gen. Stat. § 160A-311 .....App. 17-18

Excerpts from 10-12 October 2022
Hearing Transcript.....App. 19-37

ADDENDUM

TABLE OF CASES AND AUTHORITIES

Cases:

Auto Parks, Inc. v. Shmukler,
No. 310, 1990 WL 902437 (Pa. Com. Pl. June 8, 1990) . 13

Bald Head Island Utils., Inc. v. Vill. of Bald Head Island, 165 N.C. App. 701, 599 S.E.2d 98 (2004)..... 9

Broadcom Corp. v. Qualcomm Inc.,
501 F.3d 297 (3d Cir. 2007)..... 23, 26

Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,
459 F. Supp. 2d 874 (N.D. Cal. 2006)..... 36

Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC, 269 N.C. App. 1, 837 S.E.2d 144 (2019).. 7

Hyde v. Abbott Labs., Inc.,
123 N.C. App. 572, 473 S.E.2d 680 (1996) 23

In re GTE S. Inc., No. P-19, Sub 277, 1996 WL 303697
(N.C.U.C. May 2, 1996) 29

In re Rulemaking Proceeding to Consider Proposed Rule Establishing Procedures for Settlements and Stipulated Agreements, No. M-100, SUB 145, 2017 WL 840295 (N.C.U.C. Mar. 1, 2017)..... 28, 29

Larsen v. City & Cnty. of San Francisco,
313 P.2d 959 (Cal. Dist. Ct. App. 1957)..... 13

Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec., 983 F.3d 671 (4th Cir. 2020) 11

Parr v. Ladd,
36 N.W.2d 157 (Mich. 1949)..... 13

Sitelink Software, LLC. v. Red Nova Labs, Inc.,
No. 14 CVS 9922, 2016 WL 3918122 (N.C. Super. Ct. June 14, 2016)..... 23

State ex rel Utils. Comm'n v. Buck Island, Inc.,
162 N.C. App. 568, 592 S.E.2d 244 (2004) 21

State ex rel. Utils. Comm'n v. Carolina Coach Co.,
260 N.C. 43, 132 S.E.2d 249 (1963) 21

State ex rel. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998)..... 19

State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 500 S.E.2d 693 (1998) 28

State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 149 N.C. App. 656, 562 S.E.2d 60 (2002) 7

State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994) 13

State ex rel. Utils. Comm'n v. Edmisten,
299 N.C. 432, 263 S.E.2d 583 (1980) 7

State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.,
281 N.C. 318, 189 S.E.2d 705 (1972) 8, 14, 15

State ex rel. Utils. Comm'n v. Mackie,
79 N.C. App. 19, 338 S.E.2d 888 (1986) 9, 10

State ex rel. Utils. Comm'n v. N.C. Sustainable Energy Ass'n, 254 N.C. App. 761, 803 S.E.2d 430 (2017)..... 10

State ex rel. Utils. Comm'n v. Nat'l Merchandising Corp., 288 N.C. 715, 220 S.E.2d 304 (1975)..... 8

State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983) 11, 13

State ex rel. Utils. Comm'n v. Rail Common Carriers,
42 N.C. App. 314, 256 S.E.2d 508 (1979) 7, 8

State ex rel. Utils. Comm'n v. Roanoke Voyages Corridor Comm'n, 76 N.C. App. 324, 332 S.E.2d 753 (1985)..... 8

State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.,
307 N.C. 541, 299 S.E.2d 763 (1983) 15, 16

State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.,
326 N.C. 522, 391 S.E.2d 487 (1990) 15, 16

State ex rel. Utils. Comm'n v. Simpson,
295 N.C. 519, 246 S.E.2d 753 (1978) 9

State ex rel. Utils. Comm'n v. Thornburg,
84 N.C. App. 482, 353 S.E.2d 413 (1987) 12

Wetherington v. N.C. Dep't of Pub. Safety,
270 N.C. App. 161, 840 S.E.2d 812 (2020) 32

Statutes:

N.C. Gen. Stat. § 7A-29 3

N.C. Gen. Stat. § 7A-250 3

N.C. Gen. Stat. § 62-2 ..... 7, 12, 14

N.C. Gen. Stat. § 62-3 .....*passim*

N.C. Gen. Stat. § 62-69 29

N.C. Gen. Stat. § 62-73 ..... 19, 20

N.C. Gen. Stat. § 62-90 3

N.C. Gen. Stat. § 62-94 ..... 6, 26, 30

N.C. Gen. Stat. § 62-153 15

N.C. Gen. Stat. § 62-160 15

N.C. Gen. Stat. § 160A-311 12

Other Authorities

Daniel P. Moynihan, *More Than Social Security Was At Stake*, Wash. Post at A17 (Jan. 18, 1983) 30

No. COA23-424

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; VILLAGE OF BALD HEAD ISLAND, Complainant; PUBLIC STAFF-NORTH CAROLINA UTILITIES, Intervenor; BALD HEAD ISLAND CLUB, Intervenor; BALD HEAD ASSOCIATION, Intervenor, Appellees, v. BALD HEAD ISLAND TRANSPORTATION, INC., Respondent; BALD HEAD ISLAND LIMITED, LLC, Respondent; and SHARPVUE CAPITAL, LLC, Intervenor, Appellants.	From The North Carolina Utilities Commission

****

APPELLANTS' BRIEF

****

In disregard of the plain meaning of the relevant statutes, the North Carolina Utilities Commission asserted an unprecedented expansion of the agency's jurisdiction in declaring that it can regulate stand-alone business activities that are not, and have never been, under the control of a regulated

entity and that fall outside the statutory definition of public utilities. That decision should be reversed.

ISSUES PRESENTED

1. Did the Utilities Commission err in asserting jurisdiction over non-utilities in excess of its statutory authority?
2. Were the conclusions of the Utilities Commission based on irrelevant considerations and speculation, unsupported by substantial evidence, and arbitrary and capricious?

STATEMENT OF THE CASE

On 16 February 2022, the Village of Bald Head Island filed a "Complaint" with the North Carolina Utilities Commission requesting a determination on whether parking and freight barge businesses run by non-utility Bald Head Island Limited, LLC are subject to the Commission's regulatory authority. (R pp 3-25).

On 16 August 2022, the Commission denied Respondents' motion to dismiss the Complaint. (R pp 217-29).

After evidence was submitted pursuant to Commission rules, the matter came on for hearing before the Commission in October 2022.

On 30 December 2022, the Commission entered its "Order Ruling on Complaint and Request for Determination of Public Utility Status," in which a Commission majority held that the parking and freight barge businesses are

subject to the Commission's regulatory authority. (R pp 621-51). One commissioner concurred in part and dissented in part and would have held that the freight barge business is not a public utility subject to the Commission's full authority. (R pp 652-54). Two commissioners recused themselves from this proceeding. (R p 651).

Respondents timely appealed from the Commission's order. (R pp 655-73). The settled record on appeal was filed on 9 May 2023.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The decision of the Utilities Commission constitutes a final judgment appealable to this Court pursuant to N.C. Gen. Stat. §§ 7A-29(a), 7A-250(b), and 62-90.

STATEMENT OF THE FACTS

1. Bald Head Island

Bald Head Island ("BHI") is the southernmost of North Carolina's barrier islands. (R p 625). The public can only access the Island by boat. (R p 626). Personal-use automobiles are generally not allowed on the Island, and the governing Village requires any internal combustion engine vehicle to secure a special permit to operate on the Island's roadways. (R p 626).

2. The regulated ferry and tram operations

A passenger ferry runs between terminals in Southport, North Carolina and BHI, and is owned and operated by Bald Head Island Transportation, Inc.

("BHI Transportation"). A ticket for ferry passage includes tram service on the Island to take passengers to and from their destinations. There is no dispute that the ferry and tram operations are a public utility subject to the jurisdiction of the Commission. (*See* R p 625). The ferry and tram received a common carrier certificate from the Commission to operate as a utility in 1995 and have been regulated by the Commission since then. (R p 632). Prices for ferry tickets were most recently set in a 2010 rate case that was resolved through a stipulated settlement agreed to by the Village and approved by both the Commission and the Public Staff. (R p 632; Doc.Ex.(I) 1086-1109).

3. The unregulated parking and freight barge businesses

Adjacent to the ferry terminal in Southport, North Carolina is a parking lot consisting of 1,955 paved and 347 unpaved spaces. (R p 625; T(4) p 64). The parking lot is owned and operated by Bald Head Island Limited, LLC ("BHI Limited"). Passengers who use BHI Transportation's ferry can park in BHI Limited's parking lot, as can members of the public who are not boarding the ferry but instead going to the marina, restaurant, offices, or the Island shipping/receiving center located around the terminal. (R pp 56, 626). There is a charge to park in the lot for more than two hours, and an annual parking pass is available to (and often purchased by) Island residents. (R p 56; Doc.Ex.(I) 1157).

BHI Limited also owns and operates a tugboat and "roll-on/roll-off" freight barge that are used to transport vehicles carrying materials and supplies to and from the Island. (R p 625). The barge and tugboat are inspected and regulated by the United States Coast Guard, and the record contains their current Certificates of Inspection. (T(4) p 145; Doc.Ex.(I) 525-28). Cargo vehicles using the freight barge pay a charge based upon the size of the space on the barge deck that the vehicle occupies. (T(4) pp 146-47). The barge and tugboat are domiciled in Southport. (T(4) pp 143-44).

The parking and freight barge operations have been in place at various Southport locations for almost thirty years. (T(5) p 42). Neither was referenced in the Utilities Commission certificate issued to BHI Transportation to operate the ferry and tram in 1995. Their assets were not included in the utility rate base of the regulated ferry operated by BHI Transportation in the 2010 rate case. They have never been regulated by the Utilities Commission at all.

4. The Village of Bald Head Island

The Village (the Complainant below) is a municipality chartered and operating under Chapter 160A of the General Statutes with municipal limits coterminous with Bald Head Island. (R p 624). Neither BHI Limited's parking lot nor its mainland barge dock and maintenance facility are located within the Village's jurisdiction.

5. The proposed sale to SharpVue Capital, LLC

BHI Limited, whose ultimate owner is the Estate of George Mitchell, intends to sell the parking lot and freight barge businesses as part of the liquidation of that Estate. (Doc.Ex.(I) 720). BHI Limited has entered into an Asset Purchase Agreement to sell these assets to an affiliate of SharpVue Capital, LLC. (Doc.Ex.(I) 720). The Village would rather purchase the assets itself. (R pp 16, 44). The Village moved to join SharpVue as a necessary party, which motion was granted by the Commission. (R pp 136-43, 211-16).

ARGUMENT

I. STANDARD OF REVIEW.

The General Assembly has prescribed direct appellate review of orders of the Utilities Commission to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 62-94(b) [App. 13]. A decision of the Commission should be reversed or modified if the order is:

> (1) In violation of constitutional provisions, or
> (2) In excess of statutory authority or jurisdiction of the Commission, or
> (3) Made upon unlawful proceedings, or
> (4) Affected by other errors of law, or
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
> (6) Arbitrary or capricious.

Id. Under this statute, "the essential test to be applied is whether the Commission's order is affected by errors of law or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted." *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 269 N.C. App. 1, 7, 837 S.E.2d 144, 148 (2019); *see also State ex rel. Utils. Comm'n v. Rail Common Carriers*, 42 N.C. App. 314, 318, 256 S.E.2d 508, 511 (1979) ("All relevant questions of law may be reviewed by this Court on appeal.").

II. THE COMMISSION UNLAWFULLY ATTEMPTED TO EXPAND ITS JURISDICTION BY ASSERTING AUTHORITY OVER NON-UTILITY BUSINESSES.

A. Background of the Commission.

The Utilities Commission is an administrative agency that is "vested with authority to 'regulate public utilities generally, their rates, services and operations.'" *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 657, 562 S.E.2d 60, 62 (2002) (quoting N.C. Gen. Stat. § 62-2(b) [App. 2]). "Chapter 62 of the General Statutes confers upon the Commission both the power and the duty to compel a public utility to render adequate service to its public customers in return for reasonable rates." *State ex rel. Utils. Comm'n v. Edmisten*, 299 N.C. 432, 437, 263 S.E.2d 583, 587 (1980). In essence, "the Legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable."

State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se., 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972).

B. The Commission cannot exercise jurisdiction over non-utilities.

"The Utilities Commission is a creature of the Legislature. It may exercise only such authority as is vested in it by statute. And such authority must be exercised by it in accord with the standards prescribed by law." *State ex rel. Utils. Comm'n v. Roanoke Voyages Corridor Comm'n*, 76 N.C. App. 324, 326, 332 S.E.2d 753, 754 (1985); *see also Rail Common Carriers*, 42 N.C. App. at 317, 256 S.E.2d at 510-11 ("The Commission is vested with powers to exercise some functions judicial in nature and some functions legislative in nature. It does not possess the full powers of either branch, however, but only that portion of each conferred upon it in G.S. Chapter 62."). Because of those limitations, a decision of the Commission is "null and void" if it "is in excess of its statutory authority or jurisdiction or is arbitrary or capricious." *State ex rel. Utils. Comm'n v. Nat'l Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E.2d 304, 308 (1975).

Given the scope of the Commission's duties, the threshold jurisdictional question is whether the business at issue is a public utility. If the business is not a public utility, it is "not subject to regulation by the Utilities Commission." *Id.* at 721, 220 S.E.2d at 307.

In the order on appeal, the Commission ignored the well-established boundaries on its authority when it stated that there is "no universal or formulaic test for what constitutes a public utility or public utility service." (R p 634). To the contrary, the General Assembly has provided a comprehensive definition. The legislature has defined a "public utility" as an entity that furnishes electricity or water, transports goods by bus or pipeline, or transmits messages by telephone. N.C. Gen. Stat. § 62-3(23)(a) [App. 7]. In common usage, public utilities include facilities like power lines, water pipes, and sewage treatment plants. *See Bald Head Island Utils., Inc. v. Vill. of Bald Head Island*, 165 N.C. App. 701, 599 S.E.2d 98 (2004); *State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *modified and aff'd by* 318 N.C. 686, 351 S.E.2d 289 (1987) (per curiam).

The statutory definition of "public utility" does not include businesses that provide parking lots or operate freight barges.[1] In all of Chapter 62, the

---

[1] The Commission relied on *State ex rel. Utilities Commission v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978), to contend that what constitutes a public utility can vary by circumstance. (R p 634). Indeed, the Commission found "persuasive a review of the *Simpson* factors" in supporting its conclusion that BHI Limited's parking lot is ancillary to BHI Transportation's ferry. (R p 638). But the *Simpson* factors have nothing to do with what entity is a "public utility" or what "service" is provided by a utility. That opinion addressed whether Simpson was offering services to the "public." In conducting *that* analysis, the Supreme Court cautioned that there is no "abstract, formulistic definition of 'public" to be . . . universally applied." *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756.

Public Utilities Act, there is not a single mention of parking lots or freight barges. As a commissioner aptly noted in dissent, "Clearly the service of parking does not fall within one of the six categories of public utility service under N.C.G.S. § 62-3(23)a." (R p 652). She further observed that "the majority found its jurisdiction over [BHI Limited's] barge operation outside of the definition of a public utility." (R p 652); *see also Mackie*, 79 N.C. App. at 32, 338 S.E.2d at 897 (citations omitted) ("The status of an entity as a public utility, entitled to the rights conferred by the statutes and subject to the jurisdiction of the Commission . . . is determined . . . according to whether it is, in fact, operating a business defined by the Legislature as a public utility.").

That should have been the end of the matter. Because businesses that operate parking lots and freight barges are not public utilities, the Utilities Commission cannot regulate them.

Notably, in interpreting the General Assembly's definition, this Court is in no way bound by the Commission's analysis; issues of statutory interpretation are questions of law reviewed de novo. *State ex rel. Utils. Comm'n v. N.C. Sustainable Energy Ass'n*, 254 N.C. App. 761, 763, 803 S.E.2d 430, 432 (2017). "Courts will not defer to an agency's interpretation when that interpretation is in direct conflict with the clear intent and purpose of the legislature's act." *Id.* After all, "[i]t is the Court and not the agency that is the final interpreter of legislation." *State ex rel. Utils. Comm'n v. Pub. Staff-N.C.*

Utils. Comm'n, 309 N.C. 195, 212, 306 S.E.2d 435, 445 (1983). Moreover, it is the judiciary's role to interpret the statutes that delineate regulatory jurisdiction:

> Our job is to police the boundary between permissible agency actions that help fulfill the goals of the political branches and agency overreach that threatens to unjustly burden those they regulate and blur the lines upholding the separation of powers.

Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec., 983 F.3d 671, 689 (4th Cir. 2020).

If the General Assembly *had* intended to include businesses that operate parking lots and freight barges within the scope of public utilities, surely there would be at least some language to that effect.[2] Courts will not presume that the General Assembly expanded the scope of the Commission's reach through

---

[2] The Commission erroneously stated that the General Assembly has "implicitly recognized" the Commission's jurisdiction over parking lots because of the definition of a "Ferry transportation system" in Chapter 160A. (R p 638). This assertion is ironic, since the Ferry Transportation Act expressly *excludes* such a system from the scope of public utilities: "The term 'public utility' shall not include a Ferry Transportation Authority created pursuant to Article 29 of Chapter 160A of the General Statutes." N.C. Gen. Stat. § 62-3(23)(m) [App. 9]. The Commission jumped a veritable regulatory canyon in concluding that a statute which *extinguishes* its authority over ferries upon creation of a ferry authority somehow *extends* its regulatory ambit to include what the General Assembly explicitly assigned to a different government entity. Indeed, the Commission's rationale makes no sense. If a "ferry" includes parking, then there would have been no need to separately identify parking in Article 29 of Chapter 160A.

"vague language"; "[t]his is more than this Court can or should safely assume." *State ex rel. Utils. Comm'n v. Thornburg*, 84 N.C. App. 482, 489, 353 S.E.2d 413, 417 (1987). BHI Limited's separately owned, operated, and audited (and heretofore unregulated) parking and freight barge operations do not furnish electricity or water, transport goods by bus or pipeline, or transmit messages by telephone. (*See* T(5) p 97 [App. 36]). They are thus outside the regulatory authority of the Commission granted by the General Assembly.

Of course, the legislative branch knows how to address parking when it wants to. For example, the definition of "public enterprise" for purposes of municipal authority includes water, power, electric, and transportation systems as well as "[o]ff-street parking facilities and systems." N.C. Gen. Stat. § 160A-311 [App. 17]. No such language was included in the Public Utilities Act.

Thus, to reach its conclusion, the Commission below relied on a different definition in the Public Utilities Act—the definition of "Service." N.C. Gen. Stat. § 62-3(27) [App. 10]. This reliance was erroneous. The Commission does not have jurisdiction over a "Service" generally; it has jurisdiction over a *public utility's* service. *See id.* § 62-2(b) (vesting authority "to regulate public utilities generally, their rates, services and operations, and their expansion") [App. 2]. If that were not clear enough, the statutory definition of Service is tied to a public utility—it means "any service *furnished by a public utility*." *Id.* § 62-

3(27) (emphasis added) [App. 10]. Nothing in Chapter 62 gives the Commission authority to regulate services offered by a *non*-public utility.

Further, the undersigned have been unable to uncover a single instance in which a court has upheld the Commission exercising jurisdiction over any type of parking or freight barge businesses. The few cases from other jurisdictions that have addressed the issue have held that such operations are *not* public utilities. *See Larsen v. City & Cnty. of San Francisco*, 313 P.2d 959, 966 (Cal. Dist. Ct. App. 1957) (holding that an off-street parking facility was "not a public utility," noting that no charter or statute defined off-street parking as a public utility); *Parr v. Ladd*, 36 N.W.2d 157, 162 (Mich. 1949) ("An automobile parking system is not a public utility . . . ."); *Auto Parks, Inc. v. Shmukler*, No. 310, 1990 WL 902437 (Pa. Com. Pl. June 8, 1990) (holding that fees charged at commuter rail parking lots did not fall within Pennsylvania's Public Utility Code) [Add. 1-4], *aff'd sub nom. Shmukler v. Auto Parks, Inc.*, 613 A.2d 190 (Pa. Commw. Ct. 1992).

Failure to follow the clear, unambiguous wording of a statute is an error of law. *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 335 N.C. 493, 507-08, 439 S.E.2d 127, 135 (1994). If "the Commission's practice is not authorized by statute (*i.e.,* is in excess of statutory authority), it is the duty of [the appellate courts] to declare it so." *Pub. Staff-N.C. Utils. Comm'n*, 309 N.C. at 207, 306 S.E.2d at 442. Because the Commission in this case erred in its

jurisdictional overreach, this Court should "declare it so" and reverse the Commission's order.

C. The Commission's jurisdiction does not extend to operations it deems "integral and necessary."

The Commission cannot extend its jurisdiction by implication without statutory authorization. The General Assembly specified in the Public Utilities Act: "Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission." N.C. Gen. Stat. § 62-2(b) [App. 2]. Likewise, even if a portion of a company's operations constitutes a public utility, that does not make everything the company does subject to regulation by the Commission. The legislature has specified that "[i]f any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions" of the public utility regulations. *Id.* § 62-3(23)(d2) [App. 8]. Thus, regulated, utility operations and unregulated, non-utility operations by affiliated companies have been commonly differentiated by the Commission, and no regulatory jurisdiction has been extended to non-utility functions. *See, e.g.*, *Gen. Tel. Co.*, 281 N.C. at 344, 189 S.E.2d at 722 ("Neither the Commission nor the courts may add to the types of business defined by the Legislature as public utilities."). Indeed, that is the very premise underlying the statutory

provisions that govern contracts with, and financing by, unregulated affiliated companies. *See* N.C. Gen. Stat. §§ 62-153, 62-160 [App. 15-16].

Despite these clear statutory pronouncements, the order below asserted an unprecedented expansion of the Commission's jurisdiction on the grounds that the Commission can do what the Supreme Court says it cannot: add parking and freight barge businesses "to the types of businesses defined by the Legislature as public utilities." *See Gen. Tel. Co.*, 281 N.C. at 344, 189 S.E.2d at 722. Declaring BHI Limited's businesses as somehow "integral and necessary" to the regulated ferry operations of BHI Transportation does not cure this agency overreach. (*See* R p 635).

Nor do the cases cited by the Commission support its theory. According to the Commission, the Supreme Court in 1983 "upheld the Commission's authority over" a phone company's Yellow Pages and therefore approved of the expansive jurisdiction that the Commission now attempts to exercise. (R p 637 (citing *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983)) ("*Southern Bell I"*)). The Commission misapplied the Supreme Court's "Yellow Pages" precedent.

In *Southern Bell I*, and subsequently *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 326 N.C. 522, 391 S.E.2d 487 (1990) ("*Southern Bell II"),* Southern Bell was indisputably a long-time regulated utility that, as a requirement of its tariff, was mandated to publish a telephone directory.

Southern Bell later contracted with an affiliated entity to publish the directory, and that affiliated entity sold advertisements for inclusion in the "Yellow Pages." *Southern Bell II*, 326 N.C. at 523, 391 S.E.2d at 488.

In *Southern Bell I*, the Court held that Southern Bell's "expenses, revenues and investments, arising from directory advertising," could be included in the Commission's ratemaking process. 307 N.C. at 543, 299 S.E.2d at 764. The Court "point[ed] out that the yellow pages have never been and are not now regulated by the Utilities Commission." *Id.* at 544, 299 S.E.2d at 765. However, because Southern Bell was a regulated entity, the expenses and revenues from its activities could be "included in determining the rate structure of the utility" under those particular facts. *Id.*

In *Southern Bell II*, the Court held that the Commission had jurisdiction over complaints regarding the directory when "the regulated utility has delegated to another company the public utility function of publishing its directory which also includes paid advertising." 326 N.C. at 529, 391 S.E.2d at 491. The Court accepted the Public Staff's position that "general regulatory jurisdiction over the entire yellow pages operation" was not required to ensure a consumer remedy for errors in a regulated activity. *Id.* at 531, 391 S.E.2d at 492.

Thus, *Southern Bell I* and *II* involved a regulated utility spinning off a regulated activity to an affiliate and then seeking to curtail the Commission's

jurisdiction over it. There are two key takeaways from these holdings. First, there are instances in which the Commission can consider in ratemaking the financial returns of a public utility's non-regulated activities. Second, the Commission has tools at its disposal to protect customers when dealing with a regulated entity. By their express terms, however, neither decision stands for the proposition that the Commission can exert general regulatory jurisdiction over the activities of non-regulated entities simply because there is an ownership affiliation with a regulated utility.

Rather, the Commission's jurisdictional reach has always been limited to regulated activities. Publishing a directory was a regulated activity of Southern Bell, and the Court's analysis revolved around whether it made any difference that an affiliate performed the function or that it generated revenues from advertisements included within the mandated directory. BHI Limited's parking and freight barge operations, by contrast, do not share the hallmarks of the telephone company's directory and are not regulated activities. BHI Limited's parking and freight barge assets do not appear in BHI Transportation's ferry certificate from 1995; they were not included in the ferry's rate base in the 2010 rate case; and they have never appeared in the detailed quarterly reports of BHI Transportation's utility activities filed with the Commission. (T(5) pp 37, 41-42 [App. 30, 33-34]). BHI Limited has

provided parking and freight barge operations for more than thirty years and has never been subject to the Commission's jurisdiction.

The Commission itself even recognized that it was going beyond existing jurisdictional limits by stating that the *Southern Bell* precedent was "persuasive, though not directly on point." (R p 637). Of course, the precedent is not directly on point because these cases—which embody North Carolina law on the topic—do not authorize the expansion of jurisdiction sought here. The order on appeal entered an uncharted frontier far beyond the jurisdictional outposts put in place in the *Southern Bell* cases. The Commission's conclusion that it can fully regulate businesses not recognized by the General Assembly as a "public utility" is contrary to North Carolina law, and the order should be reversed.

D. The Commission's jurisdiction was not properly invoked in any event.

Even if the Commission were deemed to have the legislative power to declare that parking and freight barge businesses are public utilities, that still did not give the Commission jurisdiction to hear this dispute. The Commission is not authorized to adjudicate anything and everything related to public utilities. Instead, the Commission's statutory authority to hear complaints against public utilities is found in N.C. Gen. Stat. § 62-73 (emphasis added) [App. 12]:

> Complaints may be made. . . by petition or complaint in writing *setting forth any act or thing done or omitted to be done by any public utility*, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable.

For example, under this statute "an interested party may file a complaint with the Commission alleging that a utility rate is unjust or unreasonable." *State ex rel. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 700 (1998). This was the statute relied on by the Village here. (R p 23).

However, there were no allegations that the current ferry service, rules, regulations, or rate structure—approved in 2010 (by stipulated settlement, with Village consent)—are unjust or unreasonable. There were no allegations "setting forth any act or thing done or omitted to be done" by the regulated ferry. BHI Transportation has consistently operated under the conditions of the 2010 rate case, in which the Commission set ferry rates with full knowledge and understanding of BHI Limited and its independent parking and freight barge businesses. Existing regulation of BHI Transportation's ferry is not enough for the Village to invoke jurisdiction under N.C. Gen. Stat. § 62-73 regarding BHI Limited's parking and freight barge businesses.

The illusory nature of the Commission's jurisdiction is further highlighted by its conclusion that "complaint jurisdiction" must exist because "the act or omission" alleged by the Village was BHI Limited's "failure to submit these Assets to regulation." (R p 225). Thus, the Commission errantly concluded it had "complaint jurisdiction" over the parking and freight barge businesses because—notwithstanding the Commission's knowing and long-standing non-regulation of those activities—BHI Limited had some separate obligation to "submit them for regulation." Nothing in section 62-73 allows for such a conclusion.

III. THE COMMISSION'S LEGAL ANALYSIS WAS ERRONEOUS.

A. The Commission cannot unilaterally expand its jurisdiction to regulate a business type that is important to the vitality of the Village.

The Commission created for itself an unprecedented, and virtually unbounded, scope of authority in deciding that it can extend its jurisdiction to include BHI Limited's parking lot and freight barge businesses because the Commission deemed those services to be important to the Island. (R p 629). In support of this expanded jurisdiction, the Commission relied on the proposition that "[a]ny service . . . which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary." (R p 644 (quoting *State ex rel. Utils. Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963))). However, *Carolina Coach*

(which involved whether the public convenience and necessity would be served by a common carrier's augmentation of its services) had nothing to do with the Commission's subjective view of whether the importance of a service to the public justifies the Commission's regulatory authority over it. The North Carolina Utilities Commission Public Staff (representing the using and consuming public) pointed out the flaw in the Commission's logic in its comments, noting that "[w]hile barge service is undoubtedly critical for those living and traveling to and from the island, it is not related to the provision of regulated passenger ferry service." (R p 269; *see also* R p 653 ("[T]he barge operation is a service for the benefit of the commercial success of Bald Head Island, such as, for example, transporting commercial goods like food and construction materials.")).

As the Commission acknowledged, it has authority "to supervise utilities and such ancillary services that are necessary to the *public utility function* in order 'to protect the public from poor service and exorbitant charges." (R p 639 (emphasis added) (citing *State ex rel Utils. Comm'n v. Buck Island, Inc.*, 162 N.C. App. 568, 584, 592 S.E.2d 244, 254 (2004)). However, the Commission's jurisdictional analysis sought to cover *all* services that may be necessary *to Bald Head Island*, whether or not they are provided by a public utility. (*See* R p 643 ("The Barge Operations . . . support essential services, tourism,

development . . . on the Island.")). That was legally erroneous. Importance to the Island is not a basis for the Commission's jurisdiction.

The Commission's logic appears to be this: because (i) a utility (*i.e.*, the passenger ferry) takes visitors to (ii) an island that provides modern conveniences, and (iii) none of the materials or supplies required to make this resort island attractive could get there without a boat, then the freight barge must, therefore, be a "public utility" (regardless of its absence in the six-page statutory definition). In its order, the Commission "credits" and finds "true" and "axiomatic" the observations of BHI property owners that few people would take the ferry "if the barge did not transport goods needed to sustain the BHI community." (R pp 635, 644). But the Commission provided no explanation for why the attractiveness of the Island destination transforms a parking lot or freight barge business (functions that are not rate-regulated by any other state in the country) into regulated utilities.

B. The Commission misapplied the law relating to marketplace competition.

As another justification for the expansion of its jurisdiction, the Commission jumped to the conclusion that regulation is required under a monopoly theory—not because of any indicia of monopoly abuse but instead because of the benign fact that BHI Limited does not face a current competitor.

The Commission either misconstrued or ignored the law governing marketplace competition. Under antitrust principles, a monopoly meriting regulation requires "(1) the possession of monopoly power in the relevant market" and also "(2) the willful acquisition or maintenance of the power *as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident*." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306-07 (3d Cir. 2007) (emphasis added); *see also Sitelink Software, LLC. v. Red Nova Labs, Inc.*, No. 14 CVS 9922, 2016 WL 3918122, at *10 (N.C. Super. Ct. June 14, 2016) (same) [Add. 54].[3] That is, "the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor." *Broadcom*, 501 F.3d at 308. The anticompetitive conduct may come in different forms, but whatever the form it must be "conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Id.* The distinction between a natural monopoly (in which competition *cannot* occur) and a current

[3] Antitrust principles and utility regulation share a similar policy goal: protecting the consuming public from anticompetitive conduct. Therefore, antitrust law can be instructive in analyzing whether utility regulation is necessary in a particular instance. Given the similarities between the Sherman Act and Chapter 75 of our General Statutes, North Carolina courts recognize that "[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in considering our own antitrust statutes." *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996).

operational posture (in which competition has not *yet* occurred) carries legal significance. The former may require regulatory intervention; the latter does not.

Here, BHI Limited's parking business could only fall in the latter category. The Village's economic expert testified that he believed BHI Limited's parking operation to be a *de facto* monopoly in its current operational posture. (T(3) pp 72-73 [App. 21-22]). Yet, the economist also admitted that he did not believe that BHI Limited had obtained or maintained its market position through any improper conduct. The economist had no first-hand knowledge of any exclusionary or predatory conduct. (T(3) p 73 [App. 22]). Nor did he have any evidence that BHI Limited sought or secured monopoly rents. (T(3) pp 70, 115 [App. 20, 24]).

The record on appeal shows why: BHI Limited has never engaged in anticompetitive conduct. For example, the president of the Bald Head Association (the landowners' association that monitors Island concerns on behalf of its 1,900+ members and acts for their collective benefit) testified bluntly about the favorable pricing that Island users are offered when parking at BHI Limited's parking lot:

> I think that, you know, it's $3 a day for the year. It's a good deal. We have a good deal there. There's no question in my mind. It's reasonable.

(T(3) p 171 [App. 25]). Across the categories of users of the parking lot, uniformly low prices have always been offered. The current rates are as follows:

DEEP POINT PARKING RATES				
Class	Premium	General *(a)*	Contractor	Employee
Annual Pass	$1,350.00	$1,200.00	$700.00	$650.00
General Daily	n/a	$12.00	n/a	n/a
Contractor Daily	n/a	n/a	$10.00	n/a
QR Exit Pass Coupon	n/a	n/a	$6.00	$6.00
(a) First 2-hours free.	$3.70/day	$3.29/day	$1.92/day	$1.78/day

(Doc.Ex.(I) 1157). Under existing parking rates, contractors can purchase annual passes that enable parking at an average rate of $1.92 per day, and employees can purchase similar passes for $1.78 per day. Those who park for longer periods and use the premium lot can buy an annual pass for $3.70 per day. If users buy a pass for the general lot, which is the one most used by vacation visitors but further away from the terminal, they can park for $3.29 per day. As to the freight barge, no evidence was presented of any Village witness or citizen complaining about the prices for transporting vehicles.

The Village's economist also acknowledged that he had no opinion on the critical issue of whether the pro-consumer pricing behavior of BHI Limited had even left a window of market opportunity in which a competitor would find it attractive to compete; the economist had not even examined the issue. (T(3) pp 72, 77 [App. 21, 23]). *Only if* a competitor arose would it be proper, the economist testified, to examine BHI Limited's pricing behavior at some future

time when it *might be* appropriate to reduce or remove the regulation he urged the Commission to impose. (T(3) pp 72, 77 [App. 21, 23]). The Commission took the same, unsupported tact, asserting that "[w]hen and if" competition emerged, its "calculus might change" about its decision to regulate BHI Limited's parking and freight barge operations. (R p 639). This analysis was erroneous. "It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*." *Broadcom*, 501 F.3d at 308 (internal quotation omitted).

The Commission ignored the undisputed evidence of BHI Limited as a healthy, fair-playing market actor. (*See, e.g.*, R p 105 (the Village admitting that the operators have been "a good steward")). Instead, the Commission focused on a single piece of evidence on which to hang its regulatory hat—lack of current competition—to proclaim justification for regulation. The Commission's reliance on a lack of competition as equating with a need for regulation makes the order "[a]ffected by other errors of law." *See* N.C. Gen. Stat. § 62-94(b)(4) [App. 13].

C. The Commission erred in using conditions of a settlement contrary to its terms.

In the stipulated settlement in BHI Transportation's 2010 rate case (agreed to by the Village and approved by the Commission), the imputation of certain funds from BHI Limited's parking business was:

> (i) "limited to this case";
>
> (ii) agreed to "establish[] no binding precedent for future cases"; and
>
> (iii) said not to be "binding in future cases as a reason for or against imputation of parking revenues or *any other regulatory treatment of parking operations*."

(Doc.Ex.(I) 1090-91) (emphasis added). In addition, the Commission at that time made an explicit finding that it was "just and reasonable" *not* to construe the settlement "to allow, support, confer, or provide a basis for Commission regulation or jurisdiction over rates, service, or complaints regarding parking services." (Doc.Ex.(I) 1095).

But in the order below, the Commission "[n]evertheless" decided to use the settlement against Respondents in determining the "regulatory treatment of parking operations." (R p 643). Even though the Commission recited that the 2010 settlement terms were "not binding," (R p 644), the Commission bound Respondents to those terms anyway—concluding that the imputation "directly affected the rates" that BHI Transportation has charged for the ferry. The Commission even considered the settlement's imputation as one of the "various determinations made by the Commission in the 2010 Rate Case Order" that it deemed consistent with its new assertion of jurisdiction. (R p 643). By contravening the express terms of the stipulated settlement, the Commission erred as a matter of law.

Further, the imputation of parking lot revenue to the ferry's revenue target was simply used to produce sufficient revenue to support the $23 ferry ticket that Public Staff indicated it could support in the 2010 rate case. (T(5) p 71 [App. 35]). The imputation was not an element of rate design but rather an accounting exercise to identify revenue sufficient to support a compromise rate outcome. The Public Staff even stated as much in its comments here. (R p 265 ("The fact that parking revenues have been imputed in the calculation of ferry rates does not indicate that operation of the parking lot should be a regulated function.")). Thus, there was no legal justification for the Commission to "nevertheless" use the settlement for exactly the purpose it earlier eschewed. Indeed, the Commission was forbidden from doing so. In *State ex rel. Utilities Commission v. Carolina Utility Customers Ass'n,* the Supreme Court extolled the "great value" of resolving rate cases by stipulation, but cautioned that "while this is so, *the court will not extend the operation of the agreement beyond the limits set by the parties or by the law."* 348 N.C. 452, 464, 500 S.E.2d 693, 702 (1998) (emphasis added).

The Commission itself previously expressed a similar sentiment in a docket focused specifically on procedures and structures for stipulated settlements. *See In re Rulemaking Proceeding to Consider Proposed Rule Establishing Procedures for Settlements and Stipulated Agreements*, No. M-100, SUB 145, 2017 WL 840295 (N.C.U.C. Mar. 1, 2017) [Add. 34-46]. There,

the Commission agreed "that settlements should be encouraged, and that the Commission should do all it lawfully and reasonably can to facilitate the parties' efforts to reach a full and fair settlement." *Id.* at *9 [Add. 40]. That recognition dovetails with the Commission's statutory obligation to "encourage the parties and their counsel to make and enter stipulations of record." N.C. Gen. Stat. § 62-69(a) [App. 11].

It is unclear why the Commission majority took a different approach below. Endorsing the Commission's cherry-picking of the 2010 settlement would undercut "one of the chief benefits of a settlement [ ] that it saves parties and ratepayers the expense of fully litigating a case." *In re Rulemaking Proceeding*, 2017 WL 840295, at *12 [Add. 41]; *see also In re GTE S. Inc.*, No. P-19, Sub 277, 1996 WL 303697 (N.C.U.C. May 2, 1996) ("Negotiation between the parties to actions before the Commission, in an effort to resolve their differences, advances the public policy of North Carolina as expressed by our Supreme Court.") [Add. 25].

The Commission's conclusion was not only legally erroneous but also problematic as a practical matter. The effect of this reversal of long-standing Commission practice interjects uncertainty into the regulatory process, will dissuade parties from settling rate cases in the future, and impacts the ability of litigants to rely upon stipulations and agreements approved by Commission order. Parties rely on established processes—including stipulated

settlements—to bring complex rate cases to conclusion. The Commission should not be permitted to backtrack on commitments it approves in rate case settlements.

IV. THE COMMISSION'S FINDINGS AND CONCLUSIONS WERE NOT SUPPORTED.

In addition to its legal errors discussed above, the Commission's order violates the maxim that "[e]veryone is entitled to his own opinion, but not his own facts."[4] This case poses a serious, and hopefully rare, question of what happens when an agency is not content to rely upon the evidence as presented at a hearing but instead speculates about how different facts might support its chosen result. Respondents' substantial rights have been prejudiced because the Commission's order was "[u]nsupported by competent, material and substantial evidence in view of the entire record as submitted" and was "[a]rbitrary or capricious." *See* N.C. Gen. Stat. § 62-94(b) [App. 13].

A. The Commission relied on hypothetical facts rather than record evidence.

Instead of basing its conclusion on evidence presented at the hearing, the Commission's analysis regarding the freight barge operations was based on a hypothetical scenario. "Were it not for the automobile-free nature of BHI," the

---

[4] Daniel P. Moynihan, *More Than Social Security Was At Stake*, Wash. Post at A17 (Jan. 18, 1983).

Commission mused, BHI Limited would not need to have a separate freight barge and could instead operate a fleet of ferries that transport both vehicles and passengers. (R p 646). In other words, the Commission envisioned some type of alternative reality wherein the Village has different rules for regulating vehicle traffic on the Island, in which case passenger and freight traffic could be accommodated by the types of passenger-vehicle ferries used in some other coastal locations that fall under the Commission's jurisdiction. In that hypothetical scenario, BHI Limited "would have no need for a different type of boat" (*i.e.*, the freight barge), and therefore the Commission concluded that Respondents' "choice to purchase, maintain, and operate two types of boats to provide this single service" should be disregarded. (R p 646).

But in reality, the Island does not operate as the Commission imagines. Only commercial service vehicles that have a daily or annual permit can use Village-maintained roads. (T(4) p 147 [App. 27]). Thus, the type of vehicle ferry that might be seen at other islands (on which visitors can drive their own cars) is not possible at BHI. The Village's own rules preclude the Commission's imagined scenario such that the freight barge is necessary to transport "food, groceries, dry goods, and building and landscape materials." (T(4) p 148 [App. 28]).

It was not the Commission's prerogative to rely on a hypothetical and speculate that BHI Transportation's ferry and BHI Limited's freight barge—

which are regulated separately by the Coast Guard and operated separately by different entities—are not distinct.[5] An imagined set of facts, about conditions on the Island which do not exist, does not constitute "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *See Wetherington v. N.C. Dep't of Pub. Safety*, 270 N.C. App. 161, 171, 840 S.E.2d 812, 821 (2020).

B. The Commission mischaracterized drivers of vehicles on the freight barge as would-be ferry passengers.

The record is unambiguous that the freight barge does not accept passengers, but (pursuant to the federal regulations that govern its operation) a driver is allowed to stay in the cab of a vehicle being transported. The barge is inspected and regulated by the Coast Guard as a "freight barge" and, as such, is permitted by federal law to have up to 12 non-crew persons aboard. (Doc.Ex.(I) 511). Significantly, unlike regulated passenger ferries, there is no charge for the drivers of such vehicles on the freight barge. Charges for the

---

[5] The Commission's new blurring of the operational and corporate borders of the regulated ferry and the separately owned parking and barge businesses even contravenes the conditions under which the Commission requires BHI Transportation to account for, and memorialize, distinct business lines. Costs and expenses arising from functions common to regulated and affiliated non-regulated entities (which are not unusual) are maintained separately, so that the financial records of each reflect the appropriate line items. In fact, the Commission explicitly approved a methodology in the 2010 rate case to make such allocations. (T(5) pp 38-39 [App. 31-32]).

freight barge are solely based upon six-foot lengths of deck space, not per vehicle or per person. (Doc.Ex.(I) 732-33). Drivers remain on board to drive their vehicles onto, and then off of, the freight barge. (Doc.Ex.(I) 511).

Yet, in its effort to link the unregulated freight barge to the regulated passenger ferry, the Commission erroneously found that "[p]ersons" "travel on the Barge as passengers in the transported vehicles" and that the freight barge therefore "impacts ferry ridership" because "there are up to 12 fewer persons who do not have to buy tickets on the Ferry . . . for each Barge trip made to and from the Island." (R pp 627, 645). No party in this proceeding raised this substitute-ferry-passenger theory that was propounded, *sua sponte*, by the Commission—or presented any facts to support it. If the theory had been raised, it would have easily been refuted by evidence of Coast Guard maritime freight regulations and logistical operations. The Commission had no basis to speculate that the driver of a fuel tanker or other cargo truck transported on the freight barge—who would not otherwise be going to the Island and who needs to stay with his vehicle to drive it off the barge—impacts ferry operations in any way because he or she doesn't otherwise buy a passenger ticket for the

ferry.[6] The Commission's analysis was unsupported by, and contrary to, the evidence in the record.

C. The Commission's findings do not support the conclusion that there is a need for regulation.

The Commission conceded that it is an agency "generally guided by the principle that its authority only need be imposed to achieve the purposes for the regulation." (R p 649). The Commission noted that "the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both" BHI Limited and BHI Transportation. (R p 648). The Commission even permitted "the status quo—and the current rates and services of the Parking and Barge Operations—to continue." (R p 648).

Yet, without any evidentiary support, the Commission adopted a "regulate first, ask questions later" approach. Even though the record contained no evidence of anticompetitive pricing, abusive behavior, or exclusionary conduct, the Commission resolutely marched forward toward its conclusion "that the Ferry, Parking, and Barge Operations function as interdependent components of a single transportation system" and thus, in its

---

[6] The Commission's logic also ignores the fact that the few drivers of the vehicles on the freight barge, even if they were required to buy some type of ticket (which they are not), could hardly "impact" the ridership of a ferry that transported 373,000 passengers and made more than 16,000 voyages in 2021. (*See* T(5) p 118 [App. 37]).

opinion, BHI Limited's parking and freight barge businesses should be regulated. (R p 645).

The Commission exacerbated the problem by giving weight to public opinion in making this jurisdictional determination. While the Commission acknowledged that "[w]hether or not a particular entity or its operations constitutes a public utility or a public utility service is a question of law," (R p 634), the Commission rationalized that "[p]ublic sentiment from Island stakeholders strongly emphasizes . . . the need for regulatory oversight over the system to include the Parking and Barge Operations." (R p 628). And in reaching its conclusion, (R p 629), the Commission "emphasiz[ed] the great weight of public support for regulation of these operations." (R p 647). The Commission even credited purported survey results of Island homeowners who urged "Commission oversight over both the Parking and Barge Operations," (R p 647), over the Commission's own determination that "there has been no substantiated allegation that [BHI Limited] is, at present, abusing its monopoly power," (R p 648).

This analysis was an abrogation of the Commission's duty to confine its regulatory jurisdiction to the parameters set forth in the General Statutes. In its zeal to extend its jurisdiction to regulate parking lots and freight barges as "public utilities," the Commission improperly weighed the opinion of Island

landowners[7] more than the statutory boundaries of its authority. The Commission is an agency tasked with implementing the law as written, not creating law to serve its own objectives or perceived popular opinion. *See Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 903 (N.D. Cal. 2006) ("Regulation is not a popularity contest.").

CONCLUSION

For the foregoing reasons, the decision of the Utilities Commission should be reversed or vacated.

Respectfully submitted this the 10th day of July, 2023.

FOX ROTHSCHILD LLP

Electronically submitted
Kip D. Nelson
N.C. State Bar No. 43848
knelson@foxrothschild.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

M. Gray Styers, Jr.
N.C. State Bar No. 16844
Bradley M. Risinger
N.C. State Bar No. 23629
230 N. Elm St., Suite 1200
Greensboro, NC 27401

[7] Those who use the parking lot and benefit from the freight barge are not only Island landowners, but also vacationers, renters, day-trippers, contractors, employees, etc.

Telephone: (336) 378-5200
Facsimile: (336) 378-5400

Counsel for Respondents-Appellants Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC

David P. Ferrell
N.C. State Bar No. 23097
dferrell@nexsenpruet.com
MAYNARD NEXSEN PC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 755-1800
Facsimile: (919) 890-4540

Counsel for Appellant SharpVue Capital, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, the undersigned counsel for Appellants certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, index, table of authorities, caption, signature blocks, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 10th day of July, 2023.

/s/ Kip D. Nelson
Kip D. Nelson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 10th day of July, 2023, a copy of the foregoing **Appellants' Brief** was e-filed and served by email upon the parties as follows:

Marcus W. Trathen Craig D. Schauer Amanda S. Hawkins Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. P.O. Box 1800 Raleigh, NC 27602 mtrathen@brookspierce.com cschauer@brookspierce.com ahawkins@brookspierce.com *Counsel for Village of Bald Head Island*	Jo Anne Sanford Sanford Law Office, PLLC P.O. Box 28085 Raleigh, NC 27611-8085 sanford@sanfordlawoffice.com *Counsel for Village of Bald Head Island*
Edward S. Finley, Jr. 2024 White Oak Road Raleigh, NC 27608 Edfinley98@aol.com *Counsel for Bald Head Association*	Lucy Edmondson Elizabeth Culpepper Zeke Creech North Carolina Utilities Commission Dobbs Building 430 North Salisbury Street 5th Floor, Room 5063 Raleigh, NC 27603-5918 Lucy.edmondson@psncuc.nc.gov Elizabeth.culpepper@psncuc.nc.gov Zeke.creech@psncuc.nc.gov *North Carolina Utilities Commission Public Staff*

Daniel C. Higgins Burns Day & Presnell, P.A. 2626 Glenwood Avenue, Suite 560 Raleigh, NC 27608 dhiggins@bdppa.com *Counsel for BHI Club*	

/s/ Kip D. Nelson
Kip D. Nelson

No. COA23-424

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; VILLAGE OF BALD HEAD ISLAND, Complainant; PUBLIC STAFF-NORTH CAROLINA UTILITIES, Intervenor; BALD HEAD ISLAND CLUB, Intervenor; BALD HEAD ASSOCIATION, Intervenor, Appellees, v. BALD HEAD ISLAND TRANSPORTATION, INC., Respondent; BALD HEAD ISLAND LIMITED, LLC, Respondent; and SHARPVUE CAPITAL, LLC, Intervenor, Appellants.	**From The North Carolina Utilities Commission**

****

CONTENTS OF APPENDIX

****

Appendix Pages

N.C. Gen. Stat. § 62-2 ..... App. 1-3

N.C. Gen. Stat. § 62-3 ..... App. 4-10

N.C. Gen. Stat. § 62-69 .....App. 11

N.C. Gen. Stat. § 62-73 .....App. 12

N.C. Gen. Stat. § 62-94 ..... App. 13-14

N.C. Gen. Stat. § 62-153 .....App. 15

N.C. Gen. Stat. § 62-160 .....App. 16

N.C. Gen. Stat. § 160A-311 ..... App. 17-18

Excerpts from 10-12 October 2022
Hearing Transcript ..... App. 19-37

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 1. General Provisions

N.C.G.S.A. § 62-2

§ 62-2. Declaration of policy

Effective: May 17, 2021
Currentness

(a) Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the ratemaking process for the investment of public utilities in plants under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply;

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of expansion funds for natural gas local distribution companies or gas districts to be administered under the supervision of the North Carolina Utilities Commission; and

(10) To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:

a. Diversify the resources used to reliably meet the energy needs of consumers in the State.

b. Provide greater energy security through the use of indigenous energy resources available within the State.

c. Encourage private investment in renewable energy and energy efficiency.

d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

(b) To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of local exchange, exchange access, and long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110, and the Commission is further authorized after notice to affected parties and hearing to deregulate or to exempt from regulation under any or all provisions

of this Chapter: (i) a service provided by any public utility as defined in G.S. 62-3(23)a.6. upon a finding that such service is competitive and that such deregulation or exemption from regulation is in the public interest; or (ii) a public utility as defined in G.S. 62-3(23)a.6., or a portion of the business of such public utility, upon a finding that the service or business of such public utility is competitive and that such deregulation or exemption from regulation is in the public interest.

Notwithstanding the provisions of G.S. 62-110(b) and G.S. 62-134(h), the following services provided by public utilities defined in G.S. 62-3(23)a.6. are sufficiently competitive and shall no longer be regulated by the Commission: (i) intraLATA long distance service; (ii) interLATA long distance service; and (iii) long distance operator services. A public utility providing such services shall be permitted, at its own election, to file and maintain tariffs for such services with the Commission up to and including September 1, 2003. Nothing in this subsection shall limit the Commission's authority regarding certification of providers of such services or its authority to hear and resolve complaints against providers of such services alleged to have made changes to the services of customers or imposed charges without appropriate authorization. For purposes of this subsection, and notwithstanding G.S. 62-110(b), "long distance services" shall not include existing or future extended area service, local measured service, or other local calling arrangements, and any future extended area service shall be implemented consistent with Commission rules governing extended area service existing as of May 1, 2003.

The North Carolina Utilities Commission may develop regulatory policies to govern the provision of telecommunications services to the public which promote efficiency, technological innovation, economic growth, and permit telecommunications utilities a reasonable opportunity to compete in an emerging competitive environment, giving due regard to consumers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service.

(b1) Broadband service provided by public utilities as defined in G.S. 62-3(23)a.6. is sufficiently competitive and shall not be regulated by the Commission.

(c) The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1985.

Credits

Added by Laws 1963, c. 1165, § 1. Amended by Laws 1975, c. 877, § 2; Laws 1977, c. 691, § 1; Laws 1983 (Reg. Sess., 1984), c. 1043, § 1; Laws 1985, c. 676, § 3; Laws 1987, c. 354; Laws 1989, c. 112, § 1; Laws 1991, c. 598, § 1; Laws 1995, c. 27, § 1, eff. July 1, 1995; Laws 1995 (Reg. Sess., 1996), c. 742, §§ 29 to 32, eff. June 21, 1996; S.L. 1998-132, § 18, eff. Sept. 9, 1998; S.L. 2003-91, § 1, eff. May 30, 2003; S.L. 2005-95, § 1, eff. June 21, 2005; S.L. 2007-397, § 1, eff. Jan. 1, 2008; S.L. 2021-23, § 25, eff. May 17, 2021.

N.C.G.S.A. § 62-2, NC ST § 62-2

The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 1. General Provisions

N.C.G.S.A. § 62-3

§ 62-3. Definitions

Effective: May 17, 2021
Currentness

As used in this Chapter, unless the context otherwise requires, the term:

(1) “Broadband service” means any service that consists of or includes a high-speed access capability to transmit at a rate of not less than 200 kilobits per second in either the upstream or downstream direction and either (i) is used to provide access to the Internet, or (ii) provides computer processing, information storage, information content, or protocol conversion, including any service applications or information service provided over such high-speed access service. “Broadband service” does not include intrastate service that was tariffed by the Commission and in effect as of the effective date of this subdivision.

(1a) “Broker,” with regard to motor carriers of passengers, means any person not included in the term “motor carrier” and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(1b) “Bus company” means any common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers over fixed routes or in charter operations, or both, except as exempted in G.S. 62-260.

(2) “Certificate” means a certificate of public convenience and necessity issued by the Commission to a person or public utility or a certificate of authority issued by the Commission to a bus company.

(3) “Certified mail” means such mail only when a return receipt is requested.

(4) “Charter operations” with regard to bus companies means the transportation of a group of persons for sightseeing purposes, pleasure tours, and other types of special operations, or the transportation of a group of persons who, pursuant to a common purpose and under a single contract, and for a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

(5) “Commission” means the North Carolina Utilities Commission.

(6) “Common carrier” means any person, other than a carrier by rail, which holds itself out to the general public to engage in transportation of persons or household goods for compensation, including transportation by bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) “Common carrier by motor vehicle” means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or household goods or any class or classes thereof for compensation, whether over regular or irregular routes, or in charter operations, except as exempted in G.S. 62-260.

(7a) “Competing local provider” means any person applying for a certificate to provide local exchange or exchange access services in competition with a local exchange company.

(8), (9) Repealed by Laws 1995, c. 523, § 1, eff. July 29, 1995.

(9a) “Fixed route” means the specific highway or highways over which a bus company is authorized to operate between fixed termini.

(10) “Foreign commerce” means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) “Franchise” means the grant of authority by the Commission to any person to engage in business as a public utility, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates, and all other forms of licenses or orders and decisions granting such authority.

(12) “Highway” means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) “Industrial plant” means any plant, mill, or factory engaged in the business of manufacturing.

(14) “Interstate commerce” means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) “Intrastate commerce” means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) “Intrastate operations” means the transportation of persons or household goods for compensation in intrastate commerce.

(16a) “Local exchange company” means a person holding, on January 1, 1995, a certificate to provide local exchange services or exchange access services.

(17) “Motor carrier” means a common carrier by motor vehicle.

(18) “Motor vehicle” means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) “Municipality” means any incorporated community, whether designated in its charter as a city, town, or village.

(20) Repealed by Laws 1995, c. 523, § 1, eff. July 29, 1995.

(21) “Person” means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(21a) “Plug-in electric vehicle” [means] a four-wheeled motor vehicle that meets each of the following requirements:

a. Is made by a manufacturer primarily for use on public streets, roads, and highways and meets National Highway Traffic Safety Administration standards included in 49 C.F.R. § 571.

b. Has not been modified from original manufacturer specifications with regard to power train or any manner of powering the vehicle.

c. Is rated at not more than 8,500 pounds unloaded gross vehicle weight.

d. Has a maximum speed capability of at least 65 miles per hour.

e. Draws electricity from a battery that has all of the following characteristics:

1. A capacity of not less than four kilowatt hours.

2. Capable of being recharged from an external source of electricity.

(22) “Private carrier” means any person, other than a carrier by rail, not included in the definitions of common carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is

purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of household goods for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is either for (i) a person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation or (ii) a person who constructs or operates an eligible solar energy facility on the site of a customer's property and leases such facility to that customer, as provided by and subject to the limitations of Article 6B of this Chapter;

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water or sewer service to less than 15 residential customers, except that any person or company which constructs a water or sewer system in a subdivision with plans for 15 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 15 residential building lots shall be a public utility at the time of such planning or holding out to serve such 15 or more building lots, without regard to the number of actual customers connected;

3. Transporting persons or household goods by street, suburban or interurban bus for the public for compensation;

4. Transporting persons or household goods by motor vehicles or any other form of transportation for the public for compensation, except motor carriers exempted in G.S. 62-260, carriers by rail, and carriers by air;

5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;

6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for ratemaking purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include the following:

1. A municipality, county, or a city, town, or village.

2. A special district, public authority, or unit of local government, as those terms are defined in G.S. 159-7(b) and that is subject to the provisions of Chapter 159, Subchapter III, Article 3 of the General Statutes.

3. An electric or telephone membership corporation.

4. Any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others.

d1. Any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge.

d2. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.

d3. A water or sewer system owned by a homeowners' association that provides water or sewer service only to members or leaseholds of members is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel, motel, time share or condominium complex operated primarily to serve transient occupants, which imposes charges to occupants for local, long-distance, or wide area telecommunication services when such calls are completed through the use of facilities provided by a public utility, and provided further that the local services received are rated in accordance with the provisions of G.S. 62-110(d) and the applicable charges for telephone calls are prominently displayed in each area where occupant rooms are located.

h. The term "public utility" shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, or (ii) a marina; provided that (i) the campground or marina charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite or marina slip occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite or marina slip, and (iv) the campground or marina only resells electricity to campsite or marina slip occupants.

i. The term "public utility" shall not include the State, the Department of Information Technology, or the Microelectronics Center of North Carolina in the provision or sharing of broadband telecommunications services with non-State entities or organizations of the kind or type set forth in G.S. 143B-1371.

j. The term "public utility" shall not include any person, not otherwise a public utility, conveying or transmitting messages or communications by mobile radio communications service. Mobile radio communications service includes one-way or two-way radio service provided to mobile or fixed stations or receivers using mobile radio service frequencies.

k. The term "public utility" shall not include a regional natural gas district organized and operated pursuant to Article 28 of Chapter 160A of the General Statutes.

l. The term "public utility" shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. and is subject to the provisions of G.S. 160A-340.1.

m. The term "public utility" shall not include a Ferry Transportation Authority created pursuant to Article 29 of Chapter 160A of the General Statutes.

n. The term "public utility" shall not include a person who uses an electric vehicle charging station to resell electricity to the public for compensation, provided that all of the following apply:

1. The reseller has procured the electricity from an electric power supplier, as defined in G.S. 62-133.8(a)(3), that is authorized to engage in the retail sale of electricity within the territory in which the electric vehicle charging service is provided.

2. All resales are exclusively for the charging of plug-in electric vehicles.

3. The charging station is immobile.

4. Utility service to an electric vehicle charging station shall be provided subject to the electric power supplier's terms and conditions.

Nothing in this sub-subdivision shall be construed to limit the ability of an electric power supplier to use electric vehicle charging stations to furnish electricity for charging electric vehicles. Any increases in customer demand or energy consumption associated with transportation electrification shall not constitute found revenues for an electric public utility.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the

public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility that qualifies as a "small power production facility" under 16 U.S.C. § 796, as amended.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission.

Credits

Added by Laws 1963, c. 1165, § 1. Amended by Laws 1967, c. 1094, §§ 1, 2; Laws 1971, c. 553; Laws 1971, c. 634, § 1; Laws 1971, c. 894; Laws 1971, c. 895; Laws 1973, c. 372, § 1; Laws 1975, c. 243, § 2; Laws 1975, c. 254; Laws 1975, c. 415; Laws 1979, c. 652, § 1; Laws 1979 (2nd Sess.), c. 1219, § 1; Laws 1981 (Reg. Sess., 1982), c. 1186, § 2; Laws 1985, c. 676, § 4; Laws 1987, c. 445,§ 2; Laws 1989, c. 110; Laws 1993, c. 349, § 1, eff. July 15, 1993; Laws 1993 (Reg. Sess., 1994), c. 777, § 1(b), eff. July 17, 1994; Laws 1995,c. 27, §§ 2, 3, eff. July 1, 1995; Laws 1995, c. 509, § 34, eff. July 29, 1995; Laws 1995, c. 523, § 1, eff. July 29, 1995; S.L. 1997-426, § 8, eff. Aug. 22, Laws 1997; S.L. 1997-437, § 1, eff. Aug. 28, 1997; S.L. 1998-128, §§ 1 to 3, eff. Sept. 4, 1998; S.L. 2004-199, § 1, eff. Aug. 17, 2004; S.L. 2004-203, § 37(a), eff. Aug. 17, 2004; S.L. 2005-95, § 2, eff. June 21, 2005; S.L. 2011-84, § 2(a), eff. May 21, 2011; S.L. 2015-241, § 7A.4(e), eff. Sept. 18, 2015; S.L. 2017-120, § 2, eff. July 18, 2017; S.L. 2017-192, §§ 1(a), 6(b), eff. July 27, 2017; S.L. 2019-132, §§ 1(a), (b), eff. July 19, 2019; S.L. 2021-23, §§ 2, 25, eff. May 17, 2021.

N.C.G.S.A. § 62-3, NC ST § 62-3

The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 4. Procedure Before the Commission

N.C.G.S.A. § 62-69

§ 62-69. Stipulations and agreements; prehearing conference

Currentness

(a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

(1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,

(2) Facilitating the use of exhibits, and

(3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner, and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court.

Credits
Added by Laws 1963, c. 1165, § 1.

N.C.G.S.A. § 62-69, NC ST § 62-69
The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 4. Procedure Before the Commission

N.C.G.S.A. § 62-73

§ 62-73. Complaints against public utilities

Currentness

Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing.

Credits

Added by Laws 1963, c. 1165, § 1.

N.C.G.S.A. § 62-73, NC ST § 62-73

The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Enacted Legislation Amended by 2023 North Carolina Laws S.L. 2023-54 (S.B. 327),

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 5. Review and Enforcement of Orders (Refs & Annos)

N.C.G.S.A. § 62-94

§ 62-94. Record on appeal; extent of review

Currentness

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable.

Credits

Added by Laws 1963, c. 1165, § 1. Amended by Laws 1969, c. 614; Laws 1975, c. 391, § 14.

N.C.G.S.A. § 62-94, NC ST § 62-94

The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 7. Rates of Public Utilities

N.C.G.S.A. § 62-153

§ 62-153. Contracts of public utilities with certain companies and for services

Effective: July 27, 2017
Currentness

(a) All public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency, and when requested by the Commission, copies of contracts with any person selling service of any kind. The Commission may disapprove, after hearing, any such contract if it is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility. Such contracts so disapproved by the Commission shall be void and shall not be carried out by the public utility which is a party thereto, nor shall any payments be made thereunder. Provided, however, that in the case of motor carriers of passengers this subsection shall apply only to such contracts as the Commission shall request such carriers to file.

(b) No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. Provided, however, that this subsection shall not apply to (i) motor carriers of passengers or (ii) power purchase agreements entered into pursuant to the competitive renewable energy procurement process established pursuant to G.S. 62-110.8.

Credits
Added by Laws 1963, c. 1165, § 1. Amended by S.L. 2017-192, § 2(b), eff. July 27, 2017.

N.C.G.S.A. § 62-153, NC ST § 62-153
The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 8. Securities Regulation

N.C.G.S.A. § 62-160

§ 62-160. Permission to pledge assets

Currentness

No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the Commission and by order obtain its permission so to do.

Credits
Added by Laws 1963, c. 1165, § 1.

N.C.G.S.A. § 62-160, NC ST § 62-160
The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 160A. Cities and Towns
Article 16. Public Enterprises
Part 1. General Provisions

N.C.G.S.A. § 160A-311

§ 160A-311. Public enterprise defined

Currentness

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems.

(2) Water supply and distribution systems.

(3) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems.

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without.

(5) Public transportation systems.

(6) Solid waste collection and disposal systems and facilities.

(7) Cable television systems.

(8) Off-street parking facilities and systems.

(9) Airports.

(10) Stormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types.

Credits

Added by Laws 1971, c. 698, § 1. Amended by Laws 1975, c. 549, § 2; Laws 1975, c. 821, § 3; Laws 1977, c. 514, § 2; Laws 1979, c. 619, § 2; Laws 1989, c. 643, § 5; Laws 1991 (Reg. Sess., 1992), c. 944, § 14; S.L. 2000-70, § 3, eff. July 15, 1989.

N.C.G.S.A. § 160A-311, NC ST § 160A-311

The statutes and Constitution are current through S.L. 2023-34 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

PLACE: Dobbs Building, Raleigh, North Carolina
DATE: Tuesday, October 11, 2022
TIME: 2:00 p.m. - 5:30 p.m.
DOCKET NO: A-41, Sub 21
BEFORE: Commissioner ToNola D. Brown-Bland, Presiding
Commissioner Daniel G. Clodfelter
Commissioner Kimberly W. Duffley
Commissioner Jeffrey A. Hughes
Commissioner Floyd B. McKissick, Jr.

IN THE MATTER OF:
Village of Bald Head Island,
Complainant
V.
Bald Head Island Transportation, Inc.,
and Bald Head Island Limited, LLC,
Respondents

Volume 3

NORTH CAROLINA UTILITIES COMMISSION

got to use it. The guy has a home on the island. He's got -- or they visited the island for years or he works on the island. So they know that those people are captive customers, and they can begin to extract what we call monopoly rents and charge a little bit higher and a little bit higher until such time that they see the demand start to fall off. Then they back off a little bit. That's what can happen with monopoly pricing.

Q Have you made any determinations in your analysis in this case that Limited has secured monopoly rents for the parking in this case?

A No, but Limited has -- had approved by this Commission pricings that was capped, so that was part of the last rate case.

Q Once again, you've answered the very question I asked. Do you have any evidence that Limited has secured monopoly rents with relation to the parking or the barge, the unregulated assets?

A No. I was not asked to study that.

Q A witness on behalf of SharpVue has rendered testimony in the action that SharpVue or any subsequent buyer of the assets would be best

SharpVue's only interest is the interest of island. No. SharpVue's interest is profits. And I don't begrudge them that. That's fine. But those profits do not mean that they're going to never raise the rates or never collect monopoly rents or never not sell the parking lot. You just don't know.

Q Dr. Wright, the market position that you ascribed to Limited in your testimony, are you of the opinion that that market position was secured or maintained through any improper conduct on behalf of Limited?

A Can you describe what you mean by the "market position"?

Q Yeah, yeah. I --

A That I -- I --

Q I was trying to do it in a way that didn't put words in your mouth, right? You've indicated that you believe that it's not a natural monopoly but that they're in a de facto monopoly position?

A Correct.

Q Does that fairly describe your testimony?

A For the parking services and -- yes, that's

correct.
Q And my question is have you made any findings or drawn any conclusions that Limited obtained that position or -- obtained it or maintains it through any improper conduct?
A No, I have not made that analysis, nor do I think that's happened.
Q And the same question with regard to the market position that you ascribe to Limited. Has there been any type of exclusionary, you know, or predatory conduct on behalf of Limited with regard to that position?
A On first-hand knowledge, I don't know of that. I can tell you that the Mayor, I believe, told me this, and the last witness may have told me this, so you can ask -- I think he's coming up on rebuttal. You need to ask him that because I hate to provide hearsay, but they said there was a taxi service that was using the Bald Head Island terminal during the Covid restrictions and stuff, and that -- I don't know why, but that was cut out. The way it was put to me that it was Limited who stopped allowing them to use that terminal.

of the asset should and should not be. True?
A That's the way I think the case should proceed, yes.
Q I want to ask you just a couple questions about a topic in your rebuttal statement. And I'm going to pull out one statement, but it's in several places where you say that there's simply no other parking available to riders of the ferry at Deep Point currently. Do you recall that testimony?
A Yes.
Q Does it fairly characterize it for you?
A Yes.
Q Okay. Has the -- have the availability or pricing metrics with regard to parking that Limited has put forward provided an opportunity and incentive for competition to emerge?
A I have no opinion on that. I haven't study it.
Q So the issue of whether the pricing of parking or barge is such that it's high enough that it should or should not attract competition or where those inflection points are. You've not analyzed that issue with regard to parking or the barge?

Q -- giving a statement to that effect? Is there any evidence, based upon the present ownership situation, that there's been an effort made to maximize an opportunity to get monopoly rents?
A No, but understand that in the 2010 Rate Case, there was a stipulation.
Q Um-um.
A And I was involved. And to some extent because I was in one of the rooms, and there were negotiations going on in the other room. So the parking and all those issues were sort of thrown in the mix, and the parties came out with a stipulation which included a freeze on the price of the parking. You know, I don't know of anything where the parties have tried to extract monopoly rents, but that is not to say that that wouldn't happen in the future. And they've, you know, reached a stipulation. And at that time, the parties that owned the Ferry System, the passenger ferry and Deep Point, they were still developing the island. They had a real strong incentive to get as many people as they could to that island to want to buy something on that island, and to make it a

A I've traveled a lot.
Q And you worked in the D.C. area --
A Yes, sir.
Q -- if I'm not mistaken. So you've paid for parking in those other cities that you've been to, traveled over again?
A Yes, sir.
Q So you're familiar with parking rates and other locations, are you not, to some degree?
A I mean, I'm familiar. I pay what they are. And I can't tell you I'm familiar what the rates are. I don't have any protective memory of that, but I've done a lot of parking.
Q I'm not asking for any specifics, but do you have any general observations about the reasonableness of the prices for parking at Deep Point Terminal?
A I mean, I don't have any individual opinion. I heard the testimony earlier. I think that, you know, it's $3 a day for the year. It's a good deal. We have a good deal there. There's no question in my mind. It's reasonable. But, you know, it's not like I've paid much attention to parking costs anywhere with the

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: Wednesday, October 12, 2022

TIME: 9:31 a.m. - 12:31 p.m.

DOCKET NO: A-41, Sub 21

BEFORE: Commissioner ToNola D. Brown-Bland, Presiding
Commissioner Daniel G. Clodfelter
Commissioner Kimberly W. Duffley
Commissioner Jeffrey A. Hughes
Commissioner Floyd B. McKissick, Jr.

IN THE MATTER OF:

Village of Bald Head Island,

Complainant

V.

Bald Head Island Transportation, Inc.,
and Bald Head Island Limited, LLC,

Respondents

Volume 4

transported vehicle or equipment, at the rate of one barge "ticket" required for each six lane-feet of cargo no matter what the vehicle is carrying.

Barge travel is charged by deck spaces only, and each deck space authorizes the holder to utilize six feet in one of three lanes aboard the barge for one round trip. Barge deck spaces are $60.00 each. The size of a vehicle determines the number of deck spaces required; lengths over an increment of six feet are rounded up to the nearest six feet.

Q: Can any vehicle simply pay the required per-foot fee and be transported to the Island?

A: No, because the Village of Bald Head Island closely regulates what vehicles may operate there, any vehicle that reserves space on the barge must also have either a daily or annual Village-issued Internal Combustion Engine (ICE) permit that is required to use any ICE vehicle on roads maintained by the Village.

Q: So, the barge cannot be used in a manner that many people might have experienced with car ferries that operate in various parts of the country?

A: That's correct. What you are likely to see on the barge most often are trucks transporting food, groceries, dry goods, and building and landscape materials; container vehicles that bring diesel, gasoline, and propane; construction vehicles; and solid waste. It is rare to see a passenger vehicle transported on the barge, and rare for the Village to issue an ICE permit to such a vehicle.

Q: Can the barge be used to transport appliances, furniture and other items a homeowner might need to establish a residence or rental property for vacationers, or that a business that caters to residents and visitors might require?

A: Yes, individuals or businesses who wish to transport furniture, materials, equipment or supplies to the Island can do so as cargo in a vehicle that qualifies to rent space on the barge and has secured a Village-issued ICE permit.

Q: If the barge transports a Home Depot delivery truck that contains a stove and patio furniture purchased by an Island homeowner, isn't the barge a shipper of household goods?

A: No. Some of the vehicles that are transported on the barge may contain household goods, but the barge is just transporting the vehicles. Barge and

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: Wednesday, October 12, 2022

TIME: 1:41 p.m. - 4:37 p.m.

DOCKET NO: A-41, Sub 21

BEFORE: Commissioner ToNola D. Brown-Bland, Presiding
Commissioner Daniel G. Clodfelter
Commissioner Kimberly W. Duffley
Commissioner Jeffrey A. Hughes
Commissioner Floyd B. McKissick, Jr.

IN THE MATTER OF:

Village of Bald Head Island,

Complainant

V.

Bald Head Island Transportation, Inc.,
and Bald Head Island Limited, LLC,

Respondents

Volume 5

the asset categories and accumulated depreciation for the rate base assets of BHIT. These reports are publicly available on the Commission's website, and Respondents also have produced each of those reports to Complainant in this docket. A true and accurate copy of the most recent set of financial statements produced to Complainant is attached hereto as Exhibit B.

Q. Are any parking or barge assets included on the plant schedules included in Exhibit B, or any of the other quarterly BHIT reports filed with the Commission?

A. No, the parking and barge assets are not owned by BHIT and have never been considered to be part of BHIT's rate base; therefore, it would have been inaccurate to include them on the financial statements.

Q. If the Commission were to now determine that either the parking or barge businesses lines of BHIL are regulated activities within the Commission's jurisdiction, how would this affect the rate base of the utility?

A. Because it is necessary for all used and useful assets necessary for the provision of a regulated utility function to be owned (or leased) by the utility, the parking lot and/or assets would need to be sold or leased to BHIT. As previously explained, those assets have never been owned by BHIT in the past and have never been considered to be part of BHIT's rate base, so, hypothetically, this would be a new addition to BHIT's balance sheet and plant schedules. Those assets were appraised for purposes of their potential sale to the Bald Head Island Transportation Authority, so we know that their fair market value in an arm's length transaction is

well in excess of the *total* rate base of the regulated utility in the 2010 Rate Case. Therefore, any new lease by BHIT of those assets should be based upon that value and be included in the cost of service. As well, any purchase of those assets by BHIT for inclusion, for the first time, in the BHIT rate base would increase the BHIT rate base by more than its total from the 2010 Rate Case.

Q. Are there activities conducted by either BHIT or BHIL that in some fashion benefit the other? If so, how does BHIL account for such activities on the books of the appropriate entity?

A. Yes, there are certainly functions performed that benefit a regulated and non-regulated entity that require us to appropriately charge costs and expenses so the financial records of each entity reflects the appropriate expenses. One clear example is the Marine Maintenance (MM) department that is a part of BHIT. Because marine vessel maintenance and repair is a common and regular need for BHIT's four ferries and BHIL's tugboat and barge, the same staff and shop resources from the MM department are tasked with the maintenance of each entity's vessels. Indeed, the MM department's facilities are purposefully situated on the Deep Point campus so that all of the subject vessels can easily access its facility. Costs and expenses of the MM Department are typically recorded in one of three ways. First, the cost is a direct charge for a specific expense to the maintenance of a specific vessel or to the barge. Second, for a split invoice -- where one invoice covers multiple vessels and/or the barge -- the maintenance history, time expended, parts and supplies are all considered and the decision to assign cost is determined

by experienced personnel in the MM department and then signed off on by the MM Supervisor. Lastly, we engage in detailed monthly allocations of expenses related to numerous Deep Point campus maintenance and services so that the cost is appropriately and fairly shared among the entities and departments consistent with their usage and afforded benefits.

Figure 2 (*see* Exhibit C), below, demonstrates at a broad level the categories of expenses that the Accounting department allocates on a monthly basis:

Departmental Allocations of common expenses

Telephone
Cable
Utilities Water & Sewer
Utilities Electric
Trash & Garbage
Supplies General
Supplies Fuel
R&M Buildings
R&M Carts &Vehicles
R&M Machinery & Equipment
R&M Landscaping and Grounds
R&M Docks & Piers
Copying, Printing & Forms
Pest Control
Rental Equipment
Taxes, Licenses, & Permits
Security
Property Tax
Insurance
Sales Tax
Depreciation
(Gain) or Loss Cap Asset
I/C Facilities Maintenance
I/C Housekeeping
I/C Monthly Parking (for security guard)

Figure 2

The allocation model used today is the same methodology audited by the Public Staff and approved in the 2010 rate case.

A. Yes, they were. All of the parties agreed that the rate base value of all assets used and useful in the provision of the regulated utility service upon which the rates were based was $3,943,335, and, likewise, the Commission found in its Order that the value of all assets used and useful were $3,943,335. *Proposed Order of the Stipulating Parties*, Docket No. A-41, Sub 7, ¶ 7 (Nov. 22, 2010); *Order Granting Partial Rate Increase and Requiring Notice*, Docket No. A-41, Sub 7, ¶ 7 (Dec. 17, 2010).

Q. At any time – in the initial application, in the negotiations with the Public Staff, in the Stipulation of Settlement, or in the Commission's final order -- did the rate base of assets include any assets that were part of the parking or barge businesses lines conducted by BHIL?

A. No. Parking or barge assets were never part of the rate base calculations.

Q. Have you reviewed the documents from BHIT's initial application to the Utilities Commission for authority to operate ferry service?

A. Yes. The initial application in 1993, and the Commission Orders from 1993 and 1995, were filed in Docket No. A-41, Sub 0 and can found on the Commission's website.

Q. Were any real estate assets including in the financial statement filed in Docket, No. A-41, Sub 0 or in any regulatory filings made since then?

A. Indeed, there were no real estate assets (*see* Exhibit D) in rate base connected with parking furnished at Indigo Plantation as shown, below, in Figure 3:

EXHIBIT D Applicant's assets and liabilities are as follows: As of December 31, 1992:

ASSETS		LIABILITIES	
Real Estate	$ -0-	Liens on Real Estate	$ -0-
Rolling Equipment	773,208	Liens on Equipment	835,710
Cash on Hand	800	Judgments	-0-
Cash in Bank	14,713	Other Liabilities	53,612
Other Assets	197,773	Advances from Parent Co.	1,297,321
Total	$1,486,494	Total	$ 2,186,643

Page 2

Figure 3

In the almost thirty years that parking has been provided both at Indigo Plantation and, more recently, at Deep Point, parking facilities have never been regulated by the Commission and parking assets have never been part of the rate base of BHIT on which rates were calculated. Accordingly, rates for BHIT have never included recovery of a rate of return on the property used for parking, depreciation expenses of improvements on that property, or property taxes paid.

Q. Does a prospective inclusion of parking and/or barge assets into the rate base of the regulated utility pose concerns for BHIL and BHIT, or the public?

A. I believe the inclusion does pose a concern, not only for BHIL and BHIT, but also for the consuming public. First, there would be the matter of the form of inclusion -- lease or ownership; either would create a higher rate base and/or higher cost of service on which required revenues would be calculated to determine new ferry rates. One would also need to evaluate how and to what extent parking and barge

if -- what would be the significance of this imputing the parking revenue to Transportation? Is that --

Q. Of the parent company doing that.

A. Why? Okay. All right. I can explain that. During the rate case, Transportation requested a $28 general fare ticket after our calculations. The Public Staff just immediately told us that that was gonna be rate shock and we were not gonna get that ticket. So we began negotiating to try to figure out where we were going to end up with the revenue on the transportation.

Ultimately, after a great deal of negotiation, we ended up agreeing with the Public Staff at $23. But even at $23 we had deficit revenue. We were not breaking even. So there was a three-prong approach to solve that problem.

One was we went back and looked at expenses and made adjustments. We were about $897,000 short on the bottom line. We went back and looked at expenses and came up with about, I don't know, $250,000. At the time, too, there had been an agreement between Limited and the Village for the holding of parking fees. And Mr. Horde went and did a calculation on the imputation of parking to make up part of the deficit as well. And then lastly, there was still a deficit in the revenue,

A. Very much so. The financial books of BHIT, the BHIL Parking Department, and the BHIL Tug & Freight Barge Department are kept, maintained, and audited separately. Additionally, each operation has its own vertically integrated employee base to include employees, managers, and senior managers. An exception to this structure is inter-company services provided by BHIT's Marine Maintenance that also provide services to the barge and tugboat operated by BHIL, careful allocations of costs and expenses among benefitted entities are honored and accounted for pursuant to Commission practice and guidelines.

Q. Could you describe the changes that are occurring with regard to BHIL and BHIT ownership and operation of these infrastructure assets?

A. George Mitchell died in July 2013. Since that time, BHIL and BHIT have continued to operate under the umbrella of his Estate, but that Estate is moving toward settlement and closure. The Mitchell family is not in a position to continue operations of BHIL and BHIT in perpetuity, and the decision was made to divest the remaining assets.

To that end, BHIL and BHIT entered into an Asset Purchase Agreement ("APA") to sell most of their remaining operations and some real estate assets on or associated with Bald Head Island to an affiliate of SharpVue Capital, LLC ("SharpVue"), a North Carolina limited liability company, and its affiliates on May 17, 2022 (the "SharpVue Transaction").

SharpVue is seeking approval, in a separate docket before the Commission, to receive the Certificate of Common Carrier Authority issued by this Commission in

Charles A. "Chad" Paul, III Testimony Summary

Docket No. A-41, Sub 21

My name is Charles A. "Chad" Paul, III. I am the President of Bald Head Island Transportation, Inc. ("BHIT"). I also serve as Chief Executive Officer and a Manager of Bald Head Island Limited LLC ("BHIL"), BHIT's parent company.

BHIL formed BHIT to operate the passenger ferry and on-island tram system in 1993 and obtained final authority for its operations from this Commission in 1995. The schedules for the Ferries are approved by the Commission. Ferry ticket prices have only been raised once – in 2010 -- since 1993. That one rate case was in NCUC Docket No. A-41, Sub 7.. BHIT sells all ferry ticket classes at the Deep Point Terminal and one-way-return tickets at the Island Terminal.

Certain ticket classifications include baggage and tram service to and from the on-Island terminal and the passenger's ultimate destination on the island. To provide the on-island tram service, BHIT owns and operates 23 tram units that are comprised of a truck driven by a BHIT employee and an attached passenger trailer. Passengers' belongings are transported in the truck's bed to their final designation on the island.

In 2021, BHIT transported over 373,000 passengers, and its ferries made over 16,000 voyages. About 40 percent of passengers traveled on general fare tickets which allows them to utilize on-island tram service.

BHIL also owns the ferry terminals in Southport, NC (at Deep Point) and on the Island and leases them to BHIT pursuant to lease terms that were part of the financial data that served as the basis of the 2010 Rate Case order. Adjacent or near to the ferry terminal in Southport, NC, BHIL owns and operates parking lots, which are the subject of this proceeding. There are 1,955

No. COA23-424

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; VILLAGE OF BALD HEAD ISLAND, Complainant; PUBLIC STAFF-NORTH CAROLINA UTILITIES, Intervenor; BALD HEAD ISLAND CLUB, Intervenor; BALD HEAD ASSOCIATION, Intervenor, Appellees, v. BALD HEAD ISLAND TRANSPORTATION, INC., Respondent; BALD HEAD ISLAND LIMITED, LLC, Respondent; and SHARPVUE CAPITAL, LLC, Intervenor, Appellants.	**From The North Carolina Utilities Commission**

****

CONTENTS OF ADDENDUM

****

Addendum Pages

Auto Parks, Inc. v. Shmukler,
No. 310, 1990 WL 902437
(Pa. Com. Pl. June 8, 1990) ..... Add. 1-4

In re GTE S. Inc.,
No. P-19, Sub 277,
1996 WL 303697 (N.C.U.C. May 2, 1996)..... Add. 5-33

In re Rulemaking Proceeding to Consider Proposed Rule Establishing Procedures for Settlements and Stipulated Agreements,
No. M-100, SUB 145,
2017 WL 840295 (N.C.U.C. Mar. 1, 2017)..... Add. 34-46

Sitelink Software, LLC. v. Red Nova Labs, Inc.,
2016 WL 3918122
(N.C. Super. Ct. June 14, 2016) ..... Add. 47-57

1990 WL 902437 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Philadelphia County

Auto Parks, Inc.
v.
Stanford Shmukler
v.
Southeastern Pennsylvania Transportation
Authority and Consolidated Rail Corporation

No. 310.
|
August Term, 1974
|
June 8, 1990

Attorneys and Law Firms

William M. Shields, Esquire, for Plaintiff.

Richard P. Abraham, Esquire and *Judah I. Labovitz,* Esquire, for Defendants.

OPINION

KLEIN, R.B., J.

The question presented in this case is whether SEPTA and Conrail unlawfully charged parking fees at commuter rail station parking lots owned by the defendants. This Court holds they did not. It is noted that SEPTA and Conrail did not *increase* rates without holding hearings, they merely continued the existing rates for several years without doing anything more.

Noted attorney and commuter Stanford Shmukler and the class he represents raised a number of reasons claiming that the parking fees were illegal, basically claiming that after SEPTA and Conrail took over the operations of the commuter railroads, they were required to immediately file tariffs for the parking fees.

***140** His arguments fail for several reasons:
(a) Parking charges are separate from the base passenger fare rate, primarily because not everyone uses the parking lot and it is an auxiliary service.

(b) SEPTA did not have to file tariffs, since they properly contracted out for the management of the parking lots.

(c) Claims against Conrail for failure to file for tariffs cannot be considered, since Shmukler did not exhaust administrative remedies with the PUC.

(d) SEPTA and Conrail are not corporate successors to the Reading and Penn Central railroads, so cannot be responsible for any of their alleged improprieties.

FACTS

Between 1968-1976, Auto Parks, Inc., as lessee of the Reading and Penn Central Railroads, managed and operated parking lots adjacent to commuter rail stations. In April of 1976, Conrail, SEPTA and Amtrak (Amtrak is not a party to the action) took over rail operations of Reading and Penn Central Companies. Amtrak took ownership to 24 of the parking lots previously owned by Reading and Penn Central. Of the remaining 38 lots, Conrail acquired 33 and SEPTA acquired only 5. Auto Parks continued to collect parking fees at the commuter rail parking lots. Pursuant to an agreement between SEPTA and Conrail, SEPTA was authorized to fix parking fees at the lots while Conrail was authorized to collect the parking proceeds from Auto Parks, administer the continuing contracts with Auto Parks and operate parking services at the lots.

From 1976, when SEPTA and Conrail acquired the parking lots, until 1979, parking fees charged at the commuter rail parking lots were never increased. On March 30, 1979, SEPTA acquired all or substantially all of the parking lots from Conrail. In October of 1979, after public notice and ***141** hearing, SEPTA's Board of Directors approved Tariff 137. This tariff was the first increase in parking fees since SEPTA and Conrail had acquired the lots in question. This was the first tariff ever filed with respect to these lots. In January of 1980, SEPTA put the parking services concession out for competitive bids and awarded the concession to Pennsylvania Parking, not a party to this action. Auto Parks no longer manages the commuter rail parking lots.

In 1974 Auto Parks sued Stanford Shmukler, a rail commuter, for failing to pay $10.75 in parking fees at commuter rail parking lots. Shmukler filed a counterclaim as a class action, in which approximately 320 commuters joined. In 1983 Auto

Parks filed complaint against additional defendants SEPTA and Conrail, claiming that these parties were liable to the class on Shmukler's counterclaim.

Shmukler alleges that Auto Parks and its lessors SEPTA and Conrail lacked authority to collect separate parking fees at the lots. He further alleges that SEPTA and Conrail had no right to lease to Auto Parks without competitive bidding following public notice and hearing. Counterclaim plaintiff Shmukler and the Class ('Shmukler') seek an accounting from Auto Parks of charges collected, repayment of parking fees and penalties to members of the class, and an injunction against any further collection of parking fees.

DISCUSSION

I. Parking Fees At Commuter Rail Station Parking Lots Are Not 'Rates' Within The Meaning Of The Public Utility Code

Shmukler claims that the railroads must include commuter parking charges in the passenger fare rate base rather than charging separate parking fees at the commuter rail lots.

Shmukler argues that just as the railroads do not charge separately for the use of 'auxiliary facilities' such as waiting ***142** rooms, train platforms and bathrooms, the railroads cannot charge separately for the use of commuter rail parking facilities.

Shmukler's attempt to equate free 'auxiliary facilities' (e.g., waiting rooms and train platforms) with commuter parking facilities is without merit. Presumably, all rail commuters use waiting rooms and platforms. It is fair to spread the cost of upkeep of such facilities among the riding public by including the maintenance cost in the passenger ratebase. The cost of maintaining commuter rail parking lots, on the other hand, can be accurately assessed to only those commuters who actually choose to use these parking facilities. For example, railroads have McDonald's concessions at railroad stations and do not have to give away Big Mac's for nothing. There are newspaper machines and pay telephones at railroad stations, and people must pay for papers and phone calls.

The Pennsylvania Public Utilities Commission (PUC) has ruled on this issue, and has held contrary to Shmukler's contentions, that railroads need not include commuter rail parking fees in the passenger rate base.

In *Post v. Reading Co.,* 29 Decisions of the Pennsylvania Public Utilities Commission 468, Docket No. 15128 (1951), the plaintiff, a rail commuter, claimed that Reading Railroad could not charge a separate parking fee at commuter rail stations because free parking at such stations had become part of the rate structure approved by the PUC. The PUC granted the defendant railroad's motion to dismiss the complaint. 'The parking fee … is not a 'rate' within the contemplation of the Public Utility Law. Moreover the law does not require a railroad utility to furnish all-day parking, free or otherwise, to its patrons.' *Id.* at 470. The order in *Post* has never been reversed or overruled by the PUC.

***143** *II. SEPTA Acted In Accordance With Its Enabling Statute With Regard To Parking Lots In Question*

As of April 30, 1976, when SEPTA acquired five parking lots from Reading and Penn Central, SEPTA's enabling statute was the Metropolitan Transportation Authorities Act (MTAA) of 1963, Act No. 450, P.L. 984, since recodified as the Pennsylvania Urban Mass Transportation Law (PUMTL), 55 P.S. §600.101 *et seq.*

Shmukler claims that SEPTA's failure to file tariffs or hold public hearings before 1979 in connection with the parking fees bypassed public scrutiny of the fees.

As of April 30, 1976, when SEPTA acquired five of the parking lots in question, SEPTA was authorized by MTAA §4(d)(9) (§600.303(d)(9) of PUMTL) to 'fix, alter, charge and collect fares, rates, rentals and other charges for its facilities by zones or otherwise at reasonable rates to be determined exclusively by it … The authority shall determine by itself, exclusively, the facilities to be operated by it, the services to be available and the rates to be charged therefor. Public hearings shall be held prior to such determinations when changes are proposed which would increase or decrease fares …'

When SEPTA began charging for its newly-acquired commuter rail parking facilities as of 1976, it was authorized to do so by MTAA §4(d)(9). SEPTA continued to charge the same parking fees as charged by the Reading and Penn Central Railroads until 1979 when, for the first time, SEPTA proposed to increase the parking charges. SEPTA at that time held public hearings, also in accordance with the requirements of MTAA §4(d)(9).

Shmukler also claims that SEPTA violated its enabling act by failing to let the contracts for collection of parking fees out for competitive bid.

MTAA §28(a) (§600.332(a) of PUMTL) requires that 'competitive bids shall be secured … before any contract is awarded … for rendering any services to the authority ***144** … the contract shall be awarded to the lowest responsible bidder.'

MTAA §4(d)(21) also authorized SEPTA 'to … contract for service, including managerial and operating service, whenever it can more efficiently and effectively serve the public by doing so, rather than conducting its own operations with its own property.'

Although SEPTA acquired five of the 38 parking lots in question in 1976, Conrail administered all contracts with Auto Parks and operated parking services at the five SEPTA owned lots, pursuant to an agreement between SEPTA and Conrail. This was precisely the type of agreement within the contemplation of MTAA §4(d)(21). There is no allegation here that SEPTA acted in bad faith in making this agreement in order to avoid MTAA competitive bidding requirements.

During the period that Conrail was responsible for all operations at the 38 parking lots, including these five lots owned by SEPTA, SEPTA was not required to let the contracts for collection of parking fees out for competitive bid.

On March 30, 1979, SEPTA became owner of all or virtually all of the 33 lots previously owned by Conrail. Notwithstanding this change in ownership, SEPTA continued to have the operation of the parking lots conducted by Conrail until March 31, 1980, as permitted by MTAA §4(d)(21). In January of 1980, shortly before the agreement between Conrail and SEPTA expired, SEPTA awarded the parking services concession to Pennsylvania Parking, after following MTAA competitive bidding procedures.

With respect to the five lots acquired by SEPTA in 1976 and the 32 lots acquired by SEPTA in 1979, SEPTA acted at all times in accordance with its enabling statute.

***145** *III. Conrail Was Not Required To File Tariffs With The PUC Before Charging Commuter Parking Fees*

Shmukler claims that Conrail could not charge commuter parking fees without first filing tariffs with the Pennsylvania Public Utilities Commission.

Conrail operates pursuant to the Public Utility Code 66 Pa. C.S.A. 101 *et seq.* and is subject to the authority of the PUC.

66 Pa. C.S.A. §1302 provides that 'every public utility shall file with the [Public Utilities Commission] … tariffs showing all rates established by it and collected or enforced …'

Shmukler's tariff claim must be adjudicated in the first instance by the PUC, pursuant to the doctrine of primary jurisdiction, and not by the Court of Common Pleas.

The United States Supreme Court has said that the doctrine of primary jurisdiction 'requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.' *U.S. v. Western Pacific Railway Co.,* 352 U.S. 59, 68, 77 S.Ct. 161, 165 (1956). In the present case, the 'agency which administers the scheme' of the Pennsylvania Public Utility Code is the Pennsylvania Public Utilities Commission. 'That the PUC should have primary jurisdiction to determine when its rules have been disregarded is not only a statutory mandate but a precept recognizing the sometimes esoteric and technical nature of and reasons for the agency's rules.' *DeFrancesco v. Western Pa. Water Co.,* 499 Pa. 374, 377, 453 A.2d 595, 596 (1982).

Initial jurisdiction in matters between public utilities and customers, including rates, installation of utility facilities and all compensation for service rendered to customers is vested in the PUC. *Einhorn v. Philadelphia Electric Co.,* 410 Pa. 630, 190 A.2d 569 (1963). A complainant must exhaust all available administrative remedies before seeking ***146** judicial redress for alleged wrongdoing by public utilities. *Feingold v. Bell of Pa.,* 477 Pa. 1, 383 A.2d 791 (1977).

In the present case the Pennsylvania PUC, not the Court of Common Pleas, has initial jurisdiction to determine whether Conrail complied with the regulatory scheme of the Public Utility Code when Conrail collected separate fees at commuter rail station parking lots without filing tariffs with the PUC.

Shmukler has not exhausted his administrative remedies in this matter.

IV. SEPTA And Conrail May Not Be Held Liable For Any Alleged Wrongdoing By The Reading And Penn Central Railroads

Shmukler claims that SEPTA and Conrail may be held liable under a corporate successor theory for any alleged wrongdoing by the Reading and Penn Central Companies from 1968-1976, before SEPTA and Conrail acquired the parking lots in question.

Without deciding the issue of whether or not Reading and Penn Central acted improperly, we reject the Shmukler's corporate successor liability claims.

The general rule in this state is that 'when one company sells or transfers all of its assets to a successor company, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets.' *Dawejko v. Jorgensen Steel Co.,* 290 Pa.Super. 15, 18, 434 A.2d 106, 107 (1981).

The Pennsylvania courts have, however, recognized exceptions to this general rule and will impose corporate successor liability where, *inter alia,* (1) the purchaser expressly or impliedly agrees to assume such obligation, or (2) the transaction amounts to a consolidation or merger. *Dawejko* at 18, 434 A.2d at 107; *citing Husak v. Berkel Inc.,* 234 Pa.Super. 452, 456-57, 341 A.2d 174, 176-77 (1975).

***147** Shmukler contends that the above-mentioned exceptions apply in the present case.

There is no evidence in the record that Conrail or SEPTA expressly or impliedly agreed to assume the obligations of Reading and Penn Central with respect to parking fees.

Furthermore, the 1976 acquisitions by Conrail and SEPTA did not constitute mergers with the railroads. Reading and Penn Central existed at the time this suit was filed and continued to exist after 1976, when Conrail and SEPTA acquired the parking lots.

Shmukler never pursued his claim against Reading and Penn Central by naming them as defendants in the counterclaim. Shmukler may not now hold SEPTA and Conrail liable for any alleged wrongdoing by Reading and Penn Central with respect to the parking lots.

All Citations

1990 WL 902437, 21 Phila.Co.Rptr. 138

1996 WL 303697 (N.C.U.C.)

Re GTE South Incorporated

Docket No. P-19, Sub 277

North Carolina Utilities Commission

May 02, 1996

APPEARANCES: FOR GTE SOUTH INCORPORATED: Robert W. Kaylor, Attorney At Law, 225 Hillsborough Street, Suite 480, Raleigh, North Carolina 27601, Morris L. Sinor, Associate General Counsel, and A. Randall Vogelzang and Joe Foster, Attorneys At Law, 4100 Roxboro Road, Durham, North Carolina 27702. FOR AT&T COMMUNICATIONS OF THE SOUTHERN STATES INC., TIME WARNER COMMUNICATIONS OF NORTH CAROLINA, L.P., AND NORTH CAROLINA PAYPHONE ASSOCIATION: Wade Hargrove, Elizabeth Crabill, and Marcus Trathen, Attorneys At Law, Brooks, Pierce, McLendon, Humphrey & Leonard, First Union Capitol Center, Suite 1600, Raleigh, North Carolina 27601. FOR AT&T COMMUNICATIONS OF THE SOUTHERN STATES INC.: Robert A. Briney, General Attorney, AT&T Communications of the Southern States Inc., 1200 Peachtree Street, N.E., Room 4040, Atlanta, Georgia 30309. FOR MCI TELECOMMUNICATIONS CORPORATION: Ralph McDonald and Cathleen Plaut, Attorneys At Law, Bailey & Dixon, LLP, Post Office Box 1351, Raleigh, North Carolina 27602, Marsha Ward, Attorney At Law, MCI Telecommunications Corporation, 780 Johnson Ferry Road, Suite 700, Atlanta, Georgia 30342. FOR CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.: Sam J. Ervin, IV, Attorney At Law, Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., Post Office Drawer 1269, Morganton, North Carolina 28680-1269. FOR THE USING AND CONSUMING PUBLIC: Karen E. Long, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, Antoinette R. Wike, Chief Counsel, Robert B. Cauthen, Jr. and Paul Lassiter, Staff Attorneys, Public Staff, Post Office Box 29520, Raleigh, North Carolina 27626-0520.

Before Sanford, president, and Cobb, and Hunt, commissioners.

BY THE COMMISSION:

On November 1, 1995, GTE South Incorporated (Applicant, GTE South, or Company) filed an Application For, and Election Of, Price Regulation pursuant to G.S. 62-133.5 (included in House Bill 161) and the North Carolina Utilities Commission Rules of Practice and Procedure. The Application seeks to have the rates, terms, and conditions of the regulated services which the Company provides determined pursuant to a form of price regulation in lieu of the current rate base/rate of return regulation, to which it is currently subject. GTE South also filed on November 1, 1995 a proposed customer notice of its Application. On November 20, 1995 the Public Staff filed a response to the proposed customer notice, stating that GTE South and the Public Staff had agreed on a revised public notice. By Order dated November 22, 1995, the Commission ordered that the revised public notice be approved and that GTE South provide public notice by means of a bill insert beginning the week of January 5, 1996, and by newspaper during the week of February 5, 1996, in newspapers having general circulation in GTE South's service area.

By Order dated November 7, 1995, the Commission suspended the Company's Application for a period of 180 days and set the matter for hearing beginning March 5, 1996. The Order also set out the schedule for prefiling testimony, including rebuttal.

Effective July 1, 1995, House Bill 161 provides authority for the Commission to allow competitive ‘offerings of local exchange [and] exchange access ‘ services as an addition to the Commission's existing authority to allow competition in the long distance telecommunications market. [1] G.S. 62-2.

1 A number of companies, including Time Warner, AT&T, MCI, and others, have filed applications to provide competitive local exchange and exchange access, some of which have been approved.

House Bill 161 also authorized the Commission, after notice and hearing, to deregulate or exempt from regulation (i) a service provided by a public utility providing telecommunications services upon a finding that the service is competitive or (ii) a public utility providing telecommunications services (or a portion of the business of such public utility) upon a finding that the service or the business of that public utility is competitive; provided that in either case the Commission also finds that deregulation or exemption is in the public interest. G.S. 62-2.

G.S. 62-3 was amended by House Bill 161 to add new definitions of 'competing local provider' and 'local exchange company'. [2] **G.S. 62-110 was amended to provide, *inter alia*, authority for the Commission to issue certificates of public convenience and necessity to competing local providers under specified conditions.**

2 GTE South is a local exchange company since it held 'on January 1, 1995, a certificate to provide local exchange services or exchange access services.' No party challenges the fact that GTE South is a local exchange company.

House Bill 161 also amended G.S. 62-133 to add a new section G.S. 62-133.5. Under that new section, *inter alia*, any local exchange company subject to rate of return regulation [or a form of alternative regulation pursuant to G.S. 62-133.5 (b)] may elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation rather than rate of return or other form of regulation. Under an approved form of price regulation, the Commission is required to allow the local exchange company to set its depreciation rates, to rebalance its rates, to adjust its prices in the aggregate, or to adjust its prices for various aggregated categories of services based upon changes in generally accepted indices of prices.

Upon application, and after notice and an opportunity to be heard, the Commission is required to approve a price regulation plan, subject only to the Commission's finding that the plan meets the following four criteria as stated in G.S. 62-133.5:

(i) protects the affordability of basic local exchange service; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest.

GTE South's Original Price Regulation Plan (Original Plan), as shown in its Application, separated the Company's services into three categories of services: Basic, Interconnection, and Non-Basic Services. As originally filed, the GTE South Plan proposed that Basic and Interconnection Services could be increased in the aggregate by one-half the annual increase in the Gross Domestic Product-Price Index (GDP-PI). [3] Increases in individual Basic Services would have been limited to 6%, and Interconnection Services increases would have been limited to 10% annually. Non-Basic Services increases were not limited because the Company considered these services to be competitive or discretionary. The Original Plan would have also allowed certain other rate changes outside the scope of the annual percentage increase limitations. For example, certain charges could have been temporarily waived for promotional purposes. Additionally, certain price changes associated with required Extended Area Service arrangements or rate changes associated with movements due to growth in access lines could have occurred outside the annual price limitations. Price changes would have been effective as required by House Bill 161, i.e., 14 days for increases and 7 days for decreases. The Company also proposed at least 30 days advance notice be given to customers of proposed rate increases. The Original Plan as filed by the Company did not establish a termination date and could have continued indefinitely, subject only to review upon request by the Company or, should events occur that significantly change the market, by the Commission.

3 The U.S. Department of Commerce, Bureau of Economic Analysis publishes this index, which is a generally recognized indicator of inflation measuring domestic expenditures and expenses.

On February 12, 1996, GTE South entered into a Stipulation and Agreement with the Public Staff. In the Stipulation and Agreement, the parties agreed to a Revised Price Regulation Plan (the Stipulated Plan). The Public Staff filed the Stipulation and Agreement with the Commission on February 13, 1996.

The Stipulated Plan classifies all services into four categories of services: Basic, Interconnection, Non-Basic 1, and Non-Basic 2 Services. Basic Services have a price cap of inflation (GDP-PI) plus 3%; Interconnection Services have a price cap of GDP-PI plus 7%; Non-Basic 1 Services have a price cap of GDP-PI plus 15%; and Non-Basic 2 Services are not limited. The price caps are applied on a rate element, by rate element basis, and aggregate price changes for all rate elements within each category of service are limited to GDP-PI less 2% (except Non-Basic 2 Services which are limited by the competitive market). In the Stipulated Plan, the Basic Services category was significantly expanded, including reclassifying the switched access and carrier common line services to Basic Services. The Stipulated Plan also prohibits any net increases in revenue during the first year, places a three-year cap on residential local rates, and caps switched access and carrier common line rates in the aggregate for the life of the Stipulated Plan. The Stipulated Plan provides that the Commission may review the Stipulated Plan after five years to determine how the Stipulated Plan comports with House Bill 161 and the four specific criteria specified therein. GTE South is also required to file annual financial reports. The Stipulated Plan also allows additional time during which the Commission may suspend and review certain changes to tariffs.

MCI Telecommunications Corporation (MCI), Time Warner Communications of North Carolina, L.P. (Time Warner), AT&T Communications of the Southern States Inc. (AT&T), the Alliance of North Carolina Independent Telephone Companies, North State Telephone Company, ALLTEL Carolina, Inc., North Carolina Payphone Association (NCPA), and Carolina Utility Customers Association, Inc. (CUCA) all filed timely requests for intervention and each was granted intervention.

On January 3, 1996, the Commission issued an Order specifying discovery procedures and on January 31, 1996, issued an Order granting an extension of time to all intervenors, including the Public Staff, until February 13, 1996 to prefile testimony. On February 6, 1996, GTE South was granted an extension of time until February 27, 1996 to prefile its rebuttal testimony. On February 20, 1996, the Commission ordered that intervenors be allowed to file supplemental testimony, limited solely to the Stipulated Plan, not later than February 27, 1996. GTE South was allowed to file additional rebuttal testimony in response to such supplemental testimony not later than March 1, 1996. On February 23, 1996, the Commission issued an Order specifying the order of witnesses.

At the hearing which began on March 5, 1996, at 9:30 a.m., Thomas J. White, Vice President of Economic Development for the Greater Durham Chamber of Commerce, appeared as a public witness on behalf of GTE South; he was the only public witness appearing in this proceeding. The following witnesses testified for GTE South: Dr. Julius A. Wright; Douglas E. Wellemeyer, and Dr. Edward C. Beauvais. Dr. David Kaserman, Wayne Ellison, and Wayne King testified for AT&T. Dr. Ben Johnson testified for the Public Staff. Terry L. Murray and Don J. Wood testified for MCI.

On March 20, 1996, the Commission issued an Order setting out four questions to be answered by the parties in their briefs and proposed orders.

Based on the foregoing, the testimony and exhibits admitted at the hearings, and the entire record in this docket, the Commission makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Applicant, GTE South is a local exchange company as defined in G.S. 62-3 (16a). GTE South is subject to rate of return regulation pursuant to G.S. 62-133 and has, by its Application, elected to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation in accordance with G.S. 62-133.5. The Commission has jurisdiction over GTE South and the subject matter considered in these proceedings.

2. The Commission-approved Price Regulation Plan, as adopted herein, protects the affordability of basic local exchange service.

3. The Commission-approved Price Regulation Plan, as adopted herein, reasonably assures the continuation of basic local exchange service that meets reasonable service standards.

4. The Commission-approved Price Regulation Plan, as adopted herein, will not unreasonably prejudice any class of telephone customers, including telecommunications companies.

5. The Commission-approved Price Regulation Plan, as adopted herein, is otherwise consistent with the public interest.

EVIDENCE FOR FINDING OF FACT AND CONCLUSION OF LAW NO. 1

The evidence supporting this finding of fact is set forth in House Bill 161, which adopted certain amendments to the statutes governing public utilities providing telecommunications services in North Carolina, in the various pleadings of the parties, particularly the Application of GTE South, and in the record as a whole. No party contested that GTE South is a local exchange company as defined in the statute and no party has contested GTE South's right to elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation.

EVIDENCE FOR FINDING OF FACT AND CONCLUSION OF LAW NO. 2

Affordability

G.S. 62-133.5 requires the Commission to find that the price regulation plan proposed by a local exchange carrier 'protects the affordability of basic local exchange service, as such service is defined by the Commission.' The Commission, for purposes of G.S. 62-133.5, finds and concludes that the term 'basic local exchange service' should be defined to mean basic residence and business local exchange service. The Commission further finds and concludes for reasons discussed hereafter, that the Commission-approved Price Regulation Plan, as adopted herein, protects the affordability of basic local exchange service.

First, the Commission notes that GTE South has not proposed to increase either the residential or business single party rates (or any rates for that matter). Residential R-1 rates in the Durham area are $12.66 per month, and in the rural exchange of Mars Hill, for example, the R-1 rate is $13.37 per month. Under the Stipulated Plan, these rates are capped and may not increase during the first three years (except pursuant to changes implemented under the governmental action section). Moreover, we note that the residential rate in Mars Hill (and other GTE South exchanges in Western North Carolina) was reduced by $3.00 per month in 1994. Each of the residential rates has been found to be just and reasonable in past proceedings and the rates are not now being changed. The Commission-approved Price Regulation Plan, as adopted herein, does not adversely affect the affordability of these services. The approved price plan protects residential rates by guaranteeing that they may not be increased for at least three years after adoption of such plan, and by controlling the degree to which these rates may be increased after the initial three-year period.

The Commission reaches the same conclusion with respect to business single party rates. The Stipulated Plan proposed no change to these rates. Dr. Beauvais testified that single line business services currently are priced 'in the relevant range of [the] cost' of providing those services. These services are in the Basic Services Category and may not be increased more than inflation plus 3% per year, provided that increases in the Basic Services Category are limited in the aggregate to inflation minus 2%. It is apparent, then, that the Business B-1 rate could be increased by inflation plus 3%. However, witness Wellemeyer testified that, notwithstanding that arithmetically the Company could raise the B-1 rates under the Stipulated Plan, 'I don't really expect that there's any freedom at all to increase Basic Business service rates … because opening the market to competition is going to push those rates in the other direction.'

Dr. Johnson testified for the Public Staff regarding the Stipulated Plan. He indicated that local telephone markets will be opened up to competition in the near future. 'As this occurs, competitive pressures will rapidly mount in many of these markets, forcing reductions in some rates (e.g. business rates) …. ' He concluded that the Company ' …will not have unlimited freedom to increase rates.'

Based upon the testimony of these three witnesses and in consideration of the Commission-approved Price Regulation Plan, which incorporates the aforesaid provisions of the Stipulated Plan, the Commission finds and concludes that the evidence of record supports the conclusion that the Commission-approved Price Regulation Plan protects the affordability of basic local exchange service.

EVIDENCE FOR FINDING OF FACT AND CONCLUSION OF LAW NO. 3

Service Quality

Neither GTE South nor any other party in this proceeding has suggested that approval of the Stipulated Plan will adversely affect service provided to the Company's customers or the service standards embodied in the Commission's Rules and Regulations. The Commission-approved Price Regulation Plan is entirely consistent with the Stipulated Plan in this regard. It specifically provides for continuing oversight by the Commission for 'service quality, complaint resolution, and compliance by the Company with all elements of the Plan.' The Commission retains the same powers and authority that it has always had with respect to the provision of quality service. The Commission can investigate service problems *either* on its own initiative or upon complaint from another party.

Neither House Bill 161 nor the Commission-approved Price Regulation Plan affects the Commission's obligation under G.S. 62-42 to direct the Company to provide adequate service. Rule R9-8 of the Commission's Rules and Regulations continues in effect and the Commission expects GTE South to continue to meet the requirements of that rule. The Commission-approved Price Regulation Plan reasonably assures the continuation of basic local exchange service that meets the reasonable service standards which have been adopted by the Commission and which are currently in effect.

EVIDENCE FOR FINDING OF FACT AND CONCLUSION OF LAW NO. 4

Prejudice Among Customer Classes

G.S. 62-133.5 affords local exchange companies the right to request price regulation in lieu of rate of return regulation, subject to the Commission's finding that the price regulation plan meets the four criteria, as specified therein. The third criterion is that the price regulation plan 'will not unreasonably prejudice any class of telephone customers, including telecommunications companies.' G.S. 62-133.5 (a)(iii).

Much of the evidence which supports the Commission's conclusion that the Commission-approved Price Regulation Plan protects the affordability of basic local exchange service is also relevant here. If residence and business local exchange service continues to be affordable, then clearly those customers are not unreasonably prejudiced.

Unlike the first two of the four specific statutory criteria, the intervenors in this proceeding raised a number of issues with respect to the impact of the Stipulated Plan from the standpoint of prejudicial pricing. Essentially, three groups of competitors and customers challenged various aspects of the Stipulated Plan as discriminatory: business services customers; customer-owned coin operated telephone (COCOT) providers; and interexchange carriers (IXCs), who purchase toll switched access services from GTE South. Issues raised in this regard, stated in question form, were as follows:

(a) Are the Company's present rates the appropriate starting rates under price regulation? (b) Should individual rate elements within the switched access services category be capped on an individual rate element basis, as opposed to the subject category

being capped in the aggregate? (c) Should the Company be required not to price certain of its services below total service long run incremental cost (TSLRIC)? (d) Should the Company be required, in establishing its price for a competitive service which includes a monopoly component, to impute as a component of the cost of such service the price it charges competitors for the monopoly component? and (e) Should the Stipulated Plan be modified to include specific language to safeguard against anticompetitive practices?

The discussion which follows provides a synopsis of the foregoing issues.

First, the Commission will address the meaning of 'unreasonably prejudice' as that term is used in the legislation. House Bill 161 did not define the term. One suggestion that was made in this proceeding, as well as in other dockets involving applications for price regulation [BellSouth Telecommunications, Inc. (BellSouth), Docket No. P-55, Sub 1013 and Carolina Telephone and Telegraph Company (Carolina) and Central Telephone and Telegraph Company (Central), Docket No. P-7, Sub 825 and Docket No. P-10, Sub 479, respectively] was that the term should be defined such that it tracks the language in G.S. 62-140. That language provides as follows:

'(a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference between localities or as between classes of service ….' G. S. 62-140.

The Commission is aware, of course, of the manner in which the statutory language in G.S. 62-140 has been interpreted by this Commission and the courts of North Carolina. That language is clearly similar to the 'unreasonably prejudice' language in House Bill 161. The Commission has never been required by the legislature or the courts to hold that all customers of public utilities must pay the same price. The Commission has always been able, under common law and under G.S. 62-140 and its predecessors, to reasonably classify customers and to require different classes of customers to pay different rates. This is as it should be or the Commission would not have had the ability to balance competing interests and to pursue, for example, the socially desirable objective of universal service. The test has always been unreasonable preference, unreasonable advantage, unreasonable prejudice, unreasonable disadvantage, and unreasonable discrimination, and the Commission does not believe the legislature intended to change those tests. [4]

4 The Commission notes that House Bill 161, notwithstanding G.S. 62-140, requires the Commission to allow local exchange companies to offer competitive services with flexible pricing arrangements to business customers pursuant to contract and to permit other flexible pricing options. One might argue that the Legislature intended to allow a relaxation of the traditional 'unreasonable discrimination' test. The Commission does not reach that decision, however, since the Commission's conclusion is valid under the stricter test traditionally applied.

Accordingly, the Commission concludes that the General Assembly, in drafting G.S. 62-133.5(a)(iii), intended to embody within that statutory enactment the same principles embodied in G.S. 62-140 and did, thereby, invoke the body of case law that has been developed under G.S. 62-140. The Commission, therefore, finds and concludes that the price regulation plan approved herein will not unreasonably prejudice or discriminate against any class of telephone customers, including telecommunications companies.

The Commission will next address two somewhat related issues: the proper level of toll switched access charges and the appropriate starting rates for price regulation; (i.e., whether the Commission should conduct a general rate case prior to implementation of price regulation). The latter issue is perhaps more closely related to the discussions included herein under the public interest finding, but due to the connection of this issue with the toll switched access charge reduction issue, it will be addressed at this juncture.

We will address the second matter first. The issue is whether the Commission should make a determination as to the appropriateness of the Company's current overall level of rates, on a specific test-year pro forma basis, under traditional rate

base, rate of return regulation, and thereafter make any necessary adjustments thereto with respect to its findings, in conjunction with or as a prerequisite to its approval of a price regulation plan. The Commission does not believe that such a review is necessary or appropriate.

AT&T and MCI assert that an underlying assumption of price regulation is that the starting rates must be ‘properly‘ set; i.e., prices should be aligned with cost. AT&T witness King testified that GTE South's access rates, as currently priced, are substantially above their cost and that they should be reduced. AT&T suggested that annual rate reductions should be identified to offset normal productivity gains and recommended that GTE South be required to share its productivity gains with its customers through price reductions to be determined from productivity targets developed from a review of historical productivity gains in comparison to the GDP-PI. However, in its proposed order AT&T did not propose specific levels of revenue reductions.

CUCA also stated that any price regulation plan's starting rates should be based on cost. Specifically, CUCA contended that, since many of GTE South's business customers are already paying rates which substantially exceed a cost-justified level, utilization of existing rates as initial rates going into price regulation violates the prejudice criterion enunciated in G.S. 62-133.5(a).

GTE South and the Public Staff (the Stipulating Parties) argue that nothing in House Bill 161 requires the Commission to conduct a general rate case for a local exchange company that elects price regulation. They state that the economic standard for evaluating price regulation plans, as contained in House Bill 161, is not whether the rates are ‘just and reasonable,‘ which is the old rate case standard, but whether the proposed price regulation plan — in this case the Stipulated Plan — ‘protects the affordability of basic local exchange service.‘ The Stipulating Parties contend that existing rates are not excessive and are a reasonable starting point.

Public Staff witness Dr. Johnson testified that several rate and revenue adjustments were made in conjunction with the merger of GTE South and Contel of North Carolina, Inc.(Contel), in 1994. These adjustments included reductions in Contel's monthly individual line residence and business rates of $3.00 and $7.58 to $7.73, respectively, as well as other reductions in other basic business rates and rates for touch calling service. Contel also upgraded all of its party-line services to individual lines. Both GTE South's and Contel's tariffed local transport rates were restructured, which resulted in an annual revenue reduction of $600,000 for GTE South. Further, Contel reduced its originating carrier common line charge and discontinued receipt of payments from the interLATA high cost fund.

In consideration of GTE South's earnings, and given the relatively recent rate reductions plus the three-year cap on basic residence rates, the Stipulating Parties contend that GTE's existing rate levels are appropriate going into the plan. Consequently, the Stipulating Parties did not propose to adjust GTE South's existing rates.

Based upon the foregoing and the entire evidence of record, the Commission finds and concludes that a general rate case review is not required at this time and that GTE South's existing rates are a reasonable starting point for price regulation. GTE's earnings, however, are relevant to this proceeding and have been considered in developing the Commission-approved Price Regulation Plan. Even though AT&T, CUCA, and MCI all argued that the initial starting rates should be based on costs, they did not take the position that GTE South's rates overall were above cost; i.e., that the Company was overearning. Therefore, the Commission further finds and concludes that GTE South should not be required to implement any rate reduction.

Regarding AT&T's and MCI's complaints that the level of toll switched access charges, including carrier common line charges, are too high [5] and should be reduced as a precondition to the approval of a price regulation plan, the Commission does not believe that such action is either required or warranted.

5 GTE South concedes the switched access rates are too high and has testified that it would reduce these rates by the amount of any net increase in revenues received as a result of Commission approval of a pending request for increases in private line rates which the Company currently has under consideration.

The Commission is aware of no events that have occurred in the evolution from the regulation of telecommunications service as a monopoly to a more competitive industry that require a decision that access charges be priced solely on the basis of incremental cost. Passage of G.S. 62-133.5 and the filing of a price regulation plan by a local exchange company do nothing to require that access charges be lowered to incremental cost. The statutory framework and regulatory decisions in North Carolina prohibited unreasonable prejudice among customer classes before language in House Bill 161 became effective that likewise prohibited this practice when authorizing price regulation plans. Establishment of the price of access charges above incremental cost passed muster under these preexisting requirements, so a reiteration of the unreasonable prejudice requirement in 1995 in the price regulation context does nothing to render this long-standing practice unlawful.

Generally, it was conceded by all the witnesses, including GTE South's, that toll switched access and carrier common line rates are priced well above incremental cost. This is true, of course, as a consequence of pricing certain services above incremental cost in order that other local exchange service could be priced lower than it would have been in the absence of higher revenues received from these other sources. This pricing approach enables the local exchange company to meet the societal objective of widespread availability of local exchange service and arguably reflects some support of joint and common costs of the local loop. Of course, the local loop is used in providing toll and other custom services as well as for basic local service. The local exchange companies have priced in this fashion as the holders of the historical monopoly with the universal service responsibilities. These responsibilities continue, at this time, to justify the practice of charging for toll switched access on a basis different from that relied upon to establish other local exchange company prices. No party has pointed out any language in House Bill 161 which even remotely suggests that switched access charges which are lawful today become unreasonably prejudicial on the effective date of an approved price regulation plan. Clearly, the amendment to G.S. 62-110(fl) authorizes the Commission to adopt rules which, *inter alia*, ‘provide for the continued development and encouragement of universally available telephone service at reasonably affordable rates.‘ This appears to the Commission to be an explicit recognition by the Legislature of the long-standing policy of pricing telephone services so as to maintain residential rates as low as practically possible. It is fair to say that all witnesses in this case agree that a reduction of switched access and common carrier line charges to the levels advocated by AT&T and MCI would result in either large, immediate increases in residential rates or substantial reductions in revenue to the Company. Therefore, the Commission again finds and concludes that GTE South should not be required to implement any rate reductions as a condition to approval of a price plan.

Another related issue is whether the advent of direct competition in the intraLATA toll market between GTE South and the interexchange carriers sufficiently changes the factual context within which access charges are assessed to invoke the proscription against unreasonable prejudice. Of course, competition between local exchange companies and interexchange carriers in the intraLATA toll market — both unauthorized and authorized — has existed for years, so the context in which the Commission established toll switched access charges significantly above incremental cost has not changed. With the advent of *de jure* intraLATA toll competition in 1994, the Commission subsequently imposed an imputation requirement upon the local exchange companies to prevent anticompetitive ‘price squeeze‘ pricing strategies. The Commission has, therefore, previously addressed certain aspects of the anticompetitive issues present in this proceeding, in Docket No. P-100, Sub 126. However, all such issues will be addressed more fully subsequently.

A further issue is whether the advent of direct competition in the local exchange and exchange access markets between local exchange companies and competitive local providers authorized by the new legislation somehow changes the factual context so as to make the pricing of toll switched access charges unreasonably prejudicial against the interexchange carriers. While resolution of this issue is perhaps more complex than the others, the same analysis undertaken historically to justify pricing access charges above incremental cost leads to the conclusion that this pricing practice continues to be justified. Even though the local exchange companies will compete with competitive local providers in the post-1995 environment, no unreasonable prejudice is created. The local exchange company uses the above-cost increment in access charges just as it uses the difference

between the price of the local exchange company's long distance service and its own cost: to provide support to maintan the price of local exchange service at a reasonably affordable level. This support enables the local exchange company to meet the societal objective of widespread availability of local exchange service and reflects the existence of joint and common costs in the local loop. The local exchange companies have borne these responsibilities as the holders of the historical monopoly. These responsibilities continue, at this time, to justify the practice of charging for toll switched access on a basis different from that relied upon to establish other local exchange company prices.

A justification for retaining existing pricing principles, at this time, in the telecommunications markets that are becoming increasingly more competitive is the desire to proceed deliberately and cautiously during the transition period. The Commission recognizes the need to move prices for individual services toward their economic costs; however, caution and deliberation are necessary so that the desire to increase services and reduce costs in the lucrative, highly-competitive sectors of the business do not result in an unexpected and socially unacceptable rise in the cost of essential services necessary to everyone. Nothing has changed with passage of the 1995 legislation that justifies, much less requires, abandonment of these principles. Nothing the legislature said in 1995 may be construed to alter the Commission's role as the protector of those least able to obtain, and most in need of, basic local exchange service.

Indeed, the 1995 legislation by its own terms reinforces these principles. While one goal is to avoid unreasonably prejudicing classes of telephone customers, other express goals are to '(i) protect the affordability of basic local exchange service, and (ii) reasonably ensure the continuation of basic local exchange service that meets reasonable service standards.'

Is there any language, then, in the 1995 legislation that requires the Commission to reduce toll switched access charges to cost-based levels? The Commission concludes that there is not. Applying the principles embodied in *State ex rel. Utilities Comm'n v. Public Staff*, 323 N.C. 481, 502, 374 S.E.2d 361, 373 (1988) and *State ex rel. Utilities Comm'n v. Carolina Utility Customers Association*, 323 N.C. 238, 252, 372 S.E.2d 692, 700 (1988), the Commission concludes that the current toll switched access rates do not unreasonably prejudice or discriminate against the interexchange carriers. G.S. 62-133.5(a)(iii), G.S. 62-140.

Regarding CUCA's position that GTE South's large business customers continue to provide a subsidy for residential service and that business rates should be reduced as a precondition to the approval of a price regulation plan, the Commission does not believe that such action is necessary or appropriate.

CUCA argued that all of the Company's prices, including those for business services, should be based upon cost. Because many of those rates are significantly above cost, CUCA argues that business customers are unreasonably prejudiced. However, the Commission believes, as stated by Company witness Wellemeyer, that competition makes further increases in rates for many business services unlikely; i.e., opening the market to competition will push those rates downward. Additionally, the Commission recognizes that under G.S. 62-133.5(a) the Company is permitted to 'rebalance its rates.' The Commission believes that the gradual rebalancing that will occur under the Commission-approved Price Regulation Plan as adopted herein is in the public interest. Some parties argued that there are distortions — in an economic sense — in the Company's prices, distortions that reflect years of pricing decisions designed to foster universal service. The Commission believes that to do as some parties advocate and immediately move rates to their economic costs would cause both social and economic consequences which should and can be avoided. The Commission believes that a competitive marketplace will gradually correct any distortions that may currently exist by forcing pricing toward economic costs. Thus, based upon the foregoing and the entire evidence of record, the Commission finds and concludes that the Commission-approved Price Regulation Plan does not unreasonably prejudice or discriminate against the Company's business customers.

Another provision of the Stipulated Plan to which some intervenors took exception is the provision in the pricing rules that '[t]he initial prices, in the aggregate, for Toll Switched Access Services shall be the maximum that the Company will charge under the Plan.' In this regard, AT&T takes the position that individual rate elements within the switched access services category should be capped on an individual rate element basis, as opposed to the subject category being capped in the aggregate. Essentially, AT&T argues that, if rate elements are not capped on an individual basis, GTE South, who is both a competitor at the retail

level and a provider of monopoly inputs into its competitors' retail services at the wholesale level, will have the flexibility and the incentive to lower the prices of competitive rate elements and raise the prices of monopoly rate elements.

MCI also takes the position, for basically the same reasons as AT&T, that prices for monopoly services should be capped, and price caps should be applied to each rate element, rather than to collections of rate elements or to the combination of rates for services in baskets.

The Stipulating Parties take the position that the statute contemplates a regulatory regime under which the Commission is required to 'permit the local exchange company …to adjust its prices in the aggregate, or to adjust its prices for various aggregated categories of services, based upon changes in generally accepted indices of prices.'

As discussed below, the Commission has incorporated into the Commission-approved Price Regulation Plan specific anticompetitive safeguard language which in conjunction with certain statutory provisions should provide aggrieved parties with a clearly defined avenue for redress in the event GTE South should engage in anticompetitive conduct. The Commission believes that the foregoing provisions reasonably balance the concerns of AT&T and MCI with the added benefit of avoiding the imposition of unnecessary constraints on GTE South's pricing flexibility.

The next issue to be discussed concerns prejudicial pricing and anticompetitive safeguards. GTE South witnesses have assured the Commission that the Company will not implement predatory prices or otherwise knowingly engage in anticompetitive conduct. It is GTE South's opinion that if a competing company believes that actions of a local exchange company are anticompetitive, then G.S. 62-133.5(e) specifically allows a complaint to be filed pursuant to G.S. 62-73. GTE South also notes that under G.S. 62-73 investigations may be undertaken by the Commission upon its own motion or may be initiated by any person having an interest in the subject matter by filing a complaint with the Commission.

Several of the intervenors in this proceeding presented arguments relating to prejudicial pricing and anticompetitive safeguards. Specifically, the subject intervenors argue that language should be included in GTE South's price regulation plan:

(1) Requiring GTE South not to price certain of its services below total service long run incremental cost (TSLRIC); (2) Requiring GTE South, in establishing its price for a competitive service which includes a monopoly component, to impute as a component of the cost of such service the price it charges competitors for the monopoly component; and (3) Prohibiting GTE South from engaging in anticompetitive practices; i.e., anticompetitive bundling of services and tying arrangements, vertical price squeezes, price discrimination, and predatory pricing.

Long run incremental cost (LRIC) is defined in the Stipulated Plan as '[t]he cost the Company would incur (save) if it increases (decreases) the level of production of an existing or new service or group of services. LRIC consists of costs associated with adjusting future-production capacity that are causally related to the rate elements being studied. These costs reflect forward-looking technology and operational methods.'

AT&T states that TSLRIC ' …measures the addition to the company's total costs in the long run caused by adding a given service to its existing product mix. TSLRIC includes provision for a normal profit and it also includes the cost of any fixed assets that can be attributed to the service being added.'

The basic difference between the foregoing costing methodologies appears to be that TSLRIC would include joint or common cost associated with a service or network element whereas LRIC would not include such costs.

AT&T, MCI, Time Warner, and NCPA, hereafter referred to collectively as the Protesting Parties, either implicitly or explicitly submit that the use of LRIC, as proposed in the Stipulated Plan, does not adequately provide competitive pricing safeguards for GTE South's potential customers so as to guard against anticompetitive pricing conduct by GTE South.

The Protesting Parties contend that, with respect to most services, GTE South is both a competitor and a monopoly provider of a necessary input to each competitive service. In the absence of anticompetitive constraints, it would be in GTE South's self-interest to utilize its existing monopoly power to exploit the remaining captive ratepayers and frustrate and delay the development of effective competition. AT&T points out that even the Public Staff's witness, Dr. Johnson, recognized the potential for such anticompetitive conduct:

'When a firm is subject to competition in at least one segment of the industry but still enjoys monopoly power in at least one other segment, it has strong incentives to use the revenue from one or more of its quasi-monopoly services to offset the cost of one or more of its quasi-competitive services, thereby allowing the firm to price the latter service(s) 'below cost.' …More generally, a problem exists whenever an integrated firm operating in both quasi-monopoly and quasi-competitive markets takes advantage of opportunities to shift costs from the former to the latter category, to overprice its less competitive services, and/or to underprice its more competitive services …. The goal may be to deter competitive entry, to gain a competitive advantage, or to maintain dominance in a potentially more competitive market.'

AT&T argues that LRIC is inadequate because it (1) applies an inappropriate cost measurement, (2) fails to provide any restriction or guidance as to how cost shall be determined, and (3) fails to address a panoply of other potential anticompetitive activities, including the fact that the Stipulated Plan does not require GTE South to impute to its own services the price it charges to its competitors for the same service; nor does the Stipulated Plan contain safeguards to prevent GTE South from cross-subsidizing its competitive services with revenues from its monopoly services.

The Protesting Parties, in general, take the position that because LRIC measures changes in output at the margin, it does not accurately reflect the cost of providing the service in question. As a result, the application of LRIC as a price floor will still allow GTE South to set its prices for its competitive services below cost and subsidize these prices with monopoly profits. By contrast, TSLRIC more accurately measures the cost of providing the service in question and will prevent GTE South from unfairly cross-subsidizing its competitive services. According to AT&T, TSLRIC sets the appropriate floor below which economists recognize a service to be cross-subsidized.

Additionally, AT&T states that the Stipulated Plan must be modified to include provisions prohibiting GTE South from engaging in other kinds of anticompetitive activity such as tying or bundling its services in an anticompetitive manner. AT&T argues it is critical that competitors not only have state law remedies for anticompetitive conduct but also have state regulatory remedies for such conduct. Finally, AT&T states that inclusion of a provision in the Plan barring GTE South from engaging in anticompetitive activity would enable the Commission to discharge its statutory duty to protect the public interest and to provide a regulatory environment in which competition can develop.

AT&T also contends that the categories of services included in the Stipulated Plan should contain services with the same intensity of competition. Since under the Stipulated Plan both competitive and noncompetitive services are included in the same basket, GTE South is permitted to decrease the price of competitive services (or partially competitive services) which would allow GTE South to increase the prices of noncompetitive services in the same basket even if GTE South's total revenues are otherwise contained.

Further, AT&T's and MCI's witnesses provided evidence that imputation is a fundamental requirement of fairness where a vertically integrated supplier with market power competes with new entrants to the market. These intervenors argue that imputation is necessary to prevent vertically-integrated supplier-retailers such as GTE South from unfairly undercutting the price of its competitors. Therefore, AT&T and MCI state that the price regulation plan must require that GTE South impute the price it charges its competitors for monopoly service components (including but not limited to, access) in the price it charges for its own competitive services.

In summary, the Protesting Parties generally contend that the Stipulated Plan, in order to provide adequate anticompetitive protection, must be modified (a) to require that GTE South not price any of its services below TSLRIC, presumably exclusive of

basic local service, (b) to require that GTE South impute the price it charges its competitors for monopoly service components (including, but not limited to, access charges) in the price it charges for its own competitive services, and (c) to include specific language barring GTE South from engaging in anticompetitive activity. Regarding the LRIC versus TSLRIC controversy, CUCA takes the position that the Commission-approved Price Regulation Plan should employ both LRIC and TSLRIC — LRIC as the pricing floor benchmark for rate elements and TSLRIC as the pricing floor benchmark for services. Additionally, Time Warner asserts that language should be included in the Commission-approved Price Regulation Plan requiring GTE South to use consistent costing methods across all services and rate elements, file and make publicly available cost support for all tariffed rates, and demonstrate that it does not shift common costs onto noncompetitive services in its monopolized markets from price reductions in competitive markets.

Last, with respect to COCOTs, the NCPA expressed fears regarding cross-subsidization and other anticompetitive practices by GTE South. The NCPA urged the Commission, among other things, to provide for an imputation requirement on the Company and to include specific language prohibiting anticompetitive practices by the Company.

The Stipulating Parties assert that there is no need to adopt rules concerning anticompetitive behavior. Such parties argue that under existing law and the Stipulated Plan, the Commission has enough authority to address issues with respect to anticompetitive conduct, such as predatory pricing and cross-subsidy, without the necessity of engrafting additional language onto the price regulation plan. These parties further contend that GTE South's competitive intraLATA toll services continue to be subject to the Commission's imputation requirement set forth in its Order of May 17, 1994, in Docket No. P-100, Sub 126. According to the Stipulating Parties, that standard requires, with respect to toll switched access service, that GTE South limit its rates by an imputation standard, and that imputation standard eliminates any possibility of GTE South engaging in price squeezing or predatory pricing strategies.

After having carefully considered the foregoing and the entire evidence of record regarding the need for inclusion of specific anticompetitive safeguard language in GTE South's price regulation plan, the Commission finds and concludes that the subject language should be included therein. Such conclusion has been reached for reasons presented by the intervenors in support of their positions in this regard. While the Commission does not find it necessary at this point to promulgate special rules to protect COCOTs, the Commission does conclude that GTE South should be required to impute to itself the charges it makes to COCOTs as part of the general imputation requirement being instituted. Furthermore, COCOTs should be able to avail themselves of the protection afforded by the general prohibition on anticompetitive activities by GTE South which is also being incorporated by the Commission into GTE South's price regulation plan. Therefore, the Commission finds and concludes that the Stipulated Plan should be modified to include the following specific language:

(a) Regarding the use of LRIC: ‘LRIC shall be construed as presumptively appropriate for use in this Plan; provided, however, that such use is without prejudice to the right of any party to challenge the propriety of use of LRIC in any complaint proceeding, including but not limited to complaints brought before the Commission alleging anticompetitive conduct on the part of the Company.‘ (b) Regarding imputation: ‘The Company shall impute the tariffed rate of a monopoly-service function to the rate for any bundled local exchange service that includes that function and to its own provision of competitive services including that function.‘ (c) Regarding anti-competitive practices: ‘This Plan shall not operate to permit anticompetitive practices. The Company shall not engage in predatory pricing, price squeezing, price discrimination, or anticompetitive bundling or tying arrangements as those terms are commonly applied in antitrust law. Nor shall the Company give any preference to the competitive services of affiliated entities.‘

In addition to the foregoing, other questions and discussions were raised during these proceedings relating to the development of general rules to further facilitate competition. The Commission considers that such rules are covered in G.S. 62-110(fl) and are, thus, the subject of a separate regulatory proceeding in Docket No. P-100, Sub 133, currently pending. [6] The Commission believes that price regulation stands, or falls, on its own and recognizes that there will always be other cases, future controversies, and future issues to be resolved. The competition docket is, indeed, evolutionary and ongoing.

6 On February 23, 1996, the Commission entered an Order setting forth detailed rules governing interconnection and other competition issues. Order of February 23, 1996, in Docket No. P-100, Sub 133.

The Commission concludes, at this time, that it is unnecessary to address the myriad of issues arising out of the advent of local exchange and exchange access competition in this proceeding.

Accordingly, for the reasons set forth herein, the Commission finds and concludes that the Commission-approved Price Regulation Plan does not 'unreasonably prejudice any class of telephone customers, including telecommunications companies.'

EVIDENCE FOR FINDING OF FACT AND CONCLUSION OF LAW NO. 5

Public Interest Standard

The fourth requirement of G.S. 62-133.5 that must be satisfied requires that the Commission find the price regulation plan to be 'otherwise consistent with the public interest.' The public interest standard is one which is not necessarily characterized by a bright line. It is, and always has been, a flexible standard requiring the application of reasonable judgment. The Commission is qualified by both experience and law to define and to apply the public interest standard.

Implicit in the decision as to whether the Stipulated Plan falls within, and is consistent with, the public interest are several issues, stated in question form, as follows:

(a) Does this price regulation case require, or necessarily imply, a general rate case for the Company? (b) Does the Stipulated Plan grant sufficient but not excessive pricing flexibility to the Company? (c) Are the productivity offsets included in the Stipulated Plan sufficient? (d) Should MCI's Competition Plus Plan be considered in lieu of the Stipulated Plan? and (e) Does the Commission retain sufficient authority, in the event of unforeseen circumstances, to modify the Price Regulation Plan?

In connection with the last issue, the Commission, by Order issued on March 20, 1996, in this docket, specifically requested the parties to answer a series of questions related to the Commission's ability, should the Commission approve the Stipulated Plan, to protect the public interest.

After reviewing the entire record and the proposed orders and briefs of the parties, the Commission concludes that the Commission-approved Price Regulation Plan, as adopted herein, is in the public interest and that sufficient authority will remain to protect the public interest should unforeseen circumstances require intervention at some future date during the life of the plan.

The intervenors in this proceeding raised several issues with respect to the requirement that the price regulation plan be consistent with the public interest. Upon consideration of such, the Commission finds and concludes that the Stipulated Plan should be modified in part to ensure that the approved price plan is 'otherwise consistent with the public interest.' The discussion which follows provides a synopsis of the issues raised relating to this last criterion and the Commission findings thereon.

Much of the evidence discussed in the finding that the Stipulated Plan as modified herein does not unreasonably prejudice any class of telephone customers, including telecommunications companies, is also relevant here; i.e., the Commission found therein that a general rate case review is not required at this time. The Commission believes that if the General Assembly had wanted the Commission to conduct a rate case proceeding as set forth in G.S. 62-133 going into competition and price regulation, it could have so required. The General Assembly did not write House Bill 161 to require such a rate case, and, therefore, the Commission finds nothing in House Bill 161 that requires the Commission to conduct a general rate case for a local exchange company that elects price regulation under G.S. 62-133.5(a).

Indeed, the House Bill 161 economic standard for evaluating price regulation plans is not whether the rates are just and reasonable, which is the rate case standard, but whether the proposed Price Regulation Plan — in this case the Stipulated Plan — protects the affordability of basic local exchange service. G.S. 62-133.5(a)(i). The Commission must interpret and apply House Bill 161 as it is written, because House Bill 161 is clear and unambiguous. [7] It allows a telecommunications public utility, currently subject to rate of return regulation, to elect to have its rates determined pursuant to 'a form of price regulation, rather than rate of return or other form of earnings regulation. ' G.S. 62-133.5(a). Thus, it is clear that the General Assembly viewed price regulation as a form of regulation entirely distinctive and different from traditional rate of return regulation. This language, coupled with the exclusion of G.S. 62-81, -130, -131, -132, -133, and -137 from applicability to local exchange companies electing price regulation pursuant to G.S. 62-133.5(g), supports the conclusion that the General Assembly did not require, or even desire, a general rate case for local exchange companies electing price regulation.

7 *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E. 2d 184, 192 (1977).

As already noted, the Original Plan proposed by the Company allowed a great deal more flexibility and allowed the Company to rebalance its rates more quickly. If the Company had followed that course, the increases in certain rates that are now alleged to be currently below cost, e.g., largely residential basic rates, would have been much more dramatic. [8]

8 The Commission has reviewed the testimony concerning the cost of providing service. Cost studies in the telephone industry have always been subject to much debate among expert witnesses and the testimony in this case is no exception. Notwithstanding that the witnesses did not agree as to the cost of providing service to residential customers, the Company and the Public Staff support the Stipulated Plan. Considering the moderate increases that might occur in residential rates and the three-year cap on those rates, the Commission believes there is no necessity to resolve those debates about cost in this case.

The Stipulated Plan allows rate rebalancing but at a moderated pace as compared to the Original Plan. Each of the Company witnesses testified that the Stipulated Plan was acceptable and that the Company could achieve its rebalancing objectives, although it would take much longer.

The Original Plan contained only three categories of service whereas the Stipulated Plan contains four. Within the three categories under the Original Plan, the Company could increase prices in the Basic and Interconnection categories by one-half the inflation rate. Price caps within the categories would have applied on a service by service basis and, in the case of Basic and Interconnection rates, the Company could have increased rates by 6% and 10%, respectively. No limits were placed on Non-Basic rates since those services were considered competitive or discretionary.

Under the Stipulated Plan, aggregate increases in the Basic, Interconnection, and Non-Basic 1 categories are limited to the inflation rate less a 2% offset. This should provide incentive for the Company to achieve productivity levels in excess of 2% since additional productivity will allow either increased earnings or the ability to decrease prices further to enhance its competitive position. The Stipulated Plan is also much more restrictive in that individual rate elements within the Basic, Interconnection, and Non-Basic 1 categories are constrained by the price cap limitations of inflation plus 3%, 7%, and 15%, respectively. This is much more restrictive than the Original Plan. The Commission, therefore, finds and concludes that the foregoing provisions of the Stipulated Plan are eminently reasonable and entirely appropriate, and accordingly will include such provisions in the Commission-approved Price Regulation Plan, as adopted herein.

Under the Original Plan the Company could have increased prices during the first year the plan is in effect but under the Stipulated Plan, the Company cannot implement price increases that will result in net increases in the categories during the first year. Residential local exchange rates are capped for three years and switched access and carrier common line charges are capped in the aggregate for the life of the Stipulated Plan. There are only two services in the Non-Basic 2 category, Centrex,

and Billing and Collection, and these services are clearly provided in a competitive market where price increases, although not limited, will be challenged in the marketplace.

The capping of residential local exchange rates for a three-year period, as provided for in the Stipulated Plan, raised the issue of whether residence local service rates should be capped and, if so, then for how long. The capped Basic Local Exchange Services include Residence Individual Line Service charges, the Residence Touch Calling Service charge, the Residence Service Order charge, the Residence Premises Visit charge, and the Residence Central Office Line Connection Work. The Attorney General and CUCA voiced concerns about the length of time that residence local service rates should be capped.

The Attorney General takes the position that residence local service rates should be capped for the life of the price plan, based on a life of five years. The Attorney General stated that the testimony of many witnesses in this proceeding indicated that residential customers are likely to be captive of their monopoly telephone providers for the life of the plan, particularly if they live in rural areas. During the transition period from earnings regulation to competition, the Attorney General believes that while there is no real competition, i.e., while residential customers have no real choices for telephone service, there should be no increase in basic residential rates without justification. Thus, the Attorney General recommended that residential rates be capped at present levels for the life of the price plan.

CUCA takes the position that caps on residence local service rates are inappropriate and should be removed from the Stipulated Plan since they are already below cost and heavily subsidized by business customers.

Based upon the entire evidence of record, the Commission finds no relevant reason for altering the three-year cap on residential rates as proposed in the Stipulated Plan. The Commission fully recognizes that these capped Basic Local Exchange Services will be subject to possible rate increases beginning in the fourth year, but such rate adjustments will be restricted subject to the rate element constraint on increases of GDP-PI plus 3% and the category constraint on overall increases of GDP-PI minus 2%. The Commission finds and concludes that the three-year cap is reasonable during the transition to competition and will incorporate such provision into the approved price regulation plan.

Next, CUCA raised the issue of whether the Non-Basic 1 price cap on increases for individual rate elements, i.e., the percentage change over the preceding year in the GDP-PI plus 15%, as reflected in the Stipulated Plan, should be modified.

CUCA argues that the 15% rate element constraint for Non-Basic 1 services in the Stipulated Plan is a particularly egregious violation of sound regulatory policy in that it constitutes prejudicial pricing. The 15% rate element constraint included in the Stipulated Plan would allow the Company to nearly double the price charged for an individual Non-Basic 1 service over the life of the plan. CUCA alleges that the inclusion of this 15% rate element constraint in the Stipulated Plan creates a significant risk that customers subscribing to services in the Non-Basic 1 category will be subjected to large annual rate increases. CUCA argues that the record does not contain any evidence tending to show the appropriateness of this 15% figure and, thus, that it should be modified to a more reasonable rate element constraint which is generally consistent with the similar constraints applicable to the other baskets. CUCA states that although there may well be a range of appropriate rate element constraints for each basket, a reasonable rate element constraint for the basket of Non-Basic 1 services should be in the area of 5%. In concluding in this regard, CUCA takes the position that the Commission should modify the Stipulated Plan by removing the reference to the 15% rate element and inserting in lieu thereof a 5% rate element constraint, which, presumably, would be in addition to the GDP-PI.

The Stipulating Parties assert that GTE South will not inappropriately increase the price of rate elements in the Non-Basic 1 Category. Such parties essentially argue that such services will be subject to significant competition and that such competition will act to ensure that GTE South does not engage in prejudicial pricing with respect to the subject services. Additionally, the Stipulating Parties observe that the Stipulated Plan's overall pricing constraint on the Non-Basic 1 Category of services is GDP-PI minus 2%.

The Commission recognizes that the 15% is a stipulated, negotiated number. It is quite possible that a number other than 15% would be appropriate, as the record provides numbers in the range of GDP-PI plus 5% to 15%, but without credible and convincing evidence supporting an alternative, the Commission believes that it is reasonable to accept the position of the Stipulating Parties as proposed in this regard. The Commission understands that the Company needs flexibility to compete. GDP-PI plus 15% may not be perfect, but we find it to be reasonable given the circumstances that attend this proceeding: the advent of local exchange and exchange access competition under House Bill 161. Accordingly, the Commission accepts the Non-Basic 1 services' rate element constraint of GDP-PI plus 15% for purposes of this proceeding.

Several of the intervenors raised concerns about the reasonableness of the productivity offset of 2% that was reflected in the Stipulated Plan. The Stipulated Plan defines the term offset as '[t]he percentage reduction to the change in GDP-PI which is applied under this Plan. The Offset for the Basic Services Category, the Interconnection Services Category, and the Non-Basic 1 Services Category will be 2%.'

Public Staff witness Dr. Johnson explained that a productivity offset such as that included in the Stipulated Plan is intended ' …to account for the differences between the rate of inflation in input prices within the particular industry and the overall rate of inflation' and ' …to reflect the benefits of increasing economies of scale and economies of density, and the benefits of increasing productivity within the telecommunications industry.' Dr. Johnson, also testified that '[n]umerous different factors affect a firm's productivity …', including ' …technological improvements; shifts from high to low cost inputs; and increased economies of density and scale.' The available evidence also suggests that the telecommunications industry has been substantially more productive than the economy as a whole, particularly in recent years. Thus, the need for some sort of offset should be obvious. The Stipulating Parties recommended an offset of 2%.

AT&T asserted that the Commission has two options for requiring GTE South to share its productivity gains with its customers. First, it could set the starting prices for GTE South's services at appropriate rates which are based on the cost of providing the services, and then adjust all prices by the appropriate productivity offset factor. However, AT&T considers that the problem with this option is that incorrect starting prices will lead to unwanted results. Therefore, AT&T states that to the extent GTE South is not required to set its initial prices based on the cost of each service, then this option would not be appropriate. The second option offered by AT&T is to identify the total rate reductions that would be required annually to offset normal productivity gains. These reductions should then target the most excessive rates to bring them in line with costs. AT&T stated that at the national level, the Company has elected a price regulation plan based on total company performance that commits it to reduce costs by a 5.3% annual productivity offset; and noted that figures underlying the FCC targets were based on total local exchange company productivity, not just interstate services. Therefore, AT&T asserts that there is no justification for electing a lower productivity offset than 5.3%. However, rather than suggest a specific increase to the productivity offset contained in the Stipulated Plan, AT&T recommends that GTE South be required to annually reduce its rates, i.e., to pass along normal productivity gains to its ratepayers.

The Attorney General takes the position that a productivity offset of 3.5% is the most appropriate number to use. Such an offset would, in the Attorney General's opinion, allow the Company flexibility to adjust prices to meet competition while assuring that rates will not rise too quickly for customers with few or no competitive alternatives. The Attorney General notes that the evidence suggests a range from 2% to 5.3% and acknowledges that no one knows what the future brings and thus, any choice will be somewhat arbitrary. In support of the recommendation of 3.5%, the Attorney General stated that Public Staff witness Dr. Johnson testified that the average productivity offset for approved price cap plans for the Bell Operating Companies adjusted for jurisdictions that used the GDP-PI for an inflator is 3.5%.

CUCA stated that the use of an unduly low offset will allow the Company to charge excessive rates, but also acknowledged that the use of an unduly high offset will impose inappropriate risks upon the Company. CUCA asserts that the appropriate offset for use in this proceeding is 5.3% which is the productivity offset the Company elected at the federal level.

The record contains very limited evidence concerning the specific reasoning for the choice of the 2% productivity offset which was included in the Stipulated Plan. Public Staff witness Dr. Johnson testified that numerous states had approved price cap plans which included an offset from the general inflation rate. He provided a listing in his testimony showing the states that have approved price cap plans for the regional Bell Operating Companies with their respective approved numeric offsets. The average offset of those approved plans is 3.2%, with the lowest offset being 1.0% and the highest offset being 4.5%.

The Commission recognizes that there is wide disagreement about inflation and productivity as it relates to the telecommunications industry. In this proceeding, suggested productivity offsets ranged from 2% in the Stipulated Plan to 5.3%, as proposed by AT&T and CUCA. The Commission recognizes that any choice will be somewhat arbitrary, and is concerned that the choice of an offset not be so high that it would impose inappropriate risks upon the Company during the transition to competition. Based upon the entire evidence of record, the Commission finds and concludes that the productivity offset of 2%, as stipulated to by the Public Staff and GTE South, is reasonable. Accordingly, the Commission accepts the proposed productivity offset of 2% as within the public interest. Such offset has been incorporated into the Commission-approved Price Regulation Plan, as adopted herein.

The next issue to be addressed is the matter of whether or not toll switched access services which are included in the Basic Services Category in the Stipulated Plan should be moved to a separate category. AT&T, CUCA, and the Attorney General all proposed that the toll switched access services should be placed in a separate category; i.e., removed from the Basic Services Category. Under the Stipulated Plan the Basic Services Category includes basic residential and basic business local services, toll switched access services, and the Company's calling plans among other services.

AT&T recommends that switched access services should be placed in a separate basket. AT&T states that if toll switched access rates are reduced at a later date, the Company can be expected to then argue that the reduction triggers the governmental action provision in the Stipulated Plan and that the Commission must permit increases in other services to compensate the Company for reduced toll switched access revenue. Additionally, AT&T noted that this would create additional regulatory proceedings before the Commission, subject all parties to wasteful expenditure of resources, and result in unnecessary rate increases for consumers.

The Attorney General argues that by including toll switched access services in the basic basket, the stipulated plan almost guarantees a degree of rate rebalancing when access charges are reduced. Because the overall basket constraint remains stable under the Stipulated Plan while access charges go down, then basic residential and basic business rates may go up as the Stipulated Plan provides. The Attorney General believes that while the possibility for competition in switched access services in the short-term is remote, particularly in the Company's territory, it is more probable that it will be competitive before basic service is competitive. The Attorney General also believes that access services provide a different functionality from basic services. Therefore, the Attorney General states that because the probable degree of competition is likely to be different and the functionality is different between basic services and access services, access services should be placed in its own basket.

CUCA argues that placing toll switched access services in the Basic Service Category, along with capped basic residential services, was apparently done to finance access charge reductions with increased basic business and extending calling plan rates. In addition, CUCA also points out that when basic residential service rates are capped, they are excluded from the calculation of the Service Price Index (SPI) for the Basic Service Category. However, toll switched access, which is also capped over the life of the plan in the aggregate, is included in the calculation of the SPI for Basic Service Category. The effect of failing to exclude toll switched access revenues from the Basic Service Category (like basic residential service is treated when it is capped) subjects other services included in the Basic Service Category to a significant risk of rate increases. Therefore, CUCA recommends removing the cap on basic residential service or, in the alternative, capping all services in the Basic Service Category. In order to resolve the problem caused by including toll switched access services in the SPI, CUCA recommends that the Commission should either move toll switched access services to another category or modify the Stipulated Plan so that toll switched access services are excluded from the SPI calculation.

The Company believes that the inclusion of toll switched access services in the same category as basic local service will facilitate its long-term goal to lower its charges for switched access services. It is the Company's opinion that certain of the services in the Basic Service Category are dramatically priced at variance with their underlying costs and that in a competitive environment the Company must gradually bring its prices back toward cost at some time in the future.

Public Staff witness Dr. Johnson testified that the Company was very concerned about wanting access charges to be in a location where the Company could raise other rates as switched access rates are reduced. According to his testimony, the Public Staff agreed during the negotiating process that the inclusion of switched access services in the Basic Service Category was an acceptable result considering that there would not be any substantial net impact on residential customers due to the negotiated pricing constraints. The Public Staff noted that: if the Company intends to lower switched access charges and raise residential rates, residential rates are capped for three years and a maximum increase of only GDP-PI plus 3% is possible for two years; that the Company will probably find it necessary to lower basic business rates and toll switched access rates due to competition; and that the overall Basic Service Category constraint was GDP-PI minus 2%. While witness Johnson viewed universal service funding as a separate issue, he acknowledged that imposition of a universal service fund is another way fair results can be accomplished.

Based upon the foregoing and the entire evidence of record, the Commission finds and concludes that it is entirely reasonable and appropriate to accept the Stipulating Parties recommendation that toll switched access services be included in the Basic Services Category. Such treatment should facilitate the Company's goal to gradually lower its charges for toll switched access charges. Furthermore, inclusion of toll switched access services in the Basic Services Category will allow the Commission to gain additional insight into the efficacy of the treatment of toll switched access charges in this manner as compared to the treatment of toll switched access charges as a stand-alone category, as in the BellSouth Price Regulation Plan approved by the Commission.

There was a considerable degree of concern in the questions raised by the Commission and those of the parties as to how the governmental actions provision would operate. As proposed in the Stipulated Plan, the Company, with Commission approval, could ‘adjust the prices of any service(s) due to the financial impacts of governmental actions that have a specific impact on the telephone industry as a whole or upon any segment of the industry that includes the Company, to the extent that such impacts are not measured in the GDP-PI. ‘ Such adjustment is mandatory upon a proper showing of a set of four criteria. Most of the intervenors, including the Attorney General, opposed the mandatory nature of the governmental actions provision. The intervenors suggested making the provision permissive and introducing a public interest criterion. Some suggested that impacts of the Telecommunications Act of 1996 be specifically excluded from pass-through under this provision.

The Commission, too, is concerned about the open-ended and mandatory nature of this provision, given the uncertainty of the nature and extent of future mandates which may be construed to constitute governmental action. The Commission further emphasizes that the governmental actions provision does *not* provide the Company with the right to recover *competitive* losses. The governmental actions provision is intended to adjust rates up or down as a direct result of costs or benefits flowing from specific governmental action and is not intended to allow recovery of remote or consequential marketplace effects.

Accordingly, the Commission concludes that the governmental actions provision should be modified by substituting the word ‘may‘ in place of the word ‘will‘ in the sentence before the criteria in order to make the adjustment permissive, rather than mandatory, and that a public interest standard should be inserted as the fifth criterion. This change will convert the governmental actions provision from one that is more or less automatic upon the satisfaction of certain criteria to one that will allow both scrutiny in the examination of governmental action claims and flexibility for the Commission in the decision-making on them.

Next, is the issue of MCI's suggestion that GTE South operate under MCI's proposed price regulation plan designated as its Competition Plus Plan which was offered by MCI witness Wood. MCI alleges that its Competition Plus Plan would essentially realign rates with direct economic costs, cap rates for GTE South's other-than-competitive services at existing rates, develop a universal service support mechanism, eliminate earnings reviews for GTE South, provide for price regulation of GTE South's

competitive services, avoid adoption of any automatic price adjustment mechanisms, and eliminate the submission of cost studies of GTE South's services.

The Company argued that MCI's Competition Plus Plan should not be considered by the Commission for several reasons. GTE South argues that the election of whether and what type of price regulation plan should be adopted is a decision to made entirely by the Company under House Bill 161. G.S. 62-133.5 expressly allows '[a]ny local exchange company to elect …to have the rates, terms and conditions of its services determined pursuant to a form of price regulation …. The Commission shall …approve such price regulation …' upon a finding that the proposed plan meets the specified criteria. Additionally, GTE South asserts that House Bill 161 expressly allows plans which differ between local exchange companies. GTE South states that MCI is not a local exchange company and thus, it has no right to propose a price regulation plan. The Company believes that MCI's rights to be heard are limited by House Bill 161 to the right to argue that a price regulation plan proposed by a local exchange company does not meet one or more of the statutory criteria.

Public Staff witness Dr. Johnson testified that the Competition Plus Plan is a massive reshifting of revenues from access to local markets and that the Company would likely reject the Commission's decision if it adopted the MCI plan. GTE South stated in its brief that if the Commission adopts MCI's Competition Plus Plan, then it will reject it as it has a right to do under the statute. Under the Competition Plus Plan, MCI witness Murray testified that the Company's earnings would drop from a rate of return of 9.63% to 5.72%. GTE South states that this is because the Competition Plus Plan allows no rate rebalancing by arbitrarily reducing some prices while capping all others. Thus, the Company states that the Commission would clearly be remiss if it did not reject MCI's Competition Plus Plan.

The Commission finds and concludes that it would be inappropriate to adopt the Competition Plus Plan. The Commission believes that MCI's proposal to cap all of GTE's noncompetitive services at existing rates would be contrary to the express provisions of G.S. 62-133.5, which requires the Commission to 'permit the local exchange company …to rebalance its rates.' Further, the Commission will be addressing the universal service support mechanism in another docket, Docket No. P-100, Sub 133, and the statute, G.S. 62-133.5(a), requires the Commission, upon approval of a price regulation plan, to thenceforth regulate the company's prices rather than its earnings.

Furthermore, the Commission finds MCI's recommendation that the Commission avoid adoption of automatic price adjustment mechanisms to be contrary to G.S. 62-133.5. The Commission also finds MCI's recommendation to eliminate price regulation of competitive services to be unnecessary in light of House Bill 161, which permits the Commission to exempt from regulation competitive services. G.S. 62-2, as amended by House Bill 161.

Additionally, G.S. 62-133.5(a) is silent as to the ability of a party to propose an alternate form of price regulation for a local exchange company that has elected price regulation pursuant to the statute. Nevertheless, the Commission has considered MCI's proposal in light of the Commission's authority to modify a proposed plan. G.S. 62-133.5. The Commission is not persuaded, however, that MCI's Competition Plus Plan for price regulation is appropriate in the existing environment and the Commission rejects this proposal.

The Commission will next address issues relating to the Commission's monitoring of the approved price regulation plan. Such issues, stated in question form, are as follows:

(a) Is the appropriate time frame for review of the price plan ultimately adopted by the Commission five years from the date of its implementation as proposed in the Stipulated Plan? In this regard the Stipulated Plan provides as follows: 'The Commission *may* undertake a review of the operation of the Plan five years from the effective date of the Plan, to determine how the operation of the Plan comports with House Bill 161 ….' (emphasis added) (b) Should the Commission monitor GTE South's earnings annually under the Plan to insure that rates are not getting out of line? and (c) As provided under the Stipulated Plan, should the annual financial surveillance reports be filed with the Commission by GTE South for the duration of the Plan on a confidential basis?

The Attorney General states that the Commission should anticipate modification of the Stipulated Plan at the end of the five-year period and begin the review process sufficiently in advance of that date. By so doing, the Attorney General believes that a plan consistent with future conditions can be appropriately put in place at the end of the five-year period for review.

AT&T takes the position that the Commission should review GTE South's cost, profit, and productivity performance annually. AT&T argues that unless there is some requirement for GTE South to share with its customers its productivity gains through price reductions, then it is not required and will have absolutely no incentive to reduce its prices. Additionally, AT&T asserts that it is necessary to maintain the correct incentives through sufficient offsets or earnings sharing, monitored and periodically adjusted as necessary through cost and rate of return reporting during the transition to full competition. Furthermore; AT&T states that the surveillance reports that GTE South must continue to file should not be filed on a proprietary basis so long as the Company enjoys a publicly sanctioned monopoly franchise.

The Stipulating Parties do not appear to have addressed the propriety of an earnings review in the context of the Stipulated Plan's provision for a five-year review or with respect to the Attorney General's foregoing proposal; nor do they address the issue regarding the Stipulated Plan's confidentiality requirements with respect to the filing of certain financial information. GTE South, in the Stipulated Plan, has agreed to allow a Commission review of the operation of the Stipulated Plan after five years, if the Commission so chooses, and has agreed to file TS-1 financial surveillance reports annually.

Based upon the foregoing and the entire evidence of record, the Commission finds and concludes that the Commission-approved Price Regulation Plan should provide: (1) that the Commission will undertake a five-year review, (2) that such review will be initiated in advance of the approved price plan's fifth anniversary, (3) for the annual filings of the TS-1 financial surveillance reports, and (4) that any claim of confidentiality with regard to these reports shall be made by the Company and shall, if necessary, be determined by the Commission in accordance with Chapter 132 of the North Carolina General Statutes, the Public Records Act. Accordingly, the Commission will include such provisions in the approved plan. Such action is being taken so as to clearly indicate the Commission's intention with respect to the five-year review and to otherwise, to the maximum extent practicable, balance the interests of all concerned.

Another important issue which the Commission must decide is whether, under the approved price regulation plan, the Commission retains sufficient authority to protect the public interest should circumstances dictate. The Commission finds and concludes that it does retain such authority, both statutorily and within the terms of the approved price plan.

G.S. 62-80 provides that the Commission may at any time, upon proper notice to affected parties and opportunity to be heard, 'rescind, alter or amend any order or decision made by it'. G.S. 62-80 also provides that any 'order rescinding, altering or amending a prior order …shall … have the same effect as …provided for original orders.' Upon adoption of the Commission-approved Price Regulation Plan, the Commission will retain its authority under G.S. 62-80.

While the Commission is persuaded that the Commission-approved Price Regulation Plan, as adopted herein, represents a useful means whereby GTE South can undertake the process of transition to a more competitive environment, where the rigors of competition gradually reduce the need for Commission oversight, the Commission concludes that it should not — indeed, cannot — divest itself of powers and responsibilities which are statutorily conferred. The Commission is, of course, cognizant that changes to the Plan should not be undertaken for light and transient reasons. Nevertheless, especially in view of the fast-changing legal and technological environment of telecommunications in North Carolina and the nation, the Commission must retain the power, consistent with due process, to make truly needful adjustments in the price regulation plan if changing circumstances and the public interest so require.

Another issue raised by the intervenors, particularly MCI and AT&T, relates to their request that the Commission recognize that certain provisions of the Telecommunications Act of 1996 may preempt portions of the Stipulated Plan. That Act was passed

by Congress and signed into law by the President after GTE South's application was filed. MCI and AT&T allege that just as the Legislature gave this Commission authority to implement rules governing such issues as resale, interconnection, and universal service, the federal legislation requires the Federal Communications Commission to implement rules concerning many of the same issues. This Commission does not know exactly how those issues will be decided and may not know for some time. To the extent any decisions made in this docket are preempted by federal rules, that is a matter over which the Commission has no control. If subsequent actions of the federal government conflict with the Commission-approved Price Regulation Plan, as adopted herein, the Commission has found that it has the statutory power to modify the approved plan.

Finally, there are two further provisions in the approved plan in the area of public interest that need to be addressed: a public notice requirement and an appropriate effective date.

First, the Commission concludes that a public notice requirement should be inserted in the approved plan. Both the Attorney General and CUCA noted the absence of public notice requirements in the Stipulated Plan. The Attorney General argued that consumers should receive clear and conspicuous notice of price changes under the Plan in the form of bill inserts on different colored paper from the rest of the bill. Such notice should include the proposed rate under the approved plan and the effective date of the rate increase. CUCA argued that the Stipulated Plan does not provide intervenors with an adequate opportunity to investigate or oppose tariff filings. The intervenors believe they should be able to receive tariff filings by hand-delivery or facsimile and should have 30 days rather than 14 days in which to challenge a tariff.

The Commission concludes that a public notice requirement is essential to the approved price regulation plan. The tariff provision should include a subparagraph that would require customer notice by bill insert or direct mail of any price increase at least 14 days before any public utility rates are increased. The notice would include the effective date of the rate change(s), the existing rate(s), and the new rate(s). The Commission concludes that the changes suggested by CUCA and the Attorney General would be unduly burdensome and are unnecessary in light of this amendment.

Second, the Commission concludes that the appropriate effective date for the approved plan is June 3, 1996. GTE South has proposed a May 1, 1996, effective date for the Stipulated Plan. However, in order to give the Company a time period in which it can accept or reject the Commission-approved Price Regulation Plan, as adopted herein, the Commission concludes that an effective date of Monday, June 3, 1996, would be more appropriate.

In summary, the Commission concludes that the Commission-approved Price Regulation Plan, as adopted herein, is ‘otherwise consistent with the public interest.‘ First, the productivity offsets require the Company to share gains in future productivity with its customers. Second, the Stipulated Plan, the provisions of which have been largely adopted by the Commission, represents a major improvement over the Original Plan and appropriately imposes significantly more risk upon the Company. Third, this Commission has a long history of encouraging negotiation, and the two parties that negotiated — the Public Staff and GTE South — represent a broad range of the public interest. In this regard, Chapter 62 expressly provides that:

In all contested proceedings the Commission …shall encourage the parties and their counsel to make and enter stipulations of record …[c]larifying the issues of fact and law. The Commission may make informal disposition of any contested proceeding by stipulation, [or] agreed settlement ….

G.S. 62-69. Negotiation between the parties to actions before the Commission, in an effort to resolve their differences, advances the public policy of North Carolina as expressed by our Supreme Court. ‘The law favors the settlement of controversies out of court. It encourages such action by securing to every man the opportunity to negotiate for the purchase of his peace without prejudice to his rights.‘*Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953).

Consistent with both the law and policy of this State, GTE South and the Public Staff have negotiated a stipulation, and the product of their efforts is largely reflected in the Commission-approved Price Regulation Plan. While other parties to this docket

have criticized them for doing that which the law and policy of this State encourage, GTE South and the Public Staff have in good faith resolved their differences and, as this Order demonstrates, have made an exceedingly significant contribution to the Commission-approved Price Regulation Plan that the Commission believes, and so concludes, meets each of the statutory criteria required by House Bill 161.

Fourth, the Commission views the five-year review and the submission of financial reports as a major concession and a major influence upon GTE South's behavior during the operation of the Plan. Fifth, the Commission believes that the Commission-approved Price Regulation Plan properly shifts the risk of future investment decisions from GTE South's ratepayers to its shareholders, which is where that risk should rest in a competitive marketplace. Sixth, the Commission believes that a competitive marketplace is not only consistent with House Bill 161, but will engender significant benefits for the citizens of this State, through improved services, lower prices, and greater technological innovation. The Commission also believes that competition will force GTE South to become more efficient, and that ultimately, GTE South's North Carolina customers will be the beneficiaries of that efficiency. Seventh, the Commission believes that the Commission-approved Price Regulation Plan will avoid the ‘marginalization‘ of GTE South, because it will permit GTE South to compete effectively, thus maintaining some market share, generating continued support for the maintenance of reasonably affordable local exchange service in North Carolina. The Commission believes that for competition to truly deliver the benefits of the Information Age to all of the citizens of North Carolina, GTE South must be a major participant in the telecommunications marketplace. Otherwise, the Commission concludes that the benefits of competition will be distributed unevenly and inequitably to the people of North Carolina, particularly to those individuals and small businesses who do not possess great market power due to size and or location. Finally, the Commission concludes that the Commission-approved Price Regulation Plan protects and retains affordability, and the Commission believes that such plan offers significant potential for enhanced economic development.

IT IS, THEREFORE, ORDERED that the Price Regulation Plan attached to this Order as Appendix A be, and the same is hereby, approved for implementation by GTE South effective Monday, June 3, 1996, provided that the Company shall, not later than Monday, May 20, 1996:

A. File a statement in this docket notifying the Commission that the Company accepts and agrees to all of the terms, conditions, and provisions of the Commission-approved Price Regulation Plan and indicating its willingness to implement said Plan effective June 3, 1996; and B. Incorporate the modifications reflected in the Commission-approved Price Regulation Plan and refile said Plan with an effective date of June 3, 1996.

This the 2nd day of May 1996.

(Seal)

Appendix A

GTE SOUTH INCORPORATED NORTH CAROLINA PRICE REGULATION PLAN (EFFECTIVE JUNE 3, 1996)

DEFINITIONS

The following definitions will apply to the terms as used in this Price Regulation Plan (the ‘Plan‘) for GTE South Incorporated (herein sometimes referred to as the ‘Company‘).

Contract Service Arrangement (CSA) — An arrangement whereby the Company provides service pursuant to a contract between the Company and a customer. Such arrangements include situations in which the services are not otherwise available through the Company's tariffs, as well as, situations in which the services are available through the Company's tariffs, but in order to meet competition the Company offers those services at rates other than those set forth in its tariffs. CSAs may contain flexible

pricing arrangements, and depending upon the particular competitive situation may also contain proprietary information that the Company desires to protect by deleting such information from the copy filed with the Commission.

Gross Domestic Product Price Index (GDPPI) — The GDPPI is a measure of change in the market prices of output in the economy. The final estimate of the Chain-Weighted Gross Domestic Product Price Index as prepared by the United States Department of Commerce and published in the *Survey of Current Business*, or its successor, shall be the measure of price change used in the administration of this Plan.

Interconnection Services — Those services, except Toll Switched Access Services, that provide access to a Company's facilities for the purpose of enabling another telecommunications company or access customer to originate or terminate telecommunications services.

Long Run Incremental Cost (LRIC) — The cost a Company would incur (save) if it increases (decreases) the level of production of an existing or new service or group of services. LRIC consists of costs associated with adjusting future-production capacity that are causally related to the rate elements being studied. These costs reflect forward-looking technology and operational methods. *LRIC shall be construed as presumptively appropriate for use in this Plan; provided, however, that such use is without prejudice to the right of any party to challenge the propriety of use of LRIC in any complaint proceeding, including but not limited to complaints brought before the Commission alleging anticompetitive conduct on the part of the Company*.

New Service — A regulated and tariffed service that is not offered by a Company as of the effective date of this Plan, but which is subsequently introduced.

Offset — The percentage reduction to the change in GDPPI which is applied under this Plan. The Offset for the Basic Services Category, the Interconnection Services Category, and the Non-Basic 1 Services Category will be 2%.

Price Regulation Index (PRI) — PRI is used to limit or otherwise place a ceiling on price changes, in the aggregate, for the Basic Services Category, the Interconnection Services Category and the Non-Basic 1 Services Category. A PRI is not applicable to the Non-Basic 2 Services Category as there is no limit on the price changes and the prices will not be adjusted for the effects of inflation. The initial PRI for the service categories listed above for the first year of the Plan is one hundred (100). In all subsequent years of the Plan, the PRI will be developed by using the change in the GDPPI minus the Offset applicable to the respective Services Category. The PRI will be developed by: (1) dividing the most recent quarterly GDPPI results available at the time of the annual filing by the GDPPI results for the same quarter for the previous year; (2) dividing the Offset by 100; (3) subtracting the results of Step 2 from the results of Step 1; and (4) multiplying the results of Step 3 by the PRI for the previous year.

Restructure — A modification of the rate structure of an existing service by introducing one or more new rate elements, establishing vintage rates for the service, deleting one or more rate elements or redefining the functions, features or capabilities provided by a rate element so that the service covered by the rate element differs from that furnished prior to the modification. Restructure does not include a change in an existing rate element price when such change is made in accordance with the provisions of Section 6 of this Plan.

Service Price Index (SPI) — An SPI will be developed for the Basic Services Category, the Interconnection Services Category, and the Non-Basic 1 Services Category. An SPI will not be developed for the Non-Basic 2 Services Category as there will be no limit on price changes for the Non-Basic 2 Services Category, and the prices will not be adjusted for the effects of inflation. Each SPI is calculated by: (1) Multiplying the existing price for each rate element in the category by the demand for that rate element to produce the existing revenue for each rate element, then adding together the existing revenues for all of the rate elements in the category to produce the existing revenues for that category (the ‘existing category revenues‘); and (2) Multiplying the proposed price for each rate element in the category by the demand for that rate element to produce the projected revenue for each rate element, then adding together the projected revenues for all of the rate elements in the category to produce the projected

revenues for the category (the 'projected category revenues '); and (3) Dividing the projected category revenues obtained in Step 2 by the existing category revenues obtained in Step 1; and (4) Multiplying the result obtained in Step 3, above, by the previous SPI. The annual filing will establish the demand to be utilized in calculating the SPIs for the coming Plan year and will reflect the most current demand available at the time the annual filing is prepared.

PROVISIONS OF THE PLAN

Section 1. Applicability of Plan.

The Price Regulation Plan will apply to all tariffed services offered by the Company that are regulated by the North Carolina Utilities Commission.

The effective date of the Plan is June 3, 1996.

Section 2. Changes to Plan.

Any change to this Plan will be effective on a prospective basis only, and shall be consistent with the provisions of the Plan or such further orders as may be issued by the Commission.

Section 3. Classification of Services.

Each tariffed telecommunications service offered by the Company and regulated by the Commission will be classified into one of four categories: Basic Services, Interconnection Services, Non-Basic 1 Services and Non-Basic 2 Services. *Basic Services (Basic)* See Attachment A for a listing of services within this category by tariff reference. *Interconnection Services (Interconnection)* See Attachment A for a listing of services within this category by tariff reference. *Non-Basic 1 Services (Non-Basic 1)* See Attachment A for a listing of services within this category by tariff reference. *Non-Basic 2 Services (Non-Basic 2)*, as of the effective date of this Plan, includes only CentraNet/Centrex Services, EDSS and Billing & Collection Services. However, existing services may later be reclassified to the Non-Basic 2 Services Category, and new services may be assigned to the Non-Basic 2 Services Category in accordance with the provisions of Section 4 of this Plan.

Section 4. Classification of New Services, and Reclassification of Existing Services.

Fourteen (14) days prior to offering a new tariffed service and thirty (30) days prior to the reclassification of an existing tariffed service, the Company shall notify, in writing, the Public Staff, the Attorney General, and the Commission. The Company shall provide the appropriate documentation to the Commission and Public Staff.

(1) Simultaneous with such notification, the Company will designate the service category into which the service is classified. (2) Any interested party shall be afforded an opportunity, by timely petition to the Commission, to propose that the new tariffed service be classified in a different category; however, the filing of such petition shall not result in the postponement of any new service. The new offering shall be presumed valid and shall become effective fourteen (14) days after the filing, unless otherwise suspended by the Commission for a term not to exceed forty-five (45) days. For the purposes of determining the service classification only, the Commission may extend the term for an additional thirty (30) days; provided, however, such extension shall not result in the further postponement of any new service. (3) Any interested party shall be afforded an opportunity, by timely petition to the Commission, to oppose the reclassification of an existing tariffed service or propose that the service be reclassified in a category different from that proposed by the Company. The reclassification shall become effective thirty (30) days after the filing, unless otherwise suspended by the Commission for a term not to exceed seventy-five (75) days. (4) The Commission may modify or disapprove the classification or reclassification proposal at any time prior to the end of the term.

Section 5. Tariff Requirements.

A. General Requirements

The Company will file tariffs for services included in any of the four service categories. These tariffs will specify the applicable terms and conditions of the services and associated rates.

(1) Any tariff filing will be presumed valid and become effective, unless disapproved, modified or other-wise suspended by the Commission for a term not to exceed forty-five (45) days, fourteen (14) days after filing. In the case of a tariff filing to restructure rates as defined in the Definitions Section of this Plan, the Commission may extend the term for an additional thirty (30) days and may disapprove or modify the tariff filing if it finds that the restructure of the tariff and the resulting effects on new and existing customers are not in the public interest. The Commission may on its own motion, or in response to a petition from any interested party, investigate whether a tariff is consistent with this Plan and the Commission's rules, and whether the terms and conditions of the services are in the public interest. Provided, however, that a tariff filing limited to a price change in an existing rate element shall only be investigated with regard to whether it is in compliance with Section 6 of this Plan. (2) Any tariff filing reducing rates will be presumed valid and become effective seven (7) days after filing unless otherwise suspended by the Commission for a term not to exceed forty-five (45) days. (*3*) *The Company will provide customer notification by bill insert or direct mail to all affected customers of any price increase at least fourteen (14) days before any public utility rates are increased. Notice of a rate increase shall include at a minimum the effective date of the rate change(s), the existing rate(s), and the new rate(s)*.

B. The Company will provide CSAs under the terms, conditions, and rates negotiated between the Company and the subscribing customer(s). Such terms, conditions, and rates will be set forth in contractual agreements executed by the parties and filed as information with the Commission. When those contracts contain proprietary information, the Company will delete that information from the copy filed with the Commission. CSAs may be, but are not required to be tariffed.

Section 6. Pricing Rules.

A. General

(1) This Plan establishes a pricing structure that allows the Company to adjust their prices for rate elements included in all service categories, except the Non-Basic 2 Services Category, to reflect the impacts of inflation less an Offset. The aggregate percentage change in prices for the affected rate elements, however, cannot exceed the percentage change of inflation minus the Offset, as represented by the PRI. The new prices are lawful when the SPI for a service category is less than, or equal to, the PRI for the same service category, and when the prices for the rate elements within that service category have been established in accordance with the rules set forth in this Plan. (2) Forty-five (45) days prior to each anniversary of the effective date of the Plan, the Company will make an annual filing. The purpose of this filing is to update the SPI and the PRI for all service categories, except the Non-Basic 2 Services Category, based upon the change in the GDPPI over the preceding year minus the Offset. These filings may or may not include proposed price changes. (3) In the event that the annual change in the GDPPI minus the Offset is a negative amount, the Company will reduce prices except: (1) for any service included in the Non-Basic 2 Services Category, and (2) for any service currently priced below its Long Run Incremental Cost (LRIC), or (3) when such a reduction would result in reducing prices below LRIC for any service currently priced above LRIC, or (4) if the SPI is below the newly-defined PRI. If, because of (2) or (3) above, it is not possible to reduce the SPI to the required level, the Company will propose equivalent revenue reductions in other categories. (4) The Company will file tariffs with documentation demonstrating that all price changes comply with the pricing constraints set forth in this Plan. (5) If the Company elects not to increase its rates by the amount allowed under the terms of the Plan in a given year, the Company may increase its rates in future years to reflect the full amount of the allowable increases previously deferred. The Company will not, however, attempt to recover any revenues foregone as a result of deferring the increase in prices. (6) The price for any individual rate element for any service offered by the Company shall equal or exceed its LRIC unless: (1) specifically exempted by the Commission based upon public

interest considerations, or (2) the Company in good faith prices the service to meet the equally low price of a competitor for an equivalent service. (7) In the event that the U.S. Department of Commerce ceases publication of the GDPPI, or significantly modifies the GDPPI, or the GDPPI becomes otherwise unavailable, the Company may select and recommend to the Commission subject to the Commission's approval, another comparable measurement of inflation to be used in the administration of this Plan. (*8*) *The Company shall impute the tariffed rate of a monopoly-service function to the rate for any bundled local exchange service that includes that function and to its own provision of competitive services including that function*. (*9*) *This Plan shall not operate to permit anticompetitive practices. The Company shall not engage in predatory pricing, price squeezing, price discrimination, or anticompetitive bundling or tying arrangements as those terms are commonly applied in antitrust law. Nor shall the Company give any preference to the competitive services of affiliated entities*.

B. Basic, Interconnection, and Non-Basic 1 Services

(1) The prices for rate elements in the Basic, Interconnection and Non-Basic 1 Services Categories in effect on the day prior to the effective date of this Plan shall be the initial effective prices under the Plan. (2) The establishment of a PRI and SPI for the Basic Services Category, the Interconnection Services Category and the Non-Basic 1 Services Category is required in order to test any change in the aggregate prices for rate elements included in those Categories.

a. The PRI places an aggregate ceiling on the prices for rate elements within the Basic, Interconnection and Non-Basic 1 Services Categories. At the time the Plan is implemented, the value of the PRI for each of these Services Categories will be set at one hundred (100). In the second and subsequent years of the Plan, the PRI will be adjusted to reflect any change in the GDPPI occurring over the preceding year minus the Offset. For example:

• if the result of dividing the most recent quarterly reported GDPPI by the reported GDPPI for the same quarter for the preceding year is 1.04, and • the result of dividing the offset (assume 2%) by 100 is .02, and • the result of subtracting the results of Step 2) is 1.02, and • the result of multiplying the results of Step 3) by the PRI for the previous year is 102, then • the PRI for the Category for the second year of the Plan would be 102.

b. The SPI is an index that reflects the relative change in revenue that would be generated by the new prices as compared to revenue generated by the old prices at equal demand for all the rate elements within the Basic, Interconnection and Non-Basic 1 Services Categories. When the Plan is implemented, the initial value of the SPI will be set at one-hundred (100). In the second and subsequent years of the Plan, the SPI will be adjusted to reflect the amount of change between the new and old prices for all the rate elements within the Category. Except for price changes associated with regrouping of exchanges as set forth in Section 8 and the financial impact of governmental action as set forth in Section 7, as prices for rate elements within the Category are changed, a new SPI is calculated, compared to the PRI and then included with the tariff filing. The SPI is applied to the entire service category and not individual services or rate elements within the Category. The Company may increase some rates, while decreasing others, as long as the SPI is less than, or equal to, the PRI and as long as the increase in any individual rate element does not exceed the GDPPI plus the percentage specified in the table set forth in Subparagraph (5) below. (3) The initial prices for Residence Basic Local Exchange Service shall be the maximum price *s* charged for a period of three years from the effective date of the Plan (the ‘cap period‘). The specific rates to be capped are the Residence Individual Line Service charges, the Residence Touch Calling Service charge, the Residence Service Order charge, the Residence Premises Visit charge and the Residence Central Office Line Connection Work charge (the ‘capped Basic Local Exchange Services‘). The initial prices, in the aggregate, for Toll Switched Access Services shall be the maximum that the Company will charge under the Plan. (4) During the cap period, the capped Residence Basic Local Exchange Services will be excluded from the calculation of the SPI for the Basic Services Category. (5) During the cap period, prices for individual non-capped rate elements within the Basic Services Category and prices for any rate elements within the Interconnection and Non-Basic 1 Services Categories may be increased or decreased by varying amounts. Price increases for individual rate elements cannot exceed the percent change in the GDPPI over the preceding year, plus the percentages shown in the table below.

Service Category	*Change in GDPPI plus*
Basic	**3%**
Interconnection	**7%**
Non-Basic 1	**15%**

• If the PRI = 103 and the SPI = 101 for the Basic Services Category at the end of the third year of the Plan, excluding the capped Residence Local Exchange Services, then • the PRI and SPI would be re-initialized to 102 and 100, respectively, as the first step. • Next, the difference between the PRI and SPI would be reduced by the percentage of capped Residence Local Exchange Service revenues to total Basic Services Category revenues. If the percentage is 50%, then • the PRI would be reduced to 101 and the SPI would remain at 100 and a further adjustment would be made to establish a new PRI for the fourth year based upon the percent change in the GDPPI from the previous year, minus the Offset.

(7) As set forth in Section 7 and Section 8 following, price changes resulting from changes in the PRI will not be impacted, or in any way affected, by changes resulting from governmental action or the regrouping of exchanges. (8) Section 2.3.14 of the GTE South Access Tariff and Section 2.3.11 of the GTE South Access Tariff for the former Contel of North Carolina service area contains provisions pertaining to Switched Access Credits. The effect of changes in the Switched Access Credits will be reflected in the calculation of the SPI for each category of service causing the credit(s) to change.

C. Non-Basic 2 Services

(1) The prices for rate elements in the Non-Basic 2 Services Category in effect on the day prior to the effective date of this Plan will be the initial effective prices under the Plan. (2) Prices for individual rate elements within the Non-Basic 2 Services Category may be increased or decreased by varying amounts, and the rate changes are not subject to either a rate element constraint or a Category constraint. Price increases and decreases may be made at any time and are not limited to any specific number of increases or decreases in the twelve-month period between anniversary dates of the Plan.

D. New Services

New tariffed services, excluding those assigned to the Non-Basic 2 Services Category, will be included in the SPI associated with the assigned service category in the first annual filing after the service has been available for six months. As set forth in Section 4 above, the Commission shall make the final determination regarding the classification or reclassification of any service.

Section 7. Financial Impacts of Governmental Actions.

A. With Commission approval, the Company may adjust the prices of any service(s) due to the financial impacts of governmental actions that have a specific impact on the telephone industry as a whole or upon any segment of the industry that includes the Company, to the extent that such impacts are not measured in the GDPPI. Such governmental actions would include, by way of illustration and not limitation, general changes such as ‘separations‘ matters (involving the separation of investment, expenses, and revenues, between the intrastate and interstate jurisdictions) as well as extended area services or Commission-required technological innovations. In such an event, the Company or another interested party may request the Commission to adjust the rates accordingly. The request shall include a description of the governmental action, the proposed adjustment to prices, the duration of the adjustment, and the estimated revenue impact of the governmental action. The Company may request price adjustments to reflect the financial impact of governmental actions as a part of the annual filing and one additional price adjustment at any time during each Plan year to reflect the financial impact of governmental actions. A Plan year shall run

from an anniversary date of the effective date of the Plan to the next anniversary date of the effective date of the Plan. The Commission *may* approve the request if the Commission finds that:

(1) the governmental action causing the financial impact has been correctly identified; (2) the financial impact of the governmental action has been accurately quantified;

(3) the proposed rates produce revenue covering only the financial impact of governmental actions; (4) the rates would be applicable to the appropriate class or classes of customers; *and* (*5*) *the adjustment in rates is otherwise in the public interest*.

B. Price changes resulting from governmental action will not impact or otherwise affect the price changes provided for under the terms of the pricing rules set forth in Section 6 preceding. In addition, any price changes resulting from *approved* governmental action *requests* will not be constrained by the pricing rules set forth in Section 6. C. The Commission may, on request of the Company or another interested party, or on its own initiative, require the Company to adjust prices for circumstances that meet the above criteria.

Section 8. Regrouping of Exchanges.

A. The Company will not regroup any of its exchanges during the three-year period for which Residence Basic Local Exchange Service rates are capped under the provisions of Section 6 preceding. B. After the expiration of the cap period, the Company may regroup exchanges due to growth in access lines. Such regrouping may be proposed in the annual filing referenced in Section 9 following, for any exchange meeting the criteria for the new rate group. Movement of an exchange from one rate group to another is limited to one rate group per year except where movement to or toward the proper rate group together with the deletion of the existing EAS additive would not cause an increase greater than the increase caused by a one rate group move. When an exchange is regrouped, any existing EAS additive will be deleted. Price changes resulting from the regrouping of exchanges will not impact or otherwise affect the price changes provided for under the terms of the pricing rules set forth in Section 6 preceding. Additionally, any price changes resulting from the regrouping of exchanges will not be constrained by the pricing rules set forth in Section 6.

Section 9. Annual Filing.

The Company shall make an annual filing containing the following information:

A. The annual percent change in the GDPPI; B. The applicable change to the PRI for the Basic, Interconnection and Non-Basic 1 Services Categories based upon the percent change in the GDPPI minus the Offset; C. The change in the SPI for the Basic, Interconnection and Non-Basic 1 Services Categories; and D. Complete supporting documentation.

Section 10. Commission Oversight.

A. The Commission retains oversight for service quality, complaint resolution and compliance by the Company with all elements of this Plan.

B. The Company will annually file the TS-1 financial surveillance reports which are now filed with the Commission. No other periodic financial reports are required to be filed. *Any claim of confidentiality with regard to these reports shall be made by the Company and shall, if necessary, be determined by the Commission in accordance with Chapter 132 of the North Carolina General Statutes, the Public Records Act*.

C. The Commission *shall* undertake a review of the operation of the Plan *in advance of* five years from the effective date of the Plan, to determine how the operation of the Plan comports with House Bill 161 and specifically how the Plan:

1. Protects the affordability of basic exchange service, as such service is defined by the Commission; 2. Reasonably assures the continuation of basic local exchange service and meets reasonable service standards that the Commission may adopt; 3. Will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and 4. Is otherwise consistent with the public interest.

Following its review, the Commission may make modifications to the Plan consistent with the public interest.

Section 11. Depreciation.

Coincident with the effective date of the Plan, the Company will determine and set its own depreciation rates.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

2017 WL 840295 (N.C.U.C.)

In the Matter of Rulemaking Proceeding to Consider Proposed Rule
Establishing Procedures for Settlements and Stipulated Agreements

Docket No. M-100, SUB 145

North Carolina Utilities Commission

March 1, 2017

ORDER DECLINING TO ADOPT PROPOSED SETTLEMENT RULES

BY THE COMMISSION:

***1** On July 14, 2016, North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a Petition for Rulemaking in the above-captioned docket. In summary, NC WARN alleged that in recent significant Commission dockets it experienced unfair impediments to participating fully in negotiated settlements by the Public Staff and other parties. In support of its allegations, NC WARN attached a summary of pertinent proceedings in four Commission dockets. NC WARN asserted that settlements are often reached between the Public Staff and the utility or between the utility and another party without other parties having the opportunity to enter into the negotiations. Further, NC WARN stated that settlements are sometimes reached before the deadline for other parties to intervene, file testimony, or conduct discovery, and at other times the settlements are presented just days prior to the expert witness hearing, without adequate time for expert review.

In addition, NC WARN contended that settlements often are presented to the Commission as a fait accompli, in that the settlement includes a non-severability clause providing that no portion of the settlement will be binding on the settling parties unless the settlement is approved by the Commission in its entirety.

Moreover, NC WARN stated that all settlements should be filed openly with full transparency. NC WARN asserted that there is a lack of transparency of the terms of settlements, especially when side agreements, such as between the utility and another party, are not filed with the Commission, or are filed under seal as confidential trade secrets. NC WARN stated that a case in point was the merger between Duke Energy Corporation and Progress Energy, Inc., in Docket Nos. E 7, Sub 986 and E-2, Sub 998. According to NC WARN, numerous “secret agreements” were made so that major parties would agree to the merger.

NC WARN stated that it was unable to find model rules for settlements or rules by other Commissions incorporating settlement procedures into their hearing procedures. It further noted that many judicial bodies across the country have requirements that parties to litigation enter into mediated settlement discussions, but that these guidelines do not include time limits or address the question of multiple parties entering into a settlement under specific requirements.

In addition, NC WARN attached an essay authored by Scott Hempling entitled “Regulatory Settlements: When Do Private Agreements Serve the Public Interest?” (Hempling article). NC WARN stated that Hempling's conclusions are summarized in two principles:
(1) A settlement proposal must be backed by principles and evidence aligned with commission priorities.

(2) The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of “the public interest” prevails for reasons other than merit.

***2** Finally, NC WARN attached a proposed rule that it suggested as a starting point for the Commission and parties to use in developing a rule to establish a settlement process that NC WARN would view as fair and transparent. NC WARN stated that it would be glad to work with other parties and interest groups to develop this rule and to provide additional comments in support of the proposed rule. The primary components of the rule proposed by NC WARN are: (1) the Commission should encourage

the parties to settle matters between and among themselves in order to reduce the issues to be heard by the Commission; (2) settlements filed with the Commission shall be supported by credible evidence, expert testimony, and exhibits; (3) the Commission will not accept a settlement until 10 days after the deadline for intervention or the filing of expert testimony established by the Commission; (4) the settlement shall be accompanied by a statement that all of the parties had the opportunity to participate in the settlement negotiations, and to review and comment on the settlement at least 10 days before it was filed with the Commission; (5) all parties should be encouraged to file statements as to which provisions of the settlement they support, oppose, or have no position on; (6) the parties entering into the settlement shall file expert testimony and exhibits providing support for the settlement; (7) the Commission will not accept settlements that require acceptance of the settlement in its entirety or not at all; (8) parties should be encouraged to submit data requests or pursue other discovery as soon as possible so that the information available to all parties is roughly equivalent prior to the review of the settlement. Late-filed discovery requests will not provide grounds to extend the settlement review period; and (9) all parties should carefully examine all filings in order to minimize, if not eliminate, filings under seal as confidential.

On August 1, 2016, the Commission issued an Order Requesting Comments on Proposed Rule. The Order requested that the Public Staff and other interested parties file comments and reply comments on the rule proposed by NC WARN. In addition, the Order included the investor-owned electric and natural gas public utilities as parties to this docket without the need for those entities to file petitions to intervene.

Petitions to intervene were filed by Carolina Utility Customers Association, Inc. (CUCA) and the North Carolina Sustainable Energy Association (NCSEA). The Commission issued Orders allowing the intervention of NCSEA and CUCA on August 1, 2016 and August 25, 2016, respectively.

On September 16, 2016, initial comments were filed by the Public Staff; jointly by Duke Energy Carolinas, LLC (DEC), Duke Energy Progress, LLC (DEP), Virginia Electric and Power Company d/b/a Dominion North Carolina Power (DNCP), Piedmont Natural Gas Company, Inc. (Piedmont), Public Service Company of North Carolina, Inc. (PSNC), and Frontier Natural Gas Company, LLC (Frontier) (collectively, utilities); NCSEA and NC WARN.

***3** On October 14, 2016, reply comments were filed by the Public Staff, CUCA and NC WARN.

SUMMARY OF COMMENTS

Public Staff

The Public Staff opposes the rule proposed by NC WARN. The Public Staff states that the rule is unnecessary and would hinder good faith negotiations between parties in Commission proceedings, citing the history of parties working together to resolve issues through settlement, and G.S. 62-69(a) requiring the Commission to encourage the parties to settle dockets through stipulations, settlement agreements and consent orders. In addition, the Public Staff cites State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 466, 500 S.E.2d 693, 703 (1998), and Knight Publ'g Co. v. Chase Manhattan Bank, 131 N.C. App. 257, 262, 506 S.E.2d 728, 731 (1998) as examples of court decisions touting the benefits of settlements in utilities regulation and business litigation, respectively.

Further, the Public Staff submits that settlements promote the informal exchange of ideas and information among the parties, the elimination of insignificant or noncontroversial issues ahead of an evidentiary hearing, informed decision-making and the efficient administration of justice, especially in the complex matters that are typically before the Commission. Moreover, settlements result in savings to consumers by reducing litigation expenses that would otherwise be recoverable by utilities as a component of the cost of providing utility service.

The Public Staff discusses the Hempling article and states that the apparent thrust of the essay is a concern that settlements can "edge the commission out of its statutory role" and "induce regulatory passivity." Further, Hempling expresses concern

about "resource differentials" between parties representing private interests and those representing the public interest. The Public Staff opines that such concerns about resource differentials between utilities and consumers in Commission proceedings were addressed by the General Assembly many years ago with the enactment of G.S. 62-15 and the designation of about 87 former Commission staff positions as the Public Staff. In addition, the Public Staff notes that it is entirely independent of the Commission in the performance of its duties, being under the sole supervision, direction, and control of an Executive Director appointed by the Governor, and is prohibited by G.S. 62-70 from engaging in ex parte communications with the Commission, as are all parties to a pending docket.

Citing State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc., 348 N.C. 452, 500 S.E.2d 693 (1998) (CUCA I), and State ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc., 351 N.C. 223, 524 S.E.2d 10 (2000) (CUCA II), the Public Staff addresses NC WARN's contention that recent settlements contested by NC WARN were a *fait accompli* and were simply rubber stamped by the Commission. The Public Staff states that in compliance with the above Supreme Court cases, the Commission cannot simply accept a nonunanimous settlement, but instead must weigh all of the evidence and render an independent decision supported by the evidence.

***4** With regard to NC WARN's objection to non-severability clauses in settlements, the Public Staff states that a settlement is a package that represents the give-and-take negotiations of the parties. In the negotiating process a settling party makes trade-offs to obtain the relief that it wants, agreeing in return to the relief that the other party wants. The non-severability clause protects a party from the possibility that the Commission might reject the settlement relief that it bargained to receive and accept the relief that it bargained to give. If that occurs, then the non-severability clause gives the party the right to withdraw from the settlement agreement.

The Public Staff discusses other flaws in the proposed rule, including:
• The proposed rule omits any parameters for maintaining confidentiality in settlement discussions involving proprietary and trade secret information that is filed with the Commission under seal. It is impractical to allow a party to participate in settlement discussions without having signed a confidentiality agreement, as that party lacks the full information necessary to meaningfully participate. Additionally, the parties should be required to affirm compliance with North Carolina Rule of Evidence 408, which prohibits the admission of evidence related to settlement discussions.

• The prohibition on filing settlements before intervention/testimony deadlines would nullify the goal of promoting judicial economy, and appears to be an attempt to require the stipulating parties to provide other parties with a basis for opposing a settlement without conducting discovery.

• The timelines in the proposed rule are unrealistic. Constructive settlement discussions are a complex process. They become possible as the parties develop their respective cases through discovery and analysis and determine that a good faith opportunity exists to explore resolving some or all of the issues. For example, it is difficult to negotiate rate design in a general rate case if a revenue requirement has not yet been established. Thus, the timeline required for determining whether or not settlement discussions are warranted varies from case to case, and once begun, actual negotiations can range from days to months.

• The proposed rule does not adequately define "opportunity to participate" in settlement negotiations. As noted above, settlement discussions are typically very fluid and involve the exchange of ideas and information between groups and individuals through various means, sometimes simultaneously. Including every party on every communication is simply not possible. In addition, some parties come into settlement negotiations unprepared to participate, having conducted little or no discovery. Any rule governing the settlement process should contain a provision requiring good faith participation in the process and include a mechanism for excluding parties seeking to delay or obstruct negotiations.

***5** • The proposed rule threatens the constitutional rights of parties to form contracts without government restrictions, citing Muncie v. Ins. Co., 253 N.C. 74, 79, 116 S.E.2d 474, 478 (1960), and Alford v. Textile Ins. Co., 248 N.C. 224, 227, 103 S.E.2d 8, 10-11(1958). Contrary to the principle of freedom of contract, the proposed rule would force parties to engage in settlement

discussions with any party, including parties who are abusive, advocate irrelevant issues, negotiate in bad faith, or maintain irrational expectations. The public interest argument of NC WARN does not change the freedom of contract principle, as the Commission remains responsible for making decisions that ensure that the public interest is served by a settlement agreement that the Commission decides to approve. Experience shows that comprehensive settlements between utilities and the Public Staff have produced positive results for consumers, as amply demonstrated by the cases cited by NC WARN in Exhibit A of its Petition. These settlements achieved benefits for consumers that the Commission could not have ordered on its own, such as monetary concessions and regulatory conditions. Additionally, other parties had the opportunity to participate fully in the settlement negotiations by entering into confidentiality agreements to gain access to confidential information provided to the Public Staff, and by taking other steps that would have placed the party in a position to effectively participate in the settlement negotiations. This is the process that has been followed for years, and there is nothing opaque or secretive about it. Any perceived barriers to a party's participation in the process would have been largely of the party's own making.

Utilities

The utilities state that the proposed rule is not reasonable, not necessary to the Commission's implementation of the Public Utilities Act (Act), contrary to the Commission's statutory mandate to encourage settlement, and would effectively erode parties' well established practice of utilizing stipulations to resolve legal and factual issues in contested Commission proceedings. They cite several sections of the Act that establish the Commission's regulatory and rulemaking authority, as well as CUCA I. In addition, the utilities submit that several provisions of the proposed rule contradict the mandate of G.S. 62-69(a) that the Commission encourage settlements, including (1) proposed subsections (b)(1) and (b)(2) prohibiting the Commission from accepting a settlement until 10 days after the later of intervention or the filing of expert testimony would unreasonably constrain the timing and process for parties to file a settlement, and (2) proposed subsection (b)(6) prohibiting non-severability clauses fails to recognize that the Commission must independently find that the provisions of the settlement are in the public interest, citing CUCA I.

***6** In addition, the utilities note that the Act establishes procedural rights to ensure that all interested parties can fully participate and advocate their interests in Commission proceedings, including G.S. 62-73, 101(c) and 94. In addition, under G.S. 62-79(a), CUCA I, and CUCA II the rights of non-settling parties are protected by requiring that the Commission demonstrate to the appellate courts that it considered all the evidence and used its independent judgment before approving a nonunanimous settlement. The utilities opine that the elaborate procedural, hearing, and appeals process mandated by the Act is working today as designed.

Further, the utilities maintain that the proposed rule is unreasonable because it is based on a fundamental mischaracterization of the existing practice and procedure of resolving contested Commission proceedings. They cite as examples NC WARN's allegations in its Petition and public statements that the settlement process is “unfair and nontransparent,” that NC WARN has been “unfairly impeded from participating fully” in proceedings in which it has intervened, that settlements are presented to the Commission as a “fait accompli,” and that “secret agreements” result in a lack of transparency. The utilities counter that the settlement of proceedings is a well-established and valuable practice, citing Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 661, 589 S.E.2d 433, 435 (2003). Moreover, the utilities submit that compromise by settlement allows the utility, the Public Staff, and other parties to avoid protracted and contentious litigation, to narrow the disputed issues before the Commission, and, in certain cases, to resolve or eliminate conflicting testimony on a given issue. The utilities contend that this is a valuable process for large and small utilities alike. Further, settlements are not a “fait accompli,” as the Commission is free to require evidence in support of them, and to accept or reject them as it deems appropriate based on the public interest.

The utilities also contend that the substantive provisions of the proposed rule are either not workable or are unnecessary under the Commission's practices and procedures. They state as an example that proposed subsections (b)(1) and (b)(2) would be unworkable in cases where separate public hearings are not scheduled other than at the opening of the expert witness hearing, or where the Commission determines there is no need for a public witness or expert witness hearing due to lack of protest, or

if there is not 10 days between the last public witness hearing and the expert witness hearing. In addition, the utilities state that proposed subsection (b)(3), requiring that all parties be given "the opportunity to participate" in settlement negotiations, would present an impracticable obstacle to the resolution of contested matters before the Commission, without offering any discernable additional benefit. They state that their doors are always open for engaging in good faith and constructive settlement discussions with any and all parties. However, the utilities state that they have determined in certain circumstances that a party's interests and advocacy are completely irreconcilable to the utilities' fundamental position, making it unlikely that settlement discussions would be productive. Based on this experience, the utilities contend that there is neither authority nor benefit in attempting to force parties whose goals and interests are completely contrary to engage in settlement discussions with each other.

***7** With respect to proposed subsection (b)(4), the utilities state that this provision also is unnecessary. They contend that the Act provides parties significant procedural and due process rights to contest stipulations either in testimony, at a hearing or in proposed orders or briefs. Similarly, the utilities submit that proposed subsection (b)(5) is unnecessary because Commission Rule R1-24(c) provides that the Commission may require proof of the facts stipulated to by parties, notwithstanding the stipulation.

In addition, the utilities maintain that proposed subsection (b)(6) is unreasonable and unworkable. They state that non-severability clauses are essential to protect a party's right to revert to its original position if a settlement is not approved by the Commission. Moreover, subsection (c) of the proposed rule, which would encourage timely discovery in Commission proceedings, is also unnecessary. The Commission provides clear guidance in its procedural orders at the outset of a given case regarding the timing and scope of discovery.

Further, the utilities contend that proposed subsection (d) is unreasonable and potentially unworkable to the extent that it is inconsistent with parties' rights under North Carolina law to protect trade secret and other confidential information from public disclosure. They also note that the Commission or any party can challenge a designation of confidentiality.

In conclusion, the utilities request that the Commission dismiss NC WARN's petition.

NCSEA

NCSEA states that settlements should be encouraged, and that transparency promotes public discourse about energy issues, and public confidence, both of which advance the public interest. NCSEA recommends that the Commission consider using prehearing conferences more frequently, or perhaps requiring them in complex proceedings, such as rate cases and mergers. Further, if the Commission is inclined to modify its rules, NCSEA recommends modernizing Commission Rule R1-20 as shown in Exhibits A and B attached to its comments, which are redlined and clean versions of Commission Rule R1-20 that incorporates NCSEA's proposed changes as well as comments to provide context for the proposed changes. NCSEA states that its proposed language updates Commission Rule R1-20 to include language from several sources, including the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, the General Rules of Practice for the Superior and District Courts, the South Carolina statutes governing that state's Office of Regulatory Staff, and the now-repealed Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program.

NC WARN

NC WARN filed letters from Citizens Action Coalition, Indianapolis, Indiana, Alliance for Energy Democracy, Weaverville, North Carolina, and Institute for Local Self-Reliance, Minneapolis, Minnesota, in support of its proposed rules. In summary, these organizations state their support for the inclusion of all parties in settlement negotiations and greater transparency in settlement agreements. In addition, NC WARN states that further research indicates that no other commission has adopted rules regulating settlements, and that a rule adopted by the Commission could serve as a model for other jurisdictions.

SUMMARY OF REPLY COMMENTS

CUCA

***8** CUCA states that it has been an active participant in the existing rate case settlement process and believes that, in most circumstances, the process has worked well. It cites as examples settlements in the last DEC and DEP rate cases in Docket Nos. E-7, Sub 1026 and E-2, Sub 1023, respectively, and PSNC's rate case in Docket No. G-5, Sub 565. CUCA further notes that it participated in lengthy settlement discussions with DNCP in its recent rate case, Docket No. E-22, Sub 532, but that despite good faith bargaining a settlement that included all the parties was not reached.

CUCA states that confidentiality of the settlement negotiations is essential to the goal of full and frank discussions. Further, requiring parties to participate in a more formalized structure would be contrary to the confidential and voluntary nature of settlement talks. CUCA states that a settlement is an "offer" to the Commission, supported by competent evidence, that the proposed settlement constitutes a fair and reasonable balancing of the interests of both the utility and its consumers. Thus, the Commission retains plenary power to accept or reject the proposed settlement. CUCA believes that the current, more informal and confidentiality-protected process of settlement is the better way to proceed, and that the sound exercise of the Commission's discretion, rather than a hard and fast rule, is the better way to handle settlements that occur near the start of scheduled hearings.

CUCA states that a significant barrier to NC WARN's participation in the settlement process is NC WARN's staunch refusal to execute appropriate confidentiality agreements. CUCA further states that the utilities and CUCA would be unwilling to have another party participate in settlement negotiations if that party has not executed a confidentiality agreement.

In addition, CUCA states that it reviewed the initial comments filed by the utilities and the Public Staff and agrees with those comments, and it adopts the initial comments of those parties as the balance of its reply comments in this matter.

Public Staff

The Public Staff agrees with NCSEA that prehearing conferences could be used more frequently with positive results, but notes that there is no one-size-fits-all timeline or procedure for settlement discussions. In addition, the Public Staff states that NCSEA's proposed changes to Commission Rule R1-20 to require the Public Staff to act as a facilitator or mediator to resolve disputes and issues, and to advise all participants of circumstances bearing on possible bias, prejudice, or partiality of the Public Staff would be unworkable, as it would hinder the Public Staff's ability to perform its statutory responsibilities on behalf of the using and consuming public. The Public Staff states that it cannot serve as both a neutral facilitator and consumer advocate in the same docket, and that the current version of Rule R1-20 properly recognizes that convening and conducting prehearing conferences is solely a Commission function.

***9** Further, the Public Staff states that the principles and policies underlying the existing settlement process are well established and are more than sufficient to protect the interests of parties who are prepared to participate in good faith. As a result, the Public Staff continues to maintain that the process should not be restricted by additional rules.

NC WARN

NC WARN states that in major electric cases, such as rate cases and mergers, it and similar public advocacy groups have been shut out of settlement discussions. Further, NC WARN reiterates its contention that too many of the settlements are presented to the Commission as a "fait accompli" with "all or nothing" provisions demanding the Commission accept the settlement in its entirety, and that the Commission should always make its own independent findings of fact and conclusions of law, rather than indiscriminately adopt a settlement agreement.

In addition, NC WARN asserts that the utilities believe Commission Rule R1-24(c) authorizes the utilities to settle with some but not all of the parties. In response, NC WARN cites the Court's statement in CUCA I that it "encourages all parties to seek such resolution through open, honest and equitable negotiation." (Emphasis added). Id., at 466, 500 S.E.2d at 717.

NC WARN states that neither the Public Staff nor the utilities offer substantive arguments concerning the time constraints in the proposed rule, only that they are contrary to current practice. It states that the goal of the proposed rule is to encourage open and transparent negotiations, and to insure that no parties are put in an unequitable position of having settlements and stipulated agreements filed before testimony is filed, or a day or two before an expert witness hearing, and that these goals reflect the Act and case law provisions that encourage settlement by all parties.

DISCUSSION AND DECISION

The Commission agrees with the parties that settlements should be encouraged, and that the Commission should do all it lawfully and reasonably can to facilitate the parties' efforts to reach a full and fair settlement. On the other hand, the Commission as the decision maker cannot be involved in the settlement discussions, or make and enforce rules that have a substantive effect on the parties' settlement negotiations. These parameters are firmly established by the Act and other considerations. In addition, there is a long Commission history in which settlement negotiations have proceeded in a fair, cooperative and productive manner, resulting in hundreds of settlements that the Commission has independently reviewed and subsequently approved, in whole or in part, as serving the public interest. In light of the success of existing settlement practices, the Commission is hesitant to attempt a major "fix" of the process when it is not broken. In addition, the Commission must abide by the following legal requirements and principles.

***10** Pursuant to G.S. 62-69(a), the Commission "shall encourage the parties and their counsel to make and enter stipulations of record." Further, "The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default." However, irrespective of whether the case is settled or fully litigated, the Commission's orders must be based on competent, material and substantial evidence. G.S. 62-65. In addition, the Commission's authority to accept or reject a nonunanimous settlement is governed by the standards set by the North Carolina Supreme Court in CUCA I and CUCA II. In CUCA I, the Supreme Court held that

[A] stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding.

The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

348 N.C. at 466, 500 S.E.2d at 703.

However, as the Court made clear in CUCA II, the fact that fewer than all of the parties have adopted a settlement does not permit the Court to subject the Commission's Order adopting the provisions of a nonunanimous stipulation to a ""heightened standard" of review. 351 N.C. at 231, 524 S.E.2d at 16. Rather, the Court said that Commission approval of the provisions of a nonunanimous stipulation "requires only that the Commission ma[k]e an independent determination supported by substantial evidence on the record [and] … satisf [y] the requirements of chapter 62 by independently considering and analyzing all the evidence and any other facts relevant to a determination that the proposal is just and reasonable to all parties." Id., at 231-32, 524 S.E.2d at 16.

Where practicable, the Commission applies the rules of evidence used in the superior courts in civil matters. See G.S. 62-65(a). Pursuant to Rule 408 of the North Carolina Rules of Evidence, in pertinent part, "Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible." G.S. 8C-1, Rule 408. There are two main reasons for prohibiting settlement discussions to be used as evidence: (1) to encourage open and frank settlement discussions by the parties regarding the evidence supporting their positions, the strengths and weaknesses of their positions and their parameters for accepting a settlement; and (2) to prevent the court, jury or Commission from knowing the lowest amount or least relief that any party might be willing to accept in resolution of the case.

***11** Thus, in establishing and enforcing any settlement guidelines, the Commission must walk the fine line between encouraging all parties to resolve their differences prior to trial, while avoiding the exercise of any control over the structure or content of the settlement discussions. The Commission's analysis of the best means for striking the proper balance between these principles leads the Commission to the following conclusions regarding the particular rule provisions proposed by NC WARN.

Subsection (a)

The Commission encourages the parties, as defined in Rule R1-3, to settle matters between and among themselves in order to focus on the issues required to be heard by the Commission. However, settlements and stipulated agreements filed with the Commission shall be supported by credible evidence, expert testimony, and exhibits.

As previously discussed, G.S. 62-69(a) requires the Commission to encourage settlements. Therefore, the first sentence of subsection (a) of the proposed rule is unnecessary. The second sentence of subsection (a) is repeated as a part of proposed subsection (b)(5), and will be discussed subsequently.

Subsections (b)(1) and (b)(2)

(1) The Commission will not accept a settlement or stipulated agreement between or among parties until 10 days after the deadline for intervention or the filing of expert testimony established by the Commission, whichever comes later.
(2) The Commission will not accept a settlement or stipulated agreement until 10 days after the last public hearing, excluding the opportunity for public testimony at the beginning of the evidentiary hearing, if public hearings are scheduled as part of the proceeding.

These rules would create an unworkably narrow window for settlements to be filed. Under the Commission's rules, direct testimony is generally due 10-15 days before the expert witness hearing. See Commission Rules R1-24(g)(2), R1-17(f) and R8-55(h)(i). The Commission's scheduling orders typically set the date for filing direct testimony as 15 days prior to the hearing. Thus, if testimony was due on April 1 and the expert witness hearing was set for April 16, the settling parties would have to file their testimony on April 1, but could not file their settlement before April 11. It appears that NC WARN would like to prevent the Public Staff and other parties from signing a settlement agreement prior to 10 days after filing their testimony. However, the proposed rule would not prohibit that, as the parties could sign a settlement agreement but hold the filing of the agreement until 10 days after filing their testimony. In addition, one likely consequence of the proposed rule would be to discourage the parties from continuing to negotiate towards a settlement of the case after they have filed their testimony. Once a party has filed its direct testimony stating its litigation position on the utility's application, that party has staked out a somewhat rigid position and may find it difficult to settle for any relief that is significantly less.

***12** In addition, one of the chief benefits of a settlement is that it saves parties and ratepayers the expense of fully litigating a case. For example, one of the most labor intensive and, consequently, expensive aspects of litigation is the preparation of testimony. To require a party to file litigation testimony, as opposed to settlement testimony, perhaps as productive settlement discussions are continuing and a settlement is nigh, would be wasteful.

With regard to the proposed prohibition against filing a settlement before the last public witness hearing scheduled in the docket, this would create the same unworkably narrow window for settlement discussions as under proposed (b)(1). The dates set for public witness hearings in a particular docket and the date for the expert witness hearing have no particular timing or relationship. Rather, there are several factors that bear upon the dates set by the Commission for public witness hearings. These factors include the availability of hearing locations, a preference for grouping the hearings on consecutive dates if the locations of the hearings are in the same area of the state, and the Commissioners' schedules. Thus, there is no set time frame for public witness hearings. They could be several weeks prior to the expert witness hearing, or they could be during the same week as the expert witness hearing. For example, in the PSNC rate case, Docket No. G-5, Sub 565, the last public witness hearing was held on August 29, and the evidentiary hearing began on August 30. In the DEC rate case, E-7, Sub 1026, the last public witness hearing was held on July 2, and the expert witness hearing began on July 8.

In addition, there is no compelling reason to require parties to withhold the filing of their settlement agreement until after the date of the last public witness hearing. Similar to the prohibition in proposed subsection (b)(1), it appears that NC WARN would like to prevent parties from signing a settlement agreement prior to the last public witness hearing. However, the proposed rule would not do so, as the parties could sign a settlement agreement but hold the filing of the agreement until after the final public witness hearing. In addition, the Commission encourages parties to begin settlement discussions as soon as they are sufficiently knowledgeable about the facts and issues, and to conclude them as quickly as reasonably possible. This helps provide the Commission and non-settling parties with sufficient time to review and understand the terms of the settlement before the expert witness hearing. Requiring that a settlement not be reached prior to the last public witness hearing would be an arbitrary and counterproductive rule.

Perhaps NC WARN is concerned that a public witness hearing held after the parties have filed a settlement gives the impression that the hearing is just “going through the motions” to give the appearance of listening to ratepayers, even though the parties, or some of them, have reached a settlement. If that is NC WARN's concern, then NC WARN is ignoring the main purpose of the public witness hearing - to provide the opportunity for ratepayers to express their views and present evidence to the Commission, which has not approved the settlement, and continues to have a duty to consider all the evidence and exercise its independent judgment to decide the case in the public interest.

Subsection (b)(3)

***13** A statement shall accompany the settlement or stipulated agreement stating that all of the parties had the opportunity to participate in settlement negotiations, and that all of the parties had the opportunity to review and comment on the settlement or stipulated agreement at least 10 days before it was filed with the Commission.

With regard to the first portion of this proposed rule, the Commission agrees that it is preferable when manageable for all parties to have an opportunity to participate in the settlement negotiations. However, the Commission also agrees with the Public Staff that it is not manageable to have a party that has not signed a confidentiality agreement participate in settlement negotiations. Therefore, the Commission does not expect the Public Staff or utilities to include a party who has declined to sign a confidentiality agreement. Further, it sometimes becomes apparent during settlement discussions that a participating party perhaps is not truly interested in settling the case or has settlement interests that hamper the ability or likelihood of other participants to reach agreement on issues they could otherwise resolve. Thus, when it is no longer fruitful to continue to include a party in the settlement meetings, the other parties must have the freedom to exclude the party. On the other hand, settlement discussions are a two-way street. Any party can initiate settlement discussions with any other party, a few of the parties or with all of the parties.

The Commission acknowledges that the Public Staff is in somewhat of a different position than a private party litigant. The Public Staff represents ratepayers and must be guided by the public interest, whereas most private litigants represent only their particular interests. However, the Public Staff is a state agency completely independent of the Commission. The Commission

does not and cannot control how the Public Staff investigates dockets, the decisions it makes about how best to represent ratepayers, or the decision it makes about who to include in settlement negotiations or what it believes to be the fairness of a particular settlement agreement. To do so would place the Commission in the unethical position of controlling the ratepayer advocate while also serving as the decision maker. Similarly, the Attorney General's Office (AGO) frequently intervenes to represent consumers in the public interest, under the authority granted in G.S. 62-20. Again, the AGO is a separate agency from the Commission, and the Commission has no control over its investigations, decisions about how best to represent ratepayers, or decisions about who it chooses to negotiate with or its view as to the fairness of a particular settlement agreement.

With regard to the last portion of proposed subsection (b)(3), the requirement to provide non-settling parties with the settlement agreement at least 10 days before it is filed would create the same unacceptable narrow window for settlement negotiations as previously discussed with regard to subsections (b)(1) and (b)(2). The rule would effectively end settlement discussions if a settlement had not been reached at least 10 days prior to the expert witness hearing. As stated earlier, the Commission encourages parties to begin settlement discussions early and conclude them as quickly as reasonably possible, but requiring that they be concluded at least 10 days prior to the expert witness hearing would be counterproductive.

Subsection (b)(4)

***14** Parties, including those not entering into the settlement or stipulated agreement, are encouraged to file statements within 10 days of the date as to which provisions of the settlement or stipulated agreement they support, oppose, or have no position on.

The Commission agrees with the general proposition of this proposed subsection and welcomes statements, especially by the non-settling parties, regarding the parties' position on a proposed settlement agreement. However, the Commission concludes that it is unnecessary to adopt a Commission rule on this point.

Subsection (b)(5)

The parties entering into the settlement or stipulated agreement shall file expert testimony and exhibits providing support for the filing.

As previously noted, G.S. 62-65 requires that the Commission's orders be based on competent, material and substantial evidence. In practice, the settling parties typically file testimony and exhibits in support of their settlement agreement. Therefore, the Commission concludes that it is unnecessary to adopt a Commission rule on this point.

Subsection (b)(6)

The Commission will not accept settlements or stipulated agreements which require the settlement or stipulated agreement to be approved in its entirety or not at all.

Non-severability clauses are a standard provision in settlement agreements and other contracts. They are intended to protect the benefit of the bargain that each of the settling parties negotiated to receive. For example, the Public Staff may agree to allow the utility to defer certain costs in return for the utility giving up its claim to recover construction work in progress (CWIP). If the Commission “cherry picks” the settlement by accepting the parties' agreement on cost deferral but rejecting their agreement on CWIP, then the balance of the bargain negotiated by the parties may be seriously impaired.

Of course, a non-severability clause does not prevent the Commission from approving the settlement provisions that it concludes are in the public interest, and rejecting those that are not. Rather, it protects the parties by allowing them to decide whether the Commission's partial approval of the settlement is acceptable to them. If not, then the parties can decide to withdraw from the settlement.

As noted above, CUCA I and CUCA II require the Commission to exercise its independent judgment to determine whether all of the provisions of a settlement agreement are in the public interest. As a result, the Commission does not view itself as being bound by the non-severability clauses included in settlement agreements. Indeed, the Commission has demonstrated its independence from such provisions in several major dockets by adding conditions of its own, or rejecting proposed settlement provisions. See Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, Docket No. E-7, Sub 795 (2006); and Order Granting General Rate Increase, Docket No. E-7, Sub 989 (2012).

***15** Finally, and perhaps most importantly, the Commission does not have the legal authority to prohibit parties from including a non-severability clause in their settlement agreements.

With regard to NC WARN's concern about "secret agreements," the Commission cannot know about or attempt to regulate every tangential agreement or stipulation entered into by the parties. It is not infrequent that a party intervenes in a docket to obtain relief on a very narrow issue that affects only that party, and the utility resolves that issue with that party without filing a settlement agreement. Nonetheless, the Commission does not impliedly or otherwise condone any "secret agreement," and especially if such an agreement might impact the position of other parties to the docket. In addition, NC WARN's assertions with regard to secret agreements are not supported by the example it gave, the Duke/Progress merger proceeding, Docket Nos. E-2, Sub 998 and E-7, Sub 986. In that docket, the Commission issued a Post-Hearing Order Requiring Verified Information on November 2, 2011. The Order, among other things, required the merger Applicants to file a copy of all settlements related to the proposed merger. The Applicants subsequently filed 17 settlement agreements under seal. In response to a request under the Public Records Act for public disclosure of the settlement agreements, the Applicants contended that public release of the settlement agreements would chill future settlement negotiations and impede the public policy in favor of settlements. The Commission rejected this argument and required disclosure of the settlement agreements, although the Applicants were allowed to redact provisions that the Commission determined were trade secrets exempted from public disclosure by G.S. 132-1.2. See Final Order on Public Records Act Request, Docket Nos. E-2, Sub 998 and E-7, Sub 986 (August 14, 2012).

Subsection (c)

Parties are encouraged to submit data requests or pursue other discovery as soon as possible so the information to all parties is roughly equivalent prior to the review of the settlement or stipulated agreement. Late-filed discovery requests will not provide grounds to extend the settlement review period.

In its orders scheduling hearings the Commission sets out very specific time limitations and other guidelines for the parties to follow in conducting discovery. In addition, the scheduling orders include the following statement: "A party shall not be granted an extension of time to pursue discovery because of that party's late intervention or other delay in initiating discovery." Thus, the Commission concludes that it is unnecessary to adopt a Commission rule addressing these points.

Subsection (d)

All parties should carefully examine all filings in order to minimize, if not eliminate, filings under the seal of confidentiality or trade secret.

***16** Pursuant to the North Carolina Public Records Act, G.S. 132-1.2, a party has the right to file information under seal when the information constitutes a trade secret. The seminal case involving a Commission determination under the Act is State ex rel. Utilities Comm'n v. MCI Telecommunications Corp. (MCI), 132 N.C. App. 625, 514 S.E. 2d 276 (1999). The appeal in MCI arose from Docket Nos. P-100, Sub 133 and P-55, Sub 1022. MCI and other competing local providers (CLPs), objected to public disclosure of certain information that the Commission required the CLPs to provide in their monthly access line reports, which were entitled Questions for Competing Carriers (QCC). In particular, QCC Nos. 11, 12 and 13 required the

CLPs to provide detailed plans of when they intended to enter the market for local telephone service and how they intended to provide business and residential customers with such service. In its initial order concerning the matter, on October 21, 1997, the Commission acknowledged that the answers to QCC Nos. 12 and 13 might involve trade secrets. The Commission stated:

> CLPs may, of course, assert their privilege to designate answers to any questions as confidential trade secrets, but they should be prepared at the time of filing to submit a detailed and cogent statement of the reasons therefore, in accordance with the provisions of G.S. 132-1.2(4). (Emphasis in original)

Order Concerning Confidentiality of Report Filings (MCI Order), at p. 2.

The Commission has similarly recognized that the disclosure of certain information could affect a public utility's ability to negotiate with providers of products and services, and the utility's negotiations in other contexts. As a result, the Commission has approved the maintenance of the proprietary nature of such trade secret information. On the other hand, the Commission has also recognized the value of making more information public so as to improve customer confidence in the expenditures made by public utilities and, in the present context, settlement agreements.

In addition, the Commission urges all parties to pay close attention to that portion of G.S. 132-6(c) that provides: "No request to inspect, examine or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested non-confidential information." This provision makes it incumbent on the party claiming confidentiality to redact from each page filed with the Commission only that information that is exempt from disclosure under the Public Records Act. When parties mark as confidential and file under seal the full text of each page of a document, even though much of the text is not trade secret information, that impedes the public's and the other parties' right to have information that does not belong under seal. Thus, the Commission takes this opportunity to reaffirm the requirement of the MCI Order that parties submit a detailed and cogent statement of the reasons for filing information under seal, and the requirement of G.S. 132-6(c) that parties refrain from including non-confidential information in their claim for confidentiality of trade secrets.

***17** Finally, the Commission appreciates NCSEA's comments regarding prehearing conferences. However, prehearing conferences have little to do with facilitating settlement agreements. Instead, a prehearing conference is a tool by which the Commission can discuss with the parties measures that might be taken to organize the presentation of witnesses and evidence in order to streamline the expert witness hearing. As the decision maker, the Commission has the authority to supervise the entire decision-making process. If necessary, this includes giving the parties direction regarding legal and ethical requirements pertinent to settlement negotiations. However, as previously discussed, the Commission generally refrains from exercising direct control over the settlement negotiation process, other than procedural matters, such as extensions of time, that might assist the parties in their effort to negotiate a settlement.

CONCLUSION

Based on the foregoing and the record, the Commission is not persuaded that there is good cause to adopt the settlement guidelines proposed by NC WARN. As a result, the Commission concludes that NC WARN's Petition for Rulemaking should be dismissed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of March, 2017.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore, Deputy Clerk

End of Document

2016 WL 3918122

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina, Wake County,
Business Court.

SITELINK SOFTWARE, LLC, Plaintiff,
v.
RED NOVA LABS, INC., Defendant.

14 CVS 9922
|
June 14, 2016

{1} THIS MATTER is before the Court on Plaintiff SiteLink Software, LLC's Motion to Dismiss Counterclaims of Defendant Red Nova Labs, Inc. ("Motion"), brought under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)"). For the reasons discussed below, the Court GRANTS the Motion and DISMISSES the challenged counterclaims without prejudice.

Attorneys and Law Firms

Daughtry, Woodard, Lawrence & Starling by Luther D. Starling, Jr. for Plaintiff.

Morningstar Law Group by W. Swain Wood, J. Christopher Jackson, and John T. Kivus for Defendant.

ORDER & OPINION

Gale, Chief Judge.

I. INTRODUCTION

***1** {2} This lawsuit is between two companies that develop and market facility-management software for the self-storage industry. The dispute centers on the ability of Red Nova Labs, Inc. ("Red Nova") and its customers to access SiteLink Software, LLC's ("SiteLink") application-programming interface ("API") and underlying database.

{3} SiteLink issues licenses to use its API and facility-management software, but conditions those licenses on the user's agreement not to purchase any product or service from SiteLink's competitors in the self-storage management-software industry, including Red Nova.

{4} SiteLink contends that Red Nova improperly accessed SiteLink's API by competing with SiteLink while the API license agreement was still in place and by later accessing the API without SiteLink's consent. Red Nova claims that SiteLink's API licensing agreement imposes a restraint of trade in violation of North Carolina's antitrust laws, and that SiteLink has engaged in unfair methods of competition, including tortiously interfering with Red Nova's contracts.

II. PROCEDURAL HISTORY

{5} SiteLink initiated this action on July 24, 2014, by filing a verified complaint in Wake County District Court. On September 29, 2014, Red Nova filed an answer, counterclaims, and a motion to transfer the matter to Wake County Superior Court.

{6} The district court entered a consent order to transfer the case to the superior-court division on October 28, 2014. That same day, Red Nova filed a notice of designation, and the matter was designated as a mandatory complex business case. The case was assigned to the undersigned on October 29, 2014.

{7} The Court entered a Consent Preliminary Injunction on May 4, 2015.

{8} SiteLink filed its Amended Verified Complaint for Permanent Injunction and Other Relief ("Amended Complaint") on August 4, 2015.

{9} Red Nova filed its answer to the Amended Complaint on August 14, 2015, along with counterclaims for (1) tortious interference with contract, (2) anticipatory repudiation of contract, (3) defamation, and (4) unfair and deceptive trade practices and antitrust violations under sections 75-1, 75-1.1, 75-2, and 75-2.1 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 75-1, -1.1, -2, -2.1 (2015).

{10} SiteLink filed its Motion to dismiss some but not all of Red Nova's counterclaims on September 11, 2015. In particular, the Motion targets Red Nova's counterclaims that assert violations of sections 75-1, 75-2, and 75-2.1 (the "antitrust claims"); violations of section 75-1.1, to the extent that claim is based on SiteLink's API licensing agreement; and

claims for tortious interference with contract and anticipatory repudiation of contract, to the extent those claims are based on SiteLink's API licensing agreement.

***2** {11} Red Nova filed an amended answer and counterclaims on November 25, 2015, for the sole purpose of amending the factual allegations relating to its defamation claim. [1]

[1] SiteLink moved to dismiss the defamation counterclaim in its Motion. After the Motion was filed, Red Nova amended its defamation counterclaim to add more-specific factual allegations. SiteLink has withdrawn its Motion as to that claim. Because the amendment modified only the defamation claim, the Court allowed the parties to proceed with briefing and oral argument on the Motion, even though the filing of an amended pleading ordinarily would moot an earlier-filed motion to dismiss that pleading.

{12} The Motion has been fully briefed, argued, and is ripe for ruling.

III. STATEMENT OF FACTS

A. The Parties

{13} SiteLink is a North Carolina limited-liability company with a principal place of business located in Wake County, North Carolina.

{14} Red Nova is a Kansas corporation with a principal place of business located in Johnson County, Kansas.

{15} Both SiteLink and Red Nova provide facility-management software to clients that own or operate self-storage facilities.

B. Facility-Management Software in the Self-Storage Industry

{16} The self-storage industry comprises storage-facility owners and operators who rent storage space to consumers. (Def.'s Am. Answer, Defenses, and Countercls. to Pl.'s First Am. Compl. ("Am. Countercls.") ¶ 14.) Storage-facility owners and operators use software technology to perform a variety of functions, including internal office tasks and external customer-facing operations. (Am. Countercls. ¶ 15.)

{17} Less than half of all self-storage-facility operators use customized, facility-specific management software to manage their internal office functions. Red Nova refers to this type of software as facility-management software ("FMS"). [2] (Am. Countercls. ¶ 15.)

[2] SiteLink refers to its management software as business-management software, or BMS, rather than FMS. For purposes of this Order & Opinion, the labels "FMS" and "BMS" refer to the same type of software.

{18} SiteLink has provided an FMS package since 2006 and currently provides FMS to approximately eleven thousand facility locations, which equals "approximately 35–40% of the addressable market of self-storage facilities in the United States." (Am. Countercls. ¶ 12.) The Court understands that market to include the portion of self-storage-facility owners or operators that use some type of facility- or business-management software, but not the self-storage facility owners and operators that use less-specialized software, such as a noncustomized database or accounting program.

{19} Apart from FMS packages, self-storage-facility owners and operators use Internet-based services, such as lead generation and website design, to increase the number of units rented at their storage facilities. (Am. Countercls. ¶ 15.) For example, a self-storage-facility owner might contract with a third-party company for access to software that compiles information about potential customers.

C. SiteLink's API

{20} SiteLink does not provide Internet-based services, but it maintains a "Partner" program through which it allows third-party Internet-based-service providers to use its API to access real-time data for mutual customers. (Am. Countercls. ¶¶ 27–29.) The API facilitates communication between software applications, which allows the third-party companies to provide services to SiteLink and the third-party companies' mutual customers (e.g., a website that contains payment functions and integrates with SiteLink's FMS).

***3** {21} Use of the API is subject to SiteLink's licensing terms. (Am. Countercls. ¶¶ 28–30.)

{22} When Red Nova began its operations in 2009, it offered only online-marketing and website-design services. By 2011, Red Nova had begun to offer other online services, including

Internet-based lead generation. (Am. Countercls. ¶ 16.) At that time, Red Nova used SiteLink's API to provide Internet-based services to SiteLink's FMS customers but did not offer its own FMS platform. (Am. Countercls. ¶¶ 17, 23.)

{23} Red Nova learned from customers that FMS platforms, including SiteLink's products, "were falling woefully short of meeting" customer needs. (Am. Countercls. ¶ 17.) In particular, Red Nova was advised that SiteLink's online platform did not integrate well with other software functions used in the industry, including those that were the core of Red Nova's product. (Am. Countercls. ¶ 19.)

{24} In fall 2012, Red Nova approached SiteLink to propose that the companies collaborate to provide an FMS platform that could respond to the customer needs that Red Nova had identified. SiteLink declined Red Nova's proposed collaboration. (Am. Countercls. ¶ 21.) At that time, approximately 40% of Red Nova's customers were also SiteLink's customers. (Am. Countercls. ¶ 22.)

{25} Following its discussions with SiteLink, Red Nova continued to use SiteLink's API to offer Internet-based services to SiteLink customers. (Am. Countercls. ¶ 23.)

{26} By 2013, Red Nova had begun to develop its own FMS platform. In January 2014, Red Nova released a "beta" version of its FMS known as storEDGE to two customers, followed by the general release of its FMS in April 2015. (Am. Countercls. ¶¶ 24–25.)

{27} SiteLink first learned of Red Nova's efforts to develop its own FMS platform in fall 2013. (Am. Countercls. ¶ 33.) Red Nova alleges that, at that point, SiteLink began a campaign to prevent Red Nova's FMS from progressing. (Am. Countercls. ¶ 34.) That campaign included efforts by SiteLink to divert Red Nova and SiteLink's mutual customers away from Red Nova, encouraging the customers to switch to SiteLink's other partners to fulfill their Internet-based-service needs. (Am. Countercls. ¶ 35.)

D. SiteLink's API and Software Licensing Agreements

{28} Red Nova used SiteLink's API to provide Internet-based software services until January 2014, when SiteLink terminated Red Nova's license to use the API after learning that Red Nova would offer a competing FMS product.

{29} SiteLink now requires customers that use its online-management program to enter into two agreements: (1) the Application Programming Interface and User Agreement ("API License"), and (2) the SiteLink Web Edition License and Service Agreement ("Software License").[3] Red Nova complains that SiteLink uses these licenses to maintain an unlawful anticompetitive advantage and to forestall Red Nova's ability to compete with SiteLink. (Am. Countercls. ¶¶ 30–31.)

3 Red Nova's counterclaims address these licenses specifically, and the licenses' provisions are an integral basis for Red Nova's claims. It is therefore appropriate for the Court to consider the licenses when ruling on the Motion. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61, 554 S.E.2d 840, 847 (2001). The licenses are attached as exhibits A–C to SiteLink's original complaint.

***4** {30} SiteLink modified its API License on April 28, 2014. The modified API License provides that an API user shall "[n]ot compete directly, or through an affiliate company, or through [sic] related third party with SiteLink," or "operate in conflict of interest to SiteLink, or in a manner detrimental to the reasonable business interests of SiteLink, or in conflict with the services provided by SiteLink." (Verified Compl. Prelim. Inj., Permanent Inj. and Other Relief ("Compl.") Ex. B, ¶ 3(R)–(S) (providing that, for purposes of the API License, " 'related third party' shall include, but not be limited to, User's other vendors or service providers").)

{31} The modified API License further provides that a licensee's access to the API will automatically terminate if the licensee violates the terms of the license. (Compl. Ex. B, ¶ 7.)

{32} Before the API License was modified in April 2014, it did not include the new restrictions that appear in the modified version, but it did require licensees to disclose to SiteLink any potential conflicts of interest that the licensee had with SiteLink. (Compl. Ex. C, ¶ 9.)

{33} SiteLink's FMS Software License provides that SiteLink may terminate either the licensee's or a third party's right to use SiteLink's software if "[the licensee] or related third party operate in competition with [SiteLink]" or "[the licensee] or related third party operate in conflict of interest with [SiteLink]." (Compl. Ex. A.) If the license is terminated for either of these reasons, the termination is deemed to be for "cause," and SiteLink is excused from any obligation to store or provide access to the user's data. (Compl. Ex. A.)

{34} In sum, these provisions provide that (1) no service provider may use SiteLink's API if the service provider competes with SiteLink, and (2) no SiteLink licensee may use SiteLink's software if the licensee is also obtaining services from one of SiteLink's competitors. (Am. Countercls. ¶ 31.) Thus, under the agreements, as long as Red Nova offers FMS services that compete with SiteLink's services, Red Nova cannot access SiteLink's API, and no facility owner or operator that uses any of Red Nova's products or services can use SiteLink's software.

E. SiteLink Terminates Red Nova's Access to the API

{35} In January 2014, SiteLink sent a letter to Red Nova advising that Red Nova was no longer authorized to use SiteLink's API. SiteLink also sent letters to SiteLink and Red Nova's mutual customers, instructing those customers that they could continue using SiteLink's platform only if they switched from Red Nova to other Internet-based-service providers that did not compete with SiteLink. (Am. Countercls. ¶¶ 35–37.)

{36} Red Nova complains that SiteLink's campaign included a number of false statements to Red Nova customers, including statements that customers contracting with Red Nova while using SiteLink's software were violating their existing license agreements, that Red Nova had engaged in "shameless theft and abuse" of SiteLink's property, and that customers could switch to other vendors without significant consequences. (Am. Countercls. ¶¶ 38–39.) Red Nova also complains that SiteLink improperly provided financial incentives to customers that switched from Red Nova to other, noncompeting vendors. (Am. Countercls. ¶ 40.)

{37} SiteLink's purpose in modifying its API License in April 2014 was to implement this restriction. (Am. Countercls. ¶ 43.)

{38} Red Nova has lost customers as a result of SiteLink's various efforts. (Am. Countercls. ¶ 42.)

F. Red Nova's Contentions

{39} Red Nova avers that SiteLink's campaign was

> done for anticompetitive purposes, including to protect an inferior product from competition, to divert potential competitors, to maintain artificially high prices, to punish competitors and potential competitors, to make an example out of Red Nova, to monopolize the market for FMS, and to leverage its domination of the market for FMS to control and dictate winners and losers, pricing, and other terms, in the broader market for technology for self-storage industry.

***5** (Am. Countercls. ¶ 46.) They further allege that "SiteLink's actions were intended to, and did, have the effect of stifling legitimate competition in the market for self-storage FMS products and services." (Am. Countercls. ¶ 46.)

{40} Red Nova's counterclaims contain no other allegations regarding pricing, nor do they describe or identify other actual or potential SiteLink competitors or customers who have suffered any loss or harm from SiteLink's licensing program.

{41} Red Nova's broadly worded twenty-six paragraph chapter 75 claim incorporates sections 75-1, 75-1.1, 75-2, and 75-2.1, and includes allegations of (1) false statements, (2) combinations and acts in restraint of trade or commerce, (3) collusion to coerce customers not to deal with SiteLink's competitors, (4) use of market power to monopolize or attempt to monopolize, (5) illegal tying, (6) unfair competition, (7) improper pricing, and (8) conduct that otherwise impedes Red Nova's ability to enter or compete in the marketplace. (Am. Countercls. ¶¶ 63–65, 73–74, 76, 80, 84.)

{42} The general factual allegations of the counterclaims include several references to a "market," which Red Nova loosely defines. Red Nova uses each of the following descriptions to refer to an alleged market:

- "the marketplace for facility management software ("FMS") for the self-storage industry" (Am. Countercls. ¶ 2);
- "the marketplace for software solutions for the self-storage industry" (Am. Countercls. ¶ 3);
- "[t]he self-storage industry generally" (Am. Countercls. ¶ 3);
- "the self-storage market" (Am. Countercls. ¶¶ 13, 24);

- "the market to provide these collateral offerings to SiteLink clients" (Am. Countercls. ¶ 27);
- "segments of the market" consisting of SiteLink customers who agree not to develop products that compete with SiteLink (Am. Countercls. ¶ 28);
- the "market that SiteLink considers its own" (Am. Countercls. ¶ 45); and
- "the broader market for technology for self-storage industry" (Am. Countercls. ¶ 46.)

{43} Ultimately, Red Nova avers that SiteLink has stifled competition "in the market for self-storage FMS products and services." (Am. Countercls. ¶ 46.)

{44} Red Nova does not allege that SiteLink offers or intends to offer any software product in the market other than its FMS, including the online version of its FMS that is accessed through the API portal.

{45} Red Nova's claims for monopolization or attempted monopolization are cast in reference to SiteLink's position in "the market for self-storage FMS, including within North Carolina." (Am. Countercls. ¶ 67.) Red Nova alleges that there are "significant and high barriers" to entry in this market, including "customer investment in learning the functions of the management software," "high cost of moving from one management software solution to another, including data conversion costs," and "high monetary and time investment required to build ... competing FMS offerings." (Am. Countercls. ¶ 70.) Red Nova does not allege how these barriers are different from the normal barriers to entry that a customer faces when switching from one platform to another in the normal course of business.

{46} Although Red Nova asserts these barriers to entry, it also alleges that the market is "underserved and inefficient." (Am. Countercls. ¶ 3.) In particular, Red Nova notes that "a well-functioning and highly integrated FMS [is] a linchpin to customers' technological needs," but that, because SiteLink's product is "falling woefully short of meeting those needs," SiteLink's customers are unhappy with its product offering. (Am. Countercls. ¶¶ 17–18.)

***6** {47} Red Nova summarily concludes that SiteLink is "by far the dominant player in the market for management software for self-storage facilities." (Am. Countercls. ¶ 12.) That characterization is based on SiteLink's 35% to 40% share in the market for self-storage facilities that use specialized management software—a market that, again, by Red Nova's admission, includes less than half of all self-storage facilities. (Am. Countercls. ¶¶ 12, 15.)

{48} Some companies that have agreed to SiteLink's license restrictions also compete with Red Nova in the sale of website marketing and e-commerce platforms. (Am. Countercls. ¶ 5.) Red Nova alleges that SiteLink's exclusionary agreements and arrangements have caused "cognizable antitrust injury by preventing its victims from making free and unhindered choices between market alternatives." (Am. Countercls. ¶ 77.)

{49} Red Nova alleges that it has lost customers and revenue but does not otherwise allege financial loss by any of Red Nova's or SiteLink's customers. (Am. Countercls. ¶ 78.)

IV. STANDARD OF REVIEW

{50} The Court will grant a motion to dismiss under Rule 12(b)(6) when any of three things is true: (1) no law supports the plaintiff's claim, (2) the complaint does not plead sufficient facts to state a legally sound claim, or (3) the complaint discloses a fact that defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). The Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (quoting *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005)), and it may ignore plaintiff's legal conclusions, *McCrann v. Pinehurst, LLC*, 225 N.C. App. 368, 377, 737 S.E.2d 771, 777 (2013).

V. ANALYSIS

A. The Antitrust Claims

{51} SiteLink's Motion seeks to dismiss Red Nova's antitrust claims in their entirety. The broad nature of the allegations has required the Court to examine the legality of SiteLink's licensing program under the lens of the various antitrust theories invoked by the counterclaims.

{52} The Motion must be decided as a matter of state law; however, it is proper for the Court to consult federal case law. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 656–57,

194 S.E.2d 521, 530–31 (1973) (consulting federal decisions to inform the court's restraint-of-trade analysis). The Court is fully cognizant that the Motion must be resolved under North Carolina's lenient Rule 12(b)(6) standard rather than the more exacting federal plausibility standard that governs the federal antitrust precedents that the parties cite in their briefs. *Compare Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) (noting that a pleading complies with North Carolina's standard if it gives sufficient notice of the events underlying the claims), *with Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (requiring that a complaint must state a plausible claim).

{53} Even North Carolina's more lenient standard, however, does not allow a party to withstand a Rule 12(b)(6) motion based on conclusory allegations that are not supported by underlying factual allegations. *See Sutton*, 277 N.C. at 98, 176 S.E.2d at 163. Having completed a thorough review of the pleadings, briefs, and authorities, and adhering to the controlling North Carolina standard of review, the Court concludes that Red Nova's counterclaims fail to state an actionable antitrust claim under sections 75-1, 75-2, and 75-2.1.

***7** {54} Sections 75-1 and 75-2 proscribe restraints of trade or commerce. N.C. Gen. Stat. § 75-1 (prohibiting all "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce"); *id.* § 75-2 (prohibiting restraints of trade that violate common-law principles). Section 75-1 requires a contract, combination, or conspiracy, whereas a section 75-2 claim can rest on a defendant's unilateral conduct. *See id.* §§ 75-1, -2. Although the prohibitions in sections 75-1 and 75-2 might be read to extend to monopolization or attempted monopolization, the more recently enacted section 75-2.1 expressly prohibits monopolization or attempts to monopolize any part of trade or commerce in North Carolina. *See id.* § 75-2.1.

1. The API License Is Not an Illegal Vertical Restraint of Trade.

{55} With certain narrow exceptions, sections 75-1 and 75-2, like their federal counterparts, prohibit restraints of trade or commerce only when such restraints are unreasonable. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998); *Waldron Buick Co. v. Gen. Motors Corp.*, 254 N.C. 117, 125–26, 118 S.E.2d 559, 566 (1961). Restraints of trade are most often evaluated under the rule of reason. *See E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 135 (2d Cir. 1984).

{56} Certain restraints of trade, such as price-fixing agreements, are so pernicious that they are presumed to cause injury to competition. *See NYNEX*, 525 U.S. at 133–34. These types of restraints, known as per se violations, are not analyzed under the rule of reason. The United States Supreme Court has been reluctant to recognize per se violations. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723–26 (1988) (outlining cases in which the Supreme Court limited per se illegality).

{57} This Court is likewise reluctant to find a per se violation of North Carolina's antitrust statutes without clear cause to do so. Although Red Nova's counterclaims include a broad conclusory allegation that agreements between SiteLink and its customers have resulted in artificially high pricing—an illegal-vertical-restraint theory—Red Nova pleads no underlying factual allegations to support that generalized conclusion. The Court finds no basis, even under North Carolina's liberal pleading standard, to further consider any claim that is based on improper pricing, including a claim of a per se violation arising from an alleged illegal vertical restraint.

2. The API License Is Not an Illegal Group Boycott.

{58} Red Nova further invites the Court to find a per se violation based on an unlawful group boycott or SiteLink's unlawful refusal to deal. Admittedly, some group boycotts may rise to the level of a per se violation, but not when the boycott is based on a vertical agreement with no pricing restraints. *NYNEX*, 525 U.S. at 135 (noting that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors"). Red Nova does not allege any horizontal agreement among SiteLink and its competitors. The Court concludes that Red Nova's allegations, even when accepted as true, do not allege a per se group boycott.

3. The Factual Allegations Are Not Adequate to Plead an Illegal Refusal to Deal or an Illegal Tying Arrangement.

{59} To prevail on a claim that is based on "antitrust injury," Red Nova must allege injury not only to itself but to competition. *See Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc.*, 101 F. Supp. 3d 1319, 1334–35 (N.D. Ga. 2015). As a general rule, antitrust law does not limit a business's right to choose with whom it will deal and to refuse to deal with others. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). This

general rule is subject to limited exceptions, which courts have recognized with caution. *See id.*

***8** {60} A claim based on a refusal to deal is generally brought as a claim for monopolization or attempted monopolization, which requires a demonstration of market power. *See id.* at 408–09 (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)).

{61} Red Nova's attack on SiteLink's API License more closely resembles a claim that the license is an unlawful tying arrangement. Specifically, Red Nova alleges that the API License is a negative tying arrangement.

{62} A negative tying agreement is an agreement by which a seller or provider conditions its sale or license of a product or service on the purchaser's or user's agreement not to do business with a seller or provider of a different product. Red Nova relies on *Image Technical Service, Inc. v. Eastman Kodak Co.* to assert that SiteLink has engaged in an illegal negative tying arrangement. 903 F.2d 612 (9th Cir. 1990). There, the court explained that

> [a] tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier*." A tying arrangement is *per se* unreasonable if the defendant has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market and if the arrangement affects more than an insubstantial volume of interstate commerce in the tied product.

Id. at 615 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958)).

{63} Accordingly, Red Nova must have alleged that SiteLink has sufficient economic power in the management-software market—assuming that market is a separate recognized market—to appreciably restrain competition in the market for other software services offered to self-storage-facility owners or operators. *See id.* Conversely, a mere tying arrangement is not illegal if it is not accompanied by sufficient market power in the tying product market to have a substantial impact in the tied product market. *Id.*

{64} Even if the Court first accepts that Red Nova has adequately alleged that SiteLink has substantial market power in some properly defined tying market, presumably an FMS market, Red Nova has made no attempt to allege that SiteLink has either sought or obtained power in a market for other software products. To the contrary, the counterclaims demonstrate that SiteLink has not attempted to sell any product or service other than its management software.

{65} SiteLink asserts that it then must be protected by the general rule that a seller is free to choose with whom to deal. This general rule must be read in conjunction with the limitation that a market participant with substantial market power cannot misuse that power. SiteLink contends that it would be wholly improper for it to be required to allow Red Nova access to its API for the very purpose of being SiteLink's competitor. A claim that one competitor must allow another competitor access to its platform is a difficult one to sustain. *See Verizon Commc'ns*, 540 U.S. at 407–08, 410; *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("[I]t is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.").

***9** {66} SiteLink relies in part on *Sambreel Holdings LLC v. Facebook, Inc.*, in which a federal court upheld Facebook's refusal to allow the plaintiffs, online-display-advertising companies, to access Facebook's platform to offer various social-media applications. 906 F. Supp. 2d 1070, 1080–81 (S.D. Cal. 2012).

{67} In *Sambreel*, the plaintiffs alleged that Facebook's attempts to eliminate competition in the sale of online display advertising by offering its website only to users who agreed not to use the plaintiffs' social-media applications, and who agreed to uninstall existing downloads of the plaintiffs' applications, constituted illegal negative tying. *Id.* at 1080.

{68} In granting Facebook's motion to dismiss and denying the plaintiffs' motion for preliminary injunction, the court noted the following:

> As an overarching premise, the Court is persuaded that Facebook has a right to control its own product, and to establish the terms with which its users, application developers, and advertisers must comply in order to utilize this product. Indeed, it is well settled that, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' "

Id. at 1075 (alteration in original) (quoting *Verizon Commc'ns*, 540 U.S. at 408).

{69} The court further commented on the plaintiffs' assertion that Facebook had engaged in an illegal negative tying arrangement:

> [J]ust as Facebook has the right to determine the terms on which it will permit its Application Developers to use the Facebook Platform, it has a right to dictate the terms on which it will permit its users to take advantage of the Facebook social network. There is no fundamental right to use Facebook; users may only obtain a Facebook account upon agreement that they will comply with Facebook's terms, which is unquestionably permissible under the antitrust laws.

Id. at 1080 (citations omitted).

{70} Red Nova argues that *Sambreel* must be distinguished on multiple grounds. First, Red Nova opines that its counterclaims must be viewed through the lens of North Carolina's more liberal pleading standard, whereas *Sambreel* was decided on the more stringent federal plausibility standard. Second, Red Nova argues that its counterclaims allege other anticompetitive conduct that was not present under the facts of *Sambreel* that demonstrates SiteLink's abuse of its market power.

{71} To support its second argument, Red Nova cites *Kickflip, Inc. v. Facebook, Inc.*, a case that discusses and distinguishes *Sambreel*. 999 F. Supp. 2d 677, 685 (D. Del. 2013). There, Kickflip, a company that provides payment and virtual-currency processing to software developers, brought antitrust claims against Facebook, alleging that Facebook excluded Kickflip from its virtual-currency service and precluded its application developers from doing business with Kickflip. *Id.* at 682.

{72} Facebook relied on *Sambreel* to challenge Kickflip's standing on the ground that Kickflip failed to allege antitrust injuries. *Id.* at 685. Noting that Kickflip's reliance on *Sambreel* was misplaced, the court held that Kickflip's description of the relevant markets—the virtual-currency-services and social-gaming-networks markets—were not "facially unsustainable." *Id.* at 687 (quoting *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)).

***10** {73} First, the court found that Kickflip had adequately described an identifiable virtual-currency market to survive a motion to dismiss, and then concluded that Kickflip had sufficiently alleged that Facebook had monopoly power in that market, based on Facebook's 90% market share. *Id.* at 687–88. After determining that Kickflip had adequately alleged that Facebook possessed monopoly power in the relevant market, the court held that Kickflip had alleged a per se unlawful tying arrangement. *Id.* at 689. Alternatively, it held that Kickflip had sufficiently alleged harm to competition that was adequate to satisfy a rule-of-reason analysis. *Id.*

{74} The *Kickflip* court provided the following instructive summary:

> Monopoly power under the Sherman Act requires: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." To plead monopoly power, "a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant 'entry barriers' protect that market." Defining a relevant market is a question of fact, and the plaintiff bears the burden of proof. A court may dismiss a claim for failure to define the relevant market. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products ..., the relevant market is legally insufficient."

Id. at 686–87 (first quoting *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306–07 (3d Cir. 2007); then quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997)).

4. Red Nova's Allegations Regarding SiteLink's Market Power Are Insufficient to Maintain Its Antitrust Claims.

{75} There is evident overlap in Red Nova's counterclaims, to the extent that Red Nova attempts to allege illegal tying and monopolization or attempted monopolization, because each theory requires sufficient allegations of market power. Red Nova's allegations are insufficient under these theories, even as a matter of pleading.

{76} Courts are reluctant to dismiss claims on a Rule 12(b)(6) motion based on a failure to plead a relevant product market or sufficient market power, because defining a relevant market and a party's power within that market may ultimately require a fact-intensive inquiry. *See Todd v. Exxon Corp.*, 275 F.3d 191, 199–200 (2d Cir. 2001). But courts do not countenance the pursuit of necessarily broad discovery that relates to defining market power when it is based solely on conclusory allegations. Here, the Court finds that Red Nova's allegations do not adequately support its conclusions regarding market power.

{77} A case decided by former Chief Judge Frank Bullock of the U.S. District Court for the Middle District of North Carolina provides an informative and extensive discussion of the principles of market power that apply in the context of monopolization or attempted-monopolization claims. *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 381–86 (M.D.N.C. 2002). While, admittedly, that case was decided at summary judgment, the court's analysis is useful in assessing a Rule 12(b)(6) motion.

{78} The factors that ultimately must be examined in assessing a market include defining a product or service market in which a competitor has the power to artificially raise and sustain supracompetitive prices. *Id.* at 381. Generally, that power must be accompanied by some restriction on output. *Id.* at 382. From there, a court is required to examine the interchangeability and cross-elasticity of supply and demand and assess whether there are significant barriers to a competitor's entry into the market. *Id.* at 382–84.

***11** {79} A court must inquire into both defining the market and the defendant's power within that market. *Id.* at 394. As Judge Bullock summarized in *R.J. Reynolds*, to prevail on a monopolization claim,

> Plaintiffs "must show possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary manner, and causal antitrust injury." To prevail on an attempted monopolization claim, Plaintiffs must demonstrate (1) a specific intent to monopolize a relevant market; (2) predatory or anticompetitive acts; and (3) a dangerous probability of successful monopolization.
>
> Courts have imposed on antitrust plaintiffs certain threshold showings as to market share in a relevant market before they may proceed on a monopolization claim.

Id. (quoting *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990)).

{80} Although each case turns on a fact-specific inquiry, courts often apply certain presumptions. Case law has identified general guidelines for measuring market power. Generally speaking, a 70% to 75% market share is necessary to sustain a monopolization claim, *see id.*, and a market-share range between 30% and 50% is presumed necessary to sustain a claim for attempted monopolization, *see M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992). While "market share" is often used to describe "market power," market share alone does not prove monopoly power. *Cobb Theatres III, LLC*, 101 F. Supp. 3d at 1341 (discussing whether certain percentages of market share constitute monopoly power as a matter of law).

{81} After careful analysis, and being fully mindful that the Motion is at the 12(b)(6) stage and is governed by North Carolina's liberal pleading standard, the Court concludes that Red Nova has not alleged minimal facts to pursue its claim that SiteLink possesses adequate market power or has misused its market power.

{82} The narrowest market suggested by Red Nova's counterclaims is the market for facility-specific management software for facility owners and operators in the self-storage industry. Such a narrow market would exclude any portion of the broader group of self-storage-facility owners and operators that use other, more-general software, such as a standardized database program like Microsoft Access, or a more generalized financial-management program like QuickBooks. (Am. Countercls. ¶¶ 11–12.) The Court need not, and does not, express any opinion on whether a market that is so narrowly defined is a proper market. But RedNova's own allegations show that, even in this narrow market, SiteLink's market share does not exceed 35% to 40%. The counterclaims contain no facts regarding any participant in such a narrow market other than SiteLink or Red Nova. Likewise, the counterclaims do not allege whether any market participant other than Red Nova offers both FMS and other Internet-based platforms. Red Nova clearly alleges that SiteLink offers only FMS.

{83} The Court is not here pronouncing a general rule. The particular facts of each case are critical to any court's inquiry. But it is fair to conclude that, even under North Carolina's liberal pleading standard, to survive a Rule 12(b)(6) motion, an antitrust plaintiff that presents claims of the type that Red Nova pursues should be required to demonstrate some minimal set of well-grounded factual allegations to support an assertion of market power. This is particularly true when the plaintiff's market share is at the bottom end of the percentage of market share adequate to sustain a claim for attempted monopolization, according to presumptions recognized by case law.

***12** {84} Resolving SiteLink's Motion has not required the Court to abandon North Carolina's liberal pleading standard in favor of the federal plausibility standard. Clearly, a claim that one competitor suffered injury by the acts of another competitor, without more, does not rise to the level of an actionable antitrust claim. Red Nova has failed to allege an antitrust claim. Red Nova's other claims, which were not challenged by the Motion, if proven, may be adequate to provide redress.

{85} SiteLink's Motion to dismiss the antitrust claims under sections 75-1, 75-2, and 75-2.1 should be GRANTED, and those claims are DISMISSED without prejudice.

B. The Section 75-1.1 Claim

{86} Red Nova's section 75-1.1 claim, to the extent that claim is based on SiteLink's API License, depends on Red Nova's antitrust claims. (*See* Def. Red Nova's Resp. to Pl. SiteLink's Mot. Dismiss Countercls. 8 ("Red Nova's antitrust claims are sufficiently pled and, therefore, its unfair competition claim —to the extent based on Site[L]ink's alleged anticompetitive behavior—should also survive this Motion.").) Specifically, Red Nova claims that the API License violates section 75-1.1 because the license is anticompetitive and constitutes an illegal restraint of trade.

{87} When a section 75-1.1 claim derives solely from an antitrust claim, the failure of the antitrust claim also defeats liability under section 75-1.1. *See, e.g.*, *R.J. Reynolds*, 199 F. Supp. 2d at 396. Thus, to the extent that Red Nova's section 75-1.1 claim is based on the API License, SiteLink's Motion to dismiss Red Nova's section 75-1.1 claim is GRANTED. The section 75-1.1 claim otherwise survives.

C. The Tortious-Interference-with-Contract Claim

{88} SiteLink moves to dismiss Red Nova's claim for tortious interference with contract only to the extent that the tortious-interference claim is based on SiteLink's enforcement of the API License.

{89} A claim for tortious interference with contract requires

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Constr. Grp., Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

{90} Like the section 75-1.1 claim, portions of Red Nova's tortious-interference claim appear to overlap with the failed antitrust claims. Any portion of the tortious-interference claim that derives from Red Nova's assertion that the API License is "anticompetitive" and constitutes an illegal restraint of trade should not continue. (*See, e.g.*, Am. Countercls. ¶ 51.)

{91} The Court further concludes that SiteLink's mere enforcement of the API License by terminating users' licenses is not an act that was done "without justification." *Embree Constr. Grp.*, 330 N.C. at 498, 411 S.E.2d at 924.

{92} Accordingly, to the extent that Red Nova's tortious-interference claim is based on SiteLink's mere enforcement of the API License, SiteLink's Motion to dismiss is GRANTED.

D. The Anticipatory-Repudiation-of-Contract Claim

{93} SiteLink also moves to dismiss Red Nova's claim for anticipatory repudiation of contract, to the extent that claim is based on SiteLink's API License.

{94} A claim for anticipatory repudiation occurs "[w]hen a party repudiates his obligations under the contract *before* the time for performance under the terms of the contract." *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987).

***13** {95} Red Nova's anticipatory-repudiation claim is unclear. The claim appears to rest primarily on the January 13, 2014 letter from SiteLink to Red Nova, in which SiteLink advised Red Nova that it would prevent Red Nova and its customers from accessing data through SiteLink's API. (Am. Countercls. ¶ 54; Mot. Dismiss Countercls. Ex. 5.) Red Nova contends that SiteLink's letter constituted an anticipatory repudiation of the API License.

{96} If the anticipatory-repudiation claim is directed at SiteLink's licenses with Red Nova's customers, the claim fails, because Red Nova has no standing to seek redress for an injury sustained by its customers.

{97} The claim also fails if it is directed at SiteLink's license with Red Nova. Red Nova fails to allege that SiteLink's letter was anything other than a notice of SiteLink's intent to terminate Red Nova's API License in the manner set forth in the API License's provisions for termination. (Compl. Ex. C, ¶ 7 (providing that SiteLink could terminate a licensee's right to use the API "at SiteLink's sole discretion, at any time, for any reason, with or without notice").) And Red Nova cannot base its contract claim on its failed antitrust theory that the API License constitutes an illegal restraint of trade.

{98} Accordingly, SiteLink's Motion to dismiss Red Nova's anticipatory-repudiation claim is GRANTED.

VI. CONCLUSION

{99} For the reasons stated in this Order & Opinion, the Court GRANTS SiteLink's Motion as follows:

1. Red Nova's antitrust claims under N.C. Gen. Stat. §§ 75-1, 75-2, and 75-2.1 are DISMISSED.

2. Red Nova's claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 is DISMISSED IN PART, to the extent the claim is based on the API License.

3. Red Nova's claim for tortious interference with contract is DISMISSED IN PART, to the extent the claim is based on the API License.

4. Red Nova's claim for anticipatory repudiation of contract is DISMISSED.

IT IS SO ORDERED, this the 14th day of June, 2016.

All Citations

Not Reported in S.E. Rptr., 2016 WL 3918122, 2016-1 Trade Cases P 79,670, 2016 NCBC 43