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

****

COMPLAINANT–APPELLEE'S BRIEF

****

INDEX

TABLE OF AUTHORITIES v

INTRODUCTION 2

ISSUES PRESENTED 4

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 7

I. The transportation system is the Island's "lifeblood." 7

II. The transportation system has always been owned and operated as one unit. 11

STANDARD OF REVIEW 13

ARGUMENT 15

I. THE COMMISSION DID NOT EXCEED ITS JURISDICTION BY ASSERTING ANCILLARY AND PARENT ENTITY AUTHORITY OVER PARKING AND THE BARGE. 15

A. The Commission properly held that the parking facilities and barge are subject to its regulatory jurisdiction. 15

1. The General Assembly authorized the Commission to assert jurisdiction over ancillary services 16

a. Parking is "ancillary" to the ferry service 21

b. The barge is also an ancillary service..... 23

2. The General Assembly authorized the Commission to assert jurisdiction over affiliated operations that affect the utility's rates and service..... 25

3. There are additional grounds for the Commission's regulatory authority over the barge..... 27

a. The Commission has authority over the barge under N.C.G.S. § 62-3(23)(c)..... 27

b. The Commission also has authority over the barge under N.C.G.S. § 62-3(23)(a)(4). 28

B. Appellants' cramped reading of the Commission's authority lacks merit. 32

C. The Village's complaint is the appropriate vehicle for determining the extent of the Commission's authority..... 37

II. THE COMMISSION DID NOT RELY ON ERRONEOUS LEGAL ANALYSIS..... 39

A. The Commission did not assert jurisdiction merely because the parking facilities and barge are "important." 39

B. The Commission can consider a party's monopoly status without a showing of anticompetitive conduct. 40

C. The Commission did not misuse the 2010 rate case settlement stipulation..... 41

III. THE COMMISSION'S FINDINGS AND CONCLUSIONS HAVE AMPLE SUPPORT. 43

A. The Commission did not rely on a hypothetical "vehicle-free Island." 43

B. The Court should not reweigh evidence about the barge's "passengers." 44

C. The Commission did not err by considering the need for regulation. 46

CONCLUSION 47

CERTIFICATE OF COMPLIANCE 49

CERTIFICATE OF SERVICE 50

APPENDIX VOLUME I

49 U.S.C. § 13102 ..... App.(I) 1–5

49 U.S.C § 14501 ..... App.(I) 6–9

N.C.G.S. § 62-2 ..... App.(I) 10–12

N.C.G.S. § 62-3 ..... App.(I) 13–19

N.C.G.S. § 62-30 ..... App.(I) 20

N.C.G.S. § 62-73 ..... App.(I) 21

N.C.G.S. § 62-94 ..... App.(I) 22–23

N.C.U.C. Rule R2-37 ..... App.(I) 24

Excerpts from 11 October 2022 Hearing Transcript (T2) ..... App.(I) 25–38

APPENDIX VOLUME II (SEALED)

Excerpts from 10 October 2022
Hearing Transcript (T1) .....App.(II) 1–26

Excerpts from 11 October 2022
Hearing Transcript (T3) .....App.(II) 27–63

Excerpts from 12 October 2022
Hearing Transcript (T4) .....App.(II) 64–88

Excerpts from 12 October 2022
Hearing Transcript (T5) .....App.(II) 89–122

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

Cases

City of Mountain View v. Southern Pacific Co.,
70 P.U.R.3d 304, 1967 WL 164047
(Cal. P.U.C. June 20, 1967) 36

Correll v. Division of Social Services
332 N.C. 141 (1992) 21

In re Application by C&P Enterprises, Inc.,
126 N.C. App. 495 (1997)..... 38

In re Southern Bell Telephone & Telegraph Co.,
Dkt. No. P-55, Sub 834, 1984 WL 1028455
(N.C.U.C. Nov. 9, 1984) 19

Letendre v. Currituck County,
259 N.C. App. 512 (2018)..... 28, 32

Nantahala Power & Light Co.,
313 N.C. 614 (1985) 20, 21, 25, 26

Stark v. North Carolina Department of Environment & Natural Resources,
224 N.C. App. 491 (2012)..... 41

State ex rel. Tar Heel Industries, Inc.,
77 N.C. App. 75 (1985)..... 27, 32

State ex rel. Utilities Commission v. Bird Oil Co.,
302 N.C. 14 (1981) 13

State ex rel. Utilities Commission v. Buck Island, Inc.,
162 N.C. App. 568 (2004).....14, 23, 24, 40

State ex rel. Utilities Commission v. Carolina Power & Light Co.,
359 N.C. 516 (2005) 16

State ex rel. Utilities Commission v. Carolina Water Service, Inc.,
225 N.C. App. 120 (2013)..... 14

State ex rel. Utilities Commission v. Cooper,
368 N.C. 216 (2015) 14

State ex rel. Utilities Commission v. CUCA,
348 N.C. 452 (1998) 14

State ex rel. Utilities Commission v. Eddleman,
320 N.C. 344 (1987) 14, 18

State ex rel. Utilities Commission v. General Telephone Co. of the Southeast,
281 N.C. 318 (1972) 40

State ex rel. Utilities Commission v. Mackie,
79 N.C. App. 19 (1986).....29, 35, 38

State ex rel. Utilities Commission v. Morgan,
277 N.C. 255 (1970) 20

State ex rel. Utilities Commission v. National Merchandising Corp.,
288 N.C. 715 (1975) 33

State ex rel. Utilities Commission v. Public Staff-N.C.U.C.,
323 N.C. 481 (1988) 13, 14, 44

State ex rel. Utilities Commission v. Simpson,
295 N.C. 519 (1978) 29

State ex rel. Utilities Commission v. Southern Bell Telephone & Telegraph Co. (Southern Bell I),
307 N.C. 541 (1983) 19

State ex rel. Utilities Commission v. Southern Bell Telephone & Telegraph Co. (Southern Bell II), 326 N.C. 522 (1990) 19, 38

State ex rel. Utilities Commission v. Thornburg, 84 N.C. App. 482 (1987)..... 34

Statutes

49 U.S.C. § 13102..... 30

49 U.S.C § 14501..... 31

N.C.G.S. § 62-2..... 5, 16

N.C.G.S. § 62-3.....*passim*

N.C.G.S. § 62-30..... 6

N.C.G.S. § 62-73..... 37, 38

N.C.G.S. § 62-94..... 13

Rules

N.C. R. App. P. 28..... 27

N.C.U.C. Rule R2-37..... 30

Regulations

46 C.F.R. § 90.10-3..... 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

****

COMPLAINANT–APPELLEE'S BRIEF

****

INTRODUCTION

After hearing three days of testimony and receiving thousands of pages of exhibits into evidence, the North Carolina Utilities Commission found all four components of the Bald Head Island transportation system—the parking facilities, ferry, tram, and barge—subject to its regulatory jurisdiction.

The transportation system allows residents, workers, and visitors to travel to and from Bald Head Island ("Island") along with all the goods, supplies, and other items necessary to support the Island. Bald Head Island Transportation, Inc. ("Transportation") has operated the ferry as a regulated utility since its inception. Likewise, Transportation's tram, which transports visitors and their luggage to and from the Island-side ferry terminal, has always been subject to the Commission's regulatory jurisdiction. Until this proceeding, the Commission had never directly addressed the regulatory status of the other principal components of the transportation system: the ferry's mainland parking facilities and the related barge operation, both of which are owned by Transportation's parent company, Bald Head Island Limited, LLC ("Limited").

In concluding that the entire transportation system is subject to its jurisdiction, the Commission found that the parking facilities are necessary and integral to Transportation's provision of the regulated ferry service. The Commission further found that parking revenue subsidizes the utility operation. Based on these factual findings, the Commission concluded that the parking facilities are subject to its regulatory authority because they (1) provide an essential service that is ancillary to the operation of the ferry and (2) affect the ferry's rates and service. Similarly, the Commission determined that the barge, which provides the only viable way to transport items larger than personal luggage to the Island, provides an integral and necessary ancillary service for the ferry as well. The Commission thus asserted regulatory jurisdiction over the parking facilities and the barge.

The Commission's factual findings upon which these determinations were made have ample record support, and Appellants do not meaningfully challenge them. These findings are thus binding for purposes of appellate review and they show that the Commission's undisputed authority over the ferry and tram would be meaningless without regulating parking. Absent regulation, Limited could negate the

Commission's control over the ferry's regulated rates by inflating the price charged for parking or by disposing of essential utility assets without Commission approval. Simply put, Limited's parking facilities, which face no meaningful competition, are an inherent and essential part of the ferry operation.

Similarly, use of the barge is necessary for delivery of items that ferry riders need, subsidizes ferry operations, and would not exist but for the ferry. Thus, barge service is an inherent part of the ferry's operation as well.

For these reasons and other reasons, the Commission's order should be affirmed.

ISSUES PRESENTED

I. Did the Commission act within its jurisdiction by asserting regulatory authority over the parking and barge operations?

II. Was the Commission's legal analysis correct?

III. Did the Commission's findings and conclusions have adequate support?

STATEMENT OF THE CASE

After the potential sale of the transportation system, or components thereof, to a private buyer became public knowledge,[1] the Village of Bald Head Island ("Village") filed a complaint requesting that the Commission declare that the parking facilities and barge used in connection with the ferry service are subject to the Commission's regulatory authority.

First, the Commission has the "general power and authority to supervise and control" public utilities, including their "rates, services, and operations." "Services" are defined to include "any service furnished by a public utility, including . . . any *ancillary* service or facility used in connection with such service." N.C.G.S. §§ 62-2(b), 62-30, 62-3(27) (emphasis added). Thus, the Village urged the Commission to determine that the parking and barge operations are ancillary services or facilities subject to its regulatory jurisdiction. (R pp 19–20 ¶¶ 53–54).

Second, the Village alleged that because the Commission's regulatory authority extends to a utility's affiliates "to such an extent

---

[1] Limited made public statements that it was seeking a private buyer for all or portions of the transportation system. (R p 4). After the Village filed its complaint, SharpVue Capital, LLC ("SharpVue") entered into an agreement to purchase the transportation system and other assets from Limited. (T(5) p 97:16–20).

that the Commission shall find that such affiliation has an effect on the rates or service of such public utility," and because Limited's ownership of Transportation and its parking and barge operations have affected the ferry's service and rates, the Village alleged that the parking and barge operations and assets are subject to the Commission's regulatory jurisdiction for that reason as well. (R p 20 ¶ 55–56); N.C.G.S. § 62-3(23)(c).

Finally, the Village alleged that the barge was subject to the Commission's jurisdiction as a common carrier as defined in Section 62-3(23)(a)(4). (R p 23 ¶ 66).[2]

After an evidentiary hearing at which Transportation, Limited, SharpVue, the Village, and other intervenors presented testimony and introduced documentary evidence, all participating Commissioners agreed that the parking facilities are subject to the Commission's jurisdiction. The Commission found two statutory grounds for this determination: (1) the parking facilities provide a service that is ancillary

[2] The Commission did not address whether the barge's operations affect the ferry's rates or service and expressly refrained from deciding whether the barge is a common carrier.

to the ferry and (2) the operation of the parking facilities affects the ferry's rates and service. N.C.G.S. §§ 62-3(27), 62-3(23)(c); (R p 627 ¶¶ 22–23).

In addition, all but one of the participating Commissioners agreed that the barge is subject to the Commission's jurisdiction because it provides a service ancillary to the operation of the ferry. (R p 628 ¶ 34).

The Commission's order was limited. It did not declare the parking or barge operations, by themselves, to be public utilities. Instead, the Commission exercised regulatory authority over these operations as ancillary components of the regulated ferry service and, in the case of the parking facilities, having an effect on the ferry's service and rates. The Commission deferred determining how it would exercise its authority for a later time, holding only that Limited could not transfer the parking facilities or barge without the Commission's approval. (R pp 650–51).

STATEMENT OF THE FACTS

I. The transportation system is the Island's "lifeblood."

Hundreds of North Carolinians call Bald Head Island home, and thousands of people visit the Island, which is open to the public, annually. (R p 626 ¶ 9; T(2) p 34:14–19). The Island features many historic and

ecological attractions, and Island tourism plays a vital role in the regional economy. (R pp 625–26 ¶ 8; T(1) pp 145:7–146:9; T(1) pp 112:19–113:2; T(2) pp 38:18–39:3).

The Island's vitality depends on its transportation system. (R p 626 ¶ 16; T(2) p 28:9–14 ("The transportation system . . . is the lifeblood to Bald Head Island . . . ."); T(2) p 39:11–16). The transportation system provides the only public access to the Island. (R p 626 ¶ 11; T(5) pp 95:23–96:5). There is no bridge to the Island, no alternative ferry service to the Island, and no airport on the Island. Thus, the hundreds of thousands of residents, visitors, and workers[3] who come to the Island each year depend on the transportation system. (*Id.*). More than 370,000 people rode the ferry during 2021. (R p 626 ¶ 9; T(2) p 28:11–14).

The transportation system consists of the parking facilities, ferry, tram, and barge. (R p 625 ¶ 2; T(3) pp 18:13–19:3). The ferry and barge depart from the mainland at the Deep Point Marina ("Marina"), which is located several miles outside of Southport. (R p 626 ¶ 12; T(5) p 230 (Table 1); T(1) p 114:17–20).

---

[3] Nearly 40% of ferry riders are people who work on the Island while living on the mainland. (*See* T(3) pp 17–18 (Table)).

Ferry riders must use the Marina's parking facilities for three reasons. First, personal-use vehicles are generally prohibited on the Island. (R pp 625–26 ¶ 8; T(5) p 96:2–5). Thus, passengers driving to the Marina must leave their cars in the parking lot.

Second, the only way for mainland-departing passengers to use the ferry is to park at the Marina. The record contains no evidence that any person has ever taken the ferry without using Limited's parking facilities. (*See* T(1) p 115:1–4; T(1) pp 128:22–129:4; T(1) pp 148:1–17; T(2) p 37:8–21). The undisputed record evidence shows that there is no bus or shuttle service to the Marina (R p 630 n.2; T(1) p 129:12; T(1) p 148:15–17; T(3) p 31:10–14). The record contains no evidence that taxi or ride-sharing services reach the Marina. (R p 630 n.2; T(3) p 31:10–14). Further, there are no alternative parking facilities near the Marina or in Southport (R p 626 ¶¶ 13–14; T(1) p 114:17–20; T(1) p 129:5–11; T(5) pp 229–230 (Table)), and parking is prohibited on the road outside the Marina. (R p 630; T(5) p 134:6–15; T(1) p 148:1–6).

Finally, the Island's visitors typically carry a large amount of luggage (R p 630; T(3) pp 31:15–32:2), making it important for them to

be able to drive directly to the Marina's ferry landing, where they can drop luggage for loading onto the ferry.

After parking, passengers board the ferry and travel across the river to the Island ferry landing. (T(5) p 98:3–10 (fig. 2)). Although ferry-only tickets are available, passengers can also purchase a ticket that includes tram service, which takes them and their luggage to and from their Island destination. (R p 637; T(3) pp 17–18 (Table)); T(5) p 99:8–11).

Anyone wishing to bring larger items, such as furniture, appliances, or construction supplies, to the Island must use the barge, which is available for use by the general public. (R pp 627–628 ¶¶ 26, 30; Doc.Ex.(II) pp 1499–3396 (barge log listing furniture, appliances, and building materials)).

If a tradesperson performing services on the Island needs a vehicle to perform that service, that person must use the barge; there is no other way to transport vehicles the Island. (R p 627 ¶ 26; T(1) pp 148:22–149:3; T(4) pp 166:8–168:21). These workers drive their vehicles onto the barge, which carries them to the Island where they disembark. (R p 627 ¶ 25; T(4) p 146:12–18; T(5) p 110:1–2).

II. The transportation system has always been owned and operated as one unit.

George Mitchell, a Texas oil magnate, purchased the Island out of receivership in 1983. (R p 625 ¶ 3; T(5) p 95:15–16). Acting through Limited, which he owned, Mitchell played a key role in the Island's development, including establishing the transportation system. (T(5) p 96:6–13). Mitchell's development interests incentivized him to facilitate easy access to the Island, and he priced the transportation system accordingly. (T(3) p 210:12–14).

Although Limited organized its corporate structure so that it directly owns the parking facilities and barge while its wholly-owned subsidiary, Transportation, owns the ferry and tram, the two entities have always operated the transportation system as a unified whole and held it out to the public as such. (R p 637; T(5) p 34:16–18).

For example, Limited and Transportation advertised the transportation system as a "single service provider." (R p 646 (citing T(5) pp 146:14–147:23)). Transportation's website also instructs passengers to use the parking facilities, including listing the parking facilities as part of the process for taking the ferry without mentioning any alternative. (T(3) pp 28:4–30:22).

Additionally, Limited's parking and barge operations have provided "substantial positive cash flow and strong positive financial net income," while the ferry "has consistently shown annual financial losses." (R p 641 (citing T(1) p 172); *see also* T(1) p 172:6–13). Thus, the parking facilities and barge (operated by Limited) have subsidized the ferry and tram (operated by Transportation). (R p 641; T(1) p 176:2–9).

As Transportation's parent company, Limited has owned and controlled, directly or indirectly, the transportation system since its inception. (*See* T(5) p 34:16–17).

The regulatory status of the parking and barge was previously raised before the Commission but not directly decided. In approving a stipulation settling Transportation's 2010 rate case, the Commission approved the imputation of $523,097 in parking revenues in calculating the ferry's regulated rates. (T(3) at 39:21–40:16; Doc.Ex.(I) at 1090–91 ¶ 9). The 2010 stipulation also limited parking fee increases through 2016 and required Limited to notify the Commission before transferring the parking facilities to another entity. (*Id.*) Although the stipulation was not binding on the Commission or the parties in future proceedings, its

provisions illustrate the interconnected manner in which the parking facilities, ferry, barge, and tram are operated.

STANDARD OF REVIEW

The Commission's determinations are "*prima facie* just and reasonable." N.C.G.S. § 62-94(e). Judicial reversal of the Commission's orders "is a serious matter . . . properly addressed only by strict application of the six criteria [in Section 62-94(b)] which circumscribe judicial review." *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 19–20 (1981) (Section 62-94(b) "substantially circumscribe[s]" appellate review)); *see also* N.C.G.S. § 62-94(b) (Commission's order can only be reversed if it is: (1) in violation of constitution; (2) in excess of authority or jurisdiction; (3) made on unlawful proceedings; (4) affected by errors of law; (5) unsupported by evidence; or (6) arbitrary and capricious).

The appellant bears the burden of showing that the Commission committed legal errors. *Bird Oil Co.*, 302 N.C. at 25. The appellant must show (1) that the Commission committed an error of law and (2) that this error was prejudicial. *Id.* at 20; *see also State ex rel. Utils. Comm'n v. Pub. Staff-N.C.U.C.*, 323 N.C. 481, 491 (1988).

"The Commission's findings may not be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 225 N.C. App. 120, 125 (2013) (citation omitted). Unchallenged findings and findings supported by "competent, material, and substantial evidence," are binding on appeal. *State ex rel. Utils. Comm'n v. Cooper*, 368 N.C. 216, 223 (2015); *State ex rel. Utils. Comm'n v. Buck Island, Inc.,* 162 N.C. App. 568, 575 (2004).

Additionally, determinations about credibility or the weight accorded to certain evidence are for the Commission. *Pub. Staff*, 323 N.C. at 491. The appellate court's role "is not to determine whether there is evidence to support a position that the Commission did not adopt." *State ex rel. Utils. Comm'n v. CUCA,* 348 N.C. 452, 460 (1998). Rather, the appellate court must determine whether the Commission's findings support its conclusions as a matter of law. *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352 (1987).

ARGUMENT

I. THE COMMISSION DID NOT EXCEED ITS JURISDICTION BY ASSERTING ANCILLARY AND PARENT ENTITY AUTHORITY OVER PARKING AND THE BARGE.

Appellants do not meaningfully challenge the Commission's findings of fact as lacking sufficient evidentiary support. For that reason, the issue before the Court is whether the Commission's findings support its conclusion that it has regulatory authority over the parking facilities and barge. They clearly do.

Although Appellants assert that the Commission exceeded its statutory authority by subjecting the parking facilities and barge to regulation, they fail to employ the applicable standard of review, acknowledge the Commission's actual factual findings, analyze the relevant statutory provisions, or address the Commission's order. A proper legal analysis demonstrates that the Commission did not err.

A. The Commission properly held that the parking facilities and barge are subject to its regulatory jurisdiction.

The Commission asserted jurisdiction over the parking facilities and the barge because they are (1) ancillary to the regulated ferry service, and, in the case of parking, (2) provided by an affiliate and affect the

utility's rates or service. The Commission's findings support these conclusions.

1. The General Assembly authorized the Commission to assert jurisdiction over ancillary services.

All parties agree that Transportation's ferry and tram operations are subject to Commission regulation. *See* N.C.G.S. § 62-3(23)(a)(4) ("Public utility" includes "[t]ransporting persons or household goods by motor vehicles or any other form of transportation for the public for the compensation"). Thus, the Commission has "general supervision over the rates charged and *service rendered by*" the ferry and tram operation. N.C.G.S. § 62-32(b) (emphasis added); *see also id.* § 62-2(a)(3), (b) (directing Commission to "promote adequate, reliable and economical" utility service and authorizing regulation of "rates, services, and operations").

Because the Commission is "responsible for ensuring that, in exchange for having a monopoly in its franchise area, a public utility provides adequate and reliable service to North Carolina citizens at reasonable rates," it has extensive authority over utility service. *State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 521–22

(2005) (citation omitted). For that reason, the General Assembly has defined utility "service" as "any service provided by a public utility, including any commodity furnished as part of such service and *any ancillary service or facility* used in connection with such service," N.C.G.S. § 62-3(27) (emphasis added).

The statutory reference to "*any* ancillary service or facility used in connection with such service" is intended to ensure the Commission has authority over all services and facilities "used in connection with" the provision of the utility service. *Id.* (emphasis added). The Commission thus has jurisdiction over both (1) "any service furnished by a public utility, including any commodity furnished as a part of such service," and, separately, (2) "any ancillary service or facility used in connection with such service," regardless of how or by whom that service or facility is provided.

This authority manifests itself in many ways. The Commission may, *inter alia*, determine which assets can be included in utility rate base; impute values derived from assets and operations which are transferred or otherwise disposed of to be credited to ratepayers; exercise authority over billing and collection services; or require the provision of

facilities necessary to provide adequate utility service—none of which would be possible under Appellants' cramped view of the Commission's authority.

Relevant here, Limited's CEO conceded that the Commission has authority over Transportation's tram operation as an ancillary service—notwithstanding that the word "tram" does not appear in the Public Utilities Act, N.C.G.S. §§ 62-1, *et seq.* ("Act"). (R p 637 ("[T]ram service is not only ancillary to the Ferry Operations but is 'fully incorporated into . . . the system.'" (quoting T(5) pp 135:5–136:12)). Similarly, in Transportation's 2010 rate case, the Island ferry terminal was included in Transportation's rate base—again, notwithstanding that the word "terminal" does not appear in the Act and that Limited owned the terminal. (R p 642). And, in the area of electric regulation, the Supreme Court has held that the Commission did not err by allowing the inclusion of parking facilities associated with a nuclear generating unit in rate base. *See Eddleman*, 320 N.C. at 361–63.

Although precedent interpreting Section 62-3(27) is sparse, the Supreme Court has held that the Commission has regulatory authority over *all* aspects of a utility's services. For example, the Supreme Court

rejected Southern Bell's argument that yellow pages advertising was not an essential utility service and upheld the Commission's authority to include yellow pages revenues in setting Southern Bell's rates. *State ex rel. Utils. Comm'n v. So. Bell Tel. & Tel. Co. (Southern Bell I)*, 307 N.C. 541, 544 (1983) (rejecting argument that "mere transmission of messages across telephone lines is adequate telephone service"). The Commission approved Southern Bell's subsequent transfer of its directory publishing business to a separate, unregulated subsidiary, subject to certain ratepayer protection measures. *In re So. Bell Tel. & Tel. Co.*, Dkt. No. P-55, Sub 834, 1984 WL 1028455, at *8–9 (N.C.U.C. Nov. 9, 1984).

Later, the Supreme Court upheld the Commission's authority to entertain complaints against the unregulated entity because the provision of directory services, even when provided by a separate affiliate, was a utility function. *State ex rel. Utils. Comm'n v. So. Bell Tel. & Tel. Co. (Southern Bell II)*, 326 N.C. 522, 523–24, 529 (1990) (explaining that because directory publishing "is a public utility function," and because subsidiary was "performing this function for Southern Bell," Commission had jurisdiction over subsidiary to handle complaints "without regard to whether BAPCO itself is a public utility").

Thus, the fact that a particular service is provided by a separate affiliated entity does not insulate it from Commission regulation.

Thus, as the Supreme Court recognized, corporate organization cannot be used to "defeat[ ] the public interest and circumvent[ ] public policy"; to prevent such a result, "a parent corporation and its wholly owned subsidiaries may be treated as one." *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 272 (1970); *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 725 (1985), *rev'd on other grounds sub nom Nantahala Power & Light Co. v. Thornburg*, 467 U.S. 953 (1986) ("[I]t is often necessary to look beyond corporate form to determine the actual scope of the public service enterprise in question, in order to prevent erosion of the obligations imposed upon the public service enterprise.").

Although the Act does not define "ancillary" service, the word "ancillary," in common parlance, encompasses anything "providing necessary support to the primary activities or operation of an organization, institution, industry, or system." *Ancillary*, The New Oxford American Dictionary (3d ed. 2010); *Ancillary*, Black's Law Dictionary (11th ed. 2019) ("Supplementary; subordinate"); *see also*

Correll v. Div. of Soc. Servs., 332 N.C. 141, 144 (1992) (in absence of statutory definition, courts look to plain language). Section 62-3(27) thus authorizes the Commission to supervise any incidental services or facilities that are necessary for the utility to serve the public, even if provided by a separate but affiliated entity.

a. *Parking is "ancillary" to the ferry service.*

The Commission's undisputed findings of fact demonstrate that the parking operation is necessary to the operation of the ferry, and thus is an ancillary service or facility for purposes of Section 62-3(27). First, the Commission found, and Transportation and Limited's expert agreed, that reasonable access to parking is "critical" to the operation of the ferry. (R p 627 ¶ 17; T(4) p 75:6–7).

In addition, the Commission determined that ferry ridership and use of the parking facilities is interconnected, such that there would be no need for the parking facility without the ferry. (R p 627 ¶ 16; R pp 635–36; T(3) p 208:4–9).

Similarly, the Commission found that the operation of parking as part of a unified transportation system supported its determination that these facilities are essential to the ferry service. *Nantahala*, 313 N.C. at

653 (affirming exercise of jurisdiction where combined facilities were "single, integrated" system). The Commission found that Transportation instructs ferry passengers to park at Limited's parking facilities (R p 626 ¶ 14); that the transportation system had relocated to the Marina, in part, to obtain better parking facilities (R p 636; T(3) p 20:1–7); and that Transportation and Limited market the Marina—including the parking facilities—as a single "ferry base." (R pp 636–37).

The Commission further found that the parking facilities are necessary to the use of the ferry because they provide the "only means of public parking access" at the Marina; there is "no existing alternative or reasonable substitutable parking facility"; and no party had identified "a practicable future alternative." (R p 626 ¶ 13). Numerous witnesses described the terminal's remote location, the lack of public transportation to the ferry terminal, and the absence of parking alternatives. (*See* T(1) pp 114:12–115:4; T(1) pp 128:22–129:4; T(1) p 138:3–7; T(1) p 148:1–17; T(2) p 37:8–21; T(5) p 119).

Finally, the Commission determined that Limited had a *de facto* monopoly over parking at the Marina. (R pp 629 ¶ 36, 639; *see also* T(3) pp 30:23–37:9; T(3) pp 269:14–274:6). As this Court has previously held,

monopoly control over access to facilities needed to ensure adequate utility service enhances the need for Commission supervision, given the risk that the owner may abuse its monopoly power. *See Buck Island*, 162 N.C. App. at 584.

For all these reasons, the Commission's findings, which have ample record support, compel its conclusion that the parking facilities are ancillary to the operation of the ferry under Section 62-3(27).

b. *The barge is also an ancillary service.*

Similarly, the Commission concluded that the barge was critically linked to the ferry, making it another ancillary service or facility for purposes of Section 62-3(27).

In support, the Commission found that any items too large to be transported on the ferry must be delivered using the barge. (R p 626 ¶ 11; *see also* T(1) p 102). Similarly, any tradesperson or contractor bringing a vehicle to the Island must use the barge; their drivers typically ride the barge with their vehicles. (R p 625–26 ¶¶ 6, 9; *see also* T(4) pp 166:3–168:18).

Because a ferry passenger bringing large items to the Island must use the barge, the Commission had no trouble concluding that the ferry

and the barge constitute "the only means of public access to and from the Island" and that but for the ferry there would be no reason for the barge to exist. (R p 626 ¶ 11; R pp 644–46).

The Commission also found that the ferry and barge are operated as a "coordinated transportation system," citing Limited's marketing of the transportation service as a "single service provider." (R p 644 (citing T(5) pp 146:14–147:23)). Because the barge brings all supplies, building materials and services needed to support the Island, the Commission credited expert and lay witness testimony that, without the barge services, most passengers would not ride the ferry. (*Id.* (citing T(5) p 185:13–15; Doc.Ex.(I) pp 18–34)). In other words, each service is dependent on the other.

Finally, the Commission found that the barge operated as a *de facto* monopoly, (R p 629 ¶ 36; R p 647; *see also* T(1) pp 149:11–150:9; T(3) p 36:1–16; T(5) p 185:5–17; T(5) pp 217:10–218:12), which further supports the exercise of its regulatory authority. *See Buck Island*, 162 N.C. App. at 584.

Thus, for all of these reasons, the Commission's conclusion that the barge is ancillary to the operation of the ferry and subject to the

Commission's jurisdiction under N.C.G.S. § 62-3(27) has ample support in the record.

2. The General Assembly authorized the Commission to assert jurisdiction over affiliated operations that affect the utility's rates and service.

As an additional basis for asserting authority over the parking facilities, the Commission determined that the parking facilities and ferry are "affiliated through stock ownership with a public utility doing business in this State as parent corporation" such that "affiliation has an effect on the rates or service of such public utility." N.C.G.S. § 62-3(23)(c); (R p 627 ¶ 23; T(5) p 121); *see Nantahala*, 313 N.C. at 656–57.

The Commission made extensive findings supporting this determination. Among other things, the Commission found that the parking facilities and ferry's services are "interdependen[t]," citing evidence that the Marina was "planned from the outset to include [Limited's] Parking Operations" and intended to provide customers with "more convenient access to parking." (R p 641; *see also* R p 627 ¶ 23 (finding Limited is Transportation's parent); *supra* Section I.A.1.a. The Commission also credited testimony showing that without the parking operations, the public's ability to use the ferry would be "significantly

impaired." (R p 632; T(3) p 204:14–16). Finally, given the interdependence between the ferry and parking facilities and the absence of adequate parking alternatives, the Commission found that the extent to which the ferry could "command the same level of tourism or ridership on the Ferry" without the parking facilities was "uncertain." (R p 640).

The Commission further concluded that the parking facilities affect the ferry's rates. Among other things, the Commission found that the parking facilities make it easier for passengers to access the ferry and that additional ridership means higher ferry revenues. (R p 641). The Commission also found that the parking facilities subsidize the ferry operation. Although the parking operations provide "substantial positive cash flow and strong positive financial net income," the ferry "has consistently shown annual financial losses." (*Id.* (citing T(1) p 172)). Finally, the relationship between Limited and Transportation has allowed Transportation to maintain lower ferry rates, given the imputation of substantial parking revenues in setting ferry rates in 2010. (T(3) pp 39:21–40:2); *Nantahala*, 313 N.C. at 657 (operation as "part of a single utility enterprise" had "enormous impact" on rates).

Thus, the Commission did not err by concluding that the parking facilities affect the ferry's rates and service and is subject to its jurisdiction pursuant to Section 62-3(23)(c).

3. There are additional grounds for the Commission's regulatory authority over the barge.

After determining that barge service is ancillary to the ferry's service, the Commission refrained from addressing alternative bases for its jurisdiction. Nevertheless, the Commission's findings necessitate a conclusion that the barge is also subject to the Commission's jurisdiction under Sections 62-3(23)(c) and 62-3(23)(a)(4). *See State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc.,* 77 N.C. App. 75, 77 (1985) (where facts are undisputed, whether entity is a common carrier is a question of law).

a. *The Commission has authority over the barge under N.C.G.S. § 62-3(23)(c).*

The Commission has jurisdiction over the barge because it affects the rates and service provided by the ferry under Section 62-3(23)(c). The Commission found that Limited is Transportation's corporate parent (R p 627 ¶ 23), and that the barge and ferry's operations are interdependent. The barge allows ferry passengers to bring larger luggage and household goods to the Island and permits workers to travel to the Island with their

vehicles instead of paying to ride the ferry. *See supra* Section I.A.1.b; (R pp 644–46). Thus, the Commission's findings conclusively show that availability of the barge affects the ferry's service.

The Commission also found that the barge affects the number of ferry tickets sold and, therefore, the ferry's rates. The Commission further concluded that Limited has been subsidizing the ferry operation, citing expert testimony that the parking facilities and barge have been overearning and, therefore, subsidize ferry losses, resulting in lower ferry rates than would have otherwise been the case. (R p 641; T(1) p 176:1–9).

Thus, the undisputed evidence shows that the barge service affects ferry rates, so the Court should uphold the Commission's decision to assert regulatory jurisdiction over the barge for this additional reason. *Cf. Letendre v. Currituck Cty.*, 259 N.C. App. 512, 526 (2018) ("[An] order must be affirmed if there is any legal basis to support the result."); N.C. R. App. P. 28(c) (appellee may raise alternative bases affirmance).

b. *The Commission also has authority over the barge under N.C.G.S. § 62-3(23)(a)(4).*

Similarly, the barge is subject to regulation as a common carrier as a matter of law. A common carrier is "any person . . . which holds itself out to the general public to engage in transportation of persons or

household goods for compensation . . . ." N.C.G.S. §§ 62-3(6), 62-3(23)(a)(4) (same).

As the Commission found, Limited makes the barge available to serve the public. (R p 628 ¶ 30). Limited admitted that use of the barge is not subject to any restriction, except that vehicles driven onto the barge must have a permit allowing their use on the Island. Limited could not identify a single instance in which it had refused barge service to any member of the public who had paid the appropriate fare and possessed a permit. (Doc.Ex.(I) pp 343–344 (DR 1-23, DR1-24)).[4]

The Commission also found that Limited charges $60 for each space on the barge such that barge service is offered to the public for compensation. (R p 628 ¶ 30; *see also* T(3) p 55:3–10; T(4) p 147:3–7). Similarly, the Commission's findings demonstrate that the barge is a "boat or other conveyance" under Section 62-3(6), and thus an "other form

---

[4] Because any permitholder can use the barge, the requirement that a vehicle possess an on-Island permit does not undercut the Commission's determination that the barge is available to the public. *State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 26 (1986) ("[A]lthough a service may be offered only to a definable class, rather than to the public at large, it still may be considered an offering of service to the 'public' within the meaning of the regulatory statutes."); *see also State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 523 (1978).

of transportation" under Section 62-3(23)(a)(4). (R p 627 ¶ 25; T(4) p 143:13–19); *cf.* 46 C.F.R. § 90.10-3 (defining "barge" for purposes of Title 46 as "any non self-propelled vessel").

Finally, the Commission found that the barge transports "large household goods (e.g., appliances and furniture)," "construction materials," (R pp 627–28 ¶ 26), and "up to 12 persons" in addition to its crew. (R p 628 ¶ 33; R p 645). Although the Act does not define "household goods," the Commission's rules and relevant federal regulations define the term as including "personal effects and property used or to be used in a dwelling." N.C.U.C. Rule R2-37; *see also* 49 U.S.C. § 13102(10) (same). Numerous witnesses testified that the barge transports household goods. (T(1) p 102; T(1) 115:9–16; T(1) p 131:6–17; T(1) pp 150:11–151:9; T(2) pp 121:21–122:22; T(3) p 206:14–24). Appellants conceded that vehicles transported on the barge may contain household goods. (T(4) p 148:7–14).

Any argument that Limited does not "take custody" of the items transported on the barge is irrelevant. The Act includes no such requirement. Similarly, the Act does not limit the Commission's authority to regulating household goods "movers."

The Commission also found that the barge transports people. (R p 628 ¶ 31). The undisputed evidence shows that Limited allows drivers to ride the barge to the Island with their vehicle. In fact, some drivers are required to do so. (T(1) p 102; T(1) p 115:9–16; T(2) p 123:1–23; T(5) p 8:1–7; Doc.Ex.(I) p 528). There is no statutory support for any argument that people who ride the barge must satisfy some definition of a "passenger" rather than simply being "persons" who occupy spaces on the barge. *See* (T(4) p 91:2–9).

Finally, federal law does not preempt the Commission's regulation of the barge.[5] Although the Federal Aviation Administration Authorization Act of 1994 preempts state and local trucking regulations, the preemption provision does not apply to vessels like the barge or to the "intrastate transportation of household goods." 49 U.S.C §§ 14501(c)(1), (c)(2)(B). Similarly, that the barge might be a "freight barge" for purposes of Titles 46 or 49 of the United State Code is irrelevant given the absence of any federal authority preempting state regulation of vessels used to transport persons or household goods in intrastate commerce.

[5] And any such argument would be waived because Appellants did not assert federal preemption before the Commission. (T(5) p 157:14–19).

The Commission's findings conclusively establish that the barge is a common carrier subject to the Commission's jurisdiction. N.C.G.S. § 62-3(23)(a)(4); *see Tar Heel Indus.*, 77 N.C. App. at 77. The Commission's assertion of jurisdiction over the barge should be affirmed for that additional reason. *Cf. Letendre*, 259 N.C. App. at 526.

B. Appellants' cramped reading of the Commission's authority lacks merit.

Rather than address the Commission's reasoning, Appellants argue generally that the Commission lacks authority to regulate the parking facilities and barge as "public utilities."

First, Appellants contend that because the words "parking" and "barge" do not appear in the Act, the Commission lacks the authority to regulate such facilities. Br. at 8–12. Appellants similarly argue that the Commission has no authority over an entity, such as Limited, that has not yet been declared to be a public utility, and that the definition of a "public utility" should be narrow. *Id.* These arguments conflict with the plain language of the Act and basic principles of North Carolina law.

Appellants fundamentally misread the Commission's order. The Commission did *not* hold that the parking facilities and barge are, by themselves, public utilities. *See* Br. at 10. Instead, it held that they are

ancillary services or facilities used by Transportation in connection with its provision of public utility ferry service (*see* Section 62-3(27)) and, in the case of parking, that Limited's parking operations affect Transportation's rates and service (*see* Section 62-3(23)(c)). (R p 627–28 ¶¶ 22–23, 34). As discussed, courts have confirmed the Commission's broad authority to ensure that a public utility provides adequate, reasonably-priced, and reliable service, regardless of the affiliated entity through which that service is provided. *Supra* Section I.A.1.

Appellants' citation to *State ex rel. Utilities Commission v. National Merchandising Corp.*, 288 N.C. 715 (1975), for the proposition that the Commission may only exercise authority over "public utilities" is inapt. Br. at 8. Unlike the plastic phonebook cover at issue in that case, the services and facilities in question here *are* public utility services and facilities by the express terms of Sections 62-3(27) and 62-3(23)(c) because they are necessary and integral to the ferry's services and affect its rates and service. As discussed above, this authority is core to the Commission's ability to ensure the provision of adequate, reliable, and reasonably-priced utility service and protect ratepayers. *See supra* Section I.A.1.

Appellants' arguments overlook the fact that the Act sets out the nature and scope of the Commission's authority in general terms. Such use of general language is consistent with the way that statutes, which necessarily apply to a range of situations, are ordinarily drafted. Thus, as long as the relevant statutory provisions, fairly construed, authorize the assertion of the Commission's regulatory authority over the parking facilities and barge, it does not matter whether specific words do or do not appear in the Act or whether any particular entity has been declared to be a "public utility."

Appellants' citation to *State ex rel. Utilities Commission v. Thornburg*'s reference to "vague language" also does not change this result. Br. at 12 (citing 84 N.C. App. 482 (1987)). There, the Court declined to construe a statutory provision addressing a specific cost recovery mechanism when that construction would have modified existing precedent based on "vague language." *Thornburg* thus concerns interpretation of a specific statutory provision—not the scope of the Commission's jurisdiction. *Id.* at 489. That decision has no application here, where the Commission's factual finding clearly bring parking and

barge within the broad authorizing language adopted by the General Assembly.

Additionally, it is irrelevant that Limited, rather than Transportation, owns the parking facilities and barge, and that Limited has not yet been certified as a public utility by the Commission. An entity's status as "public utility" "does not depend on whether it has secured a certificate of public convenience and necessity"; instead, the relevant issue is whether the entity's activities fall within the statutory definition of a utility service or function. *Mackie*, 79 N.C. App. at 32. As the Village has demonstrated, the Commission's findings more than support its conclusion that the parking facilities and barge are subject to its authority under Sections 62-3(23)(c), 62-3(27), and 62-3(23)(a)(4). Limited's unilateral decision not to seek regulatory approval of its operations is not determinative of whether its activities in fact subject it to regulation.

Finally, Appellants' attack on the Commission's reliance on the *Southern Bell* cases discussed above fails to acknowledge that the Commission treated these decisions as persuasive, not binding, authority. (R pp 637–38). The Commission used these cases to illustrate

the breadth of its authority, rather than claiming to derive any specific authority from them. (*Id.*). Further, the fact that the service at issue in *Southern Bell II* had, at one time, been provided by the utility itself was not critical to the outcome in that case, which focused on the nature of the relevant service rather than which entity provided it.

Appellants' challenges to the Commission's order rely on an overly narrow reading of the Act, a failure to confront the Commission's reasoning, and a disregard for the Commission's actual findings and conclusions. Additionally, Appellants' claim that the Commission's assertion of jurisdiction is without precedent is irrelevant and incorrect. As the record reflects, parking revenues and other facilities have been previously included the rate base for various ferry utilities (Doc.Ex.(I) pp 881–87, 889–95, 897–899), and the Commission has regulated drive-on, drive-off ferries—akin to the barge. (Doc.Ex.(I) pp 901–08). Similarly, other states regulate barge operations (T(4) pp 91:16–22), and other jurisdictions have asserted regulatory authority over parking facilities operated in connection with the provision of utility service. *See City of Mountain View v. S. Pac. Co.*, 70 P.U.R.3d 304, 1967 WL 164047 (Cal. P.U.C. June 20, 1967) (asserting regulatory authority over parking

facilities adjacent to railroad stations because lots were "part of a service in connection with'" railroad).

The nature and extent of the Commission's authority depends on operational substance rather than paper formalities. Appellants' various arguments do not provide a basis for overturning the Commission's well-supported order.

C. The Village's complaint is the appropriate vehicle for determining the extent of the Commission's authority.

Appellants next argue—without citation—that the Commission lacked jurisdiction over the Village's complaint. In essence, Appellants argue that the Commission's complaint jurisdiction is limited to challenges to existing Commission rules, regulations, and rates. Br. at 18–20. This argument lacks merit.

A complaint must "set[ ] 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 any public utility in violation of any provision of law or any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable . . . ." N.C.G.S. § 62-73.

Here, the Village's complaint alleged that Transportation—a certificated entity—and Limited were operating integral parts of the regulated ferry and tram service outside of the Commission's regulatory authority.[6] (*See* R pp 19–23 ¶¶ 54–66). Whether a particular activity is subject to the Commission's authority and has been doing business in the absence of an appropriate certificate is an "act or thing done or omitted" in violation of law. N.C.G.S. § 62-73; *cf. In re Application by C&P Enters., Inc.*, 126 N.C. App. 495, 496–97 (1997) (considering whether sewer operation—which had never been regulated—was a utility and needed a certificate of public convenience and necessity).

Recognizing this fact, the Supreme Court has held that the provision of regulated service without Commission authorization—exactly what the Village alleged here—is subject to the Commission's complaint jurisdiction. *Southern Bell II*, 326 N.C. at 527 (Commission had jurisdiction over complaint against affiliate performing utility function, instructing that relevant inquiry focuses on "functions" of affiliate rather than "plac[ing] too much emphasis on the term 'public

[6] The Village also included a petition for declaratory relief. (R p 21).

utility'"); *see also Mackie*, 79 N.C. App. at 32. Thus, Section 62-73 clearly authorizes the Village's complaint.

II. THE COMMISSION DID NOT RELY ON ERRONEOUS LEGAL ANALYSIS.

Appellants next argue that the Commission committed various "analytical" errors. These arguments lack merit.

A. The Commission did not assert jurisdiction merely because the parking facilities and barge are "important."

Appellants first contend that the Commission improperly asserted jurisdiction over the parking facilities and the barge because those facilities are "important" to the Island. Br. at 20–23. Although the Commission noted the importance of these facilities to the Island, it did not claim to have authority to regulate the facilities on that basis. Instead, the Commission's references to the importance of the parking facilities and barge were made in the context of addressing the fundamental issue of whether they are ancillary to the ferry's operations and affect the ferry's rates and service. N.C.G.S. §§ 62-3(27), 62-3(23)(c);

(R pp 635–41). The Commission did not err by acknowledging the importance of these services in its analysis.

B. The Commission can consider a party's monopoly status without a showing of anticompetitive conduct.

Without challenging the Commission's determination that the parking facilities and barge are *de facto* monopolies, Appellants contend that the Commission erred by relying on this fact given the absence of evidence that Limited had engaged in anticompetitive conduct. Br. at 22–26. Appellants' argument lacks merit.

Appellants inaccurately suggest that the Commission exercised jurisdiction over the parking facilities and barge because of their monopoly status. Instead, the Commission relied on this fact to demonstrate that parking and barge are ancillary to the ferry's operations and affect the ferry's service and rates. The lack of any alternative to Limited's parking facilities and barge service is clearly relevant to these issues.

Further, a showing of anticompetitive conduct is not necessary before the Commission can exercise regulatory authority. The Commission is empowered "to protect the public from . . . [the] normal consequences of a monopoly," *Buck Island*, 162 N.C. App. at 584; *State ex*

rel. Utils. Comm'n v. Gen. Tel. Co. of the S.E., 281 N.C. 318, 335–36 (1972) ("[A]n uncontrolled legal monopoly in an essential service" will often lead "to poor service and exorbitant charges"; thus, Commission can "police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable.").

Thus, because utility regulation is intended to ensure that anticompetitive conduct never occurs, no showing of anticompetitive conduct is required as a precondition for Commission action. Appellants' argument is misplaced.

C. The Commission did not misuse the 2010 rate case settlement stipulation.

Finally, Appellants argue that the Commission inappropriately relied on a settlement stipulation adopted by the Commission in Transportation's 2010 rate case. Br. at 26–30. Again, this argument misapprehends the nature of the stipulation and how the Commission used it.

First, Appellants waived this argument. At the hearing, Transportation and Limited introduced the stipulation into evidence and elicited testimony about it to try to show that the Village had agreed that the parking facilities were not subject to regulation. (T(5) pp 40:1–41:12).

Appellants cannot contend that the Commission erred by considering evidence they introduced. *Stark v. N.C. Dep't of Env't & Nat. Res.*, 224 N.C. App. 491, 497 (2012) ("A party may not complain of an action which he induced." (citation omitted)).

Additionally, Appellants misstate the stipulation's terms. The stipulation did not bar the Commission from considering it in future proceedings. Instead, the stipulation states that the Commission and Limited were not bound by its terms and that Limited could advance contrary arguments in future proceedings. (*See* Doc.Ex.(I) at 1090–91 ¶ 9). Here, the Commission did not deem itself or Limited bound by the stipulation, and the Commission was not barred from using the stipulation to explain the historical relationship between the parking facilities and ferry operation. (R p 641).

Appellants seek to characterize the imputation of parking-related revenues to Transportation as merely "an accounting exercise." Br. at 28. Although one witness described the imputation in that manner, the record also contains evidence that the Public Staff calculated the imputation by treating Transportation's revenues as if the parking facilities had been a regulated asset. (T(1) pp 185:11–186:10; T(2) pp

13:15–15:6; Doc.Ex.(I) p 1161). Thus, the Commission had a sufficient basis to treat the rate adjustment as something more than an "accounting exercise."

Therefore, the Commission did not err by referencing the 2010 stipulation.

III. THE COMMISSION'S FINDINGS AND CONCLUSIONS HAVE AMPLE SUPPORT.

Appellants' arguments concerning the Commission's findings and conclusions rest on disagreements with the manner in which the Commission weighed and applied the record evidence, rather than a contention that its findings lack record support, and are therefore without merit.

A. The Commission did not rely on a hypothetical "vehicle-free Island."

Appellants argue that the Commission erroneously "relied on hypothetical facts" by "envision[ing] some type of alternative reality" in which motor vehicles could be used on the Island and in which all items could be transported on the same boat. Br. at 30–32. Appellants misread the Commission's order.

Instead of basing its decision upon an "alternative reality," the Commission utilized the challenged counterfactual to highlight the

intertwined nature of the ferry, parking, and barge services (*see* R pp 644–46; *supra* Section I.A.1.b), a question central to issues before the Commission. Among other things, the Commission explained that the ferry and barge are "simply two different types of boats by which the single transportation system chooses to operate" (R p 646), before stating that if cars had been allowed on the Island, there would be no need for separate vessels to transport people and vehicles to the Island. The Commission also noted that Limited's "choice to purchase, maintain, and operate two types of boats to provide this single service" did not justify treating the two vessels differently for regulatory purposes. (*Id.*)

The challenged counterfactual is simply part of the Commission's explanation for its decision that the barge provides a service ancillary to the ferry operation. It does not involve substantive reliance on any sort of "imagined state of facts." Thus, Appellants are not entitled to relief from the Commission's order based on this argument.

B. The Court should not reweigh evidence about the barge's "passengers."

Appellants ask the Court to make an impermissible appellate credibility determination, arguing that the record shows that the barge does not accept "passengers." Br. at 32–34. An appellate court cannot,

however, reweigh evidence or revisit the Commission's credibility determinations. *Pub. Staff*, 323 N.C. at 491.

The Commission had ample basis for concluding that the barge does, in fact, accept "passengers." Although the Act does not define "passenger," the word typically refers to "a traveler . . . other than the driver, pilot, or crew." Passengers, The New Oxford American Dictionary (3d ed. 2010); *see also* Passenger, *Merriam Webster* (11th ed. 2019) (similar). The barge is "permitted by federal law to have up to 12 *non-crew persons aboard*." Br. at 32 (emphasis added). Numerous witnesses testified that people other than crew members travelled to the Island on the barge, and the evidence shows that, in some instances, Limited requires that people ride the barge with their vehicle. *See supra* p 31.

Thus, the Commission did not err by pointing out that contractors riding the barge with their vehicles would avoid paying a ferry fare. (R p 628 ¶ 31; R p 645).

Appellants contend that had this issue been raised before the Commission, they could have responded with evidence of "Coast Guard maritime freight regulations and logistical operations." Br. at 33. However, these issues *were* raised before the Commission and Appellants

did present evidence concerning the Coast Guard's regulations and their operations. (T(4) pp 170:2–178:24; R p 628 ¶ 33; *see also* R p 22; R pp 464–469).

For these reasons, Appellants' arguments lack merit.

C. The Commission did not err by considering the need for regulation.

Appellants assert that the Commission erred by concluding that exercising regulatory authority over the parking facilities and barge is necessary, arguing that ferry riders were generally satisfied and "the record contained no evidence of anticompetitive" conduct. Appellants further contend that the Commission erred "by giving weight to public opinion." Br. at 35 (citing (R p 634)). Again, Appellants misapprehend the applicable law and what the Commission actually decided.

As discussed, a showing of anticompetitive conduct is not necessary for the Commission to exercise its authority. Further, the Commission correctly determined that the assertion of jurisdiction here would be in the public interest. Given the impending sale of the transportation system, there is no guarantee that the integrated system will continue to operate as it has in the past, making Commission regulation of the entire transportation system critical and very much in the public interest.

Nor did the Commission err by acknowledging public opinion. The Commission did not assert jurisdiction simply because the public wanted regulation; it mentioned public opinion in support of its conclusion that the parking facilities and barge's services are ancillary to the operation of the ferry, an appropriate inference for the Commission to make. (*See, e.g.*, R p 647). Thus, Appellants' final argument is without merit.

CONCLUSION

For these reasons, the Commission's order should be affirmed.

This 8th day of September, 2023.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.

By: Electronically submitted

Amanda S. Hawkins
N.C. State Bar No. 50763
ahawkins@brookspierce.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.

Marcus W. Trathen
N.C. State Bar No. 17621
mtrathen@brookspierce.com
1700 Wells Fargo Capitol Center
150 Fayetteville Street
Post Office Box 1800 (zip 27602)
Raleigh, North Carolina 27601
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Jo Anne Sanford
N.C. State Bar No. 6831
SANFORD LAW OFFICE, PLLC
Post Office Box 28085
Raleigh, North Carolina 27611-8085
Telephone: (919) 210-4900
sanford@sanfordlawoffice.com

Counsel for Village of Bald Head Island

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, the undersigned counsel for Appellee 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 8th day of September, 2023.

By: /s/ Amanda S. Hawkins
Amanda S. Hawkins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMPLAINANT–APPELLEE'S BRIEF** has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail.

M. Gray Styers, Jr.
Brad Risinger
Kip Nelson
Fox Rothschild LLP
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
GStyers@foxrothschild.com
BRisinger@foxrothschild.com
KNelson@foxrothschild.com
Attorneys for Transportation and Limited

David P. Ferrell
Nexsen Pruet PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612
dferrell@nexsenpruet.com
Attorney for SharpVue

Daniel C. Higgins
Burns Day & Presnell, P.A.
P.O. Box 10867
Raleigh, NC 27605
dhiggins@bdppa.com
Attorney for BHI Club

Edwards S. Finley, Jr.
2024 White Oak Road
Raleigh, NC 27608
Edfinley98@aol.com
Attorney 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
Attorneys for Public Staff—North Carolina Utilities Commission

This the 8th day of September, 2023.

By: /s/ Amanda S. Hawkins
Amanda S. Hawkins

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 VOLUME I

****

Appendix Pages

49 U.S.C. § 13102 ..... App.(I) 1–5

49 U.S.C § 14501 ..... App.(I) 6–9

N.C.G.S. § 62-2 ..... App.(I) 10–12

N.C.G.S. § 62-3 ..... App.(I) 13–19

N.C.G.S. § 62-30 ..... App.(I) 20

N.C.G.S. § 62-73 ..... App.(I) 21

N.C.G.S. § 62-94 ..... App.(I) 22–23

N.C.U.C. Rule R2-37 ..... App.(I) 24

Excerpts from 11 October 2022
Hearing Transcript (T2) ..... App.(I) 25–38

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part B. Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Refs & Annos)
Chapter 131. General Provisions

49 U.S.C.A. § 13102

§ 13102. Definitions

Effective: July 30, 2008
Currentness

In this part, the following definitions shall apply:

(1) Board.--The term "Board" means the Surface Transportation Board.

(2) Broker.--The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

(3) Carrier.--The term "carrier" means a motor carrier, a water carrier, and a freight forwarder.

(4) Contract carriage.--The term "contract carriage" means--

(A) for transportation provided before January 1, 1996, service provided pursuant to a permit issued under section 10923, as in effect on December 31, 1995; and

(B) for transportation provided after December 31, 1995, service provided under an agreement entered into under section 14101(b).

(5) Control.--The term "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by--

(A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or

(B) any other means.

(6) Foreign motor carrier.--The term "foreign motor carrier" means a person (including a motor carrier of property but excluding a motor private carrier)--

(A)(i) that is domiciled in a contiguous foreign country; or

(ii) that is owned or controlled by persons of a contiguous foreign country; and

(B) in the case of a person that is not a motor carrier of property, that provides interstate transportation of property by motor vehicle under an agreement or contract entered into with a motor carrier of property (other than a motor private carrier or a motor carrier of property described in subparagraph (A)).

(7) Foreign motor private carrier.--The term "foreign motor private carrier" means a person (including a motor private carrier but excluding a motor carrier of property)--

(A)(i) that is domiciled in a contiguous foreign country; or

(ii) that is owned or controlled by persons of a contiguous foreign country; and

(B) in the case of a person that is not a motor private carrier, that provides interstate transportation of property by motor vehicle under an agreement or contract entered into with a person (other than a motor carrier of property or a motor private carrier described in subparagraph (A)).

(8) Freight forwarder.--The term "freight forwarder" means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business--

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.

(9) Highway.--The term "highway" means a road, highway, street, and way in a State.

(10) Household goods.--The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

(11) Household goods freight forwarder.--The term "household goods freight forwarder" means a freight forwarder of one or more of the following items: household goods, unaccompanied baggage, or used automobiles.

(12) Household goods motor carrier.--

(A) In general.--The term "household goods motor carrier" means a motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services:

(i) Binding and nonbinding estimates.

(ii) Inventorying.

(iii) Protective packing and unpacking of individual items at personal residences.

(iv) Loading and unloading at personal residences.

(B) Inclusion.--The term includes any person that is considered to be a household goods motor carrier under regulations, determinations, and decisions of the Federal Motor Carrier Safety Administration that are in effect on the date of enactment of the Household Goods Mover Oversight Enforcement and Reform Act of 2005.

(C) Limited service exclusion.--The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier).

(13) Individual shipper.--The term "individual shipper" means any person who--

(A) is the shipper, consignor, or consignee of a household goods shipment;

(B) is identified as the shipper, consignor, or consignee on the face of the bill of lading;

(C) owns the goods being transported; and

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(D) pays his or her own tariff transportation charges.

(14) Motor carrier.--The term "motor carrier" means a person providing motor vehicle transportation for compensation.

(15) Motor private carrier.--The term "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when--

(A) the transportation is as provided in section 13501 of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

(16) Motor vehicle.--The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

(17) Noncontiguous domestic trade.--The term "noncontiguous domestic trade" means transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.

(18) Person.--The term "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person.

(19) Pre-arranged ground transportation service.--The term "pre-arranged ground transportation service" means transportation for a passenger (or a group of passengers) that is arranged in advance (or is operated on a regular route or between specified points) and is provided in a motor vehicle with a seating capacity not exceeding 15 passengers (including the driver).

(20) Secretary.--The term "Secretary" means the Secretary of Transportation.

(21) State.--The term "State" means the 50 States of the United States and the District of Columbia.

(22) Taxicab service.--The term "taxicab service" means passenger transportation in a motor vehicle having a capacity of not more than 8 passengers (including the driver), not operated on a regular route or between specified places, and that--

(A) is licensed as a taxicab by a State or a local jurisdiction; or

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(B) is offered by a person that--

(i) provides local transportation for a fare determined (except with respect to transportation to or from airports) primarily on the basis of the distance traveled; and

(ii) does not primarily provide transportation to or from airports.

(23) Transportation.--The term "transportation" includes--

(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

(24) United States.--The term "United States" means the States of the United States and the District of Columbia.

(25) Vessel.--The term "vessel" means a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used, as a means of transportation by water.

(26) Water carrier.--The term "water carrier" means a person providing water transportation for compensation.

(27) Over-the-road bus.--The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 854; amended Pub.L. 104-287, § 5(27), Oct. 11, 1996, 110 Stat. 3390; Pub.L. 106-159, Title II, § 209(a), Dec. 9, 1999, 113 Stat. 1764; Pub.L. 107-298, § 3(a), Nov. 26, 2002, 116 Stat. 2343; Pub.L. 109-59, Title IV, §§ 4142(a), 4202(b), Aug. 10, 2005, 119 Stat. 1747, 1751; Pub.L. 110-244, Title III, § 305(c), June 6, 2008, 122 Stat. 1620; Pub.L. 110-291, § 3, July 30, 2008, 122 Stat. 2915.)

Notes of Decisions (97)

49 U.S.C.A. § 13102, 49 USCA § 13102
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part B. Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Refs & Annos)
Chapter 145. Federal-State Relations

49 U.S.C.A. § 14501

§ 14501. Federal authority over intrastate transportation

Currentness

(a) Motor carriers of passengers.--

(1) Limitation on State law.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to--

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) Matters not covered.--Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) Freight forwarders and brokers.--

(1) General rule.--Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(2) Continuation of Hawaii's authority.--Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.--

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.--This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction.--Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) Pre-arranged ground transportation.--

(1) In general.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service--

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for--

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

(2) Intermediate stop defined.--In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) Matters not covered.--Nothing in this subsection shall be construed--

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 899; amended Pub.L. 105-178, Title IV, § 4016, June 9, 1998, 112 Stat. 412; Pub.L. 105-277, Div. C, Title I, § 106, Oct. 21, 1998, 112 Stat. 2681-586; Pub.L. 107-298, § 2, Nov. 26, 2002, 116 Stat. 2342; Pub.L. 109-59, Title IV, §§ 4105(a), 4206(a), Aug. 10, 2005, 119 Stat. 1717, 1754; Pub.L. 114-94, Div. A, Title V, § 5514, Dec. 4, 2015, 129 Stat. 1557.)

Notes of Decisions (169)

49 U.S.C.A. § 14501, 49 USCA § 14501
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

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;

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(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

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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.

Notes of Decisions (58)

N.C.G.S.A. § 62-2, NC ST § 62-2

The statutes and Constitution are current through S.L. 2023-106 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

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

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.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(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.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(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

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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:

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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.

Notes of Decisions (71)

N.C.G.S.A. § 62-3, NC ST § 62-3

The statutes and Constitution are current through S.L. 2023-106 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

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's North Carolina General Statutes Annotated
Chapter 62. Public Utilities (Refs & Annos)
Article 3. Powers and Duties of Utilities Commission

N.C.G.S.A. § 62-30

§ 62-30. General powers of Commission

Currentness

The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.

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

Notes of Decisions (87)

N.C.G.S.A. § 62-30, NC ST § 62-30
The statutes and Constitution are current through S.L. 2023-106 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

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

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.

Notes of Decisions (12)

N.C.G.S.A. § 62-73, NC ST § 62-73
The statutes and Constitution are current through S.L. 2023-106 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

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

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

Effective: June 23, 2023
Currentness

(a) On appeal the court shall review the record and the issues raised 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 decision 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 any of the following:

(1) In violation of constitutional provisions.

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

(3) Made upon unlawful proceedings.

(4) Affected by other errors of law.

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

(6) Arbitrary or capricious.

(c) In making these determinations, the court shall review the whole record or the portions of it that are 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 that were not set forth specifically in the appellant's notice of appeal filed with the Commission.

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

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

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

Credits

Added by Laws 1963, c. 1165, § 1. Amended by Laws 1969, c. 614; Laws 1975, c. 391, § 14; S.L. 2023-54, § 10, eff. June 23, 2023.

Notes of Decisions (202)

N.C.G.S.A. § 62-94, NC ST § 62-94

The statutes and Constitution are current through S.L. 2023-106 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

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

ARTICLE 8.

COMMODITIES.

Rule R2-37. COMMODITY DESCRIPTION.

Group 1. *General Commodities.* — [Repealed.]
Group 2. *Heavy Commodities*. — [Repealed.]
Group 3. *Petroleum and Petroleum Products, Liquid, in Bulk in Tank Trucks.* — [Repealed.]
Group 4. *Liquid Refrigerated Products in Bulk*. — [Repealed.]
Group 5. *Solid Refrigerated Products*. — [Repealed.]
Group 6. *Agricultural Commodities*. — [Repealed.]
Group 7. *Cotton in Bales*. — [Repealed.]
Group 8. *Dry Fertilizer and Dry Fertilizer Materials*. — [Deleted.]
Group 9. *Forest Products.* — [Deleted.]
Group 10. *Building Materials*. — [Repealed.]
Group 11. *Livestock*. — [Repealed.]
Group 12. *Explosives and Other Dangerous Articles*. — [Repealed.]
Group 13. *Motor Vehicles*. — [Repealed.]
Group 14. *Dump Truck Operations*. — [Repealed.]
Group 15. *Retail Store Delivery Service*. — [Repealed.]
Group 16. *Furniture Factory Goods and Supplies*. — [Repealed.]
Group 17. *Textile Mill Goods and Supplies*. — [Repealed.]
Group 18. *Household Goods*. — The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is arranged and paid for by the householder or another party.
Group 18-B. *Household Goods Retail Delivery*. —[Repealed.]
Group 19. *Unmanufactured Tobacco and Accessories*. — [Repealed.]
Group 20. *Motion Picture Film and Special Service*. — [Repealed.]
Group 21. *Other Specific Commodities*. — [Repealed.]

(NCUC Docket No. M-100, Sub 1, 5/12/65; NCUC Docket No. M-100, Sub 31, 1/14/71; NCUC Docket No. M-100, Sub 87, 5/8/81; NCUC Docket No. M-100, Sub 106, 9/16/85; NCUC Docket No. T-100, Sub 14, 1/16/92; NCUC Docket No. T-100, Sub 14, 7/21/92; NCUC Docket No. T-100, Sub 18, 3/24/93; NCUC Docket No. T-100, Sub 32, 8/23/95; NCUC Docket No. T-100, Sub 38, 7/26/96; 9/19/96; T-100, Sub 49, 02/22/02; NCUC Docket No. T-100, Sub 49, 02/02/04.)

OFFICIAL COPY
Oct 24 2022

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: Tuesday, October 11, 2022

TIME: 9:30 a.m. - 12:08 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 2

OFFICIAL COPY
Oct 24 2022

A. Yes.
Q. All right.
MR. SCHAUER: If I may approach the witness?
COMMISSIONER BROWN-BLAND: You may.
(Pause.)
MR. SCHAUER: COMMISSIONER BROWN-BLAND, if we could, I believe this exhibit would be marked KWO Redirect Exhibit 1.
COMMISSIONER BROWN-BLAND: It would be, so identified, yes.
MR. SCHAUER: Thank you.
(KWO Redirect Exhibit 1 was marked for identification.)
Q. All right. Mr. O'Donnell, do you recall reviewing the document that I just handed you?
A. Yes.
Q. All right. And can you explain the first page of this document to the Commissioners?
A. The first page is the sum of the revenues that Mr. Horde had developed of the annual pass revenues, daily park revenues, actual park revenues. So he came down to an actual number here of $1,959,230. And then what he did, over on the third page of this

OFFICIAL COPY
Oct 24 2022

document is where the -- what I refer to as the ratemaking revenue requirement comes in and --

Q. So, Mr. -- Mr. O'Donnell, if I can interrupt. Could you just make sure we're all looking at the same page, when you say third page?

A. I'm sorry, yeah. It's entitled, on the left-hand corner, “Bald Head Island Transportation, Inc., Deep Point Parking Facility Computation of Levelized Payment.” it's the third page in this material that you passed out. It's got a lot of columns to it, a lot of numbers.

And so what he did in this is, you can see, the first set of columns he labeled as rate base treatment of facilities. He lined up all the anticipated expenses and then, over on -- under payment schedule, he did what we call a goal seek analysis and tried to figure out what the levelized payment would be for the parking facilities over a period of 20 years. And that's where he got the $1,436,133.

So, taking all those numbers back, and if you go back to the very first page here that you handed out to me, that's entitled “Bald Head Island Transportation, Inc. Docket A-41, Sub 7, Settlement Computation of Parking Revenue Contribution, Test Year

OFFICIAL COPY
Oct 24 2022

Ended 12/31/09, he took the revenues of one -- going down the line, 15, he took the revenues of $1,959,230, and subtracted out the levelized payment we just talked about over on page 3 to come up to $523,097. That was to credit that he moved over from parking into the ferry.

Q. All right. And looking at page 3, where it says plant, and it has the figure of over $9.4 million; what is that referring to?

A. That was the original book value of the plant. Well, it was the plant value at the time of the 2010 case.

Q. Okay. And so going back to page 1 -- I'm sorry for flipping pages -- line 16, where it says, "Revenue required for cost recovery of BHIT-authorized ROR," is that the expected revenue requirement, based on the ROR, applied to the original cost --

A. Yes.

Q. --of the parking assets?

A. Yes.

Q. Okay. Thank you, Mr. O'Donnell. I think I'm done with that exhibit.

Yesterday, do you recall when Mr. Styers asked you about separate corporate boundaries,

OFFICIAL COPY
Aug 24 2022

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL EXPERIENCE.

A. I have a bachelor's degree in Business and Biology from the University of North Carolina at Charlotte. I spent my thirty-three year career at Duke Energy and retired in 2010 as Director of North Carolina State Governmental Affairs.

Q. AS A MEMBER OF THE VILLAGE COUNCIL, CAN YOU SPEAK TO WHY THE VILLAGE HAS INITIATED THIS PROCEEDING?

A. Yes. The transportation system owned and operated by Bald Head Island Limited, LLC and Bald Head Island Transportation, Inc. (collectively, "Limited") is the lifeblood to Bald Head Island—in fact, according to the Limited's most recent Annual Report the ferry carried over three-hundred and seventy thousand passengers in 2021 alone. The passenger ferry is essential because, being a bridgeless island, Bald Head is only accessible to the public by the ferry. As no vehicles are allowed for transportation on the island, the parking facilities are integral to the ferry's operations since all passengers must leave their cars at the terminal before boarding the ferry. Similarly, the barge is the exclusive means of transporting supplies and household goods to the island.

If any three of these essential components of the transportation system were to become inaccessible to the public, the island community would cease to exist in its current form. Thankfully, the Commission has regulated the passenger ferry since the 1990s. The parking facilities and the barge, however, have never been

OFFICIAL COPY
Aug 24 2022

regulated. Members of the public have, for decades, expressed concerns that the parking and barge should be regulated, just like the ferry. For the convenience of the Commission, attached as Exhibit STG-2 are copies of citizen comments on this issue that have been previously submitted to the Commission. These comments are consistent with comments that have been made directly to me by various citizens and they are representative of the concerns animating the Village's initiation of this proceeding. Although the issue of the regulatory status of the parking and barge operations have been identified for years, the question of regulating the parking and barge has never been resolved by the Commission.

Q. WHY HAS THE VILLAGE CHOSEN TO PURSUE THIS ISSUE NOW?

A. The issue raised by the Village in its complaint has been lingering in the background the entire time that Limited has been operating the transportation system. I look at it like this: the issue of the regulatory status of the parking and barge operations was a question that was inevitably going to need resolution, it was just a matter of when.

With Limited's announced intention to sell the transportation system, the regulation of the parking facilities and barge has become paramount. While the current owner of the transportation system, as the island's developer, has been motivated to appease the public's concerns about the parking and barge in the past based on its own economic development interests, the future owner might not be so motivated. Absent regulation, the next owner of the transportation system will be

OFFICIAL COPY
Aug 24 2022

Q. HOW IMPORTANT IS THE PARKING AND THE BARGE TO THE ISLAND?

A. As reflected by the comments on Exhibit STG-1, the public's access to the parking facilities and the barge is critical to the island's economy and the wellbeing of all of those on the island.

Q. HOW IS THE ISLAND'S ECONOMY IMPACTED BY THE PARKING FACILITIES?

A. In myriad ways. The island's economy is fueled by tourism, and each tourist must park a vehicle in the parking facilities before boarding the passenger ferry. If the parking rates were to become cost prohibitive to tourists, the island's economy would be harmed significantly.

Let's first consider the impact to the island's rental market. Bald Head is a vacation destination. It is notable that some 65-70% of property owners on Bald Head are residents of North Carolina. While there are approximately 1,250 residences on the island, I believe there are 250 to 300 permanent or primary residences, approximately 500-550 second home properties, where owners have sought a place to get away for weekends and vacations, and the remaining homes (approximately 450) are rental properties. A reduction in the number of vacationers would reduce the demand for rentals and the rental income for these properties would shrink. I am not a real estate expert, but my expectation based on logic is that property values would sharply fall. The reduction in rentals would further

OFFICIAL COPY
Aug 24 2022

impact all of the rental agencies that manage the vacation homes. The cascading erosion of the tourist economy would further impact the businesses and laborers who service the rental properties, whether by cleaning or making maintenance and repair visits.

I would expect the construction industry also to take a hit. My understanding is that many of the new residential homes that are being built on the island are intended to be rental properties, at least, for part of the year. It is common for a property owner to offset the cost of an island home with rental revenues. In a future of fewer tourists, the construction industry would dwindle.

Another obvious victim of a tourism drought would be the commercial establishments on the island. There are about eight restaurants and thirteen retail stores on the island. Each of the owners of these businesses would likely tell you that their most profitable months are in the summer tourist season. Omit those tourists, and these businesses will obviously suffer. One can logically envision shuttered store fronts and employees having to find new jobs on the mainland.

Q. WOULD THE ECONOMIC IMPACT BE LIMITED TO THOSE WHO LIVE OR OTHERWISE OWN PROPERTY ON THE ISLAND?

A. Absolutely not. Should the tourism industry on Bald Head Island disappear, the impact will reach beyond the island. The vast majority of workers on the island live on the mainland. These workers ride the contractors ferry in the morning to reach their weekday jobs, so that they can bring home their earnings to provide for their

OFFICIAL COPY
Aug 24 2022

Q. PLEASE DESCRIBE YOUR USE OF THE PARKING FACILITIES AT THE DEEP POINT MARINA.

A. Every time we come to Bald Head, we park in the Deep Point Marina parking lot. As Bald Head is our primary home, our car is parked for many days in the Deep Point lot. Consequently, we have purchased a "Premium Parking Pass," which allows for unlimited parking days for a flat fee.

Q. ARE YOU AWARE OF ANYBODY WHO HAS USED THE PASSENGER FERRY WITHOUT HAVING TO PARK AT THE PARKING FACILITIES?

A. No. I am not aware of anybody who has used the passenger ferry to get to Bald Head without having to park a vehicle at the Deep Point parking facilities. If you need to get to Bald Head, you need to park in those parking facilities. The only exception that I am aware of is a few people who keep their own boats and have boat slips at the Southport Marina and in the Bald Head Marina. These people could get to the island without parking at the parking facilities. But most of the general public does not own a boat and, even if they did, they do not own slips in Southport and on Bald Head. Also, to my understanding, boat slips are limited in number and in demand in Southport and Bald Head Island. So I still stand by the statement that if you need to get to Bald Head, you need to park at the Deep Point parking facilities.

OFFICIAL COPY

Aug 24 2022

Q. HAVE YOU EVER USED THE BARGE AND TUG SERVICE?

A. Yes.

Q. PLEASE DESCRIBE YOUR USE OF THE BARGE AND TUG SERVICE.

A. My wife and I have had appliances, furniture, and construction material for small projects delivered on the barge. For larger projects, our contractors have used the barge to deliver larger loads of furniture, appliances, and construction material. Just recently we had two HVAC units and a water heater replaced, all of which were transported on the barge. Also, we used to have a small boat and trailer that I would transport to the mainland and back for maintenance and repair.

Q. DO YOU HAVE ANY CONCLUDING THOUGHTS?

A. Yes. I am very grateful for the Commission's time and efforts in this proceeding. Having come from this world in my pre-retirement life, I appreciate the demands placed on the Commission's limited time. I also realize that the issues that the Village has raised in its petition are not issues that the Commission hears about every day.

That said, Bald Head Island is one of the State's natural treasures. Among its coastal destinations, the island is unique due to its natural beauty, its relaxed, vehicle-less atmosphere, and its commitment to environmental stewardship as illustrated by the Maritime Forest and the Conservancy's coastal research mission and turtle nesting program. As a consequence of these features and attractions, the

OFFICIAL COPY
Aug 24 2022

island serves as a vital economic engine for the southeast coast of North Carolina and Brunswick County. As such, state oversight of the monopoly transportation system serving as the gateway to the island is paramount.

For all these reasons, I cannot overemphasize how important these matters are to the people who care about Bald Head Island. And this group includes not just the approximately 300 citizens who have permanent residences on this island. It includes the tens of thousands of visitors every year, the hundreds (if not thousands) of employees who work on the island, the business and property owners on the island, and even the surrounding communities that benefit from a vibrant island economy.

To an island that is fueled by tourism, access to the island on terms and conditions that are fair and reasonable and in the public interest is essential. Without parking and without the barge there is no meaningful public access, and without access there is no Bald Head Island as we know it. I urge the Commission to exercise its authority for the benefit of the public to assert regulatory oversight over the barge and the parking facilities.

Q. DOES THIS COMPLETE YOUR DIRECT TESTIMONY?

A. Yes.

OFFICIAL COPY
Oct 24 2022

A. Correct.
Q. Does that still exist?
A. Far as I know, yes.
Q. Do you know any of your friends or neighbors who hold an annual ferry pass?
A. Yes.
Q. Do you know whether they purchase that on a combined basis with a parking pass, or do they purchase them separately?
A. I -- I don't know the answer to that.
Q. You don't have any knowledge on that subject at all?
A. No.
Q. Because you don't hold one yourself?
A. Right.
Q. Okay. Well, I'll leave that alone.
You've used the barge --
A. Yes.
Q. -- according to your pre-trial testimony?
A. Yes.
Q. Now, as -- as you say in your prefiled testimony, you've had appliances, furniture, small construction materials, an HVAC unit, and a water heater that have come to your house by way of the

OFFICIAL COPY
Oct 24 2022

barge.

A. Yes.

Q. How -- how -- tell me a little bit more about the mechanics, actually how that happened.

Did the contractors or the retailers or the installers' truck arrive at your house and say, "Hey, we got here. We came across on the barge and we got here, here's your -- here's your refrigerator"?

A. That's correct.

Q. That's right. You -- you didn't have to go down and make arrangements to pick up the appliances or the furniture at the barge.

A. Not in those cases.

Q. And not in those cases.

A. Uh-huh.

Q. And when it was loaded on the barge on the mainland side to get to you, that wasn't done by the barge, that was just the truck -- the installers' truck, or the retailer's truck, or the contractor's truck was driven onto the barge, and the -- and the appliances and the furniture were inside it?

A. Correct.

Q. Okay. That's what I thought, and I wanted to be sure if I understood how the mechanics worked, then.

OFFICIAL COPY
Oct 24 2022

Now, you also say you have -- you used to have a small boat and trailer --

A. Yes.

Q. -- that you had to take back and forth for repairs and maintenance on the mainland.

A. Yes.

Q. How'd you get it to the barge?

A. So I would tow it, with my golf cart, up to the barge, and when Rusty said go ahead, I'd back it on there. And then when we get to the other side, drive it off until the marine service could come pick it up. And then when the service was done, they delivered it back to the mainland ferry -- barge terminal, and I would go over with my golf cart, back it --- or pull it on to the ferry -- to the barge, excuse me, and back on the main- -- on the island side, drive it off the barge back to the house.

Q. And so you'd ride on the barge with it --

A. Yes.

Q. -- in your golf cart when you took it over to the mainland, and then when you brought it back, you were riding on the barge in your golf cart?

A. Yes.

Q. Okay. Thank you, sir.

UNDER SEAL AND SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION

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 VOLUME II (FILED UNDER SEAL)

****

Pursuant to the Court's 15 May 2023 Order, the following items are filed separately under seal:

Appendix Pages

Excerpts from 10 October 2023
Hearing Transcript (T1) .....App.(II) 1–26

Excerpts from 11 October 2023
Hearing Transcript (T3) .....App.(II) 27–63

Excerpts from 12 October 2023
Hearing Transcript (T4) .....App.(II) 64–88

Excerpts from 12 October 2023
Hearing Transcript (T5) ..... App.(II) 89–122

Court's 15 May 2023 Order ..... App.(II) 123

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

City of Mountain View v. Southern Pacific Co.,
70 P.U.R.3d 304, 1967 WL 164047
(Cal. P.U.C. June 20, 1967) .....Add. 1–26

In re Southern Bell Telephone & Telegraph Co.,
Dkt. No. P-55, Sub 834, 1984 WL 1028455
(N.C.U.C. Nov. 9, 1984) .....Add. 27–67

1967 WL 164047 (Cal.P.U.C.), 70 P.U.R.3d 304

City of Mountain View v Southern Pacific Company
Additional complainants: City of Sunnyvale, Case No. 8188; and City of San Carlos, Case No. 8204 Additional defendant: Card-Key Systems, Inc. Intervenor: Sunnyvale Area Commuters Club

Case No. 8087
Decision No. 72615

California Public Utilities Commission

June 20, 1967

APPEARANCES: Fred Caploe, for city of Mountain View, Frank Gillio and Gene Fink, for the city of Sunnyvale, Michael Aaronson, for the city of San Carlos, complainants; John MacDonald Smith, for Southern Pacific Company and Card-Key Systems, Inc., defendants; Ian G. Alien, for Sunnyvale Area Commuters Club, intervenor.

By the COMMISSION:

Case No. 8087 is a complaint by the city of Mountain View (hereinafter referred to as Mountain View) against Southern Pacific Company (hereinafter referred to as Southern Pacific) and Card-Key Systems, Inc. (hereinafter referred to as Card-Key). The complaint alleges that there is a Southern Pacific railroad station in Mountain View; that Southern Pacific owns land adjacent to the station; that prior to 1959 the adjacent land had been used by Southern Pacific's customers as a parking area for their vehicles, without charge; that in 1959, Southern Pacific entered into a lease with Card-Key; that pursuant to the lease, Southern Pacific had caused the parking area to be paved, enclosed with barriers and turnstiles; that Southern Pacific and Card-Key have compelled Southern Pacific's customers to pay fees in order to park in the parking area; that Southern Pacific operates and maintains parking areas adjacent to its stations in other municipalities on its system between South San Francisco and San Jose and does not compel its customers to pay fees to park in these areas and that the imposition of parking fees at Mountain View imposes an unconscionable and discriminatory burden on train riders embarking from Mountain View and constitutes a practice that is unjust, unreasonable, and improper. Southern Pacific and Card-Key filed answers to the complaint and each filed a motion to dismiss it. The answers admitted the execution of the 1959 lease, the paving and enclosing of the lot, and the imposition of a charge for parking thereon. The answers allege that the complaint alleges no facts upon which any relief may be granted under law. Southern Pacific's answer alleges that, from time to time, Southern Pacific allowed its patrons to park on its property as a matter of convenience; that providing parking is not part of its common carrier or public utility service and that it does not hold itself out to provide parking for patrons, free or otherwise. Card-Key's answer alleges that it is not a public utility and is not subject to the jurisdiction of this commission.

Case No. 8188 is a complaint by the city of Sunny vale (hereinafter referred to as Sunnyvale) against Southern Pacific. The complaint alleges that for many years prior thereto Southern Pacific owned certain specified real property in Sunnyvale which it in part used as a passenger depot; that some of the designated area was paved and otherwise improved and Southern Pacific held out and permitted this area to be used by its patrons as a parking area, free of charge; that Southern Pacific notified Sunnyvale that it was withdrawing the parking area from use on June 1, 1965; that Sunnyvale asked Southern Pacific not to withdraw the parking area from use and offered to improve and maintain it at no expense to Southern Pacific; that Southern Pacific maintains or permits cities on its system between South San Francisco and San Jose to maintain parking areas similar to that in Sunnyvale; that on May 27, 1965, 171 vehicles were parked on Southern Pacific's property adjacent to its Sunnyvale depot; that Southern Pacific has seventy-seven employees who work at or board trains in Sunnyvale; that prior to Southern Pacific's notification about withdrawing the parking area from use, Sunnyvale was completing plans for reserving 275 parking spaces to supplement the parking area provided by Southern Pacific; that if Southern Pacific withdraws its parking area it will be necessary for Sunnyvale to raise parking fees in order to acquire funds to acquire an additional 225 parking spaces and that the withdrawal of the parking area constitutes a raise in rates without prior commission authorization. Southern Pacific filed an answer to the complaint and a motion to dismiss it. The answer admitted that it had allowed patrons to park at the Sunnyvale depot and

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

that on June 1, 1965, Southern Pacific revoked a license granting its customers the privilege of parking in the depot area; that Southern Pacific continues to allow customers to park in the immediate vicinity of the station while transacting business at the station only; that Sunnyvale never made a firm offer to lease or acquire the parking area on a basis other than that of a token rental; that the property involved has a fair market value of approximately $200,000; that Sunnyvale, over the objections of Southern Pacific, included the property in an off-street parking assessment district; that Southern Pacific has paid over $18,000 in special assessments to provide and maintain off-street parking in Sunnyvale; that Sunnyvale seeks to acquire the Southern Pacific parking area without paying just compensation; that, from time to time, Southern Pacific allowed its patrons to park on its property as a matter of convenience; that providing parking is not part of its common carrier or public utility service; that it does not hold itself out to provide parking for its patrons, free or otherwise; and that the complaint does not state any facts entitling Sunnyvale to any relief. On July 30, 1965, the Sunnyvale Commuters Club (hereinafter referred to as the Commuters Club) filed a petition seeking leave to intervene in Case No. 8188 and the commission entered an order granting it leave to intervene on September 21, 1965.

Case No. 8204 is a complaint by the city of San Carlos (hereinafter referred to as San Carlos) against Southern Pacific. The complaint alleges that in 1943, San Carlos and Southern Pacific entered into a lease, which was amended in 1950, whereby San Carlos leased property near Southern Pacific's San Carlos depot for parking lots; that pursuant to the lease, San Carlos surfaced and maintained parking areas known as the Central parking lot and Northerly parking lot which were used by Southern Pacific's customers; that the total capacity of the Central and Northerly parking lots is 166 automobiles; that in 1952, San Carlos and Southern Pacific entered into another lease which provided for another parking area, which is known as the Southerly parking lot, to be maintained by San Carlos; that the Southerly parking lot has space for 109 automobiles; that in addition to the three parking lots, some of Southern Pacific's customers park along Old County road, which is near the depot; that on May 24, 1965, Southern Pacific notified San Carlos that it was terminating the aforesaid leases on June 25, 1965, and that on the latter date the parking lot adjacent to the station would be permanently closed; that the termination of the leases and closing of the parking lot was a retaliatory action by Southern Pacific because San Carlos had denied it a use permit for developing the property except under a variety of conditions which included a restriction that no existing commuter parking be eliminated; that Southern Pacific operates and maintains or permits municipalities to develop and maintain parking areas, similar to those in San Carlos, adjacent to its depots in cities along its system, from South San Francisco to San Jose, and that if Southern Pacific is permitted to withdraw the three parking areas from use it would result in discrimination and an unauthorized increase in rates. Southern Pacific filed an answer to the complaint and a motion to dismiss it. The answer admitted the execution of the leases providing for the three parking lots and the notice terminating the leases and closing of one lot permanently for parking purposes. It denied the notice of termination was a retaliatory action. The answer also alleged that, from time to time, Southern Pacific allowed its patrons to park on its property as a matter of convenience; that providing parking is not part of its common carrier or public utility service; that it does not hold itself out to provide vehicle parking for patrons, free or otherwise; and that the complaint does not state any facts upon which relief can be granted.

Because of the related subject matter and common questions of law, the three complaints were consolidated for hearing. A duly noticed public hearing was held in these consolidated matters before Examiner Jarvis in San Francisco on November 15, 16, 17, 18, and December 6, 7, and 8, 1965. The consolidated matters were submitted, after briefs had been filed, on May 18, 1966. Thereafter, Southern Pacific filed a petition to reopen these proceedings. On July 19, 1966, the commission entered an order vacating submission of these matters and reopened each proceeding for the limited purpose of receiving evidence relating to a decision of the New York Public Service Commission and any practices of the New York commission in connection therewith. A further public hearing was held in these consolidated matters before Examiner Jarvis in San Francisco on August 16, 1966, and the matters were resubmitted on that date.

Each complaint involves areas used for commuter parking, but the facts vary. The Mountain View complaint deals with charges imposed for commuter parking. The Sunnyvale complaint deals with the withdrawal of an area for commuter parking. The San Carlos complaint deals with the termination of leases for three areas used for commuter parking and withdrawal of one of these areas. In order to consider the various legal points presented herein, it is necessary to examine the factual situation at each city here involved and other factual matters disclosed by the record.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Mountain View

For many years prior to 1959, Southern Pacific permitted its commuter customers to park all day without charge on unimproved land adjacent to its Mountain View depot. Prior to 1959, the condition of the unimproved parking area was bad. The area had many chuckholes and was littered with debris. During the winter months portions of the lot were not usable. Prior to 1959, Mountain View attempted to get Southern Pacific to improve the parking area. Numerous meetings were held between representatives of Mountain View and Southern Pacific in connection with the Mountain View parking lot situation. At some point in the negotiations Southern Pacific represented to Mountain View that it was planning to establish pay parking on numerous lots throughout its system; that Southern Pacific proposed to institute pay parking at the Mountain View depot; and that if pay parking were instituted the condition and maintenance of the parking lot would be improved. In the light of these representations, Mountain View granted a use permit for the construction and operation of a pay parking lot.

On April 21, 1959, Southern Pacific entered into a lease with Card-Key. The lease was for a term of five years commencing May 27, 1959. It provided in part that Card-Key would, at its own expense, fill, grade, and pave the Mountain View depot parking area and install automatic coin and card operated toll gates thereon. The lease required Card-Key to pay all taxes and assessments on the leased property. It provided that the gross receipts from parking should be applied. first, to Card-Key's operating expenses; second, to interest on Card-Key's investment; third, to cover reimbursement to Southern Pacific for taxes; and, fourth, to amortize Card-Key's investment for improvements. The lease provided that after Card-Key's investment was fully amortized the gross revenue should be divided, after first deducting Card-Key's operating expenses and taxes paid by Southern Pacific, 70 per cent to Southern Pacific and 30 per cent to Card-Key. The lease also provided that Card-Key would charge for parking 25 cents per day or $4 per month, and that any changes in parking fees required the consent of Southern Pacific. The following is a recapitulation of Card-Key's operations under the lease from July 1, 1959, until July 31, 1965:

Total Receipts		$35.933.90
Total Operating Expenses	$10,950.00	
Total Interest on Capital Investment	4,758.22	
Total Tax Reimbursement to Southern		
Pacific	11,577.05	
Total Amount Applied to Capital Investment	8,943.75	
Total Losses		295.12
	.....	.....
	$36,229.02	$36,229.02
Capital Investment	$18,451.17	
Less Amount Applied	8,943.75	
	.....	
Capital Investment Balance	$9,507.42	

The Mountain View pay parking lot was not a success. The commuters resented paying for parking and did not patronize it in sufficient numbers to enable Card-Key to, in its opinion, earn an adequate return there-from. Card-Key declined to under-

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

take the construction and operation of any additional pay parking lots for Southern Pacific. In December of 1963, Card-Key discontinued using the monthly parking cards, which cost $4 per month, and charged 25 cents per car per day for parking. The elimination of the monthly parking card was done because Card-Key contended that so few cards were sold that it did not justify the expense in providing an employee, one day a month to sell them. Some of the commuters using the Mountain View depot who were unhappy with the advent of pay parking became even more resentful with the elimination of the monthly parking rate. They complained to officials of Southern Pacific and Mountain View. The Mountain View officials continued their discussions with the officials of Southern Pacific, seeking the elimination of any charge for parking. On February 17, 1964, Southern Pacific sent a letter to Mountain View proposing to eliminate the parking fee at the Mountain View depot under the following conditions: 1. Mountain View would reimburse Card-Key for its current outstanding investment in improvements, which was stated to be approximately $14,000 on that date. 2. Mountain View would be given a 10-year lease on the parking lot at a rental equal to Southern Pacific's city taxes upon the leased area. The taxes at that time were stated to be $368 per annum. 3. Southern Pacific would reserve the right to terminate the lease on sixty days' notice. However, if the lease were terminated prior to the expiration of ten years, Mountain View would be reimbursed for its un-amortized balance based on a write-off of ten years. 4. Mountain View would bear the expense of maintaining and policing the parking lot. Mountain View rejected the Southern Pacific offer. It subsequently filed the complaint here under consideration.

Sunnyvale

For many years prior to 1965, Southern Pacific permitted its commuter customers to park without charge in a designated area adjacent to its Sunnyvale depot. This parking area had been in poor condition for many years prior to 1965. On May 18, 1965, a representative of Southern Pacific informed the Sunnyvale City Council that the parking lot would be closed. Commuters were notified of the closure by cards passed out on Southern Pacific's commuter trains. On June 1, 1965, Southern Pacific erected physical barriers around the parking lot and prevented its use by commuters. The Southern Pacific Sunnyvale depot is located in the downtown district of that city. On January 5, 1954, Sunnyvale, by ordinance, formed an off-street parking district known as District 1. The Sunnyvale commuter parking lot was not included within the boundaries of District 1. On January 19, 1957, other property, including the commuter parking lot and other property owned by Southern Pacific, was included in District 1. On January 14, 1958, another off-street parking district was formed. It is known as District 2 and includes all the property in District 1. On June 16, 1964, a third off-street parking district was formed, known as District 3. District 3 includes all the property in Districts 1 and 2. The total investment in parking district lots and improvements for the three districts from January 5, 1954, to June 30, 1965 was $3,060,613.56. The total amount of ad valorem assessments paid by the property owners in the three districts from January 5, 1954, to June 30, 1965 was $973,419.52. The total amount paid by Southern Pacific in ad valorem assessments to the three districts from January 5, 1954, to June 30, 1965 was $19,840.

At one time Sunnyvale installed parking meters for on-street and off-street parking within the boundaries of Parking Districts 1 and 2 (District 3 was not in existence during this period) but the meters were removed on November 16, 1960. The reason for removal was the petition of local merchants asking that the meters be removed so that the area could be competitive with regional shopping centers, which did not charge for parking. Prior to the closure of the Southern Pacific Sunnyvale commuter parking area Districts 1, 2, and 3 provided spaces for two types of free parking: Spaces were designated for 30-minute parking and 3-hour parking. No provision was made for all-day parking. On July 1, 1965, after the closing of the Southern Pacific parking lot, the districts designated certain areas for 21-hour a day parking and instituted a parking permit system for parking in these areas. The charge for a parking permit is $5 per month and permits are sold for periods of two months.

For at least ten years prior to the closing of the Southern Pacific Sunnyvale commuter parking lot Southern Pacific and Sunnyvale had been negotiating over the improvement of the parking lot. Some of the proposals contemplated the charging of a fee for parking on the lot, after it was improved. At one point the Sunnyvale planning staff, as part of an overall proposal, indicated it would recommend to the city council the imposition of a parking fee if Sunnyvale were to take over the lot in accordance with the proposal. The negotiations broke down when Sunnyvale rejected a Southern Pacific proposal to lease it the lot for a period of five years, with no provision for renewal, at a rental of $550 per month plus reimbursement to Southern Pacific for all taxes and ad valorem parking district assessments. This complaint was filed subsequent to the breakdown of negotiations.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

San Carlos

Prior to 1939 Southern Pacific's commuter customers using its San Carlos depot parked their cars on unimproved property belonging to Southern Pacific adjacent to the depot. On March 21, 1939, Southern Pacific entered into a lease with San Carlos whereby, for the rental of one dollar per year, San Carlos was given the right to maintain and operate a free parking lot on specified Southern Pacific property adjacent to the San Carlos depot. On May 3, 1943, Southern Pacific and San Carlos entered into another lease which superseded the 1939 lease and provided that San Carlos could maintain and operate a specified area belonging to Southern Pacific as a free parking lot adjacent to the San Carlos depot. This lease was amended on June 23, 1950, to include an additional specified area. The area covered by the lease of May 3, 1943, as amended, is known as the Central parking lot, which can accommodate approximately 48 automobiles, and the Northerly parking lot, which can accommodate 118 automobiles.

On May 13, 1952, Southern Pacific and San Carlos entered into another lease, similar to the 1943 lease, which provided for the lease to San Carlos of additional specified Southern Pacific property to provide an additional area for commuter parking. This area is known as the Southerly parking lot, and can accommodate approximately 109 automobiles.

San Carlos, pursuant to the various leases, surfaced, maintained, and operated the three parking lots. Some time prior to May of 1965 Southern Pacific and one Ronald Lambert entered into an agreement whereby Lambert would develop a portion of the San Carlos commuter parking lot area for commercial purposes. Lambert applied to San Carlos for a use permit to carry out the agreement. The planning commission granted the use permit, but inserted a condition which provided that no existing commuter parking could be eliminated. Shortly thereafter, Southern Pacific took steps to terminate the 1943 lease, as amended, and the 1952 lease. Southern Pacific also notified San Carlos that effective June 25, 1965, it would permanently close the Central parking lot. San Carlos subsequently filed the complaint here under consideration. At the time of hearing, Southern Pacific had not closed the Central parking lot or prevented commuters from using any of the three San Carlos parking lots.

Facts Pertaining Generally to the Three Consolidated Proceedings

The record discloses that Southern Pacific has never, at any time, had in any of its tariffs a provision relating to the parking of automobiles at any of its stations. It was stipulated that none of the parking lot properties here involved, adjacent to the depots at Mountain View, Sunnyvale, and San Carlos, has ever been included by Southern Pacific as operating plant in any proceeding for the establishment of rates for service between San Francisco and San Jose. The following table indicates the average number of daily commuters using Southern Pacific's commuter service between San Francisco and San Jose in October of 1965, the number of parking spaces on Southern Pacific property (including property leased to cities) from San Jose to 23rd street, San Francisco, and the ratio of spaces to commuters at the various stations:

Station	Average No. of One-way Northbound & Southbound Daily Commuters (October, 1965)	Parking Spaces on Southern Pacific Property, Including Property Leased to Cities	Ratio Spaces to Commuters
San Jose	1,136	335	29%

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

College Park	**192**	**0**	**0%**
Santa Clara	**599**	**103**	**17%**
Sunnyvale	**1,039**	**0(171)***	**0(16%)***
Mountain View	**866**	**0(241)****	**0(28%)****
Castro	**66**	**0**	**0%**
California Avenue	**943**	**282**	**30%**
Palo Alto	**757**	**341**	**45%**
Menlo Park	**682**	**227**	**33%**
Atherton	**553**	**129**	**23%**
Redwood City	**1,047**	**300**	**29%**
San Carlos	**742**	**234**	**32%**
Belmont	**513**	**136**	**27%**
Hillsdale	**774**	**70**	**9%**
Hayward Park	**313**	**0**	**0%**
San Mateo	**818**	**175**	**21%**
Burlingame	**645**	**225**	**35%**
Broadway	**400**	**94**	**24%**
Millbrae	**628**	**66**	**11%**
San Bruno	**455**	**122**	**27%**
South San Francisco	**295**	**135**	**45%**
Butler Road	**14**	**0**	**0%**
Bayshore	**155**	**0**	**0%**
Paul Avenue	**92**	**0**	**0%**
23rd Street	**160**	**0**	**0%**
	13,884	**2,974**	**21%**
		(3,386)	**(24%)**

.Pp

*Prior to closure of the lot.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

.Pp

**Card-Key 25-cent lot.

The record indicates that Southern Pacific has leased its parking lot adjacent to its San Francisco depot to a private operator who charges for parking.

The evidence indicates that except for the San Bruno depot (hereinafter discussed) Southern Pacific has not improved to any significant degree commuter parking areas adjacent to its depots from San Jose to 23rd street, San Francisco. The record also indicates that the Southern Pacific stations of Paul avenue and 23rd street, both in San Francisco, are located below street level and there is no area adjacent for parking. The Hayward Park station in San Mateo is located in an area where adjacent land for parking is not available. There is no evidence with respect to the College Park Castro, Butler road, and Bayshore stations.

Jurisdiction

Southern Pacific and Card-Key contend that the commission has no jurisdiction over the matters set forth in the complaints here under consideration. Southern Pacific argues that 'parking is extraneous to the furnishing of transportation for persons and their baggage; that it is not part of a public utility service; [and] that it is not a part of the carrier's transportation service ….' The complainant cities and intervenor Commuters Club contend that customer parking is incidental to the transportation service rendered by Southern Pacific and subject to the jurisdiction of this commission.

In considering the question of jurisdiction it is necessary to look at the California constitutional and statutory provisions relevant thereto. Article XII of the California Constitution provides in part as follows:

'Section 21. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state.'

'Section 22.

. . . . .

'Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares, and charges which are specified in such tariff.'

Sections 208, 229, 701, 730, 761, 762, 763, and 768 of the Public Utilities Code provide as follows:

'§208. 'Transportation of persons' includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage.'

'§229. 'Railroad' includes every commercial, interurban, and other railway, other than a street railroad, and each branch or extension thereof, by whatsoever power operated, together with all tracks, bridges, trestles, rights of way, subways, tunnels, stations, depots, union depots, ferries, yards, grounds, terminals, terminal facilities, structures, and equipment, and all other real estate, fixtures, and personal property of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property.'

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

'§701. The commission may supervise and regulate every public utility in the state and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.'

'§730. The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules, and practices to be charged, collected, and observed by all such common carriers.'

'§761. Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.'

'§762. Whenever, the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.'

'§763. Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passengers, or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger, or freight, transported or offered for transportation.'

'§768. The commission may, after a hearing, by general or special orders, rules, or otherwise, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling, establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand. Provided, however, that the commission shall not regulate the safety of operation of passenger stage corporations, highway common carriers, and petroleum irregular route carriers.'

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Southern Pacific relies on Post v Reading Co. 88 PUR NS 127, a 1951 decision of the Pennsylvania Public Utilities Commission to support its contention that railroad commuter parking is not subject to public utility regulation. In Post a complaint was filed against a railroad protesting the imposition of a fee for parking which had formerly been free. The Pennsylvania commission dismissed the complaint. It held that a parking fee was not a rate within the contemplation of public utility law and that the law did not require a railroad to provide all-day parking, free or otherwise. The Pennsylvania commission did not consider statutes similar to §§701, 730, 761, 762, 763, and 768 of the California Public Utilities Code. In this respect, we do not believe Post is authoritative on the question of the jurisdiction of this commission. Furthermore, for the reasons hereafter stated we are not disposed to follow Post.

The complainant cities rely on Re Long Island R. Co. (NY) Case 7276, June 26, 1940, 8 PUR Dig 2d, Service, §394, which, in part, states:

'*Parking Facilities*. There is merit in the village's suggestion that the structure between North Center avenue and North Village avenue be of steel and that provision be made underneath for parking facilities; but the railroad company insists that if the space is so used, it shall be compensated just as if its property were taken for a purpose entirely unrelated to the operation of the railroad. The position stated by counsel is that a railroad company is not under obligation to make any provision for the parking of vehicles on railroad property, that the public may be expected either to walk to the station or if they ride to leave their vehicles elsewhere, and that provision only need be made so that they may alight.

'The company also takes the position that if an elevated structure is provided, the railroad company is entitled to use the space under that structure for its own purposes. As the railroad will pay a maximum of 15 per cent of the cost of such structure and as it will pay a lesser amount if the benefit conferred upon the whole project does not amount to 15 per cent, it may easily happen that the elevated structure would be built at the expense of the state and that the railroad company would retain the revenue from the space created by the structure.

'Now, it is conceded by counsel for the railroad company that this commission may require an embankment instead of an elevated structure. If it exercises this power, the expense to the state will be reduced and the railroad company will not be able to use any part of the land for any purpose other than the transportation of passengers and property and will therefore obtain no increased income there-from.

'The attitude of the railroad company as stated by its counsel does not appeal to us either from the standpoint of law or of equity. A railroad company has an obligation to provide for the accommodation of its patrons. Its obligation is not limited merely to the provision of space where passengers may alight from vehicles and stand until a train arrives. It is our opinion that in view of the general use of the automobile, the obligation of a railroad to provide reasonable parking space has come into being, just as much as the obligation to provide more rapid transportation has developed out of changed economic and social conditions. Of course, there must be reasonable bounds to this obligation and we do not subscribe to the doctrine upon which the claims of the village are apparently founded, namely, that it is the duty of the railroad company (or of the state of New York) to provide all of the additional parking space for which the village asks.' [1]

Southern Pacific contends that the quoted language is dicta and that the railroad was not compelled to provide parking space by the Long Island decision. We do not have to resolve the question of whether the language relative to the railroad's obligation to provide parking is dicta or necessary to the decision. The Long Island case clearly holds that railroad station parking facilities are 'incidental improvements' so that state funds could be used for their construction under the New York Grade Crossing Elimination Act of 1939. This holding supports the contention of the cities and Commuters Club that commuter parking is incidental to the transportation of persons as defined in §208 of the Public Utilities Code. The New York Public Service Commission subsequently considered evidence on the amount of parking provided by a railroad and town in determining the adequacy of station facilities. (Re Long Island R. Co. [NY] Case 12282, Aug. 7, 1946, 8 PUR Dig 2d, Service, § 394.)

Missouri Public Service Commission v Kansas City Power & Light Co. (Mo 1939) 30 PUR NS 193, cited by Southern Pacific, does not compel a different result. In the Kansas City case the Missouri commission refused to allow the power company to include in the rate base the land upon which it operated a parking lot. The Missouri commission held that as a factual matter there was not a substantial use of the parking lot by the utility's customers to permit its inclusion in rate base. The Missouri commission stated:

'The commission is of the opinion that the customers' parking lot is not used by enough customers of the company to justify the inclusion of the value of the lot in the rate base. If the lot were generally needed for the operation of the general office building, the commission might be inclined to include the fair market value of the land in the rate base as used and useful property, but under the circumstances it does not appear proper to do so.' (30 PUR NS at p. 223.)

The Kansas City case holds that parking can be incidental to public utility activity and subject to regulation, but finds, as a matter of fact, that the particular parking lot is not sufficiently incidental to be included in rate base.

The words of one of America's foremost jurists, spoken in a different context, are pertinent:

'Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle …does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.' (Cardozo, J., MacPherson v Buick Motor Co. 217 NY 382, 391, 111 NE 1050.)

We do not believe that in the year 1967 it can seriously be argued that customer parking facilities adjacent to a railroad station are not 'incidental to the safety, comfort, or convenience of the person being transported ' (Public Utilities Code, §208); are not part of a 'station' 'depot' 'grounds' or 'terminal facilities' (Public Utilities Code, §229); are not 'facilities' or 'service' (Public Utilities Code, §§730, 761, 762); cannot be reasonably necessary to accommodate passengers (Public Utilities Code, § 763); or by their location and use have no effect on the safety of the public and the railroad's customers, passengers, and employees (Public Utilities Code, §768). In fact, a 1963 report prepared by independent consultants and introduced in evidence by Southern Pacific in a previous commission proceeding, which was received in evidence herein, states: [2]

'Adequate parking facilities at suburban stations are an essential part of commuter service. Commuters who park at the station obviously have a car at their disposal, and they, therefore, usually have a choice of commuting by car or by train. It is important to accommodate this group of commuters and to encourage their continued patronage of the service.'

Furthermore, in Application No. 44396, filed by Southern Pacific on April 30, 1962, Southern Pacific sought authority to discontinue its existing stations and facilities of San Bruno and Lomita Park and establish in their stead a new nonagency station known as San Bruno. Southern Pacific had permitted certain of its property adjacent to the two stations for which discontinuance was sought to be used for commuter parking. The commission, in Decision No. 64166, authorized the discontinuance of the two old stations and granted authority to establish the new one. The decision provided that 'Acceptable ingress and egress to the new San Bruno station with adequate parking facilities should be provided.' In connection with the establishment of the new station, the city of San Bruno leased from the city and county of San Francisco some land adjacent to the new station for a a commuter parking lot. The remainder of the parking area is on land owned by Southern Pacific. Southern Pacific paid half the cost for paving the entire commuter parking area at the new station, which was approximately $1,650. Thereafter, Southern Pacific leased for commercial purposes the land adjacent to the old stations formerly used for commuter parking. Decision No. 64166 and the actions of Southern Pacific in carrying out the authority granted thereunder, clearly indicate that parking is incidental to railroad commuter service.

The commission holds that, under the constitutional and statutory provisions heretofore set forth, it has jurisdiction over parking facilities at railroad stations, which are used to a significant degree by customers of the railroad. (Southern P. Co. v California Pub. Utilities Commission 41 Cal 2d 354, 1 PUR3d 438, 260 P2d 70; Atchison, T. & S. F. R. Co. v California R. Commission, 209 Cal 460, PUR1930E 18, 288 Pac 775, affd in Atchison, T. & S. F. R. Co. v California R. Commission, 283 US 380,

PUR1931C 359, 75 L ed 1128, 51 S Ct 558; Commercial Communications v California Pub. Utilities Commission 50 Cal 2d 512, 25 PUR3d 1, 327 P2d 513.) By the foregoing we only hold that the commission has jurisdiction over parking facilities at railroad stations. We do not hold that such facilities or service must be provided at all stations nor do we say to what degre they must be provided at any station. Resolution of such questions must be accomplished in appropriate proceedings, such as the three complaint matters here under consideration.

The foregoing discussion relating to jurisdiction primarily related to Southern Pacific, a public utility and common carrier concededly subject to the jurisdiction of the commission. The lease between Card-Key and Southern Pacific, which was received in evidence, as well as other evidence, clearly indicates that Card-Key was to operate the Mountain View parking lot and eventually other parking lots for the primary purpose of providing commuter parking for Southern Pacific's patrons. Since customer parking at railroad stations is subject to the jurisdiction of the commission, Card-Key is subject to the commission's jurisdiction as the agent of Southern Pacific and independently under §216 (c) of the Public Utilities Code, which provides as follows:

'When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality, or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.'

In addition to the jurisdiction under the constitutional and statutory provisions heretofore discussed, the commission further holds that it has jurisdiction over the subject matter of the complaints for the following reasons. In Boynton v Virginia (1960) 364 US 454, 36 PUR3d 390, 5 L ed 2d 206, 81 S Ct 182, the United States Supreme Court held at pp. 458-461 of 364 US, 36 PUR3d at pp. 393-395, as follows:

' …The Henderson case largely rested on Mitchell v United States [(1941) 313 US 80, 85 L ed 1201, 61 S Ct 873], which pointed out that while the railroads might not be required by law to furnish dining car facilities, yet if they did, substantial equality of treatment of persons traveling under like conditions could not be refused ….

. . . . .

'Respondent correctly points out, however, that, whatever may be the facts, the evidence in this record does not show that the bus company owns or actively operates or directly controls the bus terminal or the restaurant in it. But the fact that §203(a)(19) says that the protections of the motor carrier provisions of the act extend to 'include' facilities so operated or controlled by no means should be interpreted to exempt motor carriers from their statutory duty under §216(d) not to discriminate should they choose to provide their interstate passengers with services that are an integral part of transportation through the use of facilities they neither own, control, nor operate. The protections afforded by the act against discriminatory transportation services are not so narrowly limited. We have held that a railroad cannot escape its statutory duty to treat its shippers alike either by use of facilities it does not own or by contractual arrangement with the owner of those facilities. United States v Baltimore & O. R. Co. 333 US 169, 92 L ed 618, 68 S Ct 494. And so here, without regard to contracts, if the bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and co-operated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the act. In the performance of these services under such conditions the terminal and restaurant stand in the place of the bus company in the performance of its transportation obligations. Cf. Derrington v Plummet (CA5th 1957) 240 F2d 922, 925, 926, cert den (1957) 353 US 924, 1 L ed 2d 719, 77 S Ct 680.'

The record clearly indicates, and Southern Pacific concedes, that it permits its land adjacent to certain of its Peninsula stations to be used for commuter parking. Even if it does not have a legal requirement to provide parking, since it has undertaken to do so the commission can inquire whether it is discriminating between municipalities in that which it has undertaken to do. (Boynton v Virginia, *supra*; California Constitution, Art XII, §21; Public Utilities Code §§453, 494, 532.) Card-Key, which operates the

Mountain View commuter parking lot, is subject to the jurisdiction of the commission to determine whether it is a party to any unlawful discrimination. (Boynton v Virginia, *supra*, 364 US at pp. 460, 461, 36 PUR3 at pp. 394, 395.

Status of the Peninsula Parking Lots [3]

In order to properly determine the matters raised by the three complaints, it is necessary to determine the status of Southern Pacific's Peninsula parking lots. We must determine the status of the Mountain View, Sunnyvale, and San Carlos lots because they are the subject matters of the complaints here under consideration. We must consider the status of the other Peninsula lots in dealing with the question of discrimination.

Southern Pacific contends that its property used for commuter parking adjacent to its stations on the Peninsula is non-utility property, which it can develop to its highest and best use. Southern Pacific points to the absence of any tariff provision on parking, the fact that some of the parking lots have been leased to cities, and portions of other parking lots have been leased to commercial enterprises, without approval of this commission, to support its contention that the property has a nonutility status. Southern Pacific also contends that it has not dedicated its parking lot property to public utility use, but merely 'allowed parking on its property in the vicinity of suburban stations when the property was idle at the particular time and not being used for any other purpose.' Southern Pacific contends that there are not sufficient parking spaces in any of its parking lots to accommodate all of its commuter patrons, so it could not have held out a spot for each commuter. Southern Pacific contends that the parking areas are generally unimproved and those that are surfaced were improved by cities and not Southern Pacific. Southern Pacific also argues that even if it has an obligation to furnish parking for patrons dealing with it, it has no obligation to furnish all-day parking for commuters who use its service for only a small portion of the day. Southern Pacific contends that it is a function of the cities to provide suitable parking for their inhabitants. The complainant cities and the Commuters Club argue that the Peninsula parking lots have been dedicated to public use, that Southern Pacific assumed the obligation to provide a certain amount of all-day commuter parking for its patrons, and that the cities and various commuters have relied upon the continued availability of these parking lots in planning their affairs. The parties also refer to their previous arguments on whether commuter parking is an incidental service or facility of a railroad, previously considered, to support their views on dedication.

A public utility cannot be compelled to render a service or use its facilities where it has not dedicated itself or its facilities to do so. (California Water & Teleph. Co. v California Pub. Utilities Commission 51 Cal 2d 478, 27 PUR3d 423, 334 P2d 887.) However, we have previously held, in the discussion on jurisdiction, that patron parking at existing stations is subject to the commission's jurisdiction. Thus, Southern Pacific as a common carrier and public utility could be ordered to take appropriate action with respect to commuter parking under its dedication of railroad service, generally, to the communities with existing stations. The precise question with which we now deal is whether a specific dedication relating to commuter parking has been made.

The test to determine whether facilities or service have been dedicated to public utility use is whether there has been a holding out of the facility or service to the public or portion thereof. (Yucaipa Water Co. No. 1 v California Pub. Utilities Commission 54 Cal 2d 823, 827, 37 PUR3d 154, 357 P2d 295; Commercial Communications v California Pub. Utilities Commission 50 Cal 2d 512, 523, 25 PUR3d 1, 327 P2d 513; California Water & Teleph. Co. v California Pub. Utilities Commission 51 Cal 2d 478, 494, 27 PUR3d 423, 334 P2d 887; Samuel Edwards Associates v California R. Commission 196 Cal 62, 70, 235 Pac 647; Camp Rincon Resort Co. v Eshlernan, 172 Cal 561, 563, PUR1916E 418, 158 Pac 186.) Dedication may be found to exist by implication. (Yucaipa Water Co. No. 1 v California Pub. Utilities Commission, *supra*; Samuel Edwards Associates v California R. Commission, *supra*.)

The record discloses, and Southern Pacific does not seriously dispute, that since the advent of the automobile, Southern Pacific has permitted parking on unimproved land which it owns adjacent to its Peninsula stations. [4] Southern Pacific does dispute the character of the parking, claiming it to have been done under a revocable license with no dedication involved.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Prior to the three complaints here under consideration, Southern Pacific had never posted on any of the unimproved areas which it owned adjacent to its Peninsula stations, upon which it permitted its commuter patrons to park, any signs or notices which indicated that the right to park was subject to any conditions or was pursuant to a revocable license. Various commuters testified that they examined and relied upon depot commuter parking facilities before purchasing homes. Numerous commuter witnesses testified that they considered parking [5] as part of the commuter service offered by Southern Pacific. A member of the Sunnyvale City Council for seventeen years prior to the hearing testified that 'We [Sunnyvale] have always figured on the Southern Pacific parking and [sic] developing the downtown area.' The actions of Mountain View city officials prior to 1959, seeking to have Southern Pacific improve the Mountain View commuter parking lot, indicate that the city considered it a permanent part of the depot. The San Carlos leases, and the improvements and maintenance of the parking lots thereunder, indicate that San Carlos considered the parking lots to be part of the depot.

Southern Pacific contends that the absence of tariff provisions relative to parking shows that no dedication has occurred. It also argues that the leases to various cities and the leasing of areas adjacent to some Peninsula stations, without commission authorization under §851 of the Public Utilities Code, indicate that no dedication occurred. The cities and Commuters Club contend that the leases to the cities are evidence of dedication.

Southern Pacific's chief rate representative, passenger division, testified on cross-examination that it was Southern Pacific's policy to provide a seat for every commuter on the San Francisco-San Jose commuter service, but admitted that Southern Pacific had published nothing in its Peninsula commuter tariff about this. [6] He also testified that it was Southern Pacific's policy to provide clean trains which were equipped with rest rooms, but there was no provision in Southern Pacific's Peninsula commuter tariff concerning this policy. Since it appears that practices dealing with its service and facilities which are admittedly done by Southern Pacific, or required by law, do not appear in its Peninsula commuter tariff, we believe little weight should be given to the absence of a provision on parking.

Section 851 of the Public Utilities Code was amended in 1959 to exclude common carriers by railroad, including Southern Pacific, from the scope of its provisions. Prior to 1959, Southern Pacific was subject to the provisions of §851. Section 851 as amended in 1951, but prior to 1959, provided:

'No public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Art 1 of Chap 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

'Nothing in this section shall prevent the sale, lease, encumbrance, or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee, or encumbrancer dealing with such property in good faith for value.'

The record discloses that for a period of years, commencing in at least 1936, Southern Pacific leased parking lot areas adjacent to its Peninsula depots to the various cities in which the depots were located. These leases provided for a nominal rental and that the city would surface and maintain the lot. Most of the leases provided that the city would be liable for any increased taxes or assessments because of improvements. Some leases provide that the city is liable for all taxes and assessments attributed to the leased parking lot. Leases or modifications thereof were executed between Southern Pacific and the various cities as follows:

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Burlingame — 1937, 1939, 1950, 1951; Belmont — 1951, 1963; Menlo Park — 1946, 1955, 1964; Palo Alto — 1939, 1940, 1949; Redwood City — 1943, 1944; and San Mateo — 1936, 1938, 1940, 1944, 1950, 1952, 1958. Not all of these leases are presently in effect.

As indicated, the leases between Southern Pacific and the various Peninsula cities go back as far as 1936. It is clear that the purpose of the leases was to shift to the cities the cost of surfacing and maintaining the parking lots and to provide that Southern Pacific be reimbursed for any taxes or assessments for the properties. Although the leases provide for termination, usually on thirty days' notice, there is no suggestion that if they were terminated, the properties would be used for other than parking lot purposes. The Menlo Park lease of September 30, 1955, and the San Mateo lease of May 19, 1958, require the cities to post the following notice on the parking lots involved:

‘Notice

‘This property is leased from Southern Pacific Company. Vehicles parked on this property will be at the sole risk of the owner or operator thereof. Southern Pacific Company will not be responsible for theft of or loss or damage to vehicles or contents from any cause.‘

Nothing is said about the use of the parking facilities being temporary and subject to other commercial uses by Southern Pacific.

Prior to the proceedings here under consideration, Southern Pacific never attempted to withdraw any significant amount of its commuter parking area from use without first arranging for other equivalent commuter parking facilities. [7] The San Bruno proceeding illustrates this point. This shows a recognition on the part of Southern Pacific that it could not withdraw its parking areas without making suitable provisions for commuter parking at the depot involved.

None of the parking lot leases heretofore mentioned was authorized or disapproved by the commission because none was submitted to it. This is the first proceeding in which the commission's jurisdiction over and status of the Peninsula commuter parking lots has been put at issue. [8] We construe the failure to submit the leases, prior to 1959, as a lack of recognition of the legal consequences of the conduct, heretofore set forth, by Southern Pacific Company for many years. If we find that the commuter parking lots were dedicated to public use, such holding would not affect any lease made prior to 1959. We are of the opinion that in the absence of a prior commission holding on the status of these lots any lessee would be a ‘lessee …in good faith for value‘ so that these transactions would have finality.

The commission finds that Southern Pacific has held out to the public or portions thereof that Southern Pacific's patrons, including commuter patrons, could use land owned by Southern Pacific and adjacent to its Peninsula stations, where such land was available, for parking. It is not here necessary to define specifically the property so dedicated. Furthermore, we recognize that some property, previously held out for parking, may have subsequently been put to other uses and these changes in use may not now be questioned. While we find that Southern Pacific has dedicated certain property for patron and commuter parking use we reject the contention made by the cities and Commuters Club that the parking areas were dedicated to free parking in perpetuity. This proposition is contrary to common sense and to so hold would be a violation of due process and constitute confiscation. (Lyon & Hoag v California R. Commission, 183 Cal 145, PUR1920F 227, 190 Pac 795; Smyth v Ames 169 US 466, 546, 42 L ed 819, 18 S Ct 418; Miller v California R. Commission 9 Cal 2d 190, 201, 20 PUR NS 199, 70 P2d 164; The Minnesota Rate Cases 230 US 352, 414, 415, 433, 434, 57 L ed 1511, 33 S Ct 729; Cf., Federal Power Commission v Hope Nat. Gas Co. 320 US 591, 602, 51 PUR NS 193, 88 L ed 333, 64 S Ct 281.)

The term free parking is, of course, an oversimplification. To the extent taxes and assessments may be levied, maintenance necessary, or improvements made there are expenses attributable to the parking lots. As indicated, and hereinafter discussed at length, Southern Pacific, itself, did not significantly improve, by surfacing, any of the dedicated parking lot areas. In earlier years taxes and assessments were nominal. There were no maintenance costs. The amounts were relatively small and were absorbed in the general expenses of Southern Pacific. However, some of the Peninsula parking lot land has appreciated in value

and some has become subject to current assessments. The estimated taxes for 1964-1965 on the parking lots here involved are: San Carlos $5,937, Sunnyvale $3,881, and Mountain View $2,399. Southern Pacific is at least entitled to recoup these expenses.[9] Furthermore, Southern Pacific does not have to allow the dedicated parking lot areas to lie unimproved. To the extent it improves, or causes these areas to be improved, and to the extent it incurs maintenance costs, these expenses may also be recouped.

Since the commission holds that Southern Pacific may recoup at least the costs and expenses attributed to station parking lots, the next question presented is how they are to be recouped. The commission finds that the only fair, just, and equitable way for Southern Pacific to recoup the expenses attributable to taxes and assessments and costs of surfacing and maintaining its Peninsula station parking lots is by levying parking fees on those using the lots. It has heretofore been set forth that there are not enough spaces at any of the Peninsula station parking lots to accommodate all of Southern Pacific's commuter patrons. For example, there are 241 spaces for an average of 866 daily commuters in Mountain View, 171 spaces for an average of 1,039 daily commuters in Sunnyvale, and 234 spaces for an average of 742 daily commuters in San Carlos. As a practical matter, the commuters embarking on early trains get the limited number of parking spaces. The overall ratio of parking spaces to commuters at Peninsula stations is 24 per cent.[10] It would be manifestly unjust and unfair to the overwhelming number of commuters, for whom no station parking is available, to make them pay for the expenses of station parking. Other reasons also support this conclusion.

The record discloses that while the Southern Pacific Peninsula station parking lots are primarily used by commuters, they are also used by others. Southern Pacific introduced in evidence a 3-day survey taken at the three San Carlos parking lots. The survey disclosed that 85 per cent of the persons parking on the lots embarked on Southern Pacific commuter trains. Eight per cent used the lots to park and then used the service of Western Greyhound Lines. Four per cent used the lots as a point to park and form car pools and drove off in vehicles. Three per cent used the lots to park and then embarked on the local bus line. There is other evidence to support the conclusion that a certain percentage of noncommuters, not otherwise patrons of Southern Pacific, use the parking lots adjacent to Southern Pacific's Peninsula stations. Without an identification and policing system, which would entail additional expense, this noncustomer parking cannot be prevented. Clearly, Southern Pacific commuters generally should not be saddled with any cost for parking by persons who are not even patrons of Southern Pacific. This again leads us to the conclusion that the costs of the parking lots should be borne by the users.

The record also indicates that Southern Pacific competes with Western Greyhound Lines for commuter traffic on the Peninsula, and that Greyhound does not provide commuter parking space at any of its Peninsula depots. It would have a detrimental effect on Southern Pacific's Peninsula commuter operations to require Southern Pacific's passengers, generally, to support parking facilities for a limited number of commuters while Grey-hound provides no parking facilities and its patrons would not be required to contribute any part of their fare as an increment for parking.

The Complaints

We have considered the questions of jurisdiction and status of the Peninsula parking lots. Before we turn to the complaints of the three cities here involved to see what, if any, relief they may be entitled to, we must look to the general situation of the Southern Pacific Peninsula parking lots. If, for example, taxes and assessments on the unimproved Southern Pacific station parking lot in city ‘X‘ are less than $100 per year, whereas the taxes and assessments on the unimproved parking lot in city ‘Y‘ are $5,000 per year, it is not unlawful discrimination for Southern Pacific to permit free parking in city ‘X‘ and charge patrons a fee to park in city ‘Y‘.

The record shows that Southern Pacific has itself never made more than substantially unimproved land available for commuter parking. It has consistently shifted to others the costs of paving and maintaining lots and payment of taxes and assessments thereon. In some cases it has induced cities themselves to provide some of the land for commuter parking. In the case of San Bruno, Southern Pacific did contribute $1,650 toward paving the parking area adjacent to the new station. Part of the new

parking lot is not on Southern Pacific property. However, as a result of that transaction, Southern Pacific was able to withdraw the old parking area from public utility use and devote it to a commercial one. We cannot find, in the San Bruno transaction, any indication of any commitment by Southern Pacific to pay for all or part of the development of commuter parking lots by cities. Where Southern Pacific has permitted a city to take over, improve, and maintain and pay the costs of taxes and assessments on a parking lot, the costs are being defrayed by someone other than Southern Pacific. When these costs are not paid by others, but by Southern Pacific, it is not unlawful discrimination for Southern Pacific to recoup them.

The Mountain View Complaint

Preliminarily, we note that Mountain View, in its complaint, did not allege any specific parking lot area to have been dedicated to public utility use. The complaint does allege that the land leased to Card-Key, for which fees are charged, is the subject matter of the complaint. The land is adequately described in the record, [11] and even if it be assumed that the complaint contained an insufficient description, the insufficiency was cured by proof at the hearing. The Card-Key lot is the only Southern Pacific property in Mountain View alleged to be dedicated to public utility parking purposes and Mountain View did not attempt to produce evidence with respect to any other property. We only consider the complaint with respect to the Card-Key parking lot.

The Mountain View complaint raises the question of discrimination because of pay parking. No question is raised about the reasonableness of the rates presently charged by Card-Key, and the presiding examiner correctly did not receive any evidence dealing solely with the reasonableness of those rates. The issue raised is whether the instituting of a pay parking lot at Mountain View constitutes discrimination as to Mountain View and those Southern Pacific patrons using the Mountain View station.

The record discloses that the Mountain View depot is the only one on the Peninsula which has a pay parking lot. There is a pay parking lot on Southern Pacific land adjacent to its San Francisco depot. Southern Pacific's lease with Redwood City permits installation of meters by the city in the parking area leased to it.

It has previously been shown that, except for San Bruno which is distinguishable, Southern Pacific itself has not paved and maintained any of the Peninsula depot parking lots. All the improved depot commuter parking lots were surfaced and are maintained by the cities in which they are located. They were not improved at any expense to Southern Pacific and the cost of maintenance is not paid for by Southern Pacific. Thus, the failure of Southern Pacific to provide a paved parking lot with maintenance would not constitute discrimination as to Mountain View and the patrons using the depot there. However, Southern Pacific did through Card-Key, as it had a right to do, surface the Mountain View depot parking lot. Furthermore, for some period prior to 1959, Mountain View had been pressing Southern Pacific to do this. The record discloses that Card-Key's capital investment in the lot was $18,451.17. Card-Key or Southern Pacific has the right to at least recoup the operating expenses and over a period of time attempt to recoup the capital invested in surfacing and improving the lot. This could be done by charging a parking fee. Furthermore, in 1964, Southern Pacific offered to let Mountain View take over the lot on substantially the same terms as other Peninsula cities having improved depot parking lots. [12] Mountain View refused to do so. [13] The commission cannot, on this record, find that Mountain View or the patrons using the Southern Pacific depot there have been unlawfully discriminated against by Southern Pacific or Card-Key or have been subjected to any unjust, unreasonable, or improper practices by Southern Pacific or Card-Key. Mountain View is entitled to no relief in this proceeding.

The Sunnyvale Complaint

The Sunnyvale complaint involves Southern Pacific's closing, to commuter parking, of a specified area adjacent to its Sunnyvale depot. The commission finds that this area has been dedicated to public utility purposes as one of the areas previously referred to. We find, on the evidence heretofore set forth, that it is necessary for Southern Pacific to reasonably and adequately meet its public requirements for service to reopen and continue in operation the closed Sunnyvale commuter parking lot. The closing of the lot was an unjust, unreasonable, and improper act by Southern Pacific and the closing has resulted in inadequate and insufficient facilities at the Sunnyvale depot.

The commission will order the reopening of the Sunnyvale commuter parking lot. The terms under which it is operated must, on this record, be left to the parties involved, subject to appropriate proceedings before this commission within the scope of its jurisdiction. In this connection, we observe that the fact that the property of a public utility has been included in a parking assessment district does not entitle the utility to withdraw from public use property previously dedicated to parking for its patrons. On the other hand, we have heretofore indicated that a utility has the right to recoup taxes and assessment fees levied against its dedicated parking lot facilities as well as the costs of maintenance and, over a period of time, attempt to recoup money expended for capital improvements.

The San Carlos Complaint

The San Carlos complaint is against the termination of leases for three specified parking lots leased by Southern Pacific to the city and developed and maintained by the city under the leases, and the threatened withdrawal of one of the parking lots for commuter parking. [14]

The commission finds that the three San Carlos parking lots have been dedicated to public utility purposes as one of the areas previously referred to.

The commission has no jurisdiction over the termination of the leases as such. As long as the lots are continued in operation as commuter parking lots, without discrimination against San Carlos or Southern Pacific patrons using the depot in that city, the commission cannot require Southern Pacific to lease the lots to the city. [15] Southern Pacific may operate and maintain the lots if it chooses. Questions relating to the manner of operations can be raised in appropriate proceedings before this commission.

The commission does have jurisdiction to inquire into the threatened withdrawal of one parking lot for commuter parking. We find, on the evidence heretofore set forth, that it is necessary for Southern Pacific to reasonably and adequately meet its public requirements for service to continue in operation its three commuter parking lots adjacent to its San Carlos depot. Withdrawing the use of any of these lots for commuter parking would constitute an unjust, unreasonable, and improper act by Southern Pacific and result in inadequate and insufficient facilities at its San Carlos depot.

If Southern Pacific desires to use any of its San Carlos commuter parking lot area it must, in an appropriate proceeding before the commission, indicate that substitute parking facilities have been provided or that there is no longer any public need for the particular area.

Other Matters

The cities presented evidence to support a contention that some of the land upon which the depots in the complaining cities are located was conveyed to Southern Pacific by deeds which contained restrictions on the use thereof, and that the elimination of or charge for commuter parking might contravene these deeds. Southern Pacific introduced contrary evidence to support its contention that it owns all of the land in question in fee simple. The commission has not considered this point in determining these complaints. None of the provisions of any of the deeds involved, if relevant, is for the benefit of the public generally or any portion thereof. If there is a question, it is a private matter between the grantors or their heirs, successors, or assigns and Southern Pacific. No other points require discussion. The commission makes the following findings of fact and conclusions of law.

Findings of Fact

1. Southern Pacific Company is a railroad corporation as defined in §230 of the Public Utilities Code.

2. Southern Pacific has never published in its Peninsula service tariff (Local Passenger Tariff D-No. 10) or any other tariff any provisions dealing with parking for its patrons.

3. Southern Pacific has a policy, and is required by law, to provide a seat for each passenger but has never published any provision dealing with this policy and requirement in its Peninsula service tariff (Local Passenger Tariff D-No. 10).

4. Southern Pacific has a policy to provide clean trains equipped with rest rooms but has never published any provisions dealing with this policy in its Peninsula service tariff (Local Passenger Tariff D-No. 10).

5. Since the advent of the automobile Southern Pacific has permitted parking by its patrons, including commuters, on unimproved property which it owns adjacent to its Peninsula stations, where there was such property adjacent to a station.

6. Prior to the filing of the three complaints here involved, Southern Pacific had never posted on any of the unimproved areas which it owned adjacent to its Peninsula stations, upon which it permitted its commuter patrons to park, any signs or notices which indicated that the right to park was subject to any conditions or was pursuant to a revocable license.

7. Some commuters using the service of Southern Pacific examined and relied upon Southern Pacific depot commuter parking facilities before purchasing the homes in which they presently reside.

8. Numerous commuters using the service of Southern Pacific have been and are under the impression and believe that the use of Southern Pacific depot parking lots, on a 'first come first serve' basis, is a part of the railroad commuter service offered by Southern Pacific.

9. Officials of the cities of Mountain View, Sunnyvale, and San Carlos considered the parking areas owned by Southern Pacific adjacent to its depots in their cities and used by commuter patrons of Southern Pacific for parking as permanent parking facilities within their cities.

10. For a period of years, commencing in at least 1936, Southern Pacific leased parking lot areas which it owned and which were adjacent to its depots in some Peninsula cities to the cities in which the depots were located. These leases provided for a nominal rental and that the city would surface and maintain the lot. Most of the leases provided that the city would be liable for any increased taxes or assessments because of improvements. Some leases provide that the city is liable for all taxes and assessments attributed to the leased parking lot. The purpose of these leases was to shift from Southern Pacific to the cities involved the cost of surfacing and maintaining the parking lots and, where applicable, provide that Southern Pacific be reimbursed for taxes and assessments levied on the parking lots.

11. Southern Pacific held out to the public or portions thereof that its patrons, including commuter patrons, could use the land owned by it adjacent to its Peninsula stations, where available, for parking.

12. Southern Pacific held out to the public or portions thereof the area which it owns adjacent to its station in Mountain View, more particularly described in Exhibits 1 and 86, as an area which Southern Pacific patrons, including commuters, could use for parking.

13. Southern Pacific held out to the public or portions thereof the area which it owns adjacent to its station in Sunnyvale, more particularly described in Exhibit A attached to the complaint in Case No. 8188, as an area which Southern Pacific patrons, including commuters, could use for parking.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

14. Southern Pacific held out to the public or portions thereof the areas which it owns adjacent to its station in San Carlos, more particularly described in Exhibits A and B attached to the complaint in Case No. 8204, as areas which Southern Pacific patrons, including commuters, could use for parking.

15. The following table indicates the average number of daily commuters, using Southern Pacfic's commuter service between San Francisco and San Jose in October of 1965, the number of parking spaces on property owned by Southern Pacific adjacent to its Peninsula stations, including property leased to cities for parking purposes and the ratio of parking spaces to commuters at the various stations:

Station	Average No. of One-way Northbound & Southbound Daily Commuters (October, 1965)	Parking Spaces on Southern Pacific Property, Including Property Leased to Cities	Ratio Spaces to Commuters
San Jose	1,136	335	29%
College Park	192	0	0%
Santa Clara	599	103	17%
Sunnyvale	1,039	0(171)*	0(16%)*
Mountain View	866	0(241)**	0(28%)**
Castro	66	0	0%
California Avenue	943	282	30%
Palo Alto	757	341	45%
Menlo Park	682	227	33%
Atherton	553	129	23%
Redwood City	1,047	300	29%
San Carlos	742	234	32%
Belmont	513	136	27%
Hillsdale	774	70	9%
Hayward Park	313	0	0%
San Mateo	818	175	21%
Burlingame	645	225	35%
Broadway	400	94	24%

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Millbrae	**628**	**66**	**11%**
San Bruno	**455**	**122**	**27%**
South San Francisco	**295**	**135**	**45%**
Butler Road	**14**	**0**	**0%**
Bayshore	**155**	**0**	**0%**
Paul Avenue	**92**	**0**	**0%**
23rd Street	**160**	**0**	**0%**
	13,884	**2,974**	**21%**
		(3,386)	**(24%)**

.Pp

*Prior to closure of the lot.

.Pp

**Card-Key 25-cent lot.

16. The taxes on the Mountain View parking lot for the 1964-1965 tax year were approximately $2,399.

17. The taxes on the Sunnyvale parking lot for the 1964-1965 tax year were approximately $3,881.

18. The taxes on the San Carlos parking lots for the 1964-1965 tax year were $5,937.

19. Southern Pacific, or a lessee thereof, is entitled to at least recoup taxes and assessments attributed to station parking lots, costs of maintenance of these lots, and attempt over a period of years to recoup the costs of surfacing and improving these lots.

20. The overwhelming majority of persons who park on the parking lots which Southern Pacific owns adjacent to its stations are patrons of Southern Pacific, but there are persons who park on these lots who are not patrons of Southern Pacific or who do not use the service of Southern Pacific while so parked.

21. There are not sufficient parking-spaces on the Southern Pacific parking lots adjacent to its Peninsula stations to permit parking on these lots by all the commuters at all the stations or all the commuters at any station.

22. Southern Pacific competes for passenger commuter traffic on the Peninsula with Western Greyhound Lines. Greyhound does not provide space for commuter parking adjacent to its Peninsula depots. No part of the fare paid by Greyhound patrons contributes to expenses for Peninsula commuter parking.

23. It would be unjust, inequitable, unfair, and discriminatory to permit Southern Pacific, or a lessee thereof, to recoup taxes and assessments attributed to station parking lots, costs of maintenance, costs of surfacing and improvements, and other amounts which may be allowable from Southern Pacific patrons generally.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

24. Taxes, assessments attributed to Southern Pacific station parking lots, costs of maintenance, costs of surfacing and improvements, and other amounts which may be allowable should be recouped by Southern Pacific, or a lessee thereof, from the users of the station parking lots.

25. Except for the case of San Bruno, Southern Pacific itself has never substantially improved or surfaced the parking lots which it owns adjacent to its Peninsula stations. The improvements to Peninsula station parking lots, except in the case of San Bruno and the Card-Key lot in Mountain View, have been made by cities which were operating the lots under leases from Southern Pacific.

26. Southern Pacific filed Application No. 44396 with this commission on April 30, 1962. In the application Southern Pacific sought authority to discontinue its stations and facilities designated as San Bruno and Lomita Park and establish in their stead a new nonagency station known as San Bruno. Southern Pacific had permitted certain of its property adjacent to the two stations for which discontinuance was sought to be used for commuter parking. In Decision No. 64166, entered on August 28, 1962, Southern Pacific was authorized to discontinue the two old stations and authority was granted to establish the new one. Decision No. 64166 provided that 'Acceptable ingress and egress to the new San Bruno station with adequate parking facilities should be provided.' In connection with the establishment of the new station, the city of San Bruno leased from the city and county of San Francisco some land adjacent to the new station for a commuter parking lot. The remainder of the commuter parking area is owned by Southern Pacific. Southern Pacific paid half the cost of paving the entire commuter parking area at the new station, which was approximately $1,650. Thereafter, Southern Pacific leased for commercial purposes the land formerly used for commuter parking adjacent to the old stations.

27. Prior to 1959, the condition of the unimproved parking area adjacent to the Mountain View depot was bad. The area had many chuckholes and was littered with debris. During the winter, portions of the lot were unusable.

28. For many years prior to 1959, Southern Pacific permitted its commuter customers to park all day without charge on unimproved land owned by Southern Pacific adjacent to its Mountain View depot.

29. Prior to 1959, Mountain View attempted to get Southern Pacific to improve the parking lot area. Numerous meetings were held between representatives of Mountain View and Southern Pacific in connection with the Mountain View parking lot situation. At some point in the negotiations Southern Pacific represented to Mountain View that it was planning to establish pay parking on numerous lots throughout its system; that Southern Pacific proposed to institute pay parking at the Mountain View depot; and that if pay parking were instituted the condition and maintenance of the parking lot would be improved. In the light of these representations, Mountain View granted a use permit for the construction and operation of a pay parking lot.

On April 21, 1959, Southern Pacific entered into a lease with Card-Key. The lease was for a term of five years commencing May 27, 1959. It provided in part that Card-Key would, at its own expense, fill, grade, and pave the Mountain View depot parking area and install automatic coin and card operated toll gates thereon. The lease required Card-Key to pay all taxes and assessments on the leased property. It provided that the gross receipts from parking should be applied first, to Card-Key's operating expenses; second, to interest on Card-Key's investment; third, to cover reimbursement to Southern Pacific for taxes; and fourth, to amortize Card-Key's investment for improvements. The lease provided that after Card-Key's investment was fully amortized the gross revenue should be divided, after first deducting Card-Key's operating expenses and taxes paid by Southern Pacific, 70 per cent to Southern Pacific and 30 per cent to Card-Key. The lease also provided that Card-Key would charge for parking 25 cents per day or $4 per month, and that any changes in parking fees required the consent of Southern Pacific.

30. Card-Key originally charged for parking at the rate of $4 per month per car or 25 cents per car per day. In December of 1963, Card-Key discontinued the monthly $4 per car rate and has since that time charged 25 cents per car per day for parking at the Mountain View lot.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

31. The Mountain View station parking lot is the only lot owned by Southern Pacific on the Peninsula at which commuters using Southern Pacific commuter service must pay to park. Southern Pacific has a pay parking lot on its property adjacent to its San Francisco station, and Southern Pacific patrons, including commuters, must pay to park thereon.

32. The following is a recapitulation of Card-Key's operations under the lease of the Mountain View parking lot from July 1, 1959, to July 31, 1965:

Total Receipts		$35,933.90
Total Operating Expenses	$10,950.00	
Total Interest on Capital Investment	4,758.22	
Total Tax Reimbursement to Southern Pacific	11,577.05	
Total Amount Applied to Capital Investment	8,943.75	
Total Losses		295.12
	$36,229.02	$36,229.02
Capital Investment	$18,451.17	
Less Amount Applied	8,943.75	
Capital Investment Balance	$9,507.42	

33. On February 17, 1964, Southern Pacific sent a letter to Mountain View proposing to eliminate the parking fee at the Mountain View depot under the following conditions: 1. Mountain View would reimburse Card-Key for its current outstanding investment in improvements, which was stated to be approximately $14,000 on that date. 2. Mountain View would be given a 10-year lease on the parking lot at a rental equal to Southern Pacific's city taxes upon the leased area. The taxes at that time were said to be $368 per annum. 3. Southern Pacific would reserve the right to terminate the lease on sixty days' notice. However, if the lease were terminated prior to the expiration of ten years, Mountain View would be reimbursed for its unamortized balance based on a write-off of ten years. 4. Mountain View would bear the expense of maintaining and policing the parking lot. Mountain View rejected the Southern Pacific offer.

34. There has been no unlawful discrimination by Southern Pacific or Card-Key against Mountain View or Southern Pacific patrons using its depot at Mountain View nor have Mountain View or such patrons been subjected to any unjust, unreasonable, or improper practices by Southern Pacific or Card-Key.

35. For many years prior to 1965, Southern Pacific permitted its commuter customers to park without charge in the area adjacent to its Sunnyvale depot as set forth in Exhibit A attached to the complaint in Case No. 8188. This parking area had been in poor condition for many years prior to 1965.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

36. The Southern Pacific Sunnyvale depot is located in the downtown district of that city. On January 5, 1954, Sunny vale, by ordinance, formed on off-street parking district known as District 1. The Sunnyvale commuter parking lot was not included within the boundaries of District 1. On January 19, 1957, other property, including the commuter parking lot and other property owned by Southern Pacific, was included in District 1. On January 14, 1958, another off-street parking district was formed. It is known as District 2 and includes all the property in District 1. On June 16, 1964, a third off-street parking district was formed known as District 3. District 3 includes all the property in Districts 1 and 2. The total investment in parking district lots and improvements for the three districts from January 5, 1954, to June 30, 1965, was $3,060,613.56. The total amount of ad valorem assessments paid by the three districts from January 5, 1954, to June 30, 1965, was $973,419.52. The total amount paid by Southern Pacific in ad valorem assessments to the three districts from January 5, 1954, to June 30, 1965, was $19,840.

37. On June 21, 1965, Southern Pacific erected physical barriers around the parking lot and prevented its use by commuters.

38. For at least ten years prior to the closing of the Southern Pacific Sunnyvale commuter parking lot Southern Pacific and Sunnyvale had been negotiating over the improvement of the parking lot. Some of the proposals contemplated the charging of a fee for parking on the lot after it was improved. At one point the Sunnyvale planning staff, as part of an overall proposal, indicated it would recommend to the city council the imposition of a parking fee if Sunnyvale were to take over the lot in accordance with the proposal. The negotiations broke down when Sunnyvale rejected a Southern Pacific proposal to lease it the lot for a period of five years, with no provision for renewal, at a rental of $550 per month plus reimbursement to Southern Pacific for all taxes and ad valorem parking district assessments.

39. At one time Sunnyvale installed parking meters for on-street and off-street parking within the boundaries of parking Districts 1 and 2 (District 2 was not in existence during this period) but the meters were removed on November 16, 1960. The reason for removal was the petition of local merchants asking that the meters be removed so that the area could be competitive with regional shopping centers, which did not charge for parking. Prior to the closure of the Southern Pacific Sunnyvale commuter parking area Districts 1, 2, and 3 provided spaces for two types of free parking: Spaces were designated for 30-minute parking and 3-hour parking. No provision was made for all-day parking. On July 1, 1965, after the closing of the Southern Pacific parking lot, the districts designated certain areas for 21-hour a day parking and instituted a parking permit system for parking in these areas. The charge for a parking permit is $5 per month and permits are sold for periods of two months.

40. It is necessary for Southern Pacific to reasonably and adequately meet its public requirements for service at Sunnyvale, California, to reopen and continue in operation its Sunnyvale station commuter parking lot.

41. The closing by Southern Pacific of its Sunnyvale station commuter parking lot was an unjust, unreasonable, and improper act by Southern Pacific and has resulted in inadequate and insufficient facilities at the Sunnyvale station.

42. Prior to 1939, Southern Pacific's commuter customers using its San Carlos depot parked their cars on unimproved property belonging to Southern Pacific adjacent to the depot. On March 21, 1939, Southern Pacific entered into a lease with San Carlos whereby, for the rental of one dollar a year, San Carlos was given the right to maintain and operate a free parking lot on specified Southern Pacific property adjacent to the San Carlos depot. On May 3, 1943, Southern Pacific and San Carlos entered into another lease which superseded the 1939 lease and provided that San Carlos could maintain and operate a specified area belonging to Southern Pacific as a free parking lot adjacent to the San Carlos depot. This lease was amended on June 23, 1950, to include an additional specified area. The area covered by the lease of May 3, 1943, as amended, is known as the Central parking lot, which can accommodate approximately 48 automobiles and the Northerly parking lot, which can accommodate 118 automobiles. On May 13, 1952, Southern Pacific and San Carlos entered into another lease, similar to the 1943 lease, which provided for the lease to San Carlos of additional specified Southern Pacific property

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

to provide an additional area for commuter parking. This area is known as the Southerly parking lot and can accommodate approximately 109 automobiles. The areas encompassed by the Central, Northerly, and Southerly parking lots are more particularly described in Exhibits A and B attached to the complaint in Case No. 8204.

43. San Carlos, pursuant to the various leases set forth in Finding 42, surfaced, maintained, and operated the three parking lots. Some time prior to May of 1965, Southern Pacific and one Ronald Lambert entered into an agreement whereby Lambert would develop a portion of the San Carlos commuter parking lot area for commercial purposes. Lambert applied to San Carlos for a use permit to carry out the agreement. The planning commission granted the use permit, but inserted a condition which provided that no existing commuter parking could be eliminated. Shortly thereafter, Southern Pacific took steps to terminate the 1943 lease, as amended, and the 1952 lease. Southern Pacific also notified San Carlos that effective June 25, 1965, it would permanently close the Central parking lot. San Carlos subsequently filed the complaint here under consideration. At the time of hearing, Southern Pacific had not closed the Central parking lot nor prevented commuters from using any of the three San Carlos parking lots.

44. It is necessary for Southern Pacific to reasonably and adequately meet its public requirements at San Carlos, California, to continue in operation at its San Carlos station the commuter parking lots known as the Central, Northerly, and Southerly parking lots.

45. Withdrawal by Southern Pacific of the commuter parking lots adjacent to its San Carlos station, known as the Central, Northerly, and Southerly parking lots, for use by its patrons, including commuters, would constitute an unjust, unreasonable, and improper act and as a result Southern Pacific would have inadequate and insufficient facilities at its San Carlos station.

Conclusions of Law

1. Customer parking facilities, including those used for commuter parking, owned by a railroad adjacent to a station of the railroad, are part of a service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage as set forth in §208 of the Public Utilities Code.

2. Customer parking facilities, including those used for commuter parking, owned by a railroad adjacent to a station of the railroad, are parts of the stations or depots of the railroad and are grounds and terminal facilities as set forth in §229 of the Public Utilities Code.

3. The commission has jurisdiction over Southern Pacific and Card-Key and the subject matter of the complaints in Case Nos. 8087, 8188, and 8204, pursuant to Art XII, §§21 and 22 of the California Constitution and §§208, 229, 451, 453, 454, 486, 487, 491, 494, 532, 701, 730, 761, 762, 763, and 768 of the Public Utilities Code.

4. Southern Pacific dedicated the land which it owns adjacent to its Peninsula stations where it has permitted its patrons, including commuters, to park to public utility purposes.

5. Southern Pacific dedicated the land which it owns in Mountain View adjacent to its station, more particularly described in Exhibits 1 and 86, where it has permitted its patrons, including commuters, to park to public utility purposes.

6. Southern Pacific dedicated the land which it owns in Sunnyvale adjacent to its station, more particularly described in Exhibit A attached to the complaint in Case No. 8188, where it has permitted its patrons, including commuters, to park to public utility purposes.

7. Southern Pacific dedicated the land which it owns in San Carlos adjacent to its station, more particularly described in Exhibits A and B attached to the complaint in Case No. 8204, where it has permitted its patrons, including commuters, to park to public utility purposes.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

8. Mountain View is entitled to no relief against Southern Pacific and Card-Key in Case No. 8087.

9. Sunnyvale is entitled to an order requiring Southern Pacific to reopen and continue to keep open, until further order of this commission, the commuter parking lot adjacent to the Sunnyvale station.

10. San Carlos is entitled to an order requiring Southern Pacific to continue in operation and not withdraw from use the Central, Northerly, and Southerly commuter parking lots adjacent to its San Carlos station.

11. The motions to dismiss the complaints in Case Nos. 8087, 8188, and 8204 should be denied.

Footnotes

1 The text of the decision was received in evidence by reference as Item B. It is attached to Southern Pacific's petition to reopen.

2 We do not need to consider to what extent, if any, Southern Pacific is ‘bound‘ by the contents of the independent consultants' report introduced in another proceeding. The cited portion of the report is evidence of what is common knowledge, the relationship of the automobile and parking to rail commuter transportation.

3 Peninsula refers to the San Francisco Peninsula — from San Francisco to San Jose.

4 As indicated, there has never been parking at a few stations because of physical impossibility or the lack of space when constructed.

5 Some of these witnesses indicated that it was ‘free‘ parking which they considered as part of the service offered. This point is hereinafter considered.

6 This is also a statutory requirement under §2185 of the Civil Code which in part provides that: ‘A common carrier of persons must provide every passenger with a seat.‘

7 There is evidence that parts of some land leased by Southern Pacific for commercial purposes had been used for commuter parking. However, the amount of parking lot area involved was small.

8 In the San Bruno case (Decision No. 64166) Southern Pacific submitted to the jurisdiction of the commission with respect to parking. See Golden Gate Scenic Steamship Lines v California Pub. Utilities Commission (1962) 57 Cal 2d 373, 377, 43 PUR3d 321, 19 Cal Rptr 657, 369 P2d 257, footnote 2.

9 Southern Pacific contends that, assuming the parking lots to be dedicated to public utility use, it is entitled to earn a reasonable rate of return on the value of each lot. It is not necessary herein, and the commission does not pass upon the point of how parking lot rates should be calculated. See Federal Power Commission v Hope Nat. Gas Co., *supra*, 320 US 591, 602, 51 PUR NS 193.

10 Even if stations having no Southern Pacific station parking were eliminated from the ratio, it would not be appreciably lower.

11 Exhibit 1, the stipulation between Card-Key, Southern Pacific, and Mountain View contains a description of the land as does Exhibit 86.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

12 In Mountain View, since the lot was already surfaced and improved, instead of being required to pave and improve it, Mountain View was asked to reimburse Card-Key for the current outstanding investment on the money expended for improving it.

13 Perhaps the refusal may be explained by Exhibit 3, a letter from the city of Los Altos which indicates that approximately one-third of the commuters using the Mountain View depot are residents of Los Altos and Exhibit 8, a survey conducted by the Mountain View chief of police which indicated that on February 27, 1964, of the cars using the Card-Key lot and surrounding streets only 35 per cent were registered to owners residing in Mountain View, whereas 65 per cent were registered to nonresidents of Mountain View.

14 At the time of the hearing San Carlos was still operating and maintaining the three lots which were being used for commuter parking.

15 The commission would have jurisdiction over leases if there were a problem of discrimination. For example, if a railroad leased passenger parking lots to eight cities on substantially similar terms and refused, for no valid reason, to execute a similar lease with a ninth city.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

1984 WL 1028455 (N.C.U.C.), 63 P.U.R.4th 425

Re Southern Bell Telephone and Telegraph Company
Intervenors: Carolina Utility Customers Association, Inc., AT&T Communications of the Southern States, Inc., and Department of Defense et al.

Docket No. P-55, Sub 834

North Carolina Utilities Commission

November 9, 1984

Before Campbell, presiding, and Tate and Branford, commissioners.

APPEARANCES: J. Billie Ray, Jr., Charlotte, R. Douglas Lackey, Atlanta, Georgia, Edward S. Finley, Jr., and Hunton and Williams, Raleigh, for Southern Bell Telephone and Telegraph Company, for the applicant; Paul L. Lassiter, Gisele L. Rankin, and Antoinette R. Wike, Raleigh, for the using and consuming public, for the public staff; Jo Anne Sanford, special deputy attorney general, Steven F. Bryant, Karen E. Long, Robert Cansler, and Philip Telfer, assistant attorneys general, and Angeline M. Maletto, associate attorney general, North Carolina Department of Justice, Raleigh, for the using and consuming public, for the attorney general; Jerry B. Fruitt, Raleigh, for Carolina Utility Customers Association, Inc., Gene V. Coker and Michael W. Tye, Atlanta, Georgia, and Wade H. Hargrove, Tharrington, Smith & Hargrove, Raleigh, for AT&T Communications of the Southern States, Inc., Peter Q. Nyce, Jr., and Terry J. Kolp, Falls Church, Virginia for the United States Department of Defense and the federal executive agencies, Margot Roten, Raleigh, Daniel V. Besse, New Bern, Douglas Scott, Greensboro, Bill Whalen, Asheville, Louise Ashmore, Boone, Kay House, Pembroke, for Lula Chambers and Fannie Cates Graves, for the intervenors.

By the COMMISSION:

This matter is before the commission on the application of Southern Bell Telephone and Telegraph Company (Southern Bell or company), filed January 16, 1984, for authority to adjust and increase its rates and charges for local and intraLATA toll service in North Carolina to produce additional annual revenues in the amount of $121,331,007. As part of its filing, the company requested immediate interim relief amounting to $21,825,825 on an annual basis to cover the impact of the transfer of its customer premises equipment (CPE) to AT&T on January 1, 1984.

On February 3, 1984, the public staff moved the commission to suspend the application pursuant to GS 62-134(f) in addition to the 270-day period for the suspension of rates provided for in GS 62-134(b) until thirty days after Southern Bell filed actual revenue, expense, and rate base information in the format prescribed by NCUC Rule R1-17 for the three months ended March 31, 1984; to require Southern Bell to file such information for the six months ended June 30, 1984, on or before July 31, 1984; to set the toll portion of the application for hearing no earlier than July 10, 1984; and to set the local exchange portion of the application for hearing no earlier than September 25, 1984. In the subordinate alternative, the public staff moved the commission to require Southern Bell to file actual revenue, expense, and rate base information in the format prescribed by NCUC Rule R1-17 on or before April 30, 1984, for the three months ended March 31, 1984, and on or before July 31, 1984, for the six months ended June 30, 1984, and to set the toll portion of the application for hearing no earlier than July 10, 1984, and the local exchange portion of the application for hearing no earlier than September 11, 1984. The public staff's motion in its second alternative was granted by order of the commission issued February 12, 1984.

By order issued February 7, 1984, the commission suspended the tariffs filed in connection with the requests for interim and permanent rate relief and scheduled oral agrument on the matter of interim rates. On February 15, 1984, by further order, the commission denied the company's request for interim rate relief. The company's motion for reconsideration was denied by order issued February 28, 1984.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

The commission, being of the opinion that the matter constituted a general rate case under GS 62-137, issued an order on March 21, 1984, in Docket Nos. P-55, Sub 834, and P-100, Sub 69, declaring the matter to be a general rate case and setting it for investigation and hearing, establishing the test period as the twelve months ended September 30, 1983, and requiring public notice of the proceedings. The commission further concluded that the proposed adjustments in rates and charges for tariffed items concurred in by Southern Bell and the independent telephone companies would affect each of the companies through the industrywide toll settlements procedure. Accordingly, Southern Bell's request to adjust its intraLATA directory assistance charge, WATS (nonrecurring) charges, interexchange intraLATA private line and foreign exchange (FX) rates were separated from Docket No. P-55, Sub 834, and placed in Docket No. P-100, Sub 69, for investigation and hearing with all other telephone companies, including AT&T, under the commission's jurisdiction being made parties thereto.

On January 20, 1984, the attorney general filed notice of intervention in this docket on behalf of the using and consuming public.

The Carolina Utility Customers Association, Inc. (CUCA), filed a petition to intervene on January 24, 1984. AT&T Communications of the Southern States, Inc., filed a petition for leave to intervene on February 13, 1984. The United States Department of Defense and all other executive agencies of the United States filed a petition for leave to intervene on July 2, 1984. The North Carolina Legal Services Resource Center, on behalf of Lula Chambers and Fannie Cates Graves, filed a petition to intervene on August 2, 1984. These petitions to intervene were allowed by commission orders issued February 2, February 21, July 5, and August 6, 1984, respectively.

On May 30, 1984, Southern Bell filed a motion for leave to amend pleadings to propose revised rate levels for the provision of equipment for hearing-impaired customers, to include pages inadvertently omitted from the initial filing with regard to extension and tie line services, and to clarify the original filing by removing WATS time and materials units from the local service portion of the case. By order issued June 14, 1984, the commission allowed the motion to amend.

On February 3, 1984, Southern Bell filed a request in Docket No. P-55, Sub 839, for approval of the transfer of certain of its assets to BellSouth Advertising and Publishing Company (BAPCO). The matter was scheduled for hearing on June 5, 1984. Southern Bell filed on May 25, 1984, a motion to stipulate order and close docket in which the intervenors CUCA and the public staff concurred. The matter came on for hearing as scheduled, whereupon the commission issued an order dated June 6, 1984, approving the transfer of Southern Bell's directory related assets to BAPCO, subject to the stipulations of the parties, and incorporating Docket No. P-55, Sub 839, into the instant docket.

On August 3, 1984, pursuant to GS 62-134(e), Southern Bell filed a notice of placing into effect on and after August 16, 1984, increased rates amounting to no more than 20 per cent on any single rate classification, subject to undertaking. By order issued August 7, 1984, the commission approved the company's undertaking to refund.

On August 31, 1984, the commission issued its order in Docket No. P-100, Sub 69, authorizing the increase in charges applicable to intrastate toll directory assistance and rejecting the increases in WATS (nonrecurring), intraLATA private line, and FX charges proposed by Southern Bell. The annual increase in revenues to the company as a result of that decision is approximately $377,054.

Hearings were scheduled and held for the purpose of receiving testimony from public witnesses in Charlotte on September 10, Asheville on September 11, Greensboro on September 11, Raleigh on September 12 and 13, and Wilmington on October 1, 1984. The following persons appeared and testified at these hearings:

Charlotte--Stephen M. Wilfond, Betty Anthony, Jimmie F. Kiser, C. T. White, Theresa M. Wood, Frederick W. Buchta, Geneva Fletcher, and David H. Garris; Asheville--Lucy Kibler, Lillian Keller, Amanda Miller, July Cornett, Elsie Clark, Marie Schultz, Bessie Arnett, Mary Turner, Robert Kilcullen, Margaret Kasseur, Molly Green, Sarah Fain, George Odom, Richard Patzfahl, Wanita Jones, Robbie Thomas, August Webb, Melvin C. Thomason, R. D. Daniels, Ernest Messer, Inez D. Goodman, Art Mandler, E. S. Blakely, and Anthony Sciara; Greensboro-- Lula Chambers, Helen Henry, Fannie Cates Graves, James A, Poole,

Sally Comstock, Larry Pittman, and Autumn Miller; Raleigh--Thomas C. Bray, Jane MacNeela, Ethel Young, Merle Hunter, Ora Douglas, Joseph Reinckens, and Jane Sharpe; Wilmington--Vertie Bell Fuller, Myrtle Oxendine, and Harry Dorsey.

The matter came on for hearing as scheduled in Raleigh on September 13, 1984.

Southern Bell offered the testimony of the following witnesses: Jere A. Drummond, vice president responsible for Southern Bell's operations in North Carolina; Dr. James H. Vander Weide, president of Utility Financial Services, Inc., and an adjunct professor of finance at the Fuqua School of Business, Duke University; Robert N. Dean, assistant vice president--revenue requirements and treasurer of Southern Bell; J. W. Glass, operations manager--executive support in the BellSouth Corporation; E. W. Parish, Jr., an employee of BellSouth Services Incorporated; Stephen M. Wilson, division staff manager in the revenue requirements department of Southern Bell; John D. McClellan, a partner in the accounting firm of Deloitte Haskins and Sells; March R. Steele, operations manager of BAPCO; Victor E. Jarvis, assistant vice president--finance for BAPCO; Ralph T. Bishop, district staff manager in the company headquarters comptrollers department; Robert C. Hart, Jr., district staff manager in service costs for Southern Bell; and Robert L. Savage, division staff manager--rates and service costs for Southern Bell. The company also offered the affidavit of Richard E. Stark, an employee in the comptrollers department of AT&T.

The public staff offered the testimony of the following witnesses: Donald E. Daniel, assistant director--accounting division; John T. Garrison, Jr., engineer--communications division; William J. Willis, Jr., engineer-- communications division; Karyl J. Lam, accountant--accounting division; Jocelyn M. Perkerson, accountant--accounting division; Leslie C. Sutton, engineer--communications division; William W. Winters, supervisor of communications section--accounting division; and Dr. Ben Johnson, president of Ben Johnson Associates.

AT&T offered the testimony of Lawrence R. Weber, regional vice president-- external affairs for AT&T Communications.

CUCA offered the testimony of the following witnesses: Ralph L. Young, vice president of buildings and services for Wix Corporation; Harry M. Venable, director of telecommunications services for Celanese Corporation; Larry D. Brown, manager of corporate telecommunications for Cone Mills Corporation; and Louis R. Jones, telecommunications analyst, corporate communications department, Burlington Industries, Inc.

The attorney general presented the testimony of Dr. John W. Wilson, president of J. W. Wilson and Associates, Inc.

North Carolina Legal Services Resource Center, on behalf of Lula Chambers and Fannie Cates Graves, presented the testimony of Dr. Mark Cooper, president, Citizens Research, and director of energy of the Consumer Federation of America.

The Department of Defense presented the testimony of Mark Langsam of the General Services Administration.

Southern Bell offered the rebuttal testimony of Ralph T. Bishop.

Based on the foregoing, the evidence adduced at the hearing, and the entire record in this matter, the commission now makes the following

Findings of Fact

1. The applicant, Southern Bell Telephone and Telegraph Company, is a public utility duly authorized to do business in North Carolina, is providing telecommunications service in North Carolina, and, as such, is subject to the jurisdiction of this commission. Southern Bell is properly before the commission in this proceeding, pursuant to GS 62-133, for a determination of the justness and reasonableness of its proposed rates and charges.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

2. In its original application, Southern Bell requested rates designed to produce additional gross annual revenues of approximately $121,331,007 based upon a test year ended September 30, 1983. By its revised application, the company requested rates designed to produce additional annual gross revenues of approximately $95,736,058. The company's proposed order reflects a requested increase of $95,399,000.

3. The test year for purposes of this proceeding is the twelve months ended September 30, 1983, adjusted for certain known changes based upon circumstances and events occurring up to the time of the close of the hearings in this docket.

4. The overall quality of service provided by Southern Bell is adequate.

5. The contract between Southern Bell and BellSouth Advertising and Publishing Company (BAPCO) should not be approved in this proceeding.

6. The reasonable gross revenue contribution received from BAPCO's directory publishing operations is $28,456,000.

7. Refunds from American Telephone and Telegraph Company to Southern Bell of $3,594,001, required by the Federal Communications Commission as a part of the divestiture process, should be flowed through to Southern Bell's customers in this proceeding.

8. The reasonable working capital allowance to be included in the company's rate base is $9,358,000.

9. The attrition adjustment of $6,703,052 proposed by the company is unreasonable and unnecessary and should be excluded from the cost of service.

10. The net gain on sale of land of $162,375 should be flowed through to Southern Bell's customers in this proceeding.

11. No construction work in progress should be included in Southern Bell's rate base.

12. Southern Bell's reasonable original cost rate base used and useful in providing service to its customers in North Carolina is $991,752,000. This rate base consists of telephone plant in service of $1,478,944,000 plus a plant acquisition adjustment of $2,985,000, the working capital allowance of $9,358,000 less the depreciation reserve of $311,232,000, customer deposits of $3,692,000, accumulated deferred income taxes of $183,184,000, and unamortized investment tax credits of $1,427,000.

13. Southern Bell's level of end-of-period net operating revenues for the test year under present rates and after accounting, pro forma, and end-of-period adjustments, is $598,534,000.

14. The general service and license contract (GS&L) expenses to be included in Southern Bell's cost of service in this proceeding are $9,388,000.

15. The reasonable level of test-year operating revenue deductions under present rates for Southern Bell after accounting, pro forma, and end-of-period adjustments is $500,113,000.

16. The company should be allowed a rate of return on original cost rate base of 12.51 per cent, which is based upon an embedded cost of long-term debt of 9.5 per cent and will allow the company a reasonable opportunity to earn a return on common equity of 15 per cent. The capital structure for Southern Bell which is reasonable and proper for use in this proceeding is as follows:

Item	Ratio

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Long-term debt	45.2%
Common equity	54.8%
Total	100.00%

17. Based on the foregoing, Southern Bell Telephone and Telegraph Company should be allowed to increase local service revenues by $50,044,000. This increase is required for the company to have a reasonable opportunity to earn the 12.51 per cent overall rate of return which the commission has found just and reasonable. This increased revenue requirement is based on the original cost of the company's property and its reasonable test-year operating revenues and expenses as previously determined and set forth in these findings of fact.

18. The rates, charges, and regulations to be filed pursuant to this order in accordance with the guidelines contained herein, which will produce an annual increase in local service revenue of $50,044,000 will be just and reasonable.

Evidence and Conclusions for Findings Of Fact Nos. 1-3

The evidence supporting these findings of fact is contained in the filings and record as a whole. These findings of fact are essentially procedural in nature and the matters which they involve were not contested by the parties. Southern Bell originally filed to increase its rates and charges to produce additional annual revenues of $121,331,007.

Because of divestiture, a number of the items for which the company requested an increase were based on estimates rather than actual historical data. Southern Bell filed actual data, pursuant to the commission's February 12, 1984, order granting the public staff's motion, for the first six months of 1984. Consequently, Southern Bell's original request was decreased to $95,736,058. The company's proposed order reflects a requested increase of $95,399,000.

Evidence and Conclusions for Finding of Fact No. 4

The evidence concerning the quality of service was presented by company witness Drummond, public staff witness Sutton, and public witness at the public hearings.

There were approximately forty-nine witnesses, all of whom testified in opposition to the rate increase. Of the seven public witnesses who testified on the quality of service, two testified favorably and five unfavorably.

Company witness Drummond testified that the overall quality of service provided by the company was excellent and stated that Southern Bell would continue to provide its subscribers with the high quality communications services they need and deserve.

Public staff witness Sutton testified that his evaluation of the quality of service was based upon the results of numerous tests made by the public staff and on an analysis of the company's operating statistics. His conclusion regarding the qualify of service was reached after a comparison of the test results and operating statistics to the service objectives established by the commission. As shown in witness Sutton's exhibits, some exchanges failed to meet the commission's quality of service test objective and for certain months the company failed to meet the commission's quality of service operating statistics objectives. Notwithstanding those occurrences, on a companywide basis, Southern Bell generally met the commission's service objectives; and therefore witness Sutton concluded that the ervice provided by Southern Bell is adequate.

Based on the foregoing evidence, the commission concludes that the overall quality of service provided by Southern Bell to its customers in North Carolina is adequate.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Evidence and Conclusions for Findings Of Fact Nos. 5 and 6

The evidence for these findings of fact is contained in the testimony of company witnesses Drummond, Glass, Steele, Bishop, Jarvis, public staff witness Perkerson, and attorney general witness Wilson.

The two major issues regarding directory operations are: (1) whether the contract between Southern Bell and BellSouth Advertising and Publishing Company (BAPCO) should be approved or whether directory operations should remain with Southern Bell; and (2) regardless of whether the contract is approved, what is the proper amount of net revenue contribution to be included in this proceeding in order to determine the company's fair and reasonable level of gross revenue requirements.

It is important to review the methodology applied to directory revenues in the past by this commission. Southern Bell for several years has consistently removed directory revenues and costs from its calculation of end-of-period revenues and costs, while the public staff has consistently included them. This commission has uniformly rejected Southern Bell's attempt to exclude directory revenues and costs and has held that they should be included in the calculation of the company's North Carolina intrastate jurisdictional revenue requirement. The commission's decision in this regard was appealed by Southern Bell and was upheld by the North Carolina supreme court in North Carolina ex rel. Utilities Commission v Southern Bell Teleph. & Teleg. Co. (1983) 307 NC 541, 299 SE2d 763.

In the past, the directory revenues and expenses removed by the company from the calculation of the end-of-period revenues and expenses were simply reversed and none of the parties in the applicable proceedings attempted to establish the contribution from directory operations as a percentage of net directory revenues, which would necessitate using proper allocation factors and establishing proper expense levels. Consequently, the directory operations were considered an integral part of the telephone company and, therefore, precise allocation factors related to said operations were never developed.

In this proceeding, the commission has been presented with a contract between Southern Bell and BAPCO, which is a wholly owned subsidiary of BellSouth Corporation, Southern Bell's parent company, providing for 42.5 per cent of net directory revenues to be paid as a publishing fee to Southern Bell. Both Southern Bell and BAPCO represent to this commission that the 42.5 per cent publishing fee will provide the same contribution to revenues for Southern Bell as would have been available from directory operations if BAPCO had not been formed.

As was stated earlier, and as was testified to by witness Perkerson of the public staff and witness Wilson for the attorney general, no previous or current calculation of the contribution from directory operations exists in a format which allows for a statement by the company that the contribution derived from establishing a publishing fee equal to 42.5 per cent of net directory revenues provides the same contribution as would have existed if BAPCO had not been formed. The problem, as pointed out by these witnesses, lies in the fact that the calculation of the effect of directory operations by the company in the past and in this proceeding does not provide for any interstate allocation of the expenses subject to allocation.

Attorney general witness Wilson testified that the directory operations should be treated as though they had never left Southern Bell. In discussing his proposed treatment of directory operations, Dr. Wilson cited the following problems with the company's treatment:

1. Expenses were allocated 100 per cent to intrastate operations when a portion of them should be allocated to interstate operations.

2. The company's directory study, which was the basis for witness Bishop's expenses, is a fully allocated cost study and includes costs which are already covered in other expenses in the company's cost of service. Therefore, Dr. Wilson contended that witness Bishop improperly included some of these expenses again as directory expenses.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

3. The study includes a mismatch of end-of-period 1983 revenues with some 1984 expense levels. Witness Wilson said that direct directory expenses were capitalized to be matched with revenues over the life of the directory. Dr. Wilson stated that the company matched some of these future expenses with 1983 revenues.

At the hearing, company witness Jarvis explained that the 42.5 per cent of net directory revenues as a publishing fee provided for in the contract was calculated as follows:

1. A return of 13.5 per cent was calculated on the investment related to directory operations;

2. Taxes were calculated on the return revenue requirement;

3. Expenses for publication, general and administrative overhead, taxes, and miscellaneous items were totaled;

4. Items 1, 2, and 3 above were subtracted from estimated revenues;

5. The remainder was determined to be the publishing fee; and

6. The percentage was derived by dividing Item 5 above by net directory revenues.

Witness Perkerson presented testimony regarding errors in the company's 42.5 per cent calculation. First, witness Perkerson pointed out that the company used a rate-making methodology for a nonregulated company by establishing an aftertax return which was deducted from revenues before a publishing fee was established. Witness Perkerson noted that few, if any, companies in the competitive market are able to enter the business field with an assured return and full coverage for all expenses. Witness Perkerson further testified that all companies like to earn a return on their investment but that most must earn their return, rather than having one built in, and that they do not know whether they have earned one until the end of the business year.

Witness Perkerson further testified that the investment on which BAPCO had calculated its return was much higher than the investment on which a return would be calculated if directory operations had remained with the telephone company. This resulted from the fact that BAPCO included all prepaid directory expenses for the year as a component of investment, whereas Southern Bell and the public staff included only that portion of prepaid directory expenses which flows out of the lead-lag study as a component of working capital for the calculation of a return. Witness Perkerson testified that, in this proceeding, the difference between the amount of prepaid directory expense which was included by BAPCO in its directory return calculation and the amount which would be included as a result of a lead-lag study was approximately $6 million.

Under cross-examination, witness Jarvis admitted that BAPCO had included gross receipts tax on revenues to be retained by BAPCO in the amount of more than $2 million as an item of expense in deriving the approximate level of directory revenue contribution to be used in this proceeding. Witness Jarvis further stated that BAPCO had not, to his knowledge, checked with the North Carolina Department of Revenue to determine whether or not payment of this tax would be required. Witness Jarvis did state, however, that he was aware that North Carolina law requires regulated utilities to pay this tax and that BAPCO is not a regulated utility.

Witnesses for Southern Bell, BellSouth, and BAPCO gave a number of reasons for establishing BAPCO as opposed to leaving the directory operations at Southern Bell. The four reasons are found in the testimony of witnesses Drummond, Glass, Steele, and Jarvis. Witness Steele set them out clearly in his summary as being:

1. To meet competition in the directory advertising business;

2. To facilitate the development of a more professional sales-oriented organization;

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

3. To facilitate entry into other advertising and publishing markets; and

4. To achieve long-term economies of scale.

With respect to the first reason, the commission has listened to the company's concern with respect to the loss of revenues for directory advertising because of competition for several years, yet during this time, according to the testimony of witness Jarvis, directory revenues have grown at the rate of 18.5 per cent per year and are projected by the company to continue to grow at the rate of 18 per cent per year through 1987. Therefore, the need to change the method of operations to control loss of revenues due to competition does not have proven validity at this time.

The second reason given for creating BAPCO, to facilitate the development of a more sales-oriented organization, appears to be more beneficial to other jurisdictions, since Southern Bell has maintained its own sales force in the past in North Carolina while, according to company witnesses, the sale of directory advertising at South Central Bell is provided under a contract and no sales force is maintained.

To facilitate entry into other advertising and publishing markets is perhaps the most interesting reason given for creating BAPCO. BAPCO is a subsidiary of BellSouth and any new areas of advertising and publishing that BAPCO enters into will accrue to the benefit of BellSouth and not to Southern Bell or its ratepayers. Therefore, BAPCO is in a position to benefit from the expertise and experience developed by the directory operations, while an integral part of Southern Bell. The commission takes special note of witness Perkerson's statement, in her summary, regarding the fact that Southern Bell's assets were transferred to the national publishing division, where new directory and publishing ventures will be handled, at net book value. Both the company's witnesses and witness Perkerson testified that neither Southern Bell nor its ratepayers will receive any revenues generated by this division.

The last reason given for creating BAPCO addresses the ability to achieve long-term economies of scale. Under the fixed publishing fee established by the company's methodology, none of these efficiencies would accrue to the benefit of Southern Bell or its ratepayers. The 42.5 per cent of net directory revenues, calculated under the methodology outlined above, uses expenses at the current time to establish a fee that will not increase once efficiencies are achieved. Therefore, efficiencies resulting in reduced expense levels will benefit BAPCO's parent company, BellSouth, and will not benefit the North Carolina intrastate jurisdictional ratepayers.

While all of the evidence shown above provides a clear basis for ordering that directory operations remain with the telephone company, the commission does not intend in this proceeding to prevent BellSouth, through its subsidiary BAPCO, from entering into the advertising and publishing business. The commission is, however, keenly aware of the current and potential threat to the revenue stream from directory operations which is available as an offset to local rates. The commission believes, as has been said in the past, that directory revenues are generated because of the integral relationship of the directory to telephone service and that these revenues should not be siphoned off in any manner or for any purpose. The relationship between Southern Bell and BAPCO requires close scrutiny of any contract or similar arrangement between these companies to be sure that the profits of a nonregulated subsidiary are not maximized at the expense of the ratepayers.

It is necessary, therefore, that the commission's decisions and orders with regard to any contract between Southern Bell and BAPCO for publishing Southern Bell's directories provide that the appropriate amount of net directory revenues will be established in each rate case proceeding and that accounting and reporting requirements which will allow for a full and accurate establishment of the revenues and expenses associated with directory operations in North Carolina will be required and must be filed by Southern Bell on a basis prescribed by the commission.

Much of the testimony provided by the company in this case in support of 42.5 per cent of net directory revenues as a publishing fee and provided by public staff witness Perkerson in support of 54 per cent of net directory revenues as a publishing fee has already been discussed. There is additional evidence, however, which needs to be discussed and analyzed.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Witness Perkerson testified that the contract between Southern Bell and BAPCO should be approved only if the publishing fee is increased to 54 per cent of net directory revenues. Witness Perkerson gave several reasons why the 42.5 per cent was inadequate, including failure to recognize goodwill related to the transfer of assets from Southern Bell to BAPCO, the fact that 42.5 per cent of test-year revenues was less than the contribution would have been generated using traditional test-year methodology, the less than arm's-length nature of the transaction, and the contracts for directory publishing under which other telephone companies in North Carolina currently receive 54 per cent or more of net directory revenues as a publishing fee.

With regard to the last reason, company witness Glass stated that the contract between Southern Bell and BAPCO is similar to other contracts in the industry, with the exception of the delivery of the directories by BAPCO. However, company witness Steele, during cross-examination, would not agree that the contracts mentioned by witness Perkerson in her prefiled testimony are similar in their provisions to the BAPCO contract. Witness Steele stated that the General Telephone Company contract is different in a number of ways, including some provisions not written into the body of the contract.

Witness Perkerson stated that she knew the General Telephone contract differs in the area of delivery, but that she had relied on the advice of public staff counsel as to the similarity of the contracts and had been advised that the contracts were similar enough to warrant similar publishing fees.

The commission has made its own study of the contracts involved and concludes that the comparability of the contracts involved is not clear. The evidence in the record is clear, however, that the General Telephone directory contract requires the telephone company to pay for directory delivery costs, whereas Southern Bell is not responsible for this type of cost under the contract with BAPCO. Additionally, company witness Steele stated that there were other differences between the BAPCO directory contract and the General Telephone directory contract. These differences include the responsibility for customer service, for printing costs associated with white pages outside the geographic area served by the yellow pages, and for the entire cost of media advertising.

At the heart of any decision by this commission regarding the proper rate-making treatment for directory revenues is the clear-cut decision of the North Carolina supreme court, upholding a prior decision of this commission, that directory revenues are a proper offset of local rates and Judge Greene's statement in the modification of final judgment, of which the commission has taken judicial notice, that directory revenues will remain with the operating telephone companies to offset the cost of local service. North Carolina ex rel. Commission v Southern Bell, Ibid. United States v American Teleph. & Teleg. Co. (DC DC 1982) 48 PUR4th 227, 552 F Supp 131. It is, therefore, unnecessary to address again the question of who is to benefit from the directory revenues in the state of North Carolina.

It is, however, critical that this commission be assured that none of the directory revenues available as an offset of local rates be lost or redirected to another subsidiary of Southern Bell's parent BellSouth due to any change made by the company in the method to be used for publishing directories. There is a grave concern that approval of the contract at this time will result in a loss of revenues for North Carolina ratepayers.

At stake in this proceeding is the decision whether Southern Bell, in connection with BAPCO, will determine the rate-making treatment to be accorded directory revenues or whether the authority, obligation, and right to determine the rate-making treatment of these revenues will properly remain with this commission. Approval of the contractual arrangement between BAPCO and Southern Bell, in light of the cap placed on revenues by the establishment of a percentage of revenues as a publishing fee, could serve to set a precedent of allowing Southern Bell, for rate-making purposes, to spin-off profitable pieces of its telecommunications services to separate subsidiaries, thereby circumventing a determination or review of the proper rate-making treatment of these services by this commission. This means that the commission could lose control, not only of directory revenues, but also of revenues from other areas and sources in the future.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

For these and other reasons, the commission finds that this important issue requires further examination and a historical test period to assure a fair decision regarding the arrangement between BAPCO and Southern Bell. This commission, therefore, explicitly withholds approval of the contract between BAPCO and Southern Bell in this rate proceeding. The proper level of directory revenue contribution to be included in Southern Bell's revenues for this proceeding, however, must be discussed.

Company witness Bishop testified concerning the support that the directory operation currently provides to regulated services. Due to the incomplete nature of information on the company's adjustment in witness Bishop's exhibits, reference to Southern Bell's P-1 Data Request, Item 10, was required. An analysis of page 8-S of 25 filed August 8, 1984, shows that witness Bishop included $24,798,468 of net revenues for directory contribution.

Witness Wilson for the attorney general testified that he used the company's 1984 budgeted directory revenues of $61 million, along with the 1984 expenses, which were prepaid in 1983. As shown on Exh JW-3, Dr. Wilson proposed a gross directory revenue contribution of $34,243,000. When divided by the 1984 estimated revenues of $61 million, a 56 per cent of net directory revenue contribution is derived.

Public staff witness Perkerson testified that she used the same methodology in calculating the directory revenue contribution that the company used to establish the GS&L costs to be included in the cost of service. Witness Perkerson stated that, since BAPCO is also an affiliated company, she recommended that the same accounting methodology be used to calculate the revenues to be retained by Southern Bell for directory operations. Witness Perkerson stated that this provided consistent treatment for all affiliated activities.

As previously discussed, witness Perkerson used 54 per cent as the percentage of gross directory revenues that should be retained, which resulted in an annualized directory revenue contribution of $31,683,000, for the six months ended June 30, 1984, thus requiring an increase of $6,885,000 in witness Bishop's proposed contribution.

The commission has given much consideration to the proper determination of a representative level of directory contribution to be used in establishing fair and reasonable rates in this proceeding. Based on the entire record, the commission concludes that the approach taken by public staff witness Perkerson is appropriate for use in establishing such representative level of directory contribution. However, the commission further concludes that the fair and reasonable revenue retention factor to be utilized in determining the representative level of directory contribution in this proceeding is 48.5 per cent. The commission notes that the 48.5 per cent revenue retention factor is the most appropriate factor based on the evidence presented in this case.

Based on the foregoing, the commission concludes that the appropriate level of directory contribution to be used in this proceeding is $28,456,000.

The commission further concludes that BAPCO must be required to maintain all accounting records for North Carolina operations in a separate manner to provide for a full and accurate examination of the revenues and expenses of these operations in subsequent rate proceedings. Furthermore, BAPCO must also make available to the commission and the public staff records of BAPCO which relate directly or indirectly to the establishment of rates in subsequent rate proceedings, including all support data for expenses which are assigned by use of allocation factors and any other data which the commission and the public staff deem necessary, as provided for in the general statutes of North Carolina, to allow the commission an opportunity to be assured that all directory revenues appropriately assignable to North Carolina ratepayers are available as a reduction to rates in the furture.

Evidence and Conclusions for Finding of Fact No. 7

Testimony relating to the Federal Communications Commission (FCC) ordered refunds by AT&T of license contract expenses related to CPE, enhanced service, fully separate subsidiary formation, and area mobile telephone service was provided by public staff witness Perkerson and attorney general witness Wilson. The company offered no testimony relating to the refunds.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

According to testimony provided by witness Perkerson, the refunds related to expenses included in Southern Bell's cost of service between 1974 and 1982 for the items mentioned above, which were all deregulated as a result of divestiture. In order to assign proper expenses to these areas which were to be a part of the competitive marketplace and to prevent AT&T from acquiring a competitive edge due to subsidies from ratepayers, AT&T had to identify expenses associated with these areas and refund the expenses with interest. Refunds were received by Southern Bell in December, 1982, and in March, August, and November 1983. The North Carolina intrastate amount of the refunds is $4,150,751.

Witness Perkerson testified that the company made an adjustment in its application, which was not reflected on its books, for the refund in connection with its end-of-period calculation of expenses but then zeroed out the full amount of end-of-period expenses and replaced the end-of-period amount with the estimated expenses of BellSouth Corporation, Bell Communications Research (Bellcore), and BellSouth Services as the amount to be included in the cost of service for license contract, Account 674, expenses. This resulted in all of the refund being retained by Southern Bell and ultimately its parent, BellSouth Corporation.

Company witness Bishop testified during cross-examination by the attorney general that the refunds were placed in Account 174 to await final disposition by state regulatory commissions and that he did not believe the FCC intended the refunds to provide a windfall to Southern Bell shareholders.

Witness Perkerson reduced the amount of the refund to be returned to the ratepayers by $556,750, which, witness Perkerson stated, represents the adjustments made by this commission reducing the GS&L expenses in Docket No. P-55, Subs 784 and 794. Therefore, witness Perkerson recommended that the company's cost of service should be reduced to allow for an intrastate refund in the amount of $3,594,001.

Witness Wilson testified against any reduction of the refund due to adjustments made to these expenses in prior years. He stated that it was the shareholders of AT&T who would have been affected by prior year adjustments and not Southern Bell or its parent BellSouth. Therefore, Dr. Wilson recommended that the entire intrastate refund in the amount of $4,150,751 be refunded to ratepayers through a reduction of rates in this proceeding.

Based upon a careful consideration of the evidence presented in this case, the commission concludes that $3,594,001 of the refunds from AT&T to Southern Bell, as ordered by the FCC, should be passed on to the ratepayers in this proceeding and should not be retained by Southern Bell.

The commission agrees with witness Bishop's statement that the FCC did not intend these refunds to provide a windfall to Southern Bell. It is apparent that the refunds were ordered to provide for proper costing of products and services by the nonregulated segments of AT&T at the time of divestiture and to negate the possibility of the competitive ventures of AT&T being subsidized by ratepayers.

Thus, the commission concludes that the intrastate refunds in the amount of $3,594,001 should be returned to ratepayers consistent with the testimony of public staff witness Perkerson in order to give appropriate rate-making recognition to previous adjustments made by the commission reducing GS&L expenses in Docket No. P-55, Subs 784 and 794.

The commission further concludes that the appropriate methodology for refunding the money in question to North Carolina ratepayers is to reduce rates to allow for a flow through of the refunds so as not to lessen their impact by costly accounting changes for a one-time credit.

Based on the foregoing, the commission concludes that the FCC ordered refunds in an intrastate amount of $3,594,001 should be flowed through to Southern Bell's North Carolina ratepayers by a reduction of cost of service in this proceeding.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Evidence and Conclusions for Finding of Fact No. 8

Company witness Bishop and public staff witness Lam presented testimony and exhibits concerning the proper allowance for working capital. The amount of working capital proposed by each witness is shown in the following table:

Item	Company	Public Staff	Difference
Cash.....	$4,596,697	$4,596,697	
Materials and supplies.....	8,595,018	8,595,018	
Accounts payable--materials and supplies.....	(2,237,283)	(2,237,283)	
Accounts payable--plant in service.....	(2,699,072)	(2,699,072)	
Investors' (customers') funds advanced for operations.....	1,103,520	(267,115)	$ (1,370,635)
Total allowance for working capital.....	$9,358,880	$7,988,245	$ (1,370,635)

As can be seen, there was no disagreement as to the proper amounts of cash, materials and supplies, accounts payable--materials and supplies, and accounts payable--plant in service to be included in the calculation of the working capital allowance. Therefore, the commission concludes that the amounts shown above for these items are proper.

The only component of the working capital allowance on which the parties disagreed was funds advanced for operations. Company witness Bishop proposed an addition to working capital of $1,103,520 for investors' funds advanced for operations while public staff witness Lam proposed a deduction to working capital of $267,115 for customers' funds advanced for operations.

Witness Lam testified that there were two major reasons why the amount that she showed for funds advanced for operations differed from the amount shown by the company. The first was a difference in the method used to reflect the effects of the divestiture of Southern Bell from AT&T on January 1, 1984. In calculating investors' funds advanced for operations, the company first prepared a lead-lag study based upon the per book test-year cost of service. The company then adjusted the investors' funds to reflect the divestiture of the directory and design line sales operations and the change in the lags on general service and license expense and Western Electric billings charged to maintenance. Witness Lam calculated customers' funds advanced for operations from a lead-lag study based upon a divested per books cost of service. Witness Lam testified that this divested study reflects the divestiture of the directory and design line sales operations, as does the company's calculation, but also reflects changes in revenues and expenses not shown in the company's calculation, such as the loss of CPE lease revenues and toll revenues and a reduction in payroll and relief and pensions expenses. Witness Lam further testified that her method for calculating funds advanced for operations is more reasonable than the company's method because it reflects a broader range of divestiture effects. Witness Lam indicated on cross-examination that her calculation was the best that could be done under the present circumstances. Witness Lam stated that it was necessary to reflect the cost of service on a divested basis and that her lead-lag study was an attempt to do this.

Public staff witness Lam also addressed the issue of per book versus adjusted cost of service for lead-lag study purposes. Witness Lam stated that, because of the unusual circumstances surrounding this proceeding, it was appropriate to use an adjusted cost of service for lead-lag study purposes. Witness Lam stated that, because of divestiture and the changes in the company's operations, there have been numerous changes in the amount of revenues which the company collects and the expenses which it incurs, which result in the unadjusted per book test-year cost of service being no longer representative of the company's cost of service.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Witness Lam indicated that she had not deviated entirely from the per book lead-lag study concept because she used a divested per book cost of service whereby the per book test-year cost of service was adjusted, to the extent possible, to reflect what it would have been had divestiture been in effect during the entire test year. She stated that no attempt was made to include any end-of-period or pro forma adjustments in the cost of service and, therefore, a fully adjusted cost of service had not been used in her lead-lag study calculation. Witness Lam further testified that the divested per book cost of service which she used in her lead-lag study calculation was based upon a divested per book lead-lag study which the company prepared at her request.

Though the record is clear that the cost of service to be used in developing the company's lead-lag study may perhaps be affected by divestiture to an extent greater than that reflected by the company, it is equally clear, as stated by company witness Bishop, that the lags incorporated in the lead-lag study used by the public staff are not necessarily entirely reflective of a postdivestiture environment. This fact is particularly borne out by the revenue lag. Evidence of record shows that a substantial change has occurred in the revenue mix due to divestiture, and that therefore the revenue lag should change due to divestiture, since a material portion of the divested revenues had a lag shorter than the composite revenue lag developed prior to divestiture. Based on the foregoing, the commission is concerned that the postdivestiture lead-lag analysis presented by the public staff is not conclusively representative of the company's ongoing working capital requirements, and therefore the commission concludes that the company's reflection of divestiture in its lead-lag study is more appropriate for establishing rate in this proceeding.

Public staff witness Lam testified that the second reason the amount she showed for funds advanced for operations differed from the amount shown by the company was a change in the lag assigned to the net investment tax credit (ITC) related to the Revenue Act of 1971. She stated that she had assigned the composite revenue lag of 24.67 days to the post-1971 net ITC while continuing to assign a zero lag to the pre-1971 net ITC. She testified that, to the extent that funds measured through the lead-lag study are provided by investors, they represent valid additions to the rate base on which investors are given the opportunity to earn a fair rate of return but that, to the extent those funds are not provided by investors, they do not qualify as valid additions to the rate base. Witness Lam indicated that the funds related to the post-1971 ITC are not provided by investors but rather by the ratepayers and, therefore, should not be included in the working capital allowance. Witness Lam stated that assigning the revenue lag to the post-1971 net ITC results in neither an increase nor a decrease in the working capital allowance included in the rate base but has a zero effect. Witness Lam further testified that, because it has a zero effect on the rate base, it does not violate tax law restrictions prohibiting the post-1971 ITC from being used to reduce the rate base.

Witness Lam agreed on cross-examination that, if the unamortized portion of the investment tax credit was used to reduce the rate base, the company would lose its investment tax credits for all open tax years and would continue to lose the credit into the future. Witness Lam also agreed that the company would lose the credits if the rate base were reduced in an indirect manner.

The central issue concerning this matter is whether the Internal Revenue Code allows the treatment advanced by the public staff or whether it mandates the treatment advocated by the company. Initially, one should note that the treatment advocated by the company is the same as that put forth by both the company and the public staff, and accepted by this commission, in previous general rate case proceedings for Southern Bell. Additionally, it should be noted that the evidence is clear that the public staff's treatment would effectively nullity any consideration of investment tax credits in determining an appropriate level of working capital, while the company's treatment would include consideration of the ITC.

The company asserts that the position of the public staff concerning this matter could be found to be in violation of the Internal Revenue Code, placing the company in jeopardy of losing millions of dollars in ITC. Clearly, the public staff and the company agree that the ITC unamortized balance should not be directly deducted from rate base, as that would be in violation of the Internal Revenue Code and would subject the company to the loss of the ITC. However, the parties disagree concerning the interpretation of whether or not a reduction to rate base by virtue of a reduction in the working capital allowance, based on the lead-lag methodology, should be considered in the same light as a direct reduction to rate base.

The commission, in its review of this matter, has taken judicial notice of IRS Regulation 1.46-6(b)(ii) which states in part:

‘(ii) In determining whether, or to what extent, a credit has been used to reduce rate base, reference shall be made to any accounting treatment that affects rate base. In addition, in those cases in which the rate of return is based on the taxpayer's cost of capital, reference shall be made to any accounting treatment that affects the permitted return on investment by treating the credit in any way other than as though it were capital supplied by common shareholders to which a ‘cost of capital’ rate is assigned that is not less than the taxpayer's overall cost of capital rate (determined without regard to the credit.)'

Based on the foregoing, and a review of the entire record concerning this matter, the commission concludes that the public staff's adjustment would result in a reduction in rate base, and consequently would be in contradiction to the IRS regulations. Therefore, the commission concludes that the public staff's adjustment related to the appropriate treatment of investment tax credits in the lead-lag study is improper and should not be adopted.

Accordingly, the commission concludes that the proper allowance for working capital in this proceeding is $9,358,000.

The public staff asserted that a new lead-lag study should be implemented. The commission agrees with this recommendation. Therefore, Southern Bell will be ordered to prepare a complete, new lead-lag study for inclusion in its next general rate case filing. This lead-lag study should be based upon a postdivestiture test-year cost of service and should include a recalculation of all revenue and expense lags included therein so that all lags reflect postdivestiture payment practices.

Evidence and Conclusions for Finding of Fact No. 9

The evidence and conclusions for this finding of fact are contained in the testimony and exhibits of company witness McClellan, attorney general witness Wilson, and public staff witness Daniel.

Company witness McClellan defined ‘attrition’ as a term to denote those conditions where the costs of expanding, maintaining and operating a system are increasing more rapidly than the revenues produced from the system or, stated another way, the erosion of earnings resulting from operating at fixed tariffs when unit costs are increasing. Witness McClellan stated that attrition is an unavoidable problem to a regulated utility operating on fixed tariffs while cost levels are continually increasing. Witness McClellan contended that, unless the attrition adjustment is made, the test year will not function adequately in setting rates.

In computing his attrition adjustment, witness McClellan compared adjusted end-of-period revenues and costs per end-of-period access lines to the budgeted revenues and costs per estimated access lines during 1984. In his original testimony, this comparison produced an attrition adjustment of $42,456,190, which he reduced by the $18,783,569 revenue effect of the company's pro forma adjustments to avoid duplication. The net of these amounts was $23,672,621, which was the revenue effect of the attrition adjustment originally included in cost of service by the company. In supplemental testimony, witness McClellan reduced his net attrition adjustment by $16,969,569 to $6,703,052. According to witness McClellan, this reduction was due to revisions to the original budget estimates.

Witness McClellan contended that the attrition adjustment is no different from any other type of adjustment. He stated that he considered attrition a known and measurable change and had measured it. Witness McClellan also contended that the company's budget was the best measure of what costs and revenues were going to be. Witness McClellan did agree that there had been an improvement in the budget outlook and that the only thing certain is that things will change.

Attorney general witness Wilson contended that no attrition adjustment should be allowed because the company's earnings have been more than adequate without such an adjustment, even during inflationary periods. Witness Wilson testified that inflation alone does not guarantee that attrition will be experienced. Dr. Wilson concluded that one must assume no productivity gains, rate structure improvements, sales alterations or other offsets to cost increases. Witness Wilson stated that this was certainly not the case for Southern Bell where a study indicated annual productivity gains of 5.72 per cent. He contended that this makes an attrition adjustment unnecessary, when considered with lower interest rates, improved rate structures, lower rates of inflation, improved operating efficiencies, adjustments for known changes, and an end-of-period base. Dr. Wilson further testified that

an attrition adjustment is not appropriate in North Carolina in view of the fact that the test year is adjusted to end-of-period rate base and to reflect known changes.

Public staff witness Daniel also testified that the attrition adjustment is inappropriate and unnecessary. Witness Daniel stated that the commission sets rates on an end-of-period basis with investment, revenues, and expenses stated on a going level basis and, in addition, allows adjustments for actual changes subsequent to the test year. Witness Daniel cited the company's inclusion of adjustments reflecting 1984 expense levels. Witness Daniel further cited the existence of excess capacity in the investment included in this proceeding which allows the company to add customers and revenues without incurring additional costs. Witness Daniel contended that all of these factors are offsets to attrition.

On cross-examination, witness Daniel testified that many factors would have to be looked at to determine whether attrition exists. Witness Daniel stated that attrition does not come about simply because of a comparison of budget figures for next year with some actual figures for the prior year. Witness Daniel maintained that the commission would have to look at the whole picture of rate-making policy and its effects to determine the propriety of an attrition adjustment.

Witness Daniel also stated his concern with the ability to measure attrition. He cited the dramatic reduction in witness McClellan's measurement from $23 million to $6.7 million due to budget changes and said that the public staff was unable to accept witness McClellan's measurement as reasonable.

Witness Daniel agreed that the phenomenon of attrition exists but said that its measurement requires looking at capital costs, expenses, cost savings, and other things. Witness Daniel cited the costs savings due to employee reductions as an example. Witness Daniel agreed that witness McClellan's approach attempted to capture those costs savings in a simple, broad-brush approach but disagreed that they had been captured. Witness Daniel also stated on cross-examination that Southern Bell had made specific adjustments far beyond the end of the test year and that the company had the opportunity to make any other specific adjustments which it deemed necessary.

Although the commission does not deny that the phenomenon of attrition exists, the statutes of this state and the rate-making policies of this commission recognize the existence of attrition and provide the company the opportunity to reflect the effects of attrition, to the extent they are reasonably quantifiable, in its cost of service.

The commission sets rates based on an end-of-period rate base with revenues and expenses stated on an end-of-period, going level basis. In establishing the rate base, revenues, and expenses in this case, the commission has considered and adopted some adjustments reflecting actual changes after the end of the test year. These adjustments, of necessity, contain attritional elements. Further, there has been ample opportunity for any party to this proceeding, including Southern Bell in particular, to propose specific additional adjustments reflecting actual changes for consideration by the commission.

After carefully considering all of the evidence, the commission concludes that there should be no specific allowance for the possible effects of attrition in addition to those included in the accounting and pro forma adjustments already adopted by the commission. Further, the commission concludes that Southern Bell will have a reasonable opportunity to earn the rate of return approved by the commission without an additional adjustment for possible attrition. The commission, therefore, rejects the company's proposed attrition adjustment.

Evidence and Conclusions for Finding of Fact No. 10

The evidence for this finding of fact is contained in the testimony and exhibits of public staff witness Daniel.

Witness Daniel testified that, as a part of the divestiture process, the company had transferred land and buildings to AT&T at an appraised value, thus realizing a gain on the transfer. He stated that the FCC, in its order in Docket No. 83-551, dated December 15, 1983, ordered that these gains should flow to ratepayers. He also indicated that the company had flowed the gain

on buildings to retepayers by increasing the depreciation reserve, thus reducing rate base, but recorded the gain on the land below the line in Account 360. Witness Daniel proposed that the gain on the land transferred be flowed through to ratepayers as the FCC intended. He proposed a one-year flow through of the $162,375 gain.

On cross-examination, witness Daniel testified that losses, such as abandonment losses, had been charged to ratepayers in other cases and that the public staff would evaluate the propriety of including any losses recorded in a comparable account to Account 360 in the next Southern Bell rate case. He maintained that it was proper, fair, reasonable, and equitable that the gain be flowed to ratepayers.

The commission agrees that the gain on this sale of land should be flowed to ratepayers. The customers of Southern Bell are being required to cover the costs of divestiture through increased rates; therefore, it is only fair and equitable that the few related benefits go to those customers as well.

The commission sees no difference between the gain on buildings and the gain on land. The company is flowing through the gain on buildings by a reduction of rate base. The commission believes that the immediate flow through of the gain on the transfer of land is fair and reasonable. Further, the FCC intended these gains to inure to the benefit of ratepayers, and the commission concurs in that judgment. Therefore, the commission adopts the public staff's proposed adjustment flowing through the $162,375 net gain on land to ratepayers.

Evidence and Conclusions for Finding of Fact No. 11

Company witness Bishop and public staff witness Daniel presented evidence relating to the inclusion of construction work in progress (CWIP) in rate base.

Company witness Bishop proposed that the commission reconsider its position in Docket No. P-55, Sub 816, in which the commission excluded short-term CWIP from the rate base. Witness Bishop testified that most of the end-of-period balance of short-term CWIP was actually in service by December 31, 1983.

Public staff witness Daniel recommended that CWIP should be excluded from rate base because it does not meet the statutory requirement of being necessary to the financial stability of the company. Witness Daniel based his recommendation on the approach taken by the public staff and adopted by the commission in Southern Bell's last general rate case, Docket No. P-55, Sub 816.

In support of his recommendation, witness Daniel stated that the measures of financial stability used by the commission in reaching its conclusion in the last case approximate those which now exist. Witness Daniel offered the following comparison (as corrected at the hearing):

	Current Analysis	**Docket No. P-55, Sub 816**
Pretax interest coverage (excluding AFUDC).....	4.06x	4.08x
AFUDC per cent of intrastate earnings.....	4.16%	3%
CWIP per cent of total utility investment.....	1.6%	1.6%
Standard & Poor's bond rating.....	AA	AA
Moody's bond rating.....	A1	A1

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

When cross-examined on the fact that his measure of CWIP as a percentage of total utility investment included only short-term CWIP, witness Daniel stated that he had calculated such measure in exactly the same manner used in Docket No. P-55, Sub 816, to ensure comparability. Witness Daniel also stated that short-term CWIP was the only CWIP being considered for inclusion in rate base; however, he went on to say that he had no problem with using total CWIP in that calculation. Witness Daniel said that total CWIP would be only about 3.2 per cent of rate base and would not affect his recommendation at all.

Witness Daniel also pointed out that company witness Bishop had not made any of the corollary adjustments to deferred income taxes and revenues or for cost savings which are necessary if the construction is to be included in rate base as plant-in-service.

The commission again agrees with the public staff and concludes that this case is a clear instance in which the company cannot meet the statutory test set forth in GS 62-133(b) that CWIP is necessary to its financial stability. Whether or not CWIP is included in rate base in this proceeding will have virtually no effect on the company's financial position. The company is rated AA by Standard & Poors and A1 by Moody's and will remain financially stable without the inclusion of short-term CWIP in rate base. Therefore, the commission concludes that short-term CWIP should not be included in rate base in this case. Nevertheless, the commission again recognizes that the company should be allowed to recover its cost of capital associated with investment in short-term CWIP. Capitalization of allowance for funds used during construction (AFUDC) will allow the company to recover such costs.

Evidence and Conclusions for Finding of Fact No. 12

Company witness Bishop and public staff witnesses Daniel, Lam, and Winters presented testimony regarding Southern Bell's reasonable original cost rate base. The following table summarizes the amounts which the company and the public staff contend are the proper levels of rate base to be used in this proceeding.

(000'S OMITTED)

Item	Company	Public Staff	Difference
Telephone plant in service.....	$1,478,944	$1,478,944	
Property held for future use.....		128	$ (128)
Short-term CWIP.....	15,595		(15,595)
Plant acquisition adjustment.....	2,985	2,985	
Working capital.....	9,358	7,988	(1,370)
Total original cost.....	1,507,010	1,489,917	(17,093)
Less: Depreciation reserve.....	311,212	311,212	
Customer deposits.....	3,692	3,692	
Accumulated deferred income taxes.....	183,184	183,184	
Unamortized investment tax credits.....	1,427	1,427	

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Total	499,535	499,535	
Original Cost Rate Base	$1,007,475	$990,382	$ (17,093)

As the table shows, the company and the public staff agree on the amounts of telephone plant in service, plant acquisition adjustment, depreciation reserve, customer deposits, accumulated deferred income taxes, and unamortized investment tax credits. The commission, therefore, concludes that these amounts are just and reasonable for setting rates in this proceeding.

The first item on which the witnesses disagree is property held for future use. Company witness Bishop included $128,000 for this item and testified that the company has a definite plan for its use within the next two years and that efficient planning required these expenditures.

Public staff witness Winters testified that he excluded property held for future use from rate base because it does not meet the criterion of being used and useful in providing telephone service to the public as prescribed by GS 62-133. Witness Winters further testified that in prior cases the commission has consistently not allowed property held for future use to be included in rate base.

Based on the evidence presented by the witnesses, the commission concludes that property held for future use cannot and should not be included in rate base in this proceeding.

The final differences relate to construction work in progress and the proper allowance for working capital. The commission found in Finding of Fact No. 11 that construction work in progress should not be included in rate base in this proceeding and in Finding of Fact No. 8 that the proper allowance for working capital is $9,358,000.

In summary, the commission concludes that the proper level of original cost rate base to be concluded in this proceeding is $991,752,000, consisting of the following:

(000'S OMITTED)

Item	**Amount**
Telephone plant in service	$1,478,944
Plant acquisition adjustment	2,985
Working capital	9,358
Total	1,491,287
Less: Depreciation reserve	311,232
Customer deposits	3,692
Accumulated deferred income taxes	183,184
Unamortized investment tax credits	1,427
Total	499,535
Original Cost Rate Base	$991,752

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Evidence and Conclusions for Finding of Fact No. 13

Evidence concerning the proper level of operating revenues was presented through the testimony and exhibits of company witness Bishop, public staff witnesses Garrison, Willis, and Perkerson, and attorney general witness Wilson.

The following table sets forth the amounts proposed by the company and the public staff:

(000'S OMITTED)

Item	Company	Public Staff	Difference
Local service revenues.....	$336,975	$336,975	
Toll and access revenues.....	215,365	232,182	$16,817
Miscellaneous revenues.....	43,337	50,222	6,885
Uncollectibles.....	(3,350)	(3,413)	63
Total.....	$592,317	$615,966	$23,639

As the above table shows, the company and the public staff agree on the appropriate level of local service revenues, which were calculated by multiplying the access lines recorded in the months of April, through December, 1983, by the average local service revenue per access line for the first six months of 1984, and adding actual local service revenue for the first three months of 1984, thereby deriving a 12-month sum of revenue centered around the test period. Attorney general witness Wilson, on the other hand, based his calculation on the end-of-period level of access lines, multiplying it by 1984 revenue per access line and annualizing the result to derive local service revenues of $338,334,684. Witness Wilson contended that if ratepayers are required to pay a return on plant necessary to serve the September, 1983, level of access lines, those same lines should be used in the revenue calculation.

After review of the entire record, the commission concludes that the appropriate representative level of local service revenues to be included in establishing reasonable rates for Southern Bell in this proceeding is $336,975,000.

The parties disagree on the appropriate level of toll and access revenues to be included in this proceeding. The following table shows the levels proposed by the company and the public staff.

(000'S OMITTED)

	Toll	Access	Total
Southern Bell.....	$83,592	$131,773	$215,365
Public Staff.....	98,076	134,106	232,182

The differences between Southern Bell and the public staff are greater with respect to toll revenues. Southern Bell witness Bishop used adjusted per books revenues for the three months of April, May, and June, 1984. In addition, witness Bishop applied a deflation factor to reflect revenues as of September 30, 1983, the end of the test period. Public staff witness Garrison, on the

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

other hand, used actual per books revenues for the period January through June, 1984, and then deflated the annualized result to September 30, 1983. Like the $377,054 of increased toll revenues pursuant to the commission order of August 31, 1984, in Docket No. P-100, Sub 69. Attorney general witness Wilson established the company's representative level of toll revenue based on adjusted revenues for the eight-period January--August, 1984. Unlike the public staff and the company, witness Wilson did not deflate his toll calculation.

The principal questions to be answered with regard to toll revenues are whether adjusted or actual per books revenues should be used and whether the revenues should be deflated to the end of the test period.

All parties of record agree that Southern Bell's toll revenues fluctuate from month to month. Additionally, the record is clear that, during the normal course of operating and accounting for the intrastate toll pool, Southern Bell must make, and does make, adjustments to the booked toll revenues. The record is equally clear that the recognition of and responsibility for toll revenues in this state have changed as the result of divestiture. All of the above facts make it very difficult to establish a representative level of toll revenues to be used in setting rates in this proceeding. Additionally, all of the above facts weaken the reliability of per books amounts in this regard.

The commission has given this issue much consideration and thus concludes that a prudent determination on this matter should take into consideration the most representative data available. Consequently, the commission concludes that the period January, through August, 1984, should be used, because it represents the most data available related to the company's toll revenues since the implementation of divestiture. Concurrently, the commission further concludes that the adjusted toll amounts for this study period should be used because such adjusted amounts reflect the most accurate data available.

As to the contention made by attorney general witness Wilson that intraLATA toll revenues should not be deflated, the commission finds no competent evidence supporting this position, in that Southern Bell's investment is stated at the end of the test year and no attempt has been made by witness Wilson to match revenues, expenses, and investment.

Therefore, based on the foregoing, the commission concludes that the company's appropriate end-of-period intraLATA toll revenues to be used in setting rates in this proceeding are $89,191,181, plus the $377,054 toll revenue increase approved in Docket No. P-100, Sub 69.

The difference between the public staff and the company concerning access revenues involves an adjustment made by company witness Bishop due to a perceived discrepancy between estimated and actual interstate usage by AT&T. As with toll revenues, the public staff and the company agree that access revenues should be deflated to the end of the test year, whereas attorney general witness Wilson disagrees with deflation.

Witness Bishop testified that, during the month of April and the first 24 days of May, access revenues were assigned to the interstate jurisdiction on the basis of estimated minutes of use (the per cent interstate usage or PIU factor) and that, as a result, interstate access revenues were understated and intrastate access revenues were overstated. Witness Bishop further testified that beginning May 25, 1984, Southern Bell and the other BOCs began assigning access usage on the basis of actual minutes of use. On cross-examination, witness Bishop stated that the factors for determining actual usage are developed by taking originating minutes of use and adding in an amount for terminating minutes to arrive at access minutes. Public staff witness Garrison testified, on cross-examination, that actual interstate usage was derived from minutes per message, based on a 1982 annual minutes-of-use study, converted to originating minutes of use using some March 1983 data. Witness Garrison further stated that this usage was determined in basically six categories: interstate MTS, OUTWATS, and INWATS and intrastate MTS, OUTWATS, and INWATS. Witness Garrison also testified that it was appropriate to determine access minutes based on originating minutes of use only for interstate OUTWATS. To determine the reasonableness of this calculation, witness Garrison stated that he compared the results to the interstate access minutes reported by Southern Bell to the NECA settlement pool. Witness Garrison found the level of AT&T's usage in Southern Bell's adjustment in this case to be much less than the level

reported to the pool, which raises doubts as to the validity of Southern Bell's calculation of the actual PIU. Finally, witness Garrison stated that converting to originating minutes of use tends to understate intrastate usage and overstate interstate usage.

Based on the foregoing, the commission concludes that the public staff's position on this matter is appropriate and should be adopted in determining end-of-period access revenues. Further, the commission concludes, consistent with the decision to deflate intraLATA toll revenues, that the interLATA access revenues should be deflated, as proposed by both the company and the public staff.

The commission takes judicial notice of the fact that on November 2, 1984, an order was entered in Docket No. P-100, Sub 65, authorizing an interim reduction of approximately $11 million in the current level of interLATA access charges paid by AT&T Communications of the Southern States, Inc. (AT&T) to the local exchange companies operating in North Carolina. This interim access charge reduction was approved by the commission pending hearing and subject to AT&T filing an acceptable undertaking to refund with 10 per cent interest any portion of the interim access charge reduction of approximately $11 million which the commission may ultimately determine to have been unjustified after hearing. On November 7, 1984, Southern Bell filed an exhibit in Docket No P-100, Sub 65, in conformity with decretal Par 3 of the commission order in that docket dated November 2, 1984, wherein it was stated that the interim access charge reduction would result in a total reduction in access charge revenues to all local exchange companies of $10,887,085 and in a reduction in access charge revenues to Southern Bell of $5,992,000.

Thus, the interim access charge reduction in the amount of $10,887,085 authorized in Docket No. 9-100, Sub 65, will result in Southern Bell's ongoing level of interLATA access charge revenues being reduced by $5,992,000. This amount is equal to $5,783,000 on as deflated basis, consistent with the methodology applied in computing interLATA access charge revenues, discussed hereinabove. Since the company's end-of-period level of interLATA access revenues has been decreased as a result of the commission's order dated November 2, 1984, in Docket No. P-100, Sub 65, the commission concludes that this $5,783,000 reduction should be considered in determining fair and reasonable rates in this proceeding.

To the extent that all or any portion of the $5,783,000 in interim access charge revenue reductions reflected in this case may ultimately be disallowed by the full commission in Docket P-100, Sub 65, Southern Bell will be required to flow any refunds of interim access charges which it receives from AT&T back to the company's North Carolina ratepayers. Furthermore, if it is later determined by the commission that all or any portion of the $5,783,000 in access charge revenue reductions reflected in this case should have been disallowed, Southern Bell will be required to reduce its rates and charges on a prospective basis to reflect such decision by the commission.

Based on all the foregoing, the commission concludes that the appropriate level of end-of-period toll and access revenues to be used in this proceeding is $217,891,000.

The next item on which the company and the public staff disagree is miscellaneous revenues. This difference of $6,885,000 results from an adjustment to directory revenues proposed by public staff witness Perkerson. This item is discussed in Evidence and Conclusions for Findings of Fact Nos. 5 and 6. Based on all the evidence in the record, the commission concludes that the appropriate level of miscellaneous revenues is $46,995,000 for setting rates in this proceeding.

The final item on which the company and the public staff disagree is uncollectibles. The commission concludes, based on the revenues allowed herein, that the appropriate level of uncollectibles is $3,327,000.

The commission finds and concludes based on all of the evidence in the record that, under present rates, the appropriate level of revenues for setting rates in this proceeding net of uncollectibles is $598,534,000.

Evidence and Conclusions for Finding of Fact No. 14

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

The evidence for this finding of fact related to the proper level of general service and license contract (GS&L) expense is found in the testimony of company witnesses Glass, Parish, Wilson, and Bishop, public staff witness Perkerson, and attorney general witness Wilson.

The amounts included by the company in this proceeding for GS&L expenses represent estimated costs for the advice, assistance, and research functions at Bell Communications Research, Inc. (Bellcore); the holding company costs at BellSouth Corporation (BellSouth); and the costs at BellSouth Services.

Company witness Parish testified with regard to some of the changes that have taken place in Southern Bell's affiliated relationships because of divestiture, more specifically the functions, operations, and costs of Bellcore and BellSouth Services. Witness Parish also briefly described how centralized services were previously provided to Southern Bell by AT&T and other affiliates. Witness Parish testified that BellSouth Services, as the BellSouth regional owner of Bellcore, jointly planned and created Bellcore's functions. These functions include such things in the technical area as network design and operations, applied research and information systems development, and such nontechnical things as assistance in finance, governmental affairs, market research, and personnel. Services which either cannot be provided by Bellcore because of the terms of divestiture, such as procurement, or which are better provided on a centralized regional basis are provided by BellSouth Services. Witness Parish testified that the consolidation of staff functions has avoided duplication and kept costs lower than if Southern Bell provided these functions for itself. While witness Parish asserted that Bellcore was engaged only in activities related to exchange services and exchange access service, he admitted on cross-examination by the public staff that the research being undertaken by Bellcore had potential applications for both the regulated and nonregulated or competitive fields and that, with regard to Bellcore projects that would result in new services being provided, no one could guarantee that these new services would be offered in the future through Southern Bell rather than through a separate subsidiary of BellSouth.

Company witness Glass testified with regard to BellSouth Corporation, including the services it provides to Southern Bell and the eight unregulated subsidiaries that have been formed. Witness Glass testified that BellSouth was formed to perform the holding company functions which AT&T has previously performed for Southern Bell and South Central Bell, with the addition of three new functions. Witness Glass described the allocation process by which BellSouth allocated its costs among its subsidiaries and the reasonableness of the allocation of these costs to Southern Bell.

Witness Glass agreed on cross-examination that one of the reasons for divestiture, to functionally separate the telephone operating companies from AT&T, was to eliminate the incentive and ability AT&T had to cross-subsidize and impede competition at the expense of the ratepayer. Witness Glass also agreed that the same possibilities exist for a regional holding company, which uses the same facilities, equipment, and personnel to serve regulated and nonregulated subsidiaries, to overallocate the costs assigned to regulated operations in order to maximize the costs borne by the regulated retepayer.

Company witness Steve Wilson, a Southern Bell employee, testified generally with respect to the services Southern Bell's North Carolina operations obtained from its affiliated relationship with Bellcore, BellSouth, and BellSouth Services. Witness Wilson also provided information with regard to the predivestiture license contract with AT&T. Witness Wilson provided a general overview of the centralized services being provided in the postdivestiture world and described the cost savings to be derived from the centralization.

In response to a request from the commission panel, witness Wilson presented a number of charts and an explanation of how the GS&L expenses in this proceeding related to GS&L expenses prior to divestiture. As part of public staff witness Perkerson's direct testimony, she presented the public staff's position on how the GS&L expenses requested in this proceeding compare to the GS&L expenses prior to divestiture. The company and the public staff gave the same treatment to the expenses of BellSouth Services in this comparison, each treating these costs as most closely associated with the expenses from Western Electric in prior years and excluding them in any comparison of GS&L costs.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

At this point, however, their agreement as to the comparison of the GS&L costs ended. Company witness Wilson, as the chart set out below shows, compared the GS&L expenses in this proceeding in the amount of $10,772,000 to a combination of GS&L expenses, business information systems expense from Bell Labs, cost sharing expense and conduit expenses for 1983 in the amount of $19,992,000 to show that the expenses for GS&L in this proceeding represented a 46 per cent reduction over these expenses for 1983. Witness Wilson also indicated that the $19,992,000 shown for 1983 represented 2.91 per cent of revenues while the $10,772,000 was 1.84 per cent of revenues.

Witness Perkerson in her comparison, as set out in chart form below, showed the allowed level of GS&L in Docket No. P-55, Sub 816 to be $9,785,679, the assumed allowed level of GS&L for calendar year 1983 (if the commission disallowed the same level of expenses as had been disallowed in Sub 816) to be $11,158,637, and GS&L expenses, as presented in this rate proceeding, to be $10,772,146. This comparison shows the expenses for GS&L in this proceeding to be a 10.08 per cent increase over the Sub 816 level of GS&L expenses and only a 3.46 per cent reduction from the 1983 unaudited level provided by the company.

PUBLIC STAFF WITNESS PERKERSON'S AFFILIATED SERVICES EXPENSE COMPARISONS

	Sub 816 (Test Year Ended October 31, 1982)	December 31, 1983 Unaudited	Sub 834 (Test Year Ended September 30, 1983)
License Contract Account 674.	$12,258,010	$13,978,000	$11,303,349
Commission Adjustment.....	2,472,331		
Assumed Adjustment		2,819,363	
BSS removed by Company			531,203
Total.....	$9,785,679	$11,158,637	$10,772,146

Net Reduction = $386,491 (-3.46%)

Net Increase = $986,467 (+ 10.08%)

COMPANY WITNESS WILSON'S AFFILIATED SERVICES EXPENSE COMPARISON

	$000's	Per Cent Net Revenues
1983		
License Contract--AT&T and Bell Labs.....	$13,978	
Business Information Systems--Bell Labs.....	2,493	
Cost Sharing--AT&T and Bell Operating Companies.....	1,837	
Conduit--AT&T and Bell Operating Companies.....	1,684	
Total.....	$19,992	2.91%
1984		

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Bell Communications Research.....	6,747	
BellSouth Corporation.....	4,025	
Total.....	$10,772	1.84%

Net Reduction = $9,200 (-46%)

The commission finds these comparisons interesting in light of the testimony of witness Perkerson regarding the testimony of the company in prior years relating to the clear-cut differences between GS&L, conduit, and cost sharing expenses and the further testimony of witness Perkerson that the company had included in this comparison only portions of the costs related to BIS, cost sharing, and conduit.

The company's witnesses indicated that Southern Bell had been able to select the services and assistance it wanted to be provided in the postdivestiture world and that it was no longer receiving many of the previously provided services. In addition, witness Perkerson testified that a large decrease in GS&L expenses should have occurred based on company provided data showing that the postdivestiture Bellcore costs would reflect a reduction in expenses due to the removal of four levels of management, a reduction in the scope of research, and a movement of operations from expensive New York real estate to a lower rent area in New Jersey. Based on the evidence provided by the witnesses, it does not appear that this reduction has been achieved.

Witness Perkerson recommended that the maximum limit for GS&L expenses, which are the costs from Bellcore, BellSouth Services, and BellSouth Corporation, be set at one per cent of net revenues minus directory revenues, with the exclusion of the core costs at Bellcore and the costs at BellSouth Services from the one per cent limitation. As stated earlier, witness Perkerson excluded BellSouth Services expenses from the one per cent limitation due to its close relationship to predivestiture Western Electric expenses. Witness Perkerson recommended excluding the core expenses at Bellcore from the limitation because these costs are required of all owners of Bellcore's services.

Witness Perkerson further stated that the expenses allowed for license contracts and included for rate-making purposes in the company's last general rate case amounted to 1.25 per cent of net revenues.

Witness Perkerson testified that the expenses which were removed by the application of the one per cent of net revenue maximum represent the same type of expenses removed by the public staff and accepted by this commission in prior rate proceedings. Examples of these expenses are holding company costs, servicing of securities, public relations, lobbying, and contributions, as well as Bellcore expenses which will benefit both the regulated and nonregulated subsidiaries of BellSouth. Witness Perkerson further stated that a 15 per cent return on the Bellcore investment was included as a cost of the service provided by Bellcore, that this return flowed through BellSouth Services and its parent Southern Bell to Southern Bell's parent, BellSouth, and that this return was higher than the return recommended in this proceeding for other investments.

Witness Perkerson further testified that the one per cent of net revenues less directory revenues, excluding the core expenses of Bellcore and the expenses of BellSouth Services, as an interim adjustment designed to negate the possibility of having North Carolina ratepayers fund through rates projected expenses for activities that are not necessary and reasonable for the provision of exchange telephone service.

Dr. Wilson, testifying for the attorney general, also took the position that the level of expenses included in the cost of service for GS&L should be reduced to one per cent of revenues, though without any exclusions. Attorney general witness Wilson stated that though poor documentation existed for Bellcore operations, it was clear that many of the expenses are not directly related to the benefit of current ratepayers and therefore should not be recovered from them. Witness Wilson further stated that Bellcore expenses are very similar to expenses presented to this commission in the past through license contract expenses.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Based on his analysis, Dr. Wilson recommended that Bellcore costs should not be allowed to be recovered through local rates until information is available which clearly shows the purpose of each activity and documentation exists as to which service derives direct benefit. Therefore, witness Wilson stated that local exchange ratepayers should not be required to pay for competitive services. Witness Wilson testified that all affiliated activities not clearly benefiting Southern Bell's current ratepayers should be disallowed for ratemaking purposes. As a transition mechanism, until sufficient data is provided with the company's next filing, attorney general witness Wilson recommended that the commission limit the allowable Bellcore and BellSouth expenses to a combined total of one per cent of Southern Bell's jurisdictional revenues minus uncollectibles.

The commission has weighed all of the testimony provided by the witnesses on this most complex issue. Perhaps more change can be observed in this area, as a result of divestiture, than in any other area of the telephone company's operations. The GS&L expenses have always been nebulous, including a diverse mix of expenses for a wide variety of services, spanning the whole spectrum of telephone service. The issue is even more clouded with the advent of divestiture. Additionally, the commission realizes that the GS&L charges have always included expenses, which this commission has deemed to be inappropriate for inclusion in Southern Bell's cost of service for setting rates in this jurisdiction. The testimony of witnesses Perkerson and Wilson, based on intensive and lengthy investigations, clearly indicates that these kinds of expenses are again being included by Southern Bell in the GS&L charges proposed in this proceeding.

The commission also takes note of the following facts denoted in the record of this proceeding: that the expense levels are projected; that the environment at Bellcore is constantly changing, evidenced by the three changes in expense levels filed in this proceeding and the realignment of projects projected for 1985; that the environment at BellSouth Corporation is also changing, evidenced by the continued creation of new subsidiaries as allowed by Judge Greene; and that the FCC, as a result of investigations resulting from divestiture, has ordered AT&T to refund a substantial amount of money to Southern Bell's ratepayers for GS&L expenses collected in the past which was subsequently determined to have been inappropriate for inclusion as a ratemaking expense.

Based on the evidence provided in this proceeding, the commission concludes that a maximum limit of 1.25 per cent of net revenue less directory revenues for Southern Bell's allocated share of noncore expenses at Bellcore and the expenses at BellSouth Corporation is fair and reasonable. This decision is supported by the evidence of record, provides incentive to Bellcore to implement fair and reasonable cost controls, and ensures that only appropriate expenditures are supported by Southern Bell's intrastate ratepayers in North Carolina. Therefore, the commission concludes that $9,388,000 is the appropriate GS&L expense level to be included in the cost of service in this proceeding.

Evidence and Conclusions for Finding of Fact No. 15

The evidence for this finding of fact is found in the testimony of company witness Bishop, public staff witness Daniel, Perkerson, and Winters, and attorney general witness Wilson.

The following table sets forth the amounts proposed by the company and the public staff:

(000'S OMITTED)

Item	Company	Public Staff	Difference
Operating expenses.....	$298,498	$290,887	$ (7,611)
Depreciation and amortization.....	102,531	102,531	
Taxes other than income.....	51,813	52,161	348

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Income taxes.....	47,182	61,235	14,053
Total.....	$500,024	$506,814	$6,790

The above table does not include the recommendations of attorney general witness Wilson, which will be addressed elsewhere in the commission's discussion of the evidence and conclusions for this finding of fact.

As the table shows, the company and the public staff agree on the appropriate level of depreciation and amortization to be included in this proceeding. Since there was no contravening evidence presented on this item, the commission finds and concludes that $102,531,000 of depreciation and amortization should be included in the cost of service for setting rates in this proceeding.

The first item on which the company and the public staff disagree is operating expense. This difference of $7,611,000 consists of the following items:

(000's OMITTED)

Item	**Amount**
General service and license contract expense.....	$ (2,820)
Charitable contributions.....	(382)
Lobbying expense.....	(130)
Wage premium adjustment.....	(456)
Nonwage divestigure adjustment.....	(940)
Employee losses through June 30, 1984.....	(2,883)
Total.....	$ (7,611)

The commission under Evidence and Conclusions for Finding of Fact No. 14 concluded that the appropriate level of general service and license contract expense to be included in the cost of service in this proceeding is $9,388,000.

The next item on which the company and the public staff disagree is the appropriate level of charitable contributions. The company included $382,000 of charitable contributions in the cost of service, and public staff witness Winters made an adjustment to remove them. In this regard, witness Winters testified that charitable contributions are discretionary with the company and should not be included in a determination of the cost of providing utility service to the public.

In prior rate cases, the commission has consistently excluded charitable contributions from the cost of service. The commission has not been presented with any substantive evidence during this proceeding indicating that charitable contributions should be treated differently. Therefore, the commission finds and concludes that Southern Bell's cost of service should be reduced by $382,000 for this item.

The next item on which the parties disagree is lobbying expense. The company included $130,000 in lobbying expense in the cost of service, and witness Winters made an adjustment to remove it. In this regard, witness Winters testified that ratepayers

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

should not be required to pay rates to cover expenses incurred in an effort to influence legislation or public opinion. Witness Winters further testified that the commission had removed lobbying expense in Southern Bell's last two general rate cases.

The commission finds that no substantive evidence has been introduced in this case indicating that lobbying expense should be treated differently than in the past. Therefore, the commission concludes that lobbying expense in the amount of $130,000 should be excluded from the cost of service in this proceeding.

The next item on which the company and the public staff disagree is the level of wage expense to be included in the cost of service. Company witness Bishop addressed this issue as did witness Winters and attorney general witness Wilson. All parties agreed that base wages should be increased by a premium factor to reflect the effects of overtime and bonuses on the level of wages to be included in the cost of service. The parties did not agree, however, on the method which should be used to calculate the premium factor.

Witness Bishop calculated his premium factors based on the weighted average of the test-period monthly premium factors, excluding the month of August. Witness Bishop testified that he omitted the month of August because of a strike by the Communications Workers of America which caused that month to be nonrepresentative.

Witness Winters calculated his premium factor based on the weighted average of the 12 monthly factors immediately preceding the month of August. Witness Winters contended that the company's workload did not return to normal during the month of September and, consequently, the months of both August and September were unrepresentative and inappropriate for determining the premium factor. Witness Winters further testified that the relationship between actual wages paid and monthly wage rates was cyclic and that he used the twelve months immediately prior to the strike to capture this effect. Witness Winters testified that months after the close of the test period, although high, were also unrepresentative, due to the final true-up for divestiture and severe weather.

Attorney general witness Wilson calculated his premium factor based on average monthly wage rates rather than end-of-month wage rates and excluded August and September from his calculations because of the strike. In addition, witness Wilson excluded directory employee bonuses from his calculation, reasoning that bonuses would not be included in wage expense during 1984.

The commission finds that three questions are involved in the premium factor issue. They are as follows:

1. What are the proper months to include in the weighted average?

2. Should end-of-month or average monthly wages be used in the calculation?

3. Should directory employee bonuses be used in the calculation?

Based on the evidence presented, the commission concludes that the month of August, 1983, is unrepresentative due to the strike and therefore should not be included in the calculation of the premium factor. The commission further concludes that, in keeping with the objective to determine an appropriate level of wage expense related to the test year used in this proceeding, the premium factor should be calculated based on the weighted average of the 11 monthly factors occurring during the test year, excluding August. Therefore, the commission concludes that the public staff's adjustment for this item should be denied.

In regard to attorney general witness Wilson's contention that average monthly wage rates should be used in the adjustment spoken to above, the commission finds that, since employees generally leave at the end of a month, as testified to by the company, end-of-month wage rates are appropriate for setting rates in this proceeding.

Resolution of the issue of directory employee bonuses raised by witness Wilson requires further analysis of the company's wage adjustment. In the company's calculation of divested wages, directory employee bonuses were removed from the cost of service.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Furthermore, the company adjusted its premium factors to reflect the exclusion of these bonuses. Based on the above, the commission concludes that it is not necessary to remove the directory employee bonuses from the premium factor calculation.

The next item which must be addressed is the adjustment made by witness Winters to reduce nonwage expense related to divestiture. Witness Winters testified that the company divested wagerelated, nonwage expenses for employees lost through divestiture but did not reduce nonwage expense for employees lost for other reasons during the test year.

As part of its divestiture adjustments, Southern Bell calculated the amount of nonwage expense divested based on a plant split factor and a factor based on the divested wages in various accounts divided by the end-of-period calculated wages. The public staff used a similar calculation to remove nonwage expense from test-year expenses because Southern Bell lost some employees prior to divestiture. Public staff witness Winters stated that the public staff's 'adjustment to nonwage expense is designed to eliminate that portion associated with employees who left prior to divestiture. It is the public staff's contention that this relationship holds true for the wages lost during the test period as well.'

The public staff offered no evidence to support its premise that Southern Bell's nonwage expense decreased due to the loss of employees through normal attrition during the test year. The commission concludes that the relationship between nonwage to wage expenses lost due to divestiture of major segments of Southern Bell's business does not extend to expenses lost upon the permanent reduction of a limited number of employees over extended periods of time.

An example used during the cross-examination of witness Winters illustrates this principle. At divestiture, Southern Bell transferred all of its long-distance operators to AT&T. This meant that with respect to a particular long-distance office, at divestiture Southern Bell transferred the operators, the building, the equipment, the parking lot, and all other costs related to the long-distance operation to AT&T. Southern Bell transferred part of operator training expense, office supplies, janitorial expense, overhead, electric and telephone expense, and data processing expense among others to AT&T. There is no question that at divestiture much more than the traditional wage expense was transferred with the transfer of these operators.

Based on the foregoing, the commission determines that the public staff adjustment to remove nonwage expense due to the loss of employees during the test year is inappropriate and therefore rejects this adjustment.

The next item to be considered is the adjustment made by witness Winters to reduce wage expense for loss of employees through June 30, 1984. Witness Winters testified that North Carolina employee levels were reduced by approximately 168 employees between December 31, 1983, and June 30, 1984. This testimony was uncontroverted. Witness Winters further testified that the employees were lost for the following reasons:

20--Reduction of business office personnel due to decrease in customer inquiries

11--Automation of directory assistance operations

13--Increasing the span of control of some management employees

20--Conversion of some central offices to electronic from electro-mechanical

104--Attrition due to an ongoing effort to align force levels with restructured operations

The question related to this issue is whether the adjustment made by witness Winters is in violation of the test period concept of matching revenues, expenses, and investment. Witness Winters addressed this issue on cross-examination and gave the criteria which should be used in deciding what constitutes an appropriate pro forma adjustment under this concept. He stated that the underlying purpose of the test period concept is the determination of the relationships between investment, revenues, and expenses which are necessary to provide a given level of service and that pro forma adjustments are appropriate only if they

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

are related to the test period level of service. According to Mr. Winters, pro forma adjustments which are related to customer growth or usage presuppose a change in the level of service and should not be adopted for rate-making purposes. He further testified that the reasons provided by the company for the loss of employees were not related to decreased numbers of customers or decreased usage of the telephone network. Witness Winters further testified that in his opinion the test-period level of service could be rendered with 168 fewer employees.

The commission agrees with Mr. Winters' rationale and finds that his adjustment does not violate the test period concept. Therefore, the commission concludes that end-of-period wage expense should be reduced by $2,879,000, after giving consideration to the commission's decision, discussed hereinabove, to deny the wage premium adjustment proposed by the public staff.

In order to arrive at the appropriate level of operating expense, the commission must now consider the adjustments proposed by Dr. Wilson which were not addressed by the public staff. These adjustments relate to the frozen level of CPE phase-out, early retirement and separation incentives, and 'get-ready' costs.

Regarding CPE phase-out, Dr. Wilson testified as follows:

'In accordance with the FCC determination of February 26, 1982, adopting the joint board's recommendation, terminal equipment settlement payments will be phased out over a 60-month period, and the starting balance of the equipment account will be frozen, even though terminal equipment investments were entirely removed from the Bell operating companies in 1984 as a result of divestiture.

'This means that the CPE costs that existed in 1982 will be removed from the separations process slowly over a five-year period. Local ratepayers will therefore obtain a benefit via the separations process.

'[I]n February 1982 the FCC in Docket No. 80-286 adopted the joint board's recommendation to phase out the inclusion of terminal equipment in *interstate* costs. The FCC stated that the amounts would be frozen at 1982 levels, specifically they stated that: 'Under this plan, which is coordinated with the commission's implementation date for the bifurcated detariffing of CPE, no investment or expenses associated with CPE incurred after January 1, 1983, would be allocated to interstate operations. *The amounts in the CPE plant amounts on the books as of that date, and the average amounts in related expense accounts for the previous year, would constitute a 'base amount' for separation purposes*. The base amount would be reduced at the rate of one-sixtieth per month for a maximum of five years.'

'The FCC action freezes the 1982 levels and reduces that level by one-sixtieth per month. The company's calculation does not present the amount assigned to interstate for CPE in 1982.'

Dr. Wilson went on to state that he believed that the company did not properly calculate the frozen 1982 amounts and did not use the authorized interstate rate of return to develop the intrastate revenue requirement offset.

The company contends that it has calculated the revenue impact of CPE phaseout as prescribed by the joint board order and that its method is reflected in current toll and access revenue settlement procedures.

In its proposed order submitted in the proceeding, the public staff did not adopt this position of witness Wilson. Based on review of the entire record, the commission concludes that it would be inappropriate to allocate more phase-out expenses and investment to the interstate operations when such allocations cannot be recovered through the settlement process. The commission finds that this issue is basically a separations question that affects all telephone companies in the state and that it would be unfair and unreasonable to adopt witness Wilson's adjustment in this case.

Regarding early retirement incentives, attorney general witness Wilson testified as follows:

'The supplemental income protection plan (SIPP) and the management income protection plan (MIPP) were instituted by Southern Bell to encourage early retirement of employees due to a surplus force condition. The payments which will be made to the employees who took MIPP or SIPP were charged to expense in 1982 and 1983.

'Although the total liability for the 1982 and 1983 MIPP and SIPP programs was charged to expense in 1982 and 1983, Mr. Bishop adjusted test-year operating expenses to reflect the estimated cash payments to MIPP and SIPP employees in 1984.'

Southern Bell witness Bishop stated on rebuttal that Dr. Wilson's statements were in error and that for intrastate purposes the MIPP and SIPP liability is expensed in the year paid to employees. Witness Bishop further stated that these payments will be made through 1987. During cross-examination on his rebuttal testimony, Mr. Bishop stated that the amount of MIPP and SIPP payments made during 1984 were at least as great as those made during 1983. He stated that the SIPP program would continue and that the MIPP program would continue in another form into the future.

After a review of the entire record in this proceeding, the commission concludes that the company's rate-making treatment of MIPP and SIPP payments is proper. The commission also notes that there is little or no evidence in the record to support the contention that the company's retirement incentives are unreasonable or that retirement incentives per se are not in the interest of ratepayers.

Dr. Wilson also presented testimony in regard to 'get ready' expenses. His direct testimony on this subject is quoted below:

'Southern Bell is attempting to pass through to ratepayers over a five-year period incremental divestiture costs which were incurred while SB was still owned by AT&T. The expenses should be disallowed. Divestiture enabled AT&T to settle proceedings brought against it by the U. S. Justice Department for violations of antitrust law. Since divestiture was conceived to protect the interests of shareholders, its costs should be borne by them. Therefore, SB's operating expenses should be reduced by $230,208 to eliminate the first year amortization proposed for this case.'

The commission does not accept Dr. Wilson's contention that divestiture was conceived solely to protect the interests of shareholders. The opening up of portions of the telephone industry to competition is expected to result in lower competitive prices to the users of those services. The commission is not convinced that 'get ready' costs should not be amortized to the cost of service in this proceeding.

For the foregoing reasons, the commission concludes that the appropriate level of operating expenses for setting rates in this proceeding is $293,571,000.

The next item of operating revenue deductions on which the parties disagree is taxes other than income taxes. The $348,000 difference shown in the table set forth above is attributable to the payroll taxes and gross receipts taxes related to adjustments made by the public staff to wages, directory revenues, and toll revenues. The commission has not adopted the position of any party in regard to wage and revenue levels, and, therefore, the commission finds that the appropriate level of taxes other than income for setting rates in this proceeding is $51,491,000, based on the commission's decisions denoted above.

The next difference in operating revenue deductions is income taxes. This difference results from the public staff's adjustment to operating revenues and expenses, to the amortization of investment tax credits, and to interest expense for income tax purposes.

Public staff witness Winters increased the amortization of investment tax credits and thereby reduced the level of income tax expense. In regard to this adjustment, Mr. Winters testified as follows:

'My purpose is to show the commission the proper amount of amortization of investment tax credits which results from the use of 'equal life group' depreciation rates. Also, I proposed that the amortization be based on the latest information available.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Since investment tax credits must be amortized ratably over the life of the property giving rise to the credit, a change in the depreciable life of property must be reflected, in my opinion, in the calculation of the amortization of investment tax credits.

'Company witness Bishop calculated an adjustment to reflect depreciation based on 'equal life group' rates; however, he did not recalculate the amortization of investment tax credits to reflect this change, nor did he update his calculation for known changes.'

Mr. Winters further testified that he based his calculation on the level of amortization for calendar year 1983 less the amortization on additions in October, November, and December 1983. He also testified that his level of amortization is based on the properties used in the investment tax credit calculations included in the company's 1983 income tax return.

The company's adjustment to use the 'equal group life' method of calculating depreciation expense was not contested in this proceeding. Section 46(f) of the Internal Revenue Code states that investment tax credits must be amortized based on the depreciable life of the property on which investment tax credits are taken. Since the adoption of 'equal life group' depreciation rates increases depreciation expense and decreases the depreciable life of the property, it is appropriate and necessary to increase the amortization of the investment tax credits. Therefore, the commission concludes that income tax expense should be reduced by $574,000 for this item.

As to public staff witness Winters' use of data from Southern Bell's tax returns in order to determine the appropriate level of investment tax credit amortization, the commission notes that witness Winters stated that he had not used information from the company's tax returns in any other adjustment that he had made. Further, it is not clear in the record whether there are other material differences between the amounts in the company's books and the amounts shown on the company's related tax returns that could be considered for rate-making purposes. Based on the foregoing and the entire record, the commission concludes that this portion of the adjustment to the amortization of investment tax credits made by witness Winters should be denied.

The commission has not entirely adopted the level of rate base, revenues, and expenses presented by any party to this proceeding. Therefore, the level of interest expense and taxable income before interest used in calculating the company's end-of-period level of income taxes should be based on the capital structure, capital costs, rate base, revenues, and expenses found to be proper elsewhere in this order.

Based on the foregoing, the commission concludes that the appropriate level of income tax expense to be included in the cost of service in this proceeding is $52,520,000.

The commission further concludes that the appropriate level of operating revenue deductions to be included in Southern Bell's cost of service is $500,113,000 calculated as follows:

(000's OMITTED)

Item	**Amount**
Operating expenses	$293,571
Depreciation and amortization	102,531
Taxes other than income	51,491
Income taxes	52,250
Total	$500,113

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Evidence and Conclusions for Finding of Fact No. 16

The evidence for this finding of fact is found in the testimony of company witnesses Vander Weide and Dean, attorney general witness Wilson, Department of Defense witness Langsam, and public staff witness Johnson.

Company witness Vander Weide, after a review of the effects of changing economic conditions in the telecommunications industry and a review of the economic conditions in the capital markets, proceeded to determine the cost of common equity using two methods. The first method, the discounted cash-flow (DCF) model, was applied to three groups of companies which, in his opinion, were comparable in total risk to Southern Bell. The three groups consisted of nine gas and electric companies, eight independent telephone companies, and the seven recently divested Bell regional holding companies. Witness Vander Weide, using the quarterly version of the DCF model and adding a 5 per cent allowance for flotation costs, found Southern Bell's cost of equity to be in the range of 16 per cent to 17 per cent. Witness Vander Weide's second method, the risk premium method, found Southern Bell's cost of equity to be at least 17.5 per cent. This 17.5 per cent resulted from an expected yield on Southern Bell's long-term bonds of at least 12.5 per cent and a risk premium of 5 per cent. The risk premium of 5 per cent was derived from a study comparing actual stock returns over bond returns for the last forty-six years and after considering several risk premium studies by other economists. The DCF and risk premium results caused witness Vander Weide to find the investors' required return to be in the range of 16.5 per cent to 17.5 per cent. Witness Vander Weide recommended that Southern Bell be allowed a fair return of 16.5 per cent on equity capital in his original prefiled testimony, but stated during his direct examination that a 17 per cent return on equity more closely approximates what investors require on an equity investment in Southern Bell due to an increase in interest rates since his original study.

Company witness Dean testified on the cost of common equity and the overall cost of capital to Southern Bell. Witness Dean relied upon three methods to determine the cost of common equity. Witness Dean's first method, the opportunity cost/comparable earnings method, applied to three groups of industrial and a group of eight telephone companies, led him to judge the cost of equity capital for Southern Bell to be 16 per cent to 17.5 per cent, ignoring the comparable earnings for the telephone group in his conclusions. Witness Dean's second method, the DCF method, was applied only to Rochester Telephone Company. From examining Rochester's dividend yield and historic and forecasted growth rates, witness Dean found the cost of equity capital to Rochester to be 16.72 per cent to 17.84 per cent which he concluded also equaled Southern Bell's cost of capital. Witness Dean's risk premium study comparing the differences between the average required return on equity for the group of eight telephone companies and the yields on 20-year U. S. Treasury bonds over the ten-year period 1974-83 indicated a risk premium of at least 5.5 per cent over U. S. Treasury bonds. This premium, when added to 20-year bond rates of 11.32 per cent and 11.95 per cent, indicated the market cost for equity to be in the range of 16.82 per cent to 17.5 per cent. By combining his 16.5 per cent with Southern Bell's adjusted capital structure as of May 31, 1984, which included a debt ratio of 45.2 per cent at an embedded cost of 9.50 per cent and a corresponding common equity ratio of 54.8 per cent, he recommended an overall cost of capital of at least 13.33 per cent.

Attorney general witness Wilson testified that the after-tax common equity returns of 13 per cent to 14 per cent realized by Southern Bell exceeded returns elsewhere in the economy, even in the competitive unregulated sector. Witness Wilson also stated that the company would be able to finance all construction from retained earnings and other internal funds even without any rate increases in this case. He cited BellSouth's dividend yield of approximately 8 per cent, which, when combined with a reasonable growth estimate in the 3 per cent to 5 per cent range, produced a DCF cost of equity below 14 per cent. In his opinion, it was clear that an equity return allowance for Southern Bell above 14 per cent would be excessive. During cross-examination, Dr. Wilson testified that BellSouth had a Value Line Safety Rank of 1 and a market price approximately equal to the book value of its stock. Witness Wilson testified that, if he were making a specific recommendation for the cost of equity, he would probably recommend 13.5 per cent, with 13 per cent to 14 per cent being the range.

Department of Defense witness Langsam performed five separate studies: a comparable earnings study, a DCF analysis, a risk premium study, a cost-benefit analysis of whether an AAA bond rating is worth the additional money ratepayers would have to pay, and study to determine the proper capital structure for ratemaking purposes. In his comparable earnings study, witness

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Langsam examined five groups of companies, three groups representing the economy as a whole and two groups representing utilities. After examining returns of the three groups representing the economy as a whole, he concluded that a comparable return for the company would be 13 per cent to 14 per cent. Using Standard & Poor's Telephone Companies suggested to him that the appropriate return on BellSouth's equity is 14 per cent to 15.5 per cent, and using Moody's 24 Utilities as the benchmark the appropriate return is 13 per cent to 14 per cent. The DCF result was 13 per cent to 14.7 per cent for BellSouth, which he then adjusted to 13 per cent to 13.8 per cent for Southern Bell due to its lower risk. Witness Langsam's risk premium study suggested to him that the cost of equity is between 14.1 per cent to 14.5 per cent for Southern Bell. Based upon the results of the above studies, it was witness Langsam's opinion that the cost of equity to Southern Bell is in the range of 13.5 per cent to 14.5 per cent. Therefore, witness Langsam recommended to the commission the midpoint of 14 per cent. Witness Langsam's cost-benefit study suggested to him that the most efficient bond rating is in the single A to double A range. In witness Langsam's opinion, the overall cost of capital to Southern Bell is 11.7 per cent, which was calculated from his recommended 50 per cent debt at a cost rate of 9.43 per cent and 50 per cent equity at a cost of 14 per cent.

Public staff witness Johnson used two separate and distinct methods for determining the cost of equity. In his first study, witness Johnson examined the earnings of over 1,000 firms in over 40 different industries and found that the cost of equity to the typical unregulated firm is currently about 15 per cent to 15.5 per cent. After performing an analysis of Southern Bell's risk relative to that of other firms, including a study of divestiture-related effects, witness Johnson concluded the the company faces much less equity risk than the average unregulated firm and less risk than the average electric utility. Therefore, he developed equity cost ranges of 15 per cent to 15.5 per cent for the average unregulated firm, 14 per cent to 15 per cent for the average electric utility, 13 per cent to 14 per cent for the average telephone utility, and 13 per cent to 13.5 per cent for Southern Bell's North Carolina operations. Witness Johnson's second method, a market analysis, considered many factors, including the market-to-book ratios, relative dividend yields, spread theory, and, particularly, earnings/price ratios and the DCF approach. Dr. Johnson examined several of these factors for BellSouth, Moody's 24 Utilities, AT&T, the four largest independent telephone holding companies, and the various regional Bell holding companies. From this data comparison, he concluded that the current cost of equity capital to BellSouth is in the range of 13.5 per cent to 15.1 per cent after factoring in the investor return requirement by 4 per cent to account for issuing costs. Giving reasonable weight to both methods and recommending that neither end of the ranges be employed by the commission, witness Johnson recommended a 14 per cent cost of equity for Southern Bell. When witness Johnson applied the 14 per cent cost of equity to a 55 per cent equity ratio and a 9.5 per cent cost of debt to the 45 per cent debt ratio, he arrived at an overall cost of capital of 11.98 per cent.

The determination of the appropriate capital structure and fair rate of return for Southern Bell is of great importance and must be made with great care because whatever return is allowed will have an immediate impact on Southern Bell, its stockholders, and its customers. In the final analysis, the determination of a fair rate of return must be made by this commission, using its own impartial judgment and guided by the testimony of expert witnesses and other evidence of record. Whatever return is allowed must balance the interest of the ratepayers and investors and meet the test set forth in GS 62-133(b)(4):

'. . . (to) enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.'

The rate of return allowed must not burden ratepayers any more than is absolutely necessary for the utility to continue to provide adequate service. The North Carolina supreme court has stated that the history of GS 62- 133(b):

'. . . supports the inference that the legislature intended for the commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States . . .' North Carolina ex rel. Utilities Commission v Duke Power Co. (1974) 285 NC 377, 6 PUR4th 390, 398, 206 SE2d 269.

The nature of the evidence in a case such as this makes it extremely difficult to balance all of the opposing interests, since much, if not all, of the evidence is based on individual witnesses' perceptions and interpretations of trends and data from the capital market. The commission has considered carefully all of the relevant evidence presented in this case, with the constant reminder that whatever return is allowed will have an immediate impact on the company, its stockholders, and its customers. The commission must use its impartial judgment to ensure that all the parties involved are treated fairly and quickly.

Based upon the foregoing and the entire record in this proceeding, the commission finds and concludes that the fair rate of return that Southern Bell should have the opportunity to earn on its original cost rate base is 12.51 per cent. Such overall fair rate of return is based upon an embedded cost of long-term debt of 9.5 per cent and will yield a fair and reasonable teturn on the company's common equity capital of 15 per cent. The commission further concludes that the appropriate capital structure to be used in this proceeding is the adjusted capital structure actually experienced by the company as of May 31, 1984, as follows:

Item	Per Cent
Long-term debt.....	45.2%
Common equity.....	54.8%
Total.....	100.0%

The commission cannot guarantee that the company will, in fact, achieve the level of return herein found to be just and reasonable. Indeed, the commission would not guarantee it if it could. Such a guarantee would remove necessary incentives for the company to achieve the utmost in operations and managerial efficiency. The commission believes, and thus concludes, that the level of return approved herein will afford the company a reasonable opportunity to earn a reasonable return for its stockholders while providing adequate and economical service to ratepayers.

Evidence and Conclusions for Finding of Fact No. 17

The commission has previously discussed its findings and conclusions regarding the fair rate of return which Southern Bell should be afforded the opportunity to earn.

The following schedules summarize the gross revenues and the rates of return which the company should have a reasonable opportunity to achieve based upon the increases approved herein. Such schedules, illustrating the company's gross revenue requirements, incorporate the findings and conclusions heretofore and herein made by the commission.

SCHEDULE I

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NORTH CAROLINA INTRASTATE OPERATIONS

DOCKET NO. P-55, SUB 834

STATEMENT OF OPERATING INCOME TWELVE MONTHS ENDED SEPTEMBER 30, 1983

(000'S OMITTED)

Item	Present Rates	Approved Increase	Approved Rates

Operating revenues			
Local service	$336,975	$50,044	387,019
Total and access	217,891		217,891
Miscellaneous	46,995		46,995
Uncollectibles	3,327	365	3,692
Total operating revenues	$598,534	$49,697	$648,213
Operating revenue deductions			
Current maintenance expenses	$140,989		$140,989
Depreciation and amortization	102,531		102,531
Traffic expense	21,262		21,263
Commercial expense	38,256		38,256
General expense	29,499		29,499
Relief and pensions	31,754		31,754
General services and licenses	9,388		9,388
Other miscellaneous expenses	22,423		22,423
Taxes other than income	51,491	2,981	54,472
Income taxes	52,520	22,994	75,514
Total	$500,113	$25,975	$526,088
Income From Operations	98,421	23,704	122,125
Other income	1,983		1,983
Net Operating Income	$100,404	$23,704	$124,108

SCHEDULE II

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NORTH CAROLINA INTRASTATE OPERATIONS

DOCKET NO. P-55, SUB 834

STATEMENT OF RATE BASE AND RATE OF RETURN TWELVE MONTHS ENDED SEPTEMBER 30, 1983

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(000'S OMITTED)

Item	Amount
Telephone Plant in Service	$1,478,944
Plant Acquisition Adjustment	2,985
Working Capital	9,358
Total	$1,491,287
Less: Depreciation Reserve	311,232
Customer Deposits	3,692
Accumulated Deferred Income Taxes	183,184
Unamortized Investment Tax Credits	1,427
Total	499,535
Original Cost Rate Base	$991,752
Rates of Return	
Present	10.12%
Approved	12.51%

SCHEDULE III

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NORTH CAROLINA INTRASTATE OPERATIONS

DOCKET NO. P-55, SUB 834

STATEMENT OF OPERATING INCOME TWELVE MONTHS ENDED SEPTEMBER 30, 1983

(000'S OMITTED)

Item	Capitalization Ratio (%)	Original Cost Rate Base	Embedded Cost (%)	Net Operating Income
		Present Rates--Original Cost Rate Base		
Long-term debt	45.20	$448,272	9.50	$42,586
Common equity	54.80	543,480	10.64	57,818
Total	100.00	$991,752		$100,404
		Approved Rates--Original Cost Rate Base		

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Long-term debt	45.20	$448,272	9.50	$42,586
Common equity	54.80	543,480	15.00	81,522
Total	100.00	$991,752		$124,108

Evidence and Conclusions for Finding of Fact No. 18

The evidence for this finding of fact is found in the testimony of company witnesses Savage and Hart, public staff witness Willis, attorney general witness Wilson, legal services witness Cooper, and Carolina Utility Customers Association witnesses Brown, Venable, Young, and Jones. In addition, there were several public witnesses who appeared and testified in opposition to specific rate proposals and increases.

Witness Savage described the company's overall pricing policies which were followed in developing the proposed rate schedules. In general, these policies and principles are as follows: (1) discretionary services are priced to cover the costs and, where possible, to provide a contribution toward the company's overall revenue requirement so as to keep basic rates lower than they would be otherwise; (2) to the extent practical, customers responsible for costs should be the source of revenues to recover those costs; (3) consideration should be given to relative costs, demand for service, equity in the distribution of charges, and the development objectives of basic service; and (4) the rate structure should achieve a balance of administrative ease and acceptability and understandability by customers.

These pricing principles, according to witness Savage, were subsequently applied to formulate rate changes for basic exchange service, local directory assistance, service charges, special assembly items, coin telephone, telephone answering service facilities, key and pushbutton telephone service, private branch exchange service, central office nontransport service, miscellaneous and auxiliary equipment, customer provided terminal equipment, obsolete services, and intraexchange private-line services. Basic flat rate increases of $5.75 per month for residential individual lines and $9.95 per month for individual line business rates were recommended by witness Savage along with pricing relationship changes for PBX flat and message rate trunks, business one-party, and Centrex-CO GP ‘A’ exchange access lines, and the regrouping of 14 of the company's exchanges. Additionally, witness Savage presented an illustrative ‘lifeline’ rate schedule for possible inclusion into his proposed rate structure. The company filed tariffs with its initial application, which, if adopted, would produce an increase of approximately $122 million in annual revenues. It later revised the proposed revenue requirement downward to $95,736,058.

Company witness Hart described Southern Bell's private-line cost analysis, which quantifies the current direct costs of private-line channel services. Direct costs, he stated, are costs resulting from providing additional units of service and include both recurring and nonrecurring costs. Witness Hart also stated that Southern Bell's cost studies are used to test the appropriateness of prices for private-line services and to identify areas where additional efficiencies might be gained to reduce the costs of these services.

In supplemental testimony, witness Hart presented the most current results of the company's cost reduction program, which showed lower total costs for various private-line services than had been filed with his initial testimony. Nevertheless, witness Hart stated that private-line rates are still priced below cost.

Witness Hart further stated that the net revenue effect of the proposed rates for private-line service in this case is approximately $8.1 million or about 50 cents per month per residential customer. Witness Hart determined this by using the private-line cost analysis, which, he agreed on cross-examination, included an overall cost of capital of 14.7 per cent. If the company's rates were accepted, witness Hart testified that contribution could flow to residential service from this specialized and valuable business service.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Public staff witness Willis expressed his recommendations on basic local exchange rate relationships, local directory assistance, regrouping of exchanges, coin telephone service, direct inward dialing, equipment for the hearing impaired, PBX Touch-Tone rates, EAS differentials, and optional local measured service. Witness Willis also gave his recommendation on the company's proposal to charge for the installation of inside wiring and its maintenance on a time and materials basis.

Witness Willis stated that the company's proposals to change basic exchange pricing relationships would have the effect of shifting $11,975,648 of additional revenue responsibility onto the residential one-party subscriber, which is equivalent to a monthly increase of approximately $1.08. It was the opinion of witness Willis that the proposed changes would cause revenue shifts too severe to consider in this proceeding. To moderate the effect of these changes, witness Willis recommended the pricing relationships shown below:

PBX Trunks

Flat Rate	180% of IFB
Message Rate	65% of Flat Rate PBX Trunk
Business IFB	266% of IFB
Centrex-CO GP ‘A’ Access Line	15% of Flat PBX Trunk

For message rate service, the company proposed to reduce the allowance of 75 messages per month to 50 messages per month, with which public staff witness Willis concurred.

Concerning the company's proposal to increase its directory assistance charge from 20 cents to 50 cents per request, witness Willis recommended that the charge be set at 25 cents per request and that the allowance of five inquiries per month without charge be reduced to three. Witness Willis stated that the average subscriber requires about one and one-half inquiries per month. Witness Willis' calculation of an increase in revenues of $1,078,060 under this proposal excluded repression of units, which was assumed by the company.

Witness Willis also recommended approval of the company's proposal to regroup 14 exchanges which have already grown in calling scope beyond the upper limit of their current rate groups.

Concerning the company's proposals for time and materials pricing for inside wiring and maintenance activities, witness Willis explained that the restructured tariff was essentially identical to the one proposed in the last rate proceeding, which was opposed by the public staff. Under cross-examination, witness Willis commented that time and materials charges could cause inequities to the company's subscribers. Witness Willis stated that, based on his experience as an outside plant foreman, an identical jub performed by two different people could require highly different times, thereby causing a disparity in the charges. Witness Willis also stated that research conducted by the public staff under his direction revealed that there was no effective competition for the installation of residential premises wiring and that the small number of competitors identified by the public staff charged on a flat-rate basis. Witness Willis recommended that the commission disallow the company's proposals for time and materials pricing for inside wiring and maintenance in this docket.

Witness Willis recommended an approximate 5 per cent increase in service charges. Witness Willis stated that the public staff's position is that these charges should be kept at an affordable level to enable as many customers as possible to obtain telephone service, noting that Southern Bell's present minimum charge of $42.10 for connecting residential service is one of the highest in the state among the regulated companies.

With respect to coin telephone service, witness Willis recommended that the charge for a local call be increased from 20 cents to 25 cents per local call. Witness Willis stated that his calculation of the resulting revenues differed from those of Southern

Bell because of the company's failure to bring its local message units to an end-of-period level and because of the company's use of an estimated 7 per cent message repression. Upon cross-examination, witness Willis asserted that including the effects of an assumed repression of units was a type of forecasting which was incomplete and particularly dangerous since it considers the effect of price changes but not the effects of other variables which influence future units of service. Witness Willis stated that local coin messages were growing today for reasons other than price effects at a rate of 14 per cent to 15 per cent. It was his belief that there would be an increase in message units even with the effects of a price change. For this reason, witness Willis calculated an increase of $2,963,510 in pay station revenues, which was stated on an end-of-period level without an assumed repression of units.

In considering the company's proposal to transfer customers presently being billed under its obsolete direct inward dialing (DID) service tariff to its general offering DID tariff, witness Willis stated that this change would effect an overall increase for these customers of approximately 29 per cent, but, due to the differences in structure between the two tariffs, individual customers could experience increases or decreases ranging from approximately - 64 per cent to +90 per cent. To offset the magnitude of the potential increases in customers' billings, witness Willis recommended that the obsolete ID tariff be maintained and receive the same percentage increase as basic local exchange rates. It was the contention of witness Willis that this action would cause the obsolete tariff billings to move closer to the billings of the general offering tariff, which would allow future conversion between the two DID tariffs to be more easily implemented.

Witness Willis stated that the company had proposed a 172 per cent increase in monthly rates for equipment used by the hearing impaired. Witness Willis recommended that the monthly rates for this equipment receive the same overall percentage increase granted by the commission in this docket for residential local exchange service.

With regard to the company's proposal to reformat its rating procedure for Touch-Tone service used by Centrex and PBX customers, witness Willis agreed with the company's proposal to place this service on a trunk basis rather than keep it on a trunk and station basis. The net revenue effect of this proposal is a reduction of $317,813 and $3,841 for Centrex and PBX trunk users, respectively.

Witness Willis recommended that the local exchange differentials paid by the company's Claremont and Lenoir exchanges, which total $112,270 per year, be eliminated. It was the position of witness Willis that the rate differentials were proper in the polling of subscribers to determine the existence of a community of interest within an exchange. Witness Willis contended, however, that the continued long-term use of these rate differentials was discriminatory based upon the fact that other exchanges having the same type of service pay smaller monthly rates based upon calling scope alone.

In connection with the experiment being conducted on local measured service witness Willis recommended that the flat rate components of each plan should be increased by the same percentage as the experiment's alternative flat exchange rates. Witness Willis testified that this action would be necessary to preserve the integrity of the experiment.

Regarding the illustrative ‘lifeline’ rate schedule introduced by company witness Savage, witness Willis commented that the experiment in local measured service, which the commission permitted to begin June 1, 1984, would provide information on customer acceptance of alternatives to flat rates. It was the opinion of witness Willis that extensive data from the experiment should be obtained and thoroughly analysed prior to any decisions concerning the implementation of a ‘lifeline’ program.

Witness Willis' last recommendation was related to the distribution of the additional revenue requirement remaining following the implementation of his specific recommendations. Witness Willis recommended that the remainder or residual should be spread among the other categories of service by increasing the present revenue base of each of the categories by the same percentage. Witness Willis further recommended increasing each individual rate within a category by an essentially uniform percentage, but allowing any of the company's proposed rates with increases smaller than the uniform percentage.

Based upon all of the evidence regarding rate design and tariff proposals, this commission concludes that:

1. The price relationships proposed by the company for the PBX flat rate trunk, Centrex-CO GP ‘A’ access line should Contrex-CO GP ‘A’ access line should be adopted and the relationship between the residence one-party flat rate and the business one-party flat rate exchange access line should remain unchanged.

2. The company's proposal to reduce the allowance of calls under its message rate service from 75 to 50 per month is just and reasonable.

3. The company's proposal to continue to allow five free directory assistance inquiries and to increase charges for additional inquiries from 20 cents to 50 cents per inquiry should be allowed.

4. The company's proposal to regroup 14 exchanges is appropriate.

5. The company's proposed tariffs for charging for the installation and maintenance of inside wiring on a time and materials basis are not in the public interest and are inappropriate.

6. The nonrecurring service charges shown on the following schedule are just and reasonable:

Service Connection Charges

	Residential Rate	Business Rate
A. Service Order		
1. Primary	$28.50	$42.55
2. Secondary	11.05	15.00
3. Record	5.50	9.10
B. Premises Visit	10.50	10.50
C. Central Office	15.75	22.05
D. Inside Wiring, each	15.75	26.80
E. Jacks, each	6.85	6.85
F. Equipment Work	6.30	8.40
G. Number Change	4.05	4.05
H. Suspend and Restore--Nonpay	4.05	4.05
I. Suspend and Restore--Request	4.05	4.05

7. An annual increase in coin telephone revenues in the amount of $2,963,510 generated by increasing the local coin call rate from 20 cents to 25 cents per call is just and reasonable.

8. The company's proposal to transfer DID customers from its obsolete tariff to its general offering tariff is not equitable and should be denied.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

9. The monthly rates for the equipment for the hearing impaired should receive the same percentage increase as the basic local exchange rates.

10. The Centrex and PBX Trunk Touch-Tone rates should be allowed as proposed.

11. No changes should be made on the EAS differentials placed on the Claremont and Lenoir exchanges.

12. The optional measured service rate components ordered in Docket No. P-55, Sub 806, should be increased by the same percentage as their alternative flat rates.

13. Each proposed rate not mentioned above should receive an essentially uniform percentage increase, with the exception of those proposed rates with increases smaller than the uniform percentage, which should be increased as proposed by the company.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.