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November 6, 2002

Ms. Marlene H Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Presentation of the
Rural Independent Competitive Alliance in
CC Docket No. 96-262, *Seventh Report and Order*

Dear Ms. Dortch:

Attached please find a written *Ex Parte* Presentation—a letter dated today (with attachment) to Jeffrey Dygert from the Rural Independent Competitive Alliance (RICA), with copy to Jeffrey Carlisle, relating to the above-referenced proceeding. This transmittal letter and the *ex parte* are being filed electronically pursuant to Commission rules 1.1206 and 1.49(f).

Please contact the undersigned for any questions related to this submission.

Respectfully submitted,

/s/
Clifford C. Rohde
Counsel to RICA

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November 6, 2002

Mr. Jeffrey Dygert
Deputy Division Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

WRITTEN EX PARTE PRESENTATION
of the Rural Independent Competitive Alliance in
CC Docket No. 96-262, *Seventh Report and Order*

Dear Mr. Dygert:

Attached for your review please find a Recommended Order of the North Carolina Utilities Commission ("NCUC"), dated October 24, 2002, in which the NCUC finds cause to penalize AT&T Communications of the Southern States, LLC (AT&T) for using "self-help" remedies to protest CLEC access service rates.[1]

Displeased with the intrastate access service rates of Madison River Communications, a CLEC operating in North Carolina ("MRC"), AT&T refused to pay for the intrastate access services provided to it by MRC and directed MRC to discontinue these services. Between April 25 and June 26, 2001, MRC discontinued 1+ access to AT&T, ordered AT&T customers to find a new IXC, and stopped presubscribing customers to AT&T. (Recommended Order at 3-4.) Echoing concerns raised by the FCC in its Seventh Report and Order, the NCUC determined that AT&T's actions were impermissible "self-help" (See, Id. at 12.) Even though it was dealing exclusively with intrastate access services, the NCUC in its Recommended Order relied, in part, on the reasoning of the Commission's Seventh Report and Order in the above-referenced docket (Id. at 10-11). The NCUC specifically indicated that the Seventh Report and Order "properly takes into account the importance of maintaining universal connectivity." (Id. at 11) The NCUC indicated that when an IXC can simply pick and choose with which CLECs it will do business, the public switched telephone network (PSTN) "becomes fragmented, and universal connectivity is lost." (Id.) The NCUC assessed a relatively stiff $50,000 penalty[2] against AT&T for reducing services to its customers without NCUC authorization, failing to

[1] State of North Carolina Utilities Commission, Docket No. P-140, Sub 79, Recommended Order Finding Violations and Imposing Penalty (rel. Oct. 24, 2002) (viewed Oct. 25, 2002, at http://ncuc.commerce.state.nc.us/cgi-bin/fldrdocs.ndm/INPUT?compdesc=AT%26T%20COMMUNICATIONS%20OF%20THE%20SOUTHERN%20STATES%2C%20LLC&numret=004&comptype=P&docknumb=140&suffix1=&subNumb=79&suffix2=&parm1=000117646) ("Recommended Order")

[2] The NCUC indicated that only fourteen end users had been directly impacted.

provide adequate service to its customers, and discriminating against certain of its customers in contravention of North Carolina law. (Id. at 14.)

The NCUC's decision is consistent with our written *ex parte*, filed July 18, 2002, on behalf of the Rural Independent Competitive Alliance ("RICA"), which called on the Commission to strengthen the Seventh Report and Order on reconsideration. AT&T and other IXCs continue to flaunt the law and state commission and FCC rules by utilizing impermissible methods of self-help, such as non-payment, to challenge duly tariffed rates. As the Commission indicated in its Seventh Report and Order, IXCs should be using legal channels to challenge rates that they believe to be unjust or unreasonable. Until the Commission acts to strengthen the conclusions of the Seventh Report and Order, such illegal tactics will continue and the universal connectivity of the PSTN will be imperiled.

Please contact the undersigned for any questions related to this submission.

Respectfully submitted,

/s/
David Cosson
Clifford C. Rohde
Counsel to RICA

Encl.
Cc: Jeffrey Carlisle, Senior Deputy Bureau Chief, WCB

NORTH CAROLINA UTILITIES COMMISSION

NOTICE TO PARTIES

Docket No. P-140, Sub 79 Exceptions Due on or Before November 8, 2002

Parties to the above proceeding may file exceptions to the report and Recommended Order hereto attached on or before the day above shown as provided in G.S. 62-78. Exceptions, if any, must be filed (original and thirty (30) copies) with the North Carolina Utilities Commission, Raleigh, North Carolina, and a copy thereof mailed or delivered to each party of record, or to the attorney for such party, as shown by appearances noted. Each exception must be numbered and clearly and specifically stated in one paragraph without argument. The grounds for each exception must be stated in one or more paragraphs, immediately following the statement of the exception, and may include any argument, explanation, or citations the party filing same desires to make. In the event exceptions are filed, as herein provided, a time will be fixed for oral argument before the Commission upon the exceptions so filed, and due notice given to all parties of the time so fixed; provided, oral argument will be deemed waived unless written request is made therefore at the time exceptions are filed. If exceptions are not filed, as herein provided, the attached report and recommended decision will become effective and final on November 9, 2002 unless the Commission, upon its own initiative, with notice to parties of record modifies or changes said Order or decision or postpones the effective date thereof.

The report and Recommended Order attached shall be construed as tentative only until the same becomes final in the manner hereinabove set out.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-140, SUB 79

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Unauthorized Reduction of Service, Unlawful Discrimination, and Violations of FCC Regulations by AT&T Communications of the Southern States, LLC	))))	RECOMMENDED ORDER FINDING VIOLATIONS AND IMPOSING PENALTY

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, July 16, 2002

BEFORE: Commissioner Lorinzo L. Joyner, Presiding, and Commissioners Sam J. Ervin, IV, and Michael S. Wilkins

APPEARANCES:

For AT&T Communications of the Southern States, LLC:

Gene V. Coker
Post Office Box 681841
Marietta, Georgia 30068

T. John Policastro
AT&T Communications of the Southern States, LLC
150 Fayetteville Street Mall
Suite 1340
Raleigh, North Carolina 27601

For the Using and Consuming Public:

Robert S. Gillam, Staff Attorney
Public Staff - North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On June 19, 2001, the Public Staff -- North Carolina Utilities Commission (Public Staff) filed a Petition for Order to Show Cause against AT&T Communications of the Southern States, LLC (AT&T), asserting that as a result of certain actions it took in the course of a dispute with Madison River Communications, LLC (MRC), AT&T had reduced services to its customers without Commission

authorization in violation of G.S. 62-118(a), had failed to provide adequate service to its customers in violation of G.S. 62-131(b), had discriminated against certain of its customers in violation of G.S. 62-140(a), and had violated certain provisions of the federal Communications Act. The Public Staff requested that AT&T be penalized under G.S. 62-310 for its violation of North Carolina statutes, and that MRC be made a party to this docket.

On June 22, 2001, AT&T moved that the proceeding be converted into a rulemaking proceeding. The Public Staff filed a response on July 3, 2001, opposing AT&T's motion. On July 18, 2001, the Commission issued an order denying the motion to convert the proceeding into a rulemaking proceeding; directing AT&T to appear at a hearing on November 27, 2001, and show cause why the relief sought by the Public Staff should not be granted; and making MRC a party to the proceeding. In response to various motions of the parties, the hearing was subsequently continued until July 16, 2002.

On September 27, 2001, AT&T filed a response denying the statutory violations alleged by the Public Staff. On October 18, 2001, the Public Staff moved for permission to file an Amended Petition for Order to Show Cause alleging statutory violations against MRC as well as AT&T. The Commission granted the Public Staff permission to file the amended petition.

The Public Staff filed a Notice of Voluntary Dismissal against MRC on December 2l, 2001. On December 28, 2001, the Commission issued an order dismissing MRC from the proceeding with prejudice.

The Public Staff prefiled the testimony of John T. Garrison, Jr. on January 18, 2002. On February 13, 2002, AT&T prefixed the testimony and exhibits of William J. Taggart, III. On February 20, 2002, the Public Staff prefiled the rebuttal testimony of witness Garrison.

The matter came on for hearing as scheduled. The Public Staff offered the testimony of witness Garrison, and AT&T offered the testimony and exhibits of witness Taggart.

Based on the foregoing, the evidence and exhibits presented at the hearing, and the entire record in this proceeding, the Commission makes the following

FINDINGS OF FACT

1. AT&T has been certified by this Commission as an interexchange carrier (IXC) and is authorized to do business as a public utility in North Carolina. MRC is likewise authorized to do business as a public utility in North Carolina, having been certified by this Commission as a competing local provider of telecommunications

services (CLP) in an order that became effective on October 10, 1998. At the time it was certified in 1998, MRC was operating under the corporate name of MEBTEL Integrated Communications Solutions, L.L.C.

2. On April 26, 1999, the letter admitted in evidence as AT&T Exhibit WJT-1 was sent by AT&T to MEBTEL Integrated Communications Solutions, L,L,C. In this letter AT&T indicated that it was not willing to pay MRC for access services unless it had ordered those services and had reached agreement with MRC as to the rates to be charged.

3. In late 1999 MRC began to provide access services to AT&T, and in December 2000 it began to bill AT&T for those services. MRC billed AT&T for intrastate access services at rates equal to those charged by its affiliated incumbent local exchange carrier (ILEC), MEBTEL, Inc. AT&T had not ordered these access services from MRC.

4. AT&T was opposed in concept to the idea of paying for access charges it had not ordered, or paying access rates set unilaterally by a CLP without AT&T's participation. It considered non-competitive CLP access rates to be a serious problem.

5. On March 7, 2001, AT&T sent MRC the letter admitted in evidence as AT&T Exhibit WJT-2. In this letter AT&T instructed MRC to cease routing traffic to AT&T's network; not to complete any calls from AT&T's network that were intended for MRC customers; not to presubscribe any of its customers to AT&T; and to assist any MRC customers already presubscribed to AT&T with changing their long distance service provider.

6. On March 27, 2001, MRC sent AT&T the letter admitted in evidence as pages 1-2 of AT&T Composite Exhibit WJT-3. In this letter MRC refused to carry out the instructions given by AT&T in its March 7, 2001 letter.

7. Between March 7 and April 25, 2001, MRC attempted to contact AT&T and reach agreement on payment for access services previously provided by MRC and rates to be charged for access services to be provided in the future, but no agreement was reached. On April 24, 2001, MRC sent AT&T the letter admitted in evidence as page 3 of AT&T Composite Exhibit WJT-3.

8. As of April 25, 2001, AT&T had not paid MRC anything for the access services it had received from MRC.

9. On April 25, 2001, MRC ceased routing 1+ traffic to AT&T, ceased allowing new end users to presubscribe to AT&T, and directed its end users already presubscribed to AT&T to change to other long distance carriers. MRC did not block toll free or 1-800 calls to AT&T's network and did not stop providing terminating access to AT&T.

10. MRC resumed routing 1+ traffic to AT&T, and presubscribing end users to AT&T, on June 26, 2001.

11. By willfully refusing to pay for the access services MRC had provided, and by directing MRC to discontinue these services in its letter of March 7, 2001, AT&T induced MRC to block 1+ calls made by its customers to AT&T's network. Although MRC alone made the decision to block these calls, AT&T's nonpayment of access charges and its instructions in the March 7 letter were both designed to induce MRC to cease providing access services to AT&T, which MRC neither sought nor desired to do. AT&T thus used MRC as its instrumentality in bringing about the partial cessation of access services. Consequently, MRC's act in blocking its customers' calls is attributable to AT&T from a legal perspective.

12. By causing MRC to block 1+ traffic to AT&T's network, AT&T reduced its services to its customers without Commission authorization, in violation of G.S. 62-118(a); failed to provide adequate service to its customers, in violation of G.S. 62-131(b); discriminated against its customers who received local service from MRC, in violation of G.S. 62-140(a); and violated the August 6, 1990, order of this Commission in Docket No. P-100, Sub 72, requiring that AT&T continue to provide originating and terminating long distance service in North Carolina and not suspend or withdraw that service without prior Commission approval.

13. As a result of MRC's partial cessation of access services to AT&T, AT&T's customers who took local exchange service from MRC were unable to place calls over AT&T's network. MRC's customers who had not selected AT&T as their presubscribed interexchange carrier (PIC), but wished to use AT&T's network on a casual call basis, were unable to do so. AT&T made no effort to assist its customers in obtaining alternative long distance service, other than requesting that MRC provide such assistance.

14. If MRC had fully complied with the instructions in AT&T's March 7, 2001, letter and ceased providing terminating access to AT&T, end users presubscribed to AT&T would have been unable to make long distance calls to MRC customers over AT&T's network.

15. AT&T should be penalized in the amount of $50,000 for its violations of statutes and Commission orders.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is not controversial. It is supported by information contained in the parties' testimony and the Commission files and records regarding this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 2-10

These findings of fact, which summarize the most important business transactions between the parties from 1999 through June 2001, are essentially uncontradicted. They are supported by the testimony of Public Staff witness Garrison and AT&T witness Taggart.

Public Staff witness Garrison testified that on March 7, 2001, AT&T wrote to MRC and asserted that it had neither ordered nor desired access service from MRC and had no obligation to pay any bills for access service rendered by MRC. In its letter AT&T informed MRC that it was to cease routing traffic to AT&T's network; that it was not to complete any calls from AT&T's network that were intended for MRC customers; that it was not to presubscribe any of its customers to AT&T; and that it should assist any of its customers already presubscribed to AT&T with changing their long distance service provider. On April 25, 2001, MRC partially complied with AT&T's demands. Except for toll-free calls, MRC ceased allowing calls originating from its customers to be routed to AT&T's network, and it directed its customers who were presubscribed to AT&T to find another long distance carrier. However, contrary to AT&T's instructions, MRC continued to complete calls from AT&T's network to its own customers. MRC resumed routing calls originating from its customers to AT&T's network on June 26, 2001.

On cross-examination, witness Garrison testified that MRC began providing access service to AT&T in November 1999, and that it sent its first bill for access charges, covering about six months of service, to AT&T in December 2000. He testified about MRC's March 27, 2001, letter to AT&T, in which MRC refused to block calls to and from AT&T's network as AT&T had demanded, and the subsequent letters included in AT&T Composite Exhibit WJT-3, in which MRC unsuccessfully sought payment for the access services it had provided. Witness Garrison also stated, in his rebuttal testimony, that MRC's intrastate access charges were equal to the rates charged by its affiliated ILEC, MEBTEL, Inc.

AT&T witness Taggart testified that since enactment of the federal Telecommunications Act of 1996, AT&T had been concerned about the ability of CLPs to charge high rates for access services. AT&T has adopted a policy of ordering access services only after reaching agreement with CLPs on rates and other terms and conditions, and it notified MRC of this policy by letter dated April 29, 1999. MRC nevertheless began sending traffic to AT&T and billing AT&T for access services, without having received an order for services from AT&T. AT&T objected to MRC's access rates, because they were substantially higher than the composite ILEC access rates for North Carolina. On March 7, 2001, witness Taggart sent MRC the letter admitted in evidence as AT&T Exhibit WJT-2. MRC responded with the series of letters comprising AT&T Composite Exhibit WJT-3, and on April 25, 2001, MRC began blocking its customers' access to the AT&T network.

Neither witness contradicted the other's testimony as to these basic underlying facts. The parties' disagreements relate to the reasons why certain actions were taken, the effect of those actions upon the customers of AT&T and MRC, and the legal implications of those actions. These issues are addressed in Findings of Fact Nos. 11-15 and the Commission's discussion of those findings.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

This finding of fact, which relates to the responsibility of AT&T for the actions of MRC in blocking its customers' access to AT&T's long distance network, is based on the testimony of Public Staff witness Garrison and AT&T witness Taggart.

Public Staff witness Garrison testified that in its March 7, 2001, letter to MRC, AT&T specifically directed MRC to discontinue delivering telephone traffic to AT&T's network and completing calls received from AT&T's network. The only reason MRC blocked its customers' calls to AT&T was because it had been ordered by AT&T to do so. Consequently, it is appropriate to hold AT&T responsible for the fact that its customers were unable to place calls over its network.

AT&T witness Taggart emphasized that it was not AT&T, but MRC, that blocked calls placed by MRC customers from reaching AT&T's network. AT&T could not have blocked these calls, because it does not have facilities capable of distinguishing calls originated by MRC from calls originated by other CLPs or ILECs. Calls from CLPs and ILECs are delivered to AT&T together, in an intermingled fashion, at the tandem switch where its network connects with the local network. Witness Taggart testified that when he sent his letter of March 7, 2001, to MRC, he did not intend for MRC to follow his instructions literally and discontinue all access services to AT&T. Instead, he intended to initiate a negotiating process that would enable the parties to reach agreement on mutually acceptable access rates. This should have been clear from the final paragraph of his letter, in which he invited MRC to enter into negotiations. Moreover, witness Taggart testified, his letter did in fact lead to negotiations between AT&T and MRC. This is evident from MRC's letter of March 27, 2001, (pages 1-2 of AT&T Composite Exhibit WJT-3), in which it refused to discontinue access service as AT&T had directed, and its letter of April 24, 2001, (page 3 of AT&T Composite Exhibit WJT-3), in which MRC stated that it would discontinue access services unless AT&T made a partial payment for access services previously billed. According to witness Taggart, MRC blocked its customers' calls to AT&T's network solely because of AT&T's failure to pay for access service -- not because of the instructions in AT&T's March 7, 2001 letter.

The issue here is reasonably clear-cut. From April 25 through June 26, 2001, AT&T's customers who purchased local service from MRC were deprived of the ability to place long distance calls over AT&T's network. Can AT&T be held legally responsible for the blocking of these calls, e`en though the physical steps necessary to block them were taken by MRC? AT&T contends that the sole responsibility for blocking the calls must rest upon MRC, since MRC exercised its own independent judgment in deciding to block them. The Public Staff contends that through its failure to

pay for access services received from MRC, and through its instructions to MRC in the March 7 letter, AT&T induced MRC to block the calls, when MRC would not otherwise have done so. Consequently, even if MRC bears some responsibility for blocking the calls, AT&T is also responsible, under the ancient legal doctrine *Qui facit per alium facit per* se -- one who acts through another acts for himself.

The Commission finds that the Public Staff's position is on balance more persuasive than that of AT&T. AT&T, through its counsel's cross-examination and witness Taggart's testimony, took the position that MRC's decision to block the calls of AT&T's customers must have been based on one or the other of two possible causes. Either the decision was caused by AT&T's nonpayment of MRC's access bills -- in which case AT&T cannot be held responsible -- or it was caused by AT&T's March 7 letter. AT&T further contended that in light of the lapse of time between the March 7 letter and the blocking on April 25, and the negotiations between MRC and AT&T during the interim, the letter cannot reasonably be viewed as the cause of MRC's decision.

AT&T's reasoning is illogical and unpersuasive. In the first place, there is no basis for suggesting that MRC's decision must be attributed to one and only one cause. Common sense suggests that both the March 7 letter and AT&T's nonpayment of access bills were factors in MRC's decision to block calls to AT&T's network. Likewise, there is no merit to the suggestion that AT&T must be relieved of responsibility for the blocking of its customers' calls if MRC's decision to block the calls was based (in whole or in part) on AT&T's nonpayment of access bills. Indeed, as every regulated utility knows, the logical result of nonpayment of bills is cessation of service. AT&T's March 7 letter and its decision not to pay MRC's access bills were both designed to achieve a single purpose. As witness Taggart indicated in his testimony, AT&T did not want to receive or pay for access services from MRC, because it believed that MRC's access rates were too high. AT&T could not unilaterally block the calls delivered to its network by MRC, because its equipment did not have the capability to distinguish between calls coming from MRC and calls coming from other local providers. Consequently, AT&T had to induce MRC to block the calls. When AT&T began receiving access bills from MRC in December 2000, it refused to pay them. When this did not result in MRC's discontinuing its access services, AT&T took the more aggressive step of sending MRC the March 7 letter and demanding that MRC stop delivering calls to its network. Ultimately, the combination of these two steps produced the desired effect; on April 25, MRC began blocking its customers' access to AT&T's network.

Clearly, MRC never had any desire to prevent its customers from making calls over AT&T's network. On the contrary, it had every reason to make the facilities of AT&T, the nation's largest long distance carrier, available to its customers. Had it not been for the pressure exerted by AT&T through its March 7 le``er and its failure to pay MRC's access bills, there is no evidence to suggest that MRC would never have blocked the calls. AT&T used MRC as its instrumentality to bring about the cessation of

AT&T's long distance service to its customers who received local service from MRC. Consequently, even though it was MRC who physically pressed the computer keys necessary to block these customers' calls, AT&T bears legal responsibility for terminating their service.

AT&T contended at the hearing that it never actually intended to have its customers' service blocked, but only wished to begin the process of negotiating for lower access rates. Ultimately, AT&T noted, it did enter into an agreement with MRC reducing access charges and restoring its customers' access to its network. The Commission notes that even though the final paragraph of the March 7 letter contains a vague reference to negotiations, the document as a whole does not read like a letter designed simply to begin negotiations; on the contrary, it brusquely commands MRC to discontinue all access service at once. It may well be that AT&T intended the letter to serve two purposes: it was a command to discontinue access, and it was also a hint at willingness to negotiate on a prospective basis under AT&T's terms. But even though AT&T was willing to negotiate with MRC, it should not have unilaterally resorted to such tactics as refusing to pay for services it had received, or commanding MRC to block service to AT&T's own customers. When AT&T chose to negotiate in this fashion, it took the risk that MRC would take its letter literally and eventually carry out its commands or at least a part of them. It is unseemly and inequitable for AT&T to attempt to avoid responsibility for the very actions it commanded MRC to take.

The Commission does not mean to imply that MRC was completely blameless in this matter or that it would not have been more desirable for more direct evidence of motivations and intentions to have been presented such as from Mr. Trey Judy of MRC, who was at the hearing but was not called. The Commission is saying, however, that the Public Staff was able to prove by a preponderance of the evidence and reasonable inferences from the evidence that AT&T was legally responsible for using MRC as its instrumentality to block access by AT&T's customers to AT&T's own long distance network.

In any event, MRC's sins were not the issue, inasmuch as MRC had been dismissed a party on December 28, 2001, on the motion of the Public Staff and without objection from AT&T. The issue is about AT&T's responsibility for this affair. As noted above, the March 7, 2001, letter was extraordinary for its brusque and demanding tone. Even the opening for negotiations in the letter made plain that no concessions were to be presumed. It is entirely understandable that, faced with such an ultimatum, a company might first resist and then temporize. The ones left in the lurch are, of course, the customers; an unacceptable result not to be countenanced by the Commission.

Finally, the Commission notes that this entire show cause proceeding could have been avoided if AT&T had resorted to the Commission's complaint procedure rather than resorting to "self-help." Indeed, when AT&T believed that BellSouth's access rates were too high, it brought a complaint to this Commission; and the result was that the

access rates were substantially lowered. The complaint procedure is part of the "rule of law," and companies should use it rather than taking actions that needlessly victimize customers.

EVIDENCE AND CONCLUSIONS FOR FINDING NO. 12

This finding, which should be viewed in the strict sense as a conclusion of law rather than a finding of fact, is supported by the preceding findings of fact and by the testimony of Public Staff witness Garrison and AT&T witness Taggart. It relates to the issue of whether the blocking of access by AT&T's customers to its long distance network violates certain provisions of North Carolina law.

Public Staff witness Garrison testified that by directing MRC to cease routing traffic to its network, AT&T abandoned its customers who received local service from MRC, without having obtained authorization from the Commission to do so. This constituted a violation of G.S. 62-118(a), which provides (emphasis added): "[U]pon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, <u>after petition and notice,</u> to authorize by order any public utility to abandon or reduce such service."

Witness Garrison further testified that AT&T violated G.S. 62-131(b), which requires every public utility to furnish adequate, efficient and reasonable service. After their access to AT&T's network was blocked, AT&T's customers could not make long distance calls except by changing long distance carriers or using other carriers' networks on a casual-dialed basis. This amounted to inadequate and unreasonable service on AT&T's part.

Witness Garrison testified that by denying access to its network to its customers who took local service from MRC, while continuing to provide its regular service to its other customers, AT&T violated G.S. 62-140(a), which makes it illegal for a public utility to subject any person to any unreasonable prejudice or disadvantage. In addition, AT&T violated the Commission's order of August 6, 1990, in Docket No. P-100, Sub 72, which requires AT&T to continue to provide statewide originating and terminating long distance service and not to suspend or withdraw service without prior Commission approval.

AT&T witness Taggart testified that since MRC had exercised its independent judgment in deciding to block its customers' calls to AT&T's network, any violations of law resulting from the blocking were committed by MRC and not by AT&T. In addition, he testified that by directing MRC to block these calls, AT&T was exercising its right under federal law to avoid purchasing access services from MRC using the procedure authorized by the Federal Communications Commission in *MGC v. AT&T*[1] In that case

[1] MGC *Communications, Inc. v. AT&T Corp.,* File No. EAD-99-002, Memorandum Opinion and Order, FCC No. DA 99-1395 (Comm. Car. Bur. released July 16, 1999).

the FCC held that AT&T had the right to cancel switched access services from a CLP. The logical inference drawn by AT&T from that ruling is that an IXC may also refuse to order such services in the first instance. MRC had begun providing access services to AT&T without AT&T's knowledge, and in order to avoid being obligated to purchase and pay for these services, AT&T had to instruct MRC to stop providing them. In its March 7 letter, AT&T gave these instructions to MRC in the clear and unambiguous manner required by *MGC v. AT&T.* AT&T contended that if it is not allowed to proceed in this manner, it will be unable to protect itself against CLPs that charge exorbitant rates for access services.

For several reasons, the Commission doubts that AT&T's argument that its March 7 letter was authorized by the FCC's *MGC v. AT&T* decision is well supported. First, the issues in this case are issues of state law rather than federal law. The *MGC v. AT&T* case involved interstate access service, and it was decided by the FCC under federal law -- specifically, the federal Communications Act. In contrast, this case involves intrastate access service and is governed by North Carolina law. The statute relevant to this issue is G.S. 62-131(b), requiring that utilities furnish reasonable and adequate service. The FCC's rulings on interstate access charges and interconnection obligations do not preempt state commissions from deciding issues relating to intrastate access charges, interconnection obligations and service adequacy under state law.

Second, even if the *MGC v. AT&T* decision were controlling in this case, AT&T failed to follow the guidelines laid down by that ruling in sending its March 7 letter to MRC. As pointed out by witness Garrison, *MGC v. AT&T* imposed more requirements on an IXC than simply providing unambiguous notice to a CLP that the IXC no longer desires to receive access service. The FCC also noted that an IXC may not ignore the interests of the customers it shares with the local provider; it must take affirmative steps to assist them in transferring to other long distance providers. In this case, AT&T took no such affirmative steps to assist its customers. Indeed, AT&T made no attempt to even identify these customers (*e.g.*, by asking MRC to provide a list of them), much less assist them in changing carriers. Thus, even if the Commission were to accede to AT&T's argument that *MGC v. AT&T* is controlling, since AT&T failed to comply with that decision, the Commission would still conclude that AT&T has failed to furnish reasonable and adequate service.

Nor is *MGC v. AT&T* the last word. The FCC has attempted to clarify its views on an IXC's obligation to accept access service from a CLP -- and the FCC's most recent ruling on the subject provides useful guidance to this Commission in establishing state policy on this issue. In its *Access Charge Order,*[2] issued after AT&T sent its March 7 letter to MRC, the FCC established a "safe harbor" access charge rate for CLPs and held that any access charge rate at or below this rate will be presumed reasonable. In contrast, any rate in excess of the safe harbor rate will be valid only if

[2] *Access Charge Reform -- Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (released Apr. 27, 2001).

the CLP demonstrates its reasonableness. The FCC held that an IXC must accept and pay for access service whenever it is provided by a CLP at a "presumptively reasonable" rate, i.e., one at or below the safe harbor rate. In paragraph 94 of the *Access Charge Order* the FCC stated (footnote omitted):

> When an IXC's end-user customer attempts to place a call either from or to a local access line, that customer makes a request for communication service -- from the originating LEC [local exchange carrier], the IXC and the terminating LEC. When that customer attempts to call from and/or to an access line served by a CLEC [competing local exchange carrier] with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse . . . . . .

Overall, we believe that the FCC's *Access Charge Order* is better reasoned and more persuasive than the *MGC v. AT&T* ruling. The *Access Charge Order* properly takes into account the importance of maintaining universal connectivity. The public switched telephone network is important to national unity, and to the maximum extent practicable, every telephone customer in the nation should be able to call every other customer. When an IXC can pick and choose the CLPs with which it will do business, the public switched telephone network becomes fragmented, and universal connectivity is lost. Moreover, if IXCs could freely choose to connect with some CLPs but not others, the ability of CLPs to remain in business and offer competitive alternatives to ILEC service would be adversely affected. When a customer attempts to place an intrastate long distance call, that customer implicitly requests service from the originating LEC, the IXC and the terminating LEC. If the IXC refuses the customer's request by failing to carry the call (except for valid reasons such as nonpayment of the customer's bill), it is not providing reasonable and adequate service as required by G.S. 62-131(b).[3]

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[3] The FCC held that the *Access Charge Order* would be applicable on a prospective basis only. Subsequently, in *AT& T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues,* CCB/CPD Docket No. 01-02, Declaratory Ruling, FCC No. 01-313 (released October 22, 2001) *(Declaratory Ruling,* the FCC sought to apply the principle at issue here - the obligation of an IXC to accept access service from any CLP with presumptively reasonable rates - on a retroactive basis. Counsel for AT&T pointed out at the hearing that the *Decl`ratory Ruling was* vacated in *AT&T Corp.* B. *FCC'* 292 F,3d 308 (D.C. Cir. 2002). The D.C. Circuit's basis for vacating the *Declaratory Ruling was* that it was not supported by section 201 of the federal Communications Act, which was the only section the FCC referenced in its ruling. The court declined to consider whether the ruling would have been valid if the FCC had also referenced section 251 of the Act. as it did in the *Access Charge Order.* These complexities of federal law are irrelevant to the case now before this Commission. The Commission is applying state law, not federal law and is not relying upon either the federal Communications Act or the Access Charge Order as controlling legal authority. The reasoning of the Access Charge *Order* is instructive, and the Commission can properly take that reasoning into account, regardless of whether a ruling related to (but different from) the *Access Charge Order was* vacated on technical grounds.

As can be seen from the above discussion, the federal law, which pertains to interstate access charges, can perhaps most charitably be viewed as being in a process of evolution. It is also somewhat beside the point in the instant case (aside from the fact that this case deals with intrastate access charges), because the essential question is not whether AT&T might or might not have an argument that MRC was charging excessive access rates but rather what AT&T chose to do about it. AT&T chose self-help when it should have chosen legal process.

An IXC is not helpless to protect itself against CLPs that charge exorbitant rates. If an IXC believes that a CLP's access rates are unreasonable, it is free to file a complaint against the CLP under G.S. 62-73 or 62-74, seeking to have the rates reduced to a reasonable level. If the IXC believes that the rates are extremely excessive and must be reduced immediately to avoid irreparable harm, it can request an interim rate reduction, or expedited handling of its complaint. The Commission will take such a request into consideration and respond appropriately.

AT&T could have filed a complaint against MRC, asserting that MRC's access rates were in excess of a reasonable level, but it chose not to do so. Instead, it resorted to self-help, using its March 7 letter and its nonpayment of MRC's access bills to induce MRC to cease providing access services. After April 25, 2001, when MRC customers requested service from AT&T by attempting to place calls over AT&T's network, AT&T was -- through its own efforts -- unable to respond to the customers' requests by completing the calls. AT&T thus failed to provide the customers with reasonable and adequate service as required by G.S. 62-131(b).

AT&T's contention that it is not responsible for the blocking of calls to its network, because MRC exercised its own independent judgment in blocking the calls, has been considered and rejected in the discussion of Finding of Fact No. 11 above.

The Commission agrees with Public Staff witness Garrison's analysis of the provisions of law that AT&T violated when it wrongfully ceased accepting access service from MRC. Accordingly, the Commission concludes that AT&T has violated G.S. 62-118(a), 62-131(b), and 62-140(a), and the Commission's order of August 6, 1990, in Docket No. P-100, Sub 72.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 13-14

These findings of fact, relating to the impact of AT&T's violations on the customers of AT&T and MRC, are based on the testimony of Public Staff witness Garrison and AT&T witness Taggart.

Public Staff witness Garrison testified that after MRC ceased routing 1+ calls to AT&T's network, MRC's end user customers wishing to be presubscribed to AT&T and use its network were unable to do so. In addition, MRC's end user customers not presubscribed to AT&T who wished to use AT&T's network on a casual call basis were unable to do so. AT&T made no attempt to assist its customers on MRC's system in

finding another long distance carrier; in its March 7 letter, it simply directed MRC to assist them. Witness Garrison further testified that if MRC had stopped providing either originating or terminating access to AT&T, as AT&T had directed it to do in the March *7* letter, there would have been a detrimental effect on all AT&T customers -- not just those who received local service from MRC. All customers who had chosen AT&T as their PIC, wherever they were located, would have found themselves unable to make a 1+ call to any customer receiving local service from MRC.

AT&T witness Taggart did not contradict witness Garrison's testimony on these matters. He testified that because AT&T had not entered into a "CARE relationship" -- a Customer Account Records Exchange agreement -- with MRC, AT&T could not identify which of its customers were located on MRC's system. For this reason AT&T could not notify these customers that they would no longer be able to place calls over AT&T's network, or assist the customers in finding other long distance service. Witness Taggart acknowledged that AT&T did not contact MRC and ask MRC to identify which of its customers were presubscribed to AT&T.

Since the witnesses did not disagree on this issue, the Commission finds the facts to be in accordance with their testimony.

EVIDENCE AND CONCLUSIONS FOR FINDING NO. 15

This finding, which, like Finding No. 13, should be viewed in the strict sense as a conclusion of law rather than a finding of fact, relates to the amount of the penalty to be imposed on AT&T pursuant to G.S. 62-310(a) for its violations of law. It is supported by the preceding findings of fact and, in part, by the testimony of Public Staff witness Garrison.

Witness Garrison testified that at the time of AT&T's violations, MRC had 14 customers who were presubscribed to AT&T and suffered the primary impact of the violations. The violation of G.S. 62-118(a) (unauthorized abandonment of service) was a one-time occurrence, but the violations of G.S. 62-131(b) (unreasonable and inadequate service) and G.S. 62-140(a) (unreasonable discrimination) lasted for 62 days, with each day constituting a separate offense under G.S. 62-310(a). By assessing the maximum amount of $1,000 for each violation (14 violations of G.S. 62-118(a); 62 violations of G.S. 62-131(b) for each of 14 customers, for a total of 868; and 62 violations of G.S. 62-140(a) for each customer, for an additional 868) the Public Staff could theoretically have proposed a total penalty of $1,750,000. However, witness Garrison recommended a penalty of $100 per offense for the violations of G.S. 62-131(b) and 62`140(a), together with a $1,000 penalty for each violation of G.S. 62-118(a). He did not propose any additional penalty for AT&T's violation of the Commission's order in Docket No. P-100, Sub 72. The result was a recommended penalty amounting to $187,600: $86,800 for the violations of G.S. 62-131(b), $86,800 for the violations of G.S. 62-140(a), and $14,000 for the violations of G.S. 62-118(a).

AT&T contended that it had not committed any violations, but it did not address the amount of the penalty to be imposed in the event that violations were found.

The Commission believes that AT&T's violations were serious but notes only 14 customers were directly impacted by AT&T's violations. Accordingly, the Commission believes a more appropriate overall penalty is $50,000. This represents a penalty of $23,000 for violations of G.S. 62-131(b); $23,000 violations of G.S. 62-140(a); and $4,000 for violations of G.S. 62-118(a). It proportionately reduces the penalties from those recommended by the Public Staff.

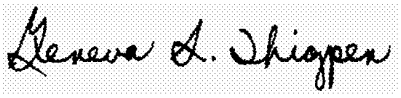
Notwithstanding the Commission's policy of limiting strict regulation of interexchange carriers, as allowed under G.S. 62-110(b), IXCs are still public utilities. They are "affected with the public interest," as G.S. 62-2(a) makes clear, and they may not disregard their obligation to operate their systems in the interests of their customers. In an effort to reduce its operating expenses by a relatively insignificant amount, AT&T disregarded the interests of its customers, and such conduct should be penalized.

IT IS, THEREFORE ORDERED that AT&T pay the sum of $50,000 to the Commission no later than 20 days from the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of October, 2002.

NORTH CAROLINA UTILITIES COMMISSION



Geneva S. Thigpen, Chief Clerk

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Commissioner Sam J. Ervin, IV dissents.

COMMISSIONER ERVIN, DISSENTING. Although I agree with much of the legal analysis and a number of the policy conclusions adopted by the majority and although I share the majority's distaste for the tactics employed by both AT&T and Madison River, I am unable to conclude that the Public Staff has met its burden of proving by the preponderance of the evidence that Madison River should be deemed to have acted as AT&T's agent when Madison River severely limited access to AT&T's long distance network. Since this finding is critical to the majority's decision that AT&T violated various provisions of North Carolina law in its dealings with Madison River and should be penalized for those violations, I respectfully dissent from the majority's finding of liability and its decision to order AT&T to pay a penalty of $50,000.00.

The majority's ultimate conclusion is that AT&T violated G.S. 62-118(a), G.S. 62-131(b), G.S. 62-140(a), and the provision of the Order Revising Capped Rate Plan And Denying Request For Phase II Proceeding entered by the Commission in Docket No. P-100, Sub 72, on August 6, 1990 (the August 6, 1990, order), that required AT&T to continue to serve all areas of North Carolina by inducing Madison River to prevent its customers from presubscribing to AT&T as their primary interexchange carrier and otherwise limiting access to AT&T's network. A careful analysis of each of these statutes and the August 6, 1990, order indicates, as the majority appears to acknowledge, that the existence of a violation hinges upon a finding that the conduct of the alleged violator actually caused the result forbidden by law. For example, G.S. 62-118(a) provides that, "[u]pon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service." In other words, G.S. 62-118(a) prohibits the abandonment of service by a public utility without Commission authorization. Duke Power Company v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974), cert. den. 285 N.C. 661, 207 S.E.2d 752 (1974). Similarly, G.S. 62-131(b) provides that "[e]very public utility shall furnish adequate, efficient and reasonable service." Put another way, G.S. 62-131(b) precludes the provision of inadequate or inefficient service by a public utility. State ex rel. Utilities Commission v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on reh., 278 N.C. 235, 179 S.E.2d 419 (1971). Moreover, G.S. 62-140(a) provides, in pertinent part, that "[n]o public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage" or "[e]stablish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service." Thus, G.S. 62-140(a) expressly prohibits unreasonably discriminatory conduct by a public utility. Finally, the August 6, 1990, order explicitly provides "[t]hat AT&T shall continue to provide statewide originating and terminating interLATA long-distance service in North Carolina and shall not, without prior Commission approval, suspend or withdraw service from any geographic area of the State." In re Investigation to Consider Whether Competitive Offerings of Long-Distance Telephone Service Should be Allowed

in North Carolina and What Rules and Regulations Should be Applicable to Such Competition if Authorized, Docket No. P-100, Sub 72, Order Revising Capped Rate Plan And Denying Request For Phase II Proceeding, Eightieth Report of the North Carolina Utilities Commission: Orders and Decisions 59, 75 (1990). As a result, the August 6, 1990, order prohibits AT&T from failing to provide service in any geographic area in North Carolina without prior Commission authorization. At bottom, each of the statutory prohibitions and ordering clauses at issue here necessarily implicates the conduct of the public utility in question.

I agree that each of these sources of legal authority is potentially relevant to AT&T's alleged conduct. Had the Public Staff succeeded in demonstrating by the preponderance of the evidence that AT&T abandoned the provision of service to its customers without Commission approval, failed to provide adequate service to its customers, unreasonably discriminated against certain of its customers, or failed to provide service in a particular geographic area, I would join the majority's decision without hesitation. Any such conduct would be contrary to AT&T's continuing responsibilities as the long distance carrier of last resort for many North Carolinians. Instead, my failure to join in the majority's decision stems almost exclusively from my disagreement with the factual finding that is the fundamental predicate for the majority's decision.

The present proceeding was initiated by the Public Staff, which petitioned the Commission to order AT&T to show cause why it should not be penalized for violating G.S. 62-118(a), G.S. 62-131(b), and G.S. 62-140(a) and why the Commission or some other properly authorized body should not file a complaint against AT&T with the Federal Communications Commission.[4] The Commission issued the requested show cause order on July 18, 2001, effectively setting the present proceeding for hearing as a complaint. According to G.S. 62-75, "the burden of proof shall be upon the complainant" in all cases not initiated by the Commission itself.[5] By seeking relief from AT&T, the Public Staff assumed the burden of proving all facts essential to the successful maintenance of its claim. State ex rel. Utilities Commission v. Nello L. Teer Company, 266 N.C. 366, 146 S.E.2d 511 (1966). As a result, the Public Staff must prove by the preponderance of the evidence that AT&T caused the end results condemned by G.S. 62-118(a), G.S. 62-131(b), G.S. 62-140(a), and the August 6, 1990, order in order to prevail in this proceeding.

The undisputed record evidence indicates that AT&T did not physically disconnect, block, or otherwise refuse to provide service to any prospective or existing

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[4] Neither the Public Staff's initial or amended pleading made any reference to alleged violations of the August 6, 1990, order.

[5] Although nothing in the literal language of G.S. 62-75 specifies the exact burden of proof to be applied in Commission proceedings, the Supreme Court of North Carolina has held that civil burden of proof rules should be applied in administrative proceedings. In re Elkins, 308 N.C. 317, 302 S.E.2d 215, reh. den., 308 N.C. 681, 311 S.E.2d 590 (1983); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1976). As a result, I believe that the preponderance of the evidence standard is applicable to Commission proceedings, and this conclusion is consistent with prior Commission practice.

customer. On the contrary, the record clearly reflects that the only service interruptions experienced by AT&T customers stemmed from actions physically taken by Madison River. For that reason, the majority cannot and does not find that AT&T committed any act that directly violated any of the relevant statutory provisions or ordering clauses itself. In order to justify its decision that AT&T should be penalized, the majority essentially concludes that Madison River acted at the behest of AT&T when it prevented Madison River customers from utilizing AT&T's network to complete interexchange calls. In other words, the majority attributes Madison River's conduct to AT&T. Although I do not dispute the possibility that a public utility can be vicariously liable for the actions of its agent and that the necessary agency can be implicit as well as express, I do not believe that Madison River's conduct should be attributed to AT&T given the evidence presented in the present proceeding.

The evidence received at the evidentiary hearing was presented through the testimony of John T. Garrison, Jr., a Public Utilities Engineer with the Public Staff, and William J. Taggart, III, the Division Manager for CLEC Business Development and Management with AT&T Corporation. No Madison River representative was called to the witness stand. In addition to presenting live testimony, the parties introduced copies of correspondence exchanged during the relevant time period. A careful analysis of this evidence persuades me that the Public Staff has not met its burden of proving that Madison River's conduct should be attributed to AT&T for purposes of a finding of liability in this case.

The correspondence between the parties extended over a period of nearly two years and clearly sets out their relative positions. On April 26, 1999, Toni LaPenna, a Manager of Supplier Relations with AT&T, sent a letter to Bruce Becker of Madison River indicating that AT&T had "received information that [Madison River] may be planning to offer, or is already offering, local exchange service in one or more cities;" that Madison River's customers "may . . . want to access AT&T's switched network, for which you will be charging originating and terminating access;" that it was "AT&T's policy to pay solely for access service that it orders;" that AT&T would "issue an order through an Access Service Request (ASR) to" Madison River "once you have completed AT&T's supplier set-up processes (e.g., establishing Customer Account Record Exchange (CARE) and bill processing capabilities)" and "AT&T has agreed to the switched access prices proposed by" Madison River; and that AT&T expected "that these prices will be competitive with the incumbent LEC in each area that your company will be offering service." [AT&T Ex. WJT-1]. After Madison River began providing access service to AT&T in November, 1999, and began billing AT&T for access services on December 5, 2000 [T. pp. 70, 80], Mr. Taggart sent a letter to Trey Judy, Madison's Director of Regulatory Affairs, dated March 7, 2001, in which AT&T acknowledged receiving invoices for switched access service from Madison River and stated that "AT&T has not ordered originating or terminating switched access services from Madison River" so that "AT&T is not obligated to pay [Madison River] for the access service on the invoices." In addition, Mr. Taggart stated that Madison River should "immediately cease routing all traffic to AT&T's network;" "not complete any calls terminating from AT&T's network that are intended" for Madison River customers;

"not . . . . presubscribe any of its local exchange customers to AT&T's interexchange services;" and notify all customers presubscribed to AT&T on Madison River's network that Madison River "is not authorized to presubscribe customers to AT&T" and "assist them in selecting another interexchange carrier." In the event that Madison River "would like to discuss the possibility of mutually acceptable arrangements between the parties," Mr. Taggart requested Madison River to execute an enclosed confidentiality agreement and return it to AT&T. [AT&T Ex. WJT-2]. On March 27, 2001, Michael T. Skrivan, Madison River's Vice President Revenues, sent a response to Mr. Taggart in which Mr. Skrivan indicated that the March 7, 2001, letter "requests and/or instructs MRC to perform a number of activities which we consider to be violations of federal law," declined to comply with Mr. Taggart's instruction that Madison River cease providing access service to AT&T, and returned two executed copies of the confidentiality agreement. [AT&T Comp. Ex. WJT-3, pp. 1-2]. On April 24, 2001, Mr. Skrivan sent another letter to Mr. Taggart in which he noted that "[Madison River] has provided monthly bills for services rendered based on actual usage and using [Madison River] rates filed in its state and federal tariffs;" that, "[t]o date, AT&T has not paid any bills and has requested termination of service; that, "[e]ffective at 5 pm on Wednesday, April 25, 2001, all access services to AT&T will be terminated" unless appropriate payment was made; and that "[Madison River] customers currently presubscribed to AT&T will be apprised of the situation and provided with a list of alternatives." [AT&T Comp. Ex. WJT-3, p. 3]. Finally, on May 4, 2001, Mr. Judy sent Mr. Taggart a letter in which he indicated that, based "[u]pon AT&T's stated intention not to pay any access charges, and based on the elapse of the payment due date requirement in the April 24, 2001, memo, [Madison River] has disconnected AT&T's originating toll service." [AT&T Comp. Ex. WJT-3, pp. 4-5]. Although the record does not reflect the terms of the eventual settlement between the parties, Madison River resumed providing access service to AT&T customers on June 26, 2001.

Mr. Taggart explicitly testified that "AT&T did not block traffic from or to Madison River" and "completed all calls that were delivered to AT&T by Madison River and all calls terminated to Madison River's local service customers." [T. p. 96]. Mr. Taggart further stated that "AT&T made its service available to any customer in North Carolina at all times from March through June 2001;" that "AT&T did not at any time take any action to block or prevent the completion of calls to or from Madison River's local service customers;" that, "[i]f any Madison River customer was unable to utilize AT&T's service, it was not due to the actions of AT&T;" that "AT&T processed each and every call it received that was originated by or intended for termination to a Madison River local customer;" and that "AT&T does not have the ability to block traffic coming from or to Madison River." [T. pp. 97, 110]. At the time that he sent the March 7, 2001, letter, Mr. Taggart wanted Madison River "to enter into negotiations with" AT&T for the purpose of working out a "switched access agreement." [T. p. 126]. Mr. Taggart testified that AT&T hoped at that time that "it would not come to" the point that Madison River "immediately cease[d] routing all traffic to AT&T's network;" that the letter was written as strongly as it was in order to comply with the FCC's MGC Order; and that "the

end in mind was a switched access agreement." [T. p. 126].[6] As a result, AT&T denied that it intended for Madison River to prevent its customers from accessing AT&T's interexchange switched network at the time that Mr. Taggart sent the March 7, 2001, letter.

In response to Mr. Taggart's assertion that Madison River, and not AT&T, was responsible for the termination of service to AT&T customers receiving local service from Madison River, Mr. Garrison urged the Commission to "reject this flawed logic." [T. p. 42]. Mr. Garrison claimed that, "[b]y directing Madison River to cease providing it with access service, AT&T was clearly withdrawing service from its customers who were receiving local exchange service from Madison River." [T. p. 42]. According to Mr. Garrison, "Madison River blocked calls to AT&T for one reason only; because AT&T ordered it to do so." [T. p. 42]. Similarly, Mr. Garrison claimed that, "[u]nder the direction of AT&T, Madison River ceased routing calls to AT&T's network," although "[t]he actual physical blocking of the calls was done by Madison River at the direction of AT&T." [T. pp. 48, 49].[7] On the other hand, Mr. Garrison admitted that AT&T did not do "anything" "to block originating traffic from reaching its network from Madison River local subscribers" except "write the March 7, 2002 letter." [T. pp. 49-50]. In addition, Mr. Garrison admitted that, "[h]ad Madison River not undertaken the request of AT&T," "there would have been no abandonment of its customers." [T. pp. 59-60]. Mr. Garrison did not know of "any calls or traffic . . . that was delivered to AT&T, that

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[6] Although the FCC Common Carrier Bureau did hold in MCG Communications, Inc. v. AT&T Corporation, File No. EAD-99-002, Memorandum Opinion and Order ¶¶ 12, 25, 26 (released July 16, 1999) (MGC Order), "that none of the statutes, rules or orders governing equal access, dialing parity or payphone services imposes any obligation on AT&T that would prevent it, should it choose to do so, from rejecting MGC's originating access service," the Bureau further concluded that "a party wishing to terminate service under a tariff [must] explicitly and unequivocally state its intention and act in a manner consistent with that intention;" that AT&T had failed to express its decision to terminate originating access service "in both words and actions that do not admit of the ambiguity that we find surrounded AT&T's actions here;" and that AT&T "failed to take certain [other] steps that . . . a carrier likely would take if it truly wished to terminate a LEC's originating access service," including "initiating the process of migrating AT&T's and MGC's shared customers to either a new LEC or a new IXC." The FCC affirmed the Bureau's decision. MGC Communications, Inc. v. AT&T Corporation, File No. EAD-99-002, Memorandum Opinion and Order (released December 28, 1999). Although I agree with the majority that the FCC's rules and decisions concerning the termination of originating access service by IXCs are nothing more than persuasive authority in this matter, which deals with intrastate rather than interstate switched access service, and that AT&T cannot successfully rely upon the MGC Order in this proceeding even if the FCC's rules and decisions were binding since AT&T failed to take adequate steps to protect the interests of its customers, I am persuaded that the MGC Order does tend to explain a great deal about the tone of the March 7, 2001, letter and that the majority places excessive importance upon the tone of the March 7, 2001, letter in reaching its decision to penalize AT&T.

[7] As I understand the record, Mr. Garrison based these assertions exclusively on his interpretation of the March 7, 2001, letter. [T. p. 69]. Although Rule 602 of the North Carolina Rules of Evidence, G.S. 8C-1, Rule 602, provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter," no objection was lodged to that portion of Mr. Garrison's testimony addressing AT&T's mental state, rendering that testimony admissible for whatever probative value it might have. State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977); Skipper v. Yow, 249 N.C. 49, 105 S.E.2d (1958).

AT&T did not process for completion." [T. p. 67].[8] In response to questions from the bench, Mr. Garrison testified that the Public Staff had not directly asked Madison River "for the reason that it took the actions that it took following receipt of AT&T's letter with respect to blocking access to AT&T's network on a presubscription basis." [T. pp. 85-86]. When Public Staff counsel asked Mr. Garrison on additional direct examination addressing matters raised from the bench whether he had had "discussions with Mr. Judy about the reason why service was disconnected—blocked to AT&T," Mr. Garrison responded that he did not "recall asking him why they blocked." [T. pp. 86-87]. Although Mr. Judy was in attendance at the hearing in response to a subpoena, he was never called to the stand by either party. [T. pp. 84-85].

The majority justifies its conclusions that "AT&T induced [Madison River] to block 1+ calls made by its customers to AT&T's network" and that "AT&T . . . used [Madison River] as its instrumentality in bringing about the partial cessation of access services" by finding that, "[a]lthough [Madison River] alone made the decision to block these calls, AT&T's nonpayment of access charges and its instructions in the March 7 letter were both designed to induce [Madison River] to cease providing access service to AT&T, which [Madison River] neither sought or desired to do." [Rec. Or., p. 4]. In further seeking to explain its decision, the majority states that "[c]ommon sense suggests that both the March 7 letter and AT&T's nonpayment of access bills were factors in [Madison River's] decision to block calls to AT&T's network" and that, "as every regulated utility knows, the logical result of nonpayment of bills is cessation of service." [Rec. Or., p. 7]. Thus, the majority suggests that, since AT&T lacked the technical capability to "distinguish between calls coming from [Madison River] and calls coming from other local providers," "AT&T had to induce [Madison River] to block the calls." [Rec. Or., p. 7]. For that reason, the majority concludes that AT&T first attempted to "induce" Madison River to block access to its network by refusing to pay access bills; that, "[w]hen this did not result in [Madison River's] discontinuing its access service, AT&T took the more aggressive step of sending [Madison River] the March 7 letter and demanding that [Madison River] stop delivering calls to its network;" and that, "[u]ltimately, the combination of these two steps produced the desired effect." [Rec. Or., p. 7]. As a result, the majority concludes that the Public Staff met its burden of proving that Madison River acted as AT&T's agent when it blocked originating switched access traffic from reaching AT&T's network after April 24, 2001.

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[8] The record is somewhat unclear as to the extent to which AT&T customers taking local service from Madison River were able to reach AT&T's long distance network on a non-presubscribed basis. At one point, Mr. Garrison testified that AT&T customers could not reach AT&T's network on a casual call basis. [T. p. 26]. On the other hand, Mr. Garrison stated that AT&T customers using Madison River as their local carrier could still place 1-800 or toll free calls to AT&T's network [T. p. 25] and that casual calling remained possible after Madison River blocked access to AT&T's network. [T. p. 62]. Given that the steps taken by Madison River in the aftermath of the April 24, 2001, letter were limited to directing AT&T customers to presubscribe to another long distance carrier, not permitting new end users to presubscribe to AT&T, and no longer permitting calls originating from its customers to be routed to AT&T's network [T. p. 25], it is not clear to me that customers were unable to use AT&T's network on a casual call basis, at least as I understand the term "casual call."

I am simply not persuaded by the majority's logic, which seems to me to overly truncate the necessary evidentiary analysis and to lack adequate record support. In order for the majority's "inducement" theory to be successful, it seems to me that the Commission would have to find (1) that AT&T genuinely wanted Madison River to stop sending switched access traffic from Madison River local customers to AT&T's network, (2) that AT&T reasonably believed that its actions would produce such a termination of switched access service, and (3) that Madison River blocked service to AT&T's network as a direct consequence of actions which AT&T took for the purpose of achieving that result. The majority does not distinguish between these three factors in its analysis, but I believe that all of them are essential to a finding of liability. On the contrary, the majority may be of the opinion that a showing of bad intent is sufficient, standing alone, to justify the imposition of a penalty, although it does not say so in that many words. Were a showing of intent to be deemed sufficient to justify a decision against AT&T, the Commission would find itself required to intervene every time a party lacked adequately pure motives regardless of the extent to which the result prohibited by law was likely to come to fruition. For that reason, I believe that a finding of liability on the basis of the agency theory adopted by the majority should include a determination that the party found liable intended the prohibited outcome, that the actions in which the party in question engaged were reasonably likely to result in conduct by another party that produced the prohibited harm, and that the actions of the other party actually stemmed from conduct by the party sought to be held liable that were intended to achieve the prohibited result. Although I am unconvinced that the Public Staff has met its burden of proof with respect to the first of these issues,[9] I do not believe that it is necessary for me to resolve this question given the Public Staff's failure to establish the second or third factors by the preponderance of the evidence.

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[9] The majority evidently bases its decision on the intent issue on its analysis of the March 7, 2001, letter and AT&T's failure to pay the switched access bills that it began to receive from Madison River in December, 2000. The language of the March 7, 2001, letter does, as the majority notes, insist that Madison River take certain actions that would have had the effect of blocking access to AT&T's network by Madison River local subscribers. Read literally and in isolation, that letter would tend to suggest that AT&T wanted Madison River to take actions that would, if implemented, have resulted in an outcome forbidden by North Carolina law. On the other hand, Mr. Taggart testified that the language of the March 7, 2001, letter stemmed from the FCC's decision in the MGC Order that a similar letter was insufficiently explicit; that the real purpose of the March 7, 2001, letter was to persuade Madison River to enter into negotiations with AT&T over switched access rate issues; and that he certainly hoped that the decision to send the March 7, 2001, letter would not result in the inability of AT&T customers taking local service from Madison River to reach AT&T's long distance network. Although I found the testimony of Mr. Taggart to be credible at the time that I heard it, the fact that AT&T attempted to comply with the standard set out in the MGC Order implies that AT&T reserved the right to terminate all business relations with Madison River at some point. Under that set of circumstances, I am unable to definitively conclude that AT&T lacked the intent attributed to it by the majority at the time that it sent the March 7, 2001, letter. I am not, however, persuaded that AT&T failed to pay the access bills submitted by Madison River for the express purpose of inducing Madison River to prevent traffic from reaching AT&T's network given the complete absence of any direct evidence to that effect and the fact that refusing to pay disputed bills is a tactic which has been employed in a wide variety of telecommunications and non-telecommunications businesses for perfectly legitimate reasons.

The record is completely devoid of direct evidence that AT&T reasonably expected that Madison River would cease providing originating access to AT&T's interexchange network at the time that it sent the March 7, 2001, letter, which is the only act of AT&T of which the Public Staff complains. The undisputed evidence in the record demonstrates that Madison River initially refused to honor AT&T's demands on the grounds that acting in that manner would be unlawful. In addition, Madison River returned the executed confidentiality agreements to AT&T at the time that it responded to the March 7, 2001, letter, a fact which suggests that Madison River wished to negotiate with AT&T in accordance with AT&T's suggestion. Madison River did not cease providing originating switched access service to AT&T customers for over a month after the delivery of the March 7, 2001, letter. Although the majority references AT&T's refusal to pay the switched access bills that Madison River began sending in December, 2000, as additional grounds for concluding that AT&T intended to induce Madison River to block access to AT&T's network, the record does not contain any direct evidence to the effect that AT&T deliberately failed to pay these bills for the purpose of getting Madison River to cease providing access to AT&T's network, and I am unwilling to make the inference that the majority draws from this aspect of AT&T's conduct given all the surrounding facts and circumstances. In any event, Madison River had a number of other options for dealing with the March 7, 2001, letter and AT&T's refusal to pay for switched access provided by Madison River aside from blocking access to AT&T's network, including making a more active attempt to enter into negotiations with AT&T, bringing suit against AT&T in the courts, or filing a complaint against AT&T with the Commission or the FCC.[10] Under this set of circumstances, I am simply unable to find by a preponderance of the evidence that AT&T reasonably expected that Madison River would act as it did at the time that it sent the March 7, 2001, letter or failed to pay the switched access bills that Madison River began sending AT&T in December, 2000. Although making the inference found in the majority's decision is appealing given my distaste for AT&T's tactics, I am simply unable to find as a matter of fact that AT&T could have reasonably expected Madison River to act as it did when it sent the March 7, 2001, letter and failed to pay the switched access invoices that Madison River began sending to AT&T in late 2000.

Similarly, I am unable to find as a matter of fact that any conduct in which AT&T engaged with the alleged intent of inducing Madison River to cease providing originating switched access service actually produced that result. Although the Public Staff repeatedly asserted that Madison River acted at the express direction of AT&T, an analysis of the record evidence indicates that the Public Staff never directly inquired of Madison River as to the reason for its actions and that the Public Staff's assertions with

[10] The majority insists that AT&T should have initiated a complaint before the Commission against Madison River instead of engaging in "self-help" efforts such as sending the March 7, 2001, letter or refusing to pay disputed switched access bills. [Rec. Or., p. 12]. It seems to me that this logic is equally applicable to Madison River. Even so, the majority never explains why AT&T should be required to initiate litigation against Madison River while Madison River should not be expected to initiate litigation against AT&T. The existence of this option and Madison River's claim that the demands made in the March 7, 2001, letter required it to engage in illegal acts strongly suggest that the initiation of judicial or administrative litigation was as likely, if not more likely, to be the result of AT&T's conduct than what actually occurred.

respect to the motivation for Madison River's conduct rest on its analysis of the March 7, 2001, letter. In view of the Public Staff's failure to make any inquiry of Madison River concerning this subject; the facially credible testimony of Mr. Taggart that the tone of the March 7, 2001, letter stemmed from his efforts to comply with the requirements of the MGC Order rather than a desire that Madison River actually cease providing switched access service to AT&T; and the length of time between the date of the March 7, 2001, letter and the date upon which Madison River blocked access to AT&T's network, I am simply unable to conclude as a matter of fact that Madison River's decision to block access to AT&T's network stemmed directly from conduct in which AT&T engaged that was intended to achieve such a result. As a result, I do not believe that the present record establishes by a preponderance of the evidence that Madison River's actions were undertaken as a result of conduct by AT&T that was intended to induce Madison River to block access to AT&T's network.

Although my conclusion that the Public Staff has failed to establish at least two of the three factual predicates for a finding of vicarious liability would be sufficient, without more, to necessitate my decision to dissent from the result reached in the recommended order, there are other incidental portions of the majority's decision that I cannot join. Even though none of these portions of the majority's logic are essential to its ultimate decision of this matter, I am unable to let them pass without some comment given their potential importance in other cases.

Although it correctly states that the matters at issue here involve the application of state rather than federal law, the majority discusses AT&T's reliance on the MGC Order, concludes that AT&T failed to comply with the procedures set out in that decision, and finds that the FCC's decision in In re Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking (released April 27, 2001) (CLEC Access Charge Reform Order), is better reasoned than the MGC Order and "provides useful guidance to this Commission" because the CLEC Access Charge Reform Order "properly takes into account the importance of maintaining universal connectivity." [Rec. Or., pp. 10-11]. Unfortunately, the majority's expression of approval for the CLEC Access Charge Reform Order is difficult to square with the result that it reaches in this proceeding. After concluding "that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable rates," the FCC determined in the CLEC Access Charge Reform Order that "some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services." CLEC Access Charge Reform Order ¶ 34. As a result, the FCC decided to establish "a benchmark level at which CLEC access rates will be conclusively presumed to be just and reasonable." CLEC Access Charge Reform Order ¶ 40. The benchmark access charge rate that the FCC found presumptively reasonable in the immediate aftermath of the CLEC Access Charge Reform Order was the higher of either "2.5 cents per minute, or the rate of the corresponding incumbent carrier," with the "corresponding incumbent carrier" defined as the "incumbent local exchange carrier . . . that would provide

interstate exchange access service to a particular end user if that end user were not served by the CLEC." CLEC Access Charge Reform Order ¶ 51; 47 C.F.R. § 61.26(a)(2). Although the majority correctly notes that the "FCC held that an IXC must accept and pay for access service whenever it is provided by a CLP at a 'presumptively reasonable' rate [Rec. Or., p. 11]," it totally overlooks the fact that the Madison River switched access rates in question, which apparently exceed the applicable benchmark rate [T. pp.7-8, 96; AT&T Comp. Ex. WJT-3, pp. 4-5], does not appear to be "presumptively reasonable" as that term is used in the CLEC Access Charge Reform Order.[11] As a result, the majority's decision to penalize AT&T is completely inconsistent with the effect of the FCC decision that it considers "persuasive."[12]

I further disagree with the majority's conclusion that AT&T violated the strictures set out in the August 6, 1990, order.[13] A careful reading of that order indicates that AT&T agreed not to cease providing service in any geographic area in the state without Commission authorization. The record contains absolutely no evidence whatsoever tending to show that the Madison River local customers that the majority finds to have been harmed by AT&T's conduct are located in any specific geographic area. The absence of such evidence precludes a finding that AT&T violated the August 6, 1990, order. As a result, the majority errs by finding AT&T in violation of the August 6, 1990, order as well.

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[11] The Public Staff argued that the logic of the CLEC Access Charge Reform Order supported a finding of liability because CLEC access charge rates are deemed just and reasonable pursuant to G.S. 62-132. [Pub. St. Br.,p. 10]. In making this argument, the Public Staff overlooks the fact that the presumption of justness and reasonableness created by G.S. 62-132 is only available to rates "established" by the Commission. A rate is "established" for purposes of G.S. 62-132 when it is set by the Commission after a full hearing, appropriate findings and conclusions, and the entry of a formal order. State ex rel. Utilities Commission v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976). As a result of the fact that the Commission exempted CLPs from all of the ratemaking provisions of the Public Utilities Act in the aftermath of the enactment of House Bill 161, including G.S. 62-132, In re Local Exchange and Local Exchange Access Telecommunications Competition, Docket No. P-100, Sub 133, Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules, Eighty-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions 110, 164-165 (1996), the access charges assessed by CLPs have not been "established" as that term is used in G.S. 62-132 and are not entitled to a presumption of justness and reasonableness.

[12] The majority distinguishes the decision of the United States Court of Appeals for the District of Columbia Circuit in AT&T Corporation v. FCC, 292 F.3d 308 (D.C. Cir. 2002), on the grounds that it only construed an IXC's obligations under 47 U.S.C. § 201 and did not address the potential impact of the interconnection provisions of 47 U.S.C. § 251. [Rec. Or.,p. 11, ftn. 3]. The majority overlooks the fact that the FCC held in the CLEC Access Charge Reform Order that an IXC has no obligation under either 47 U.S.C. § 201, 47 U.S.C. § 214, or 47 U.S.C. § 251 to purchase access service from any particular local exchange carrier unless it charges "presumptively reasonable" rates. CLEC Access Charge Reform Order ¶¶90-94. As a result, the majority's attempt to find support for its position in federal law must be deemed unsuccessful.

[13] The majority's finding in this respect has no meaningful impact on the outcome of this proceeding, since the majority has not imposed any penalty on AT&T for its alleged violation of the August 6, 1990, order.

The picture painted by the present record is not very edifying. In essence, the record suggests that AT&T and Madison River played a high stakes game of chicken, with their mutual customers being the ones placed at the greatest risk. I must confess that it is tempting to support the majority's decision to penalize AT&T out of sheer distaste for the tactics that it employed in this instance. Although not strictly in accordance with applicable law, such an outcome might well be just. I do not, however, believe that it would be consistent with a proper application of the relevant provisions of the Public Utilities Act. As a result, I respectfully dissent from the majority's decision to impose a $50,000 penalty upon AT&T for violations of G.S. 62-118(a), G.S. 62-131(a), and G.S. 62-140(a).[14]

\s\ Sam J. Ervin, IV
Commissioner Sam J. Ervin, IV

[14] As a result of the fact that the FCC held in the CLEC Access Charge Reform Order that nothing in 47 U.S.C. § 201, 47 U.S.C. §214, or 47 U.S.C. § 251 that requires an IXC to purchase originating switched access from a particular LEC that charges "presumptively reasonable" rates; the decision in AT&T Corporation v. FCC, 292 F.2d 308 (D.C. Cir. 2002); and the fact that the majority correctly describes the state of federal law governing this subject as "evolving" [Rec. Or., p. 11], I concur with the majority's implicit decision not to file a complaint against AT&T with the FCC for any interruption in interstate originating access service that resulted from this incident.