

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed
Rules Governing Telephone Filing
Requirements, Minn. Rules Parts
7810.8100 - 7810.8940

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Peter C. Erickson, Administrative Law Judge, at 9:15 a.m. on September 25, 1991, in Conference Room 3 of the American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota 55101. This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.01 through 14.28 (1991), to determine whether the proposed rules governing telephone company filing requirements should be adopted by the Minnesota Public Utilities Commission (PUC, Commission or Agency). The PUC was represented at the hearing by Margie Hendriksen, Special Assistant Attorney General, Seventh Floor, American Center Building, St. Paul, Minnesota 55101. Members of the Agency panel appearing at the hearing included the following: Richard R. Lancaster, Executive Secretary of the Commission; Mark Oberlander, Supervisor, Telecommunications Division; Dan Lipschultz, Staff Attorney; and John Lindell, Financial Analyst.

The hearing register was signed by 24 persons. Twelve witnesses provided oral testimony at the hearing. All persons desiring to testify were given an opportunity to do so. The record remained open through October 15, 1991, for the submission of initial written comments. As authorized by Minn. Stat. § 14.15, subd. 1 (1991), three business days were allowed for the filing of responsive comments. The final date for the submission of responsive comments was October 18, 1991. On October 18, 1991, the record of this rulemaking proceeding finally closed for all purposes.

The Commission must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commission of actions which will correct the defects and the Commission may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commission may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commission does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commission elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commission may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commission makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commission files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On July 23, 1991, the Commission filed the following documents with the Chief Administrative Law Judge:
 - (a) A copy of the proposed rules certified by the Revisor of Statutes.
 - (b) The Order for Hearing.
 - (c) The Notice of Hearing proposed to be issued.
 - (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
 - (e) The Statement of Need and Reasonableness.
2. On August 19, 1991, a Notice of Hearing and a copy of the proposed rules were published at 16 State Register 371-88.
3. On August 14, 1991, the Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Commission for the purpose of receiving such notice. A copy of the Notice of Hearing was also sent to all local exchange telephone companies and long distance telephone resellers operating in the State of Minnesota.
4. On August 30, 1991, the Commission filed the following documents with the Administrative Law Judge:
 - (a) The Notice of Hearing as mailed.
 - (b) The Agency's certification that its mailing list was accurate and complete.
 - (c) The Affidavit of Mailing the Notice to all persons on the Commission's list.
 - (d) An Affidavit of Additional Notice.
 - (e) The names of personnel who would represent the Commission at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
 - (f) A copy of the State Register containing the proposed rules.

- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 3 State Register 991, November 6, 1978 and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through October 15, 1991, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on October 18, 1991, the third business day following the close of the initial comment period.

6. Pursuant to Minn. Stat. § 14.115 (1991), an agency must consider the impact of its rules on small businesses when they promulgate rules which may affect such small businesses, as statutorily defined. Some local exchange telephone companies and cooperative telephone companies operating in Minnesota meet the statutory definition of a small business. In its Statement of Need and Reasonableness, the Commission documented its consideration of impact on small businesses, as required by Minn. Stat. § 14.115, subd. 2 (1991). Its mailing of the notice of rulemaking and a copy of the rules to all local exchange companies and long distance telephone service resellers operating in the State of Minnesota satisfied Minn. Stat. § 14.115, subd. 4 (1991), by providing an opportunity for small business to participate in the rulemaking process. As will be discussed in the Findings relating to Minn. Rules pt. 7810.8200, subp. 13, as a result of this rulemaking proceeding, the Commission eliminated any impact the proposed rules might have had on small businesses by proposing an amendment limiting the application of the proposed rules.

Statutory Authority

7. The authority of the Commission to adopt the proposed rules is included in the following statutory provisions: Minn. Stat. § 216A.05 (1991) and Minn. Stat. § 237.10 (1991) which specifically authorize the Commission to adopt rules; Minn. Stat. § 216A.05 (1991), which empowers the Commission to review the reasonableness of tariffs and rates for utility companies; Minn. Stat. § 216A.05 (1991), which authorizes the Commission to prescribe the form and manner of filing of utility tariffs, rates, fares and charges; Minn. Stat. § 237.06 (1991), which requires telephone companies to charge just and reasonable rates and to provide reasonably adequate service and facilities; Minn. Stat. § 237.07 (1991), which requires telephone companies to file rate schedules with the Department of Public Service; Minn. Stat. § 237.075 (1991), which requires telephone companies to give notice of rate changes; and Minn. Stat. §§ 237.57 - 237.64 (1991), which regulate the provision of competitive telephone services in Minnesota.

Nature of Proposed Rules

8. Minn. Rules pts. 7810.8100 - 7810.8940 are entirely new rules proposed by the Commission to state the filing requirements for telephone companies subject to the jurisdiction of the Commission for tariffs, price lists and new service offerings, rate changes, miscellaneous tariff changes, emerging competitive service rate changes, competitive services, and incentive

plans. The proposed rules culminate a cooperative industry and government endeavor, initiated in 1978, which included several sets of draft rules, responsive public comments and participation by an advisory task force. Generally, the rules as proposed represent a consensus among participating government agencies and private telephone companies.

7810.8100 - Purpose

9. Part 7810.8100 states the purpose of the proposed rules. Paragraphs A, B, C, and D enumerate the types of filings subject to the rules. Paragraph C of the rule, as proposed, reads as follows:

C. Competitive services under Minnesota Statutes sections 237.59, 237.62, and 237.625; and

In its prefiled comments, the Department of Public Service noted that paragraph C omitted an appropriate reference to Minn. Stat. § 237.60 and contained an erroneous reference to Minn. Stat. § 237.625. PUC Ex. 7E, p. 1. In its responsive comments, the Commission recognized the legitimacy of the Department's comment. In its Response to Public Comment, p. 9, the Commission proposed the following amendment to paragraph C of this part:

C. Competitive services under Minnesota Statutes, sections 237.59, 237.60, and 237.62, ~~and 237.625~~; and

10. Part 7810.8100 is needed and reasonable since it specifies the filings which will be subject to the proposed rules. The proposed amendment of the Commission is needed and reasonable as stating the correct statutory reference to competitive services. The amendment proposed by the Commission in its Reply Comments is not a prohibited substantial change since it only clarifies the rules by changing an incorrect reference.

Part 7810.8200 - Definitions

11. This part contains 31 definitions that are used throughout the rules. Only subparts 9, 10 and 13 received any public comments. The remaining subparts are justified and explained in the Commission's Statement of Need and Reasonableness and are needed and reasonable.

12. Part 7810.8200, subp. 9 defines "embedded cost". The definition clearly relates to the embedded cost of a company's capital, other than its cost of equity. The Office of the Attorney General suggested that the definition be changed to relate to "embedded costs of capital" in both the title of the subpart and in the first line of the definition. MPUC Ex. 7F. The Department of Public Service agreed with the Office of the Attorney General and suggested the following amendment to page 2, line 25 of the proposed rules:

Subp. 9. Embedded cost of capital. "Embedded cost of capital" means the

Posthearing Comments of the Minnesota Department of Public Service, p. 2. The Commission did not take a position on the amendment suggested by the Office of

Show here in rule where "embedded cost" is found

the Attorney General and supported by the Department. Because the application of the definition is clear from the context, subpart 9, as currently drafted, is both needed and reasonable. It would, however, clarify subpart 9 and, perhaps, avoid later confusion if the Commission adopted the clarifying amendment suggested by the Office of the Attorney General, as stated by the Department of Public Service. If the Commission adopts the amendment, it would not be a prohibited substantial change because the amendment merely clarifies the proposed rule without expanding its application.

13. Subpart 10 is an attempt to define emerging competition. Subpart 10, as proposed, reads as follows:

Subp. 10. Emerging competition. "Emerging competition" exists for services listed in Minnesota statutes section 237.59, subd. 1. Emerging competition also exists when the Commission determines that the criteria of Minnesota statutes section 237.59, subd. 5, paragraphs (A) and (C) have been satisfied.

It is both necessary and reasonable to adopt a legally correct definition of the term "emerging competition". The phrase is a statutory term of art and is used in the rules. A great number of commentators, however, stated that the Commission's definition was incorrect as a matter of law. MPUC Ex. 7D, p. 1; MPUC Ex. 7E, p. 2; October 15 Comments of U.S. West Communications, p. 2, pp. 6-10; Posthearing Comments of the Department of Public Service, p. 4; Reply Comments of the Department of Public Service, pp. 1-2. The Commission recognized that the definition it proposed did not comport with the statutes. In its Supplementary Response to Public Comments, at p. 9, the Commission proposed the following amendment to subpart 10:

Subp. 10. Emerging competition. "Emerging competition" exists for services listed in Minnesota Statutes, section 237.59, subd. 1. Emerging competition also exists when the Commission determines it to exist under Minnesota Statutes, sections 237.57, subdivision 4 and 237.59, subdivisions 2 to 6 ~~that the criteria of Minnesota Statutes, sections 237.59, subdivision 5, paragraphs (A) and (C), have been satisfied.~~

14. The definition of emerging competition finally proposed by the Commission in its Supplementary Response to Public Comment is a legally correct statement of the conditions under which emerging competition exists. The change proposed by the Commission eliminates any inconsistency between the rule definition and Minn. Stat. § 237.57, subd. 4. The definition of emerging competition proposed by the Commission in its Supplementary Response to Public Comment is both needed and reasonable as a legally correct statement of the conditions under which emerging competition may be said to exist.

15. The definition of emerging competition finally proposed by the Commission is not a prohibited substantial change because the Commission has merely restated the definition to be consistent with existing law. The amendment does not introduce any new subject matter or vary the application of the rule. The amendment merely corrects a legally incorrect definition that was contained in the original proposal.

16. Subpart 13, "general rate change", as initially drafted, would have applied the rules to a pre-rate regulated telephone company filing for a general rate change under Minn. Stat. § 237.075 and to all earnings investigations from their inception carried out under Minn. Stat. § 237.081. The definition as initially submitted would apply to earnings investigations of any of the 91 cooperatives, municipal telephone companies and independent telephone companies with fewer than 30,000 subscribers (ILECs). The Minnesota Telephone Association, in comments supported by GTE North and GTE Minnesota, the Minnesota Independent Coalition, United Telephone Company of Minnesota, and Vista Telephone Company of Minnesota argued that the filing requirement should only apply after the Commission has completed its initial investigation under Minn. Stat. § 237.081 and should only apply to pre-rate regulated telephone companies, the four largest telephone companies. MPUC Ex. 7A, pp. 2-6. A number of additional commentators agreed that some limiting amendment on the application of the rules was appropriate. MPUC Ex. 7C, p. 1; MPUC Ex. 7B, p. 1; MPUC Ex. 7E, p. 3; Comments of the Minnesota Independent Coalition, p. 1; Comments of GTE Minnesota, Michael Chopp. In its Response to Public Comment, p. 2, the Commission proposed to limit the application of the rules to the four non-ILECs operating in Minnesota; Vista; United; GTE; and U.S. West. The proposed amendment would change subpart 13 to read as follows:

Subp. 13. General rate change. "General rate change" means a change in rates for which the telephone company's gross revenue requirement must be determined to evaluate the reasonableness of the change in rates under Minnesota Statutes sections 237.075 and 237.081, subdivision 2, paragraph (B).

Response to Public Comment, p. 2.

17. Part 7810.8200, subd. 13, as amended, is needed and reasonable in that it limits the detailed filing requirements of the rules to the four non-ILECs in Minnesota, companies with more than 30,000 subscribers. To apply the detailed filing requirements of the rules to ILECs would be financially onerous, given the small amounts usually in dispute. Limitation of the rules application to the largest telephone companies is also an appropriate accommodation to small businesses, as defined in Minn. Stat. § 14.115, subd. 1 (1991).

18. The change in definition of general rate change proposed by the Commission, as stated in Finding 16, supra, is not a prohibited substantial change. The amendment does not enlarge the application of the rules to persons unrepresented at the hearing. Rather, it limits application of the rules, as a consequence of the hearing process. The amendment does not result in a rule that is fundamentally different, impose burdens on persons who would not have participated in the hearing because of a lack of notice or go to a new subject matter of significant substantive effect. Since the definition was amended in response to comments received at the public hearing, it is a logical outgrowth of the hearing process and does not result in a prohibited substantial change. American Iron and Steel Institute v. EPA, 568 F.2d 284, 293 (3d Cir. 1977); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973); South Terminal Corp. v. EPA, 504 F.2d 646 (659 (1st Cir. 1974).

7810.8400 - Tariffs and Price List

19. Subpart 1 of part 7810.8400 describes the tariffs and price lists that a company must maintain on file with the Department of Public Service. AT&T Communications of the Midwest, Inc., in its October 15 comments, noted that it would be appropriate to allow a company to reference the carrier's tariffs on file with the FCC. The State tariffs of major interexchange carriers, including AT&T, usually have references to interstate tariff provisions or rules of the FCC for add-on services. Such intrastate service is only offered in connection with a specific service or group of services offered under the carrier's interstate tariff. There is no evidence that referencing a federal tariff has caused any difficulty or deprived consumers of necessary information. Continued reference to FCC tariffs for add-on services is desirable to allow for administrative simplicity and efficiency in the filing of State tariffs related to add-on services. Moreover, customers are adequately protected by market forces. MCI Companies, in their October 18, 1991 comments, at page 4, agree with the suggestion for amendments to part 7810.8400, subp. 1 and 1A suggested by AT&T.

20. In its Supplementary Response to Public Comment, at p. 5, the Commission suggests the following amendment to part 7810.8400, subp. 1:

Subp. 1. Tariffs and price lists. A telephone company shall keep on file with the department its tariffs and price lists showing or referencing specific rates, tolls, rentals, and other charges for the services offered by it either alone or jointly and concurrently with other telephone companies. The tariffs or price lists must also include the regulations, classifications, practices, and limitations on liability of the telephone company. The tariffs and price lists must:

A. identify separately each telephone service and state or by reference provide the classifications, rates, charges, tolls, rules, regulations, and practices applicable to each service;

* * *

21. For the reasons stated by AT&T Communications of the Midwest, Inc., summarized in Finding 19, supra, subpart 1 and 1A are needed and reasonable. The amendment simply clarifies the Commission's intention to continue an existing practice. Hence, it does not result in a prohibited substantial change.

22. Part 7810.8400, subp. 1C states what a tariff and price list must include for individually priced noncompetitive services. That paragraph requires a description of each service and a statement that prices are determined on a contractual basis. Subpart 1D which relates to individually priced emerging competitive services requires that the tariff and price list describe each service and the conditions that relate to each service. AT&T Communications of the Midwest, in its October 15 comments, at p. 4, argues that paragraph 1C and 1D should be modified to require the same information. The Statement of Need and Reasonableness does not contain any reason for the different content of subpart 1C and subpart 1D. In its Supplementary Response to Public Comment, at p. 6, the Commission recommends the following amendment:

~~C. For individually priced and noncompetitive services, describe each service and include a statement that prices are determined on a contractual basis;~~

~~D. For individually priced emergingly competitive services, describe each service and the conditions that relate to each service.~~

23. Minn. Rule pt. 7810.8400, subp. 1C, as amended, is both needed and reasonable so that there is public understanding of tariffs and price lists. The basic information contained in the proposed amendment is required so that both the public and government agencies are able to understand tariffs and price lists. The Administrative Law Judge, however, notes that this paragraph should be labeled "C" rather than "D" as stated in the Commission's amendment proposed in Finding 22, supra.

24. Because the amendment does not result in a rule that is fundamentally different or go to a new subject matter and merely introduces consistency in the information required for each service, it does not constitute a prohibited substantial change.

25. The remaining portions of part 7810.8400 are discussed in the Commission's Statement of Need and Reasonableness. No adverse public comments on the remaining portions of this part were received. The Judge finds that the remaining portions of part 7810.8400 have been shown to be both needed and reasonable.

7810.8500 - New Service Offerings

26. Part 7810.8500 states the information a telephone company must file with the Department of Public Service and the Commission for each new service offering. Paragraphs A and B did not receive adverse public comment and are discussed in the Commission's Statement of Need and Reasonableness. The Judge finds that part 7810.8500, paragraphs A and B, have been shown to be both needed and reasonable.

27. Part 7810.8500 C. requires that a company file information explaining the estimated impact on the company's revenues and expenses for noncompetitive services as a result of the new service offering. Vista Telephone Company proposed that paragraph C be amended to require an explanation of the "estimated annual revenue and expenses of the new service offering". MPUC Ex. 7C, p. 2. United Telephone Company proposed the same amendment in its September 18, 1991 comments. MPUC Ex. 7B, p. 1. United argued that the data requested would be costly to produce and would have no relevance to whether a new service should be approved. The Minnesota Telephone Association filed similar comments. MPUC Ex. 7a, pp. 17-18. The Department of Public Service, in its September 18, 1991 comments, at p. 3, urges retention of the proposed language. The Department contends that new service offerings may adversely impact revenues and expenses for noncompetitive services. To enable determination of whether a new service will be detrimental to regulated noncompetitive services, information explaining only the estimated annual revenues and expenses of the new service offering would not be sufficient. MPUC Ex. 7E, p. 3. In its Response to

Public Comment, pp. 20-21, the Commission argues that the information is necessary if the Commission is to decide whether to approve a new service, whether the proposed rates for the new service are just and reasonable and whether the service is in the public interest.

28. Part 7810.8500 C., requiring an explanation of the estimated impact on the company's revenues and expenses for noncompetitive services as a result of the new service offering is both needed and reasonable. Such information, as noted by the Commission, is needed for it to decide whether to approve a new service. It will also help avoid cross-subsidy of competitive services by noncompetitive services. Finally, typically, the telephone company will have already considered the impact on other services when it decides to offer a new service.

29. Part 7810.8500 D. requires that a telephone company include an incremental cost study for new emerging competitive services when the filing for a new service offering is made with the Department and the Commission. MCI Telecommunications Corporation and Associated Companies, in their September 18, 1991 comments, at pp. 2-3, argue that part 7810.8500 D. should be amended to read as follows:

Include incremental cost-of-service study, or, if allowed pursuant to Minn. Stat. § 237.60, subd. 2(H), a variable cost study, demonstrating that the rate for each new emerging competitive service offering is above incremental, or, if allowed, variable cost.

It argues that the same amendment should be made to part 7810.8740 B.

30. The Department of Public Service, in its September 15 comments, at pages 5-6, supports the amendments to both rule parts suggested by the MCI Companies. In its Reply Comments, MCI Companies extends the suggested amendment also to rule parts 7810.8755 and 7810.8760 D. The MCI Companies make this recommendation to take into account Minn. Stat. § 237.60, subd. 2, which allows the use of a variable cost study in lieu of an incremental cost study at the Commission's discretion. MCI Reply Comments, October 18, 1991, pp. 2-3.

31. In its Supplementary Response to Public Comments, at p. 8, the Commission adopted the suggested amendment offered by MCI Companies with respect to part 7810.8500, item D, part 7810.8740, item B, and part 7810.8755. The Supplementary Response to Public Comment of the Commission does not mention incorporation of the same amendment in part 7810.8760 D.

32. To avoid subsidy, it is necessary that each new service offering be substantiated by a study demonstrating the incremental cost of providing the emerging competitive service, and that the rate for such a service is above incremental cost. It is also needed and reasonable to incorporate into this provision the option recognized by Minn. Stat. § 237.60, subd. 2 to provide a variable cost study, with the approval of the Commission. It is also needed and reasonable to make this section, when describing the incremental cost study, as detailed as the statement now contained in part 7810.8740 B. Part 7810.8500, as amended, is both needed and reasonable.

33. Since the amendment to part 7810.8500 D. proposed by the Commission merely makes this section consistent with part 7810.8740 B. and further

recognizes a statutory cost study option, the amendment does not result in a prohibited substantial change.

34. The Office of the Attorney General suggested that part 7810.8500 be amended by including a new item E as follows:

E. include, if the service is claimed to be competitive, an identification of the vendors of the products it competes against.

MPUC Ex. 7F, p. 1. However, the Attorney General does not state in its written comments and did not state orally at the hearing why the new section E is either needed or reasonable. The Judge finds that the rule has been shown to be needed and reasonable without this proposed modification.

7810.8600 - Notice; 7810.8605 - Petition

35. Parts 7810.8600 and 7810.8605 are discussed in the Commission's Statement of Need and reasonableness. Neither part received any adverse public comment, either oral or written. Parts 7810.8600 and 7810.8605 have been shown to be both needed and reasonable.

7810.8610 - Expert Testimony and Supporting Exhibits

36. Part 7810.8610 requires that a general rate change notice include expert testimony and exhibits in support of the company's proposed general rate change. United Telephone Company, in its September 18, 1991 comments, MPUC Ex. 7B, pp. 1-2, argues that it should be optional with the company as to whether its chief executive officer or any other company officer provides testimony in support of the general rate change. United notes that company officers may not be expert in a general rate change filing and would, therefore, have no reason to provide testimony. The Department of Public Service, in its September 18, 1991 comments, MPUC Ex. 7(E), p. 3, opposes the suggestion of United. The rule as proposed by the Commission requiring at least one company officer to testify in support of the rate proceeding is both needed and reasonable. The chief executive officer of the company may not be a subject matter expert with respect to any particular category of a general rate filing. He or she does, however, have final authority with the company's board of directors to approve the filing of a rate case. It would be an unusual situation in which no company officer would testify in support of the general rate filing. It is important that the company's chief executive officer or some other company officers support the rate filing that has been made. Moreover, the presence of such a company policy witness is extremely beneficial in a general rate case. The chief executive officer can testify about company policy or, at least, indicate other witnesses to testify on behalf of the company who can appropriately respond to questions relating to company policy.

7810.8615 - Test Year

37. Subpart 1 of part 7810.8615 states the requirement that a general rate change notice be based on a test year and that such a test year be

identified and justified. The concept of a test year is fundamental to a general rate change filing. Subpart 1 received no adverse written or oral comments. Subpart 1 merely states the general requirement for a test year and has been shown to be both needed and reasonable.

38. Subpart 2 relates to an historical test year. Subpart 2B, among other subject matters, discusses the use of an average or year-end rate base in the context of an historical test year. U.S. West in its prehearing comments, MPUC Ex. 7D, pp. 2-3, suggested that the rule as drafted requiring adjustments to reflect "known and measurable changes" for a year-end rate base was both unclear and confusing. See also, Comments of U.S. West, October 15, pp. 3-4. U.S. West suggested the following amendment to subpart 2B to bring the language of the proposed rule into harmony with the justification for the rule contained in the Statement of Need and Reasonableness, at p. 17:

If a year-end rate base is selected, a year-end capital structure must be shown and the operating income statement must include adjustment to a year-end level.

The Department of Public Service, in their post-hearing comments, at p. 6, retracted the amendment it had previously proposed and endorsed U.S. West's amendment. The Commission, in its Response to Public Comment, at p. 6, endorsed U.S. West's suggested clarification of the Agency's intention by proposing the following amendment:

Either an average or year-end rate base may be used. If a year-end rate base is selected, a year-end capital structure must be shown and the operating income statement must be adjusted to end-of-year levels ~~reflect known-and-measurable-changes~~. If an average rate base is selected, an average capital structure or a year-end capital structure may be shown.

39. The amended rule as proposed by the Board properly reflects the principals of matching rate base, capital structure and income. By deleting the specific reference to adjustments for "known and measurable changes", the rule avoids the erroneous impression that the Commission intended to limit adjustments for known and measurable changes to the operating income statement. The term "known and measurable changes" is a term of art in regulation. The Commission did not intend, by initial specific reference to "known and measurable changes" as adjustments to the income statement, to limit the appropriate application of that term in a rate case setting. Therefore, the amended rule is both needed and reasonable.

40. The amendment to subpart 2 proposed by the Commission is not a prohibited substantial change. The change was merely meant to clarify a rule that was otherwise fully developed in the Commission's Statement of Need and Reasonableness. The modification does not enlarge the application of the rule or result in a rule that is fundamentally different.

41. Subpart 3 relates to the use of a projected test year. The comments received on subpart 3 all related to the second paragraph of the subpart. The comments were generally of two types. The first group of comments wished to preserve the ability of the Commission to reflect known and measurable changes to the operating income statement which might occur after the end of the

projected test year. The Minnesota Telephone Association in combined comments with GTE North, MIC, United Telephone Company of Minnesota and Vista Telephone Company of Minnesota, suggested that the Commission's discretion be preserved by inserting on page 10, line 16 of the proposed rule after the word "changes", a period, and striking the phrase "during the projected test year". MPUC Ex. 7A, p. 18. Other commentators suggested reaching the same result by adding a subpart 4 to the rule which would specifically authorize adjustments for known and measurable changes occurring after the projected test year. MPUC Ex. 7B, p. 2; MPUC Ex. 17, p. 1; MPUC Ex. 7E, p. 5; Reply Comments of Vista Telephone Company, p. 11. The amendments suggested by certain of the telephone companies were opposed by the Department of Public Service. Comments of the Department of Public Service, p. 7. The argument in support of retaining the Commission's discretion is that it is appropriate to reflect known and measurable changes, even after the end of the projected test year, if they can be substantiated by the telephone company involved. The Commission, in its Responses to Public Comment, at pp. 21-22, argues that telephone companies have been sufficiently accommodated by allowing a projected test year to be used in a general rate filing. It concludes that recognizing data beyond the test year makes it more likely that rates will be unreasonable.

42. Even the adverse commentators apparently concede that what is involved is a matter of the Commission's discretion. Whether a rule is reasonable is a legal question which has been long recognized in Minnesota law. To be valid, a rule must be reasonable. Juster Bros. v. Christgau, 7 N.W.2d 501, 507 Minn. 1943); Lee v. Delmont, 36 N.W.2d 530, 539 (Minn. 1949). An unreasonable rule has been equated with an arbitrary rule. Hurley v. Chaffe, 43 N.W.2d 281, 284 (Minn. 1950); In re Application of Bryon N. Hansen, 275 N.W.2d 790 (Minn. 1978). A rule is not unreasonable simply because a reasonable alternative exists. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943). A reviewing authority should not substitute its judgment for that of an administrative agency in promulgating rules unless the agency's action disregards the facts and circumstances and can, therefore, be said to be arbitrary and unreasonable. The question to be decided in determining reasonableness is whether or not a rational person could make the same choice made by the agency from among possible alternatives in order to accomplish the legislative directive of ensuring just and reasonable rates. The Commission's limitation on its discretion finds support in public policy and practical argument and is certainly within its statutory authority. There is no showing it would result in arbitrary or capricious adverse consequences. Therefore, the limitation of adjustments for known and measurable changes to changes occurring during the test year when a projected test year is used is both needed and reasonable.

43. GTE in three sets of comments supports an additional amendment to the second paragraph of subpart 3. It proposes the following amendment at page 10, lines 13-21 of the proposed rules:

For a projected test year, an average rate base and average capital structure or an end-of-period rate base and end-of-period capital structure must be used depending on the effective date of the ordered rates. An operating income statement must be adjusted to reflect the presentation method used for a rate base and capital structure. For average levels, the operating income statement must not be adjusted to an end-of-period level

but may reflect known and measurable changes during the projected year. For end-of-period levels, the operating income statement must be adjusted to an end-of-period level and may reflect known and measurable changes during the projected year.

Comments of GTE North, Inc. and GTE Minnesota, MPUC Ex. 7H, p. 3. The effect of the GTE amendment would be to permit a rate filing that uses a projected test year to present the projected data on an end-of-period basis, if the effective date of the new rates would be after the end of the test year. The GTE amendment was opposed by the Department of Public Service in written comments and the Office of the Attorney General in oral comments made at the hearing. Both the Department and the Office of the Attorney General argue that the GTE amendment is at variance with the Commission's decision in Continental Telephone Company, Docket No. P-407/GR-84-724, Order Rejecting Filing, January 22, 1985. In that case, the Commission concluded that a filing which combined a projected test year with an end-of-period rate base was prima facie unreasonable. In its Response to Public Comments, pp. 23-24, the Commission rejected the amendment proposed by GTE.

44. Part 7810.8615, subp. 3, as written, is both needed and reasonable. The rule as written attempts to prevent projection of a test year too far into the future. GTE's proposed amendment would be contrary to the Commission's decision in Continental Telephone, supra, and would potentially allow the use of speculative and unverifiable information to determine rates. Post-hearing Comments of the Minnesota Department of Public Service, pp. 7-9.

7810.8620 - Jurisdictional Financial Summary Schedule; 7810.8625 - Rate Base Schedules; 7810.8630 - Operating Income Schedules

45. Part 7810.8620, part 7810.8625 and part 7810.8630 are supported in the Commission's Statement of Need and Reasonableness. These parts received no adverse oral or written comments. The parts have been shown to be both needed and reasonable.

7810.8635 - Supplemental Financial Information

46. Subparts 1 through 4 and subparts 6 through 8 are supported in the Commission's Statement of Need and Reasonableness. These subparts of part 7810.8635 did not receive adverse oral or written comments. They have been shown to be both needed and reasonable.

47. Subpart 5 relates to a schedule of charitable contributions. The rule requires that the company provide testimony and evidence that the contribution is prudent and complies with Minn. Stat. § 290.21, subd. 3. The Department of Public Service in their prehearing comments, MPUC Ex. 7E, at p. 5, suggests that the section be amended at page 16, line 30 after "subdivision 3" by inserting ", clause (b) or (e)". The suggestion is made to conform subpart 5 of the proposed rule with Minn. Stat. § 237.075, subd. 8 (1991) which, in relevant part, provides:

The Commission shall allow as operating expenses only those charitable contributions which the Commission deems

prudent and which qualify under sections 290.21, subdivision 3, clause (b) or (e). . . .

The Commission, in its Response to Public Comment, at pp. 8-9, adopts the amendment proposed by the Department.

Subpart 5, as amended, is both needed and reasonable. The information required by the subpart is available to the company and is necessary for the Commission to determine if the charitable gifts were prudent and otherwise qualify for reimbursement. Since the amendment merely completes a statutory citation already contained in the proposed rule, it does not constitute a prohibited substantial change.

7810.8640 - Rate of Return, Cost of Capital Schedules

48. Part 7810.8640 is discussed and justified in the Commission's Statement of Need and Reasonableness. It received no adverse oral or written comment. It has been shown to be both needed and reasonable.

7810.8645 - Rate Structure and Rate Design Information

49. Subpart 1 is both needed and reasonable as an introduction to subparts 2 and 3 which contain the substance of this part.

50. Subpart 2 requires the filing of a schedule with a general rate change notice that shows test year revenue-producing units, present rates, proposed rates, present revenue, and proposed revenue for each existing and proposed rate element of all services. GTE argues that such information is relevant only with respect to those rate elements for which a change is proposed. MPUC Ex. 7H, p. 3. The Department of Public Service, in its post-hearing comments, at p. 9, rejects GTE's proposed amendment to this subpart and to part 7810.8690. It argues that such a limitation would not allow the Commission to review the company's decision not to change certain rate elements. The Commission, in its Response to Public Comments, at pp. 24-25, rejects the proposed amendment of GTE. The Commission argues that it must have the information with respect to all rate elements to have a clear understanding of how much revenue each service is producing so that it may judge what rates should be changed to achieve the company's revenue requirement. Moreover, without the required information, the Commission would be unable to determine what impact the rate change for a service would have unless the company proposed to change that particular rate.

51. Part 7810.8645, subp. 2 is needed and reasonable as proposed by the Commission. The Commission, and not the company, has the responsibility to determine that each rate element is just and reasonable. In fulfilling its statutory responsibility, the information it receives should not be limited to those rate elements the company proposes to change. The Commission requires the information requested to determine the impact of any change it might deem appropriate and to determine the total revenue that rates will produce.

52. Subpart 3 requires that a general rate change notice be accompanied by an "embedded cost study and an incremental cost study for each proposed rate change for those services that generate revenues in excess of the greater

of either \$100,000 or one-tenth of one percent of the company's annual gross revenue for the test year." This provision of the rules generated the most public comment. Pre-rate regulated companies, other than U.S. West, generally opposed the requirement for an embedded direct cost study and an incremental cost study on a service-by-service basis. The objection of the companies can be summarized as follows: The preparation of such detailed cost studies would necessitate an expenditure of approximately half a million dollars each time the studies are prepared by outside consultants and the benefit to the Commission from having the studies would be marginal, not justifying such a significant expenditure. On that basis, it is argued that subpart 3 is unreasonable. MPUC Ex. 7A, pp. 6-16; MPUC Ex. 7B, p. 2; MPUC Ex. 7C, p. 1; Post-hearing Comments of United Telephone Company of Minnesota; Post-hearing Comments of GTE North, Inc. and GTE Minnesota, pp. 1-3; Comments of Vista Telephone Company of Minnesota, pp. 1-10; Post-hearing Comments of the Office of the Attorney General, pp. 1-4; Comments of GTE, p. 2; Reply Comments of Vista Telephone Company of Minnesota, pp. 2-11; Reply Comments of GTE North, Inc. and GTE Minnesota, pp. 2-5. The second argument advanced by the telephone companies opposed to the cost study requirement contained in the rule is that it conflicts with Minn. Stat. § 237.62, subd. 1a(c) (1991). MPUC Ex. 7A, pp. 7-8.

53. The Department of Public Service supports the cost study requirements of subpart 3 but suggests an amendment to the threshold, raising it from one-tenth of one percent of the company's annual gross test year revenues to one percent of the company's annual gross test year revenues. Post-hearing Comments of the Department of Public Service, p. 10. The Office of the Attorney General supports requiring an incremental cost study but believes that a fully allocated embedded cost study should be provided instead of an embedded direct cost study. Post-hearing Comments of the Office of the Attorney General. The Attorney General also recommends limiting the use of an incremental cost study to situations in which a company is proposing a change in existing rate design. MPUC Ex. 7F, p. 2.

54. The Commission in both its oral testimony and written responsive comments contends that an incremental cost study and an embedded direct cost study with respect to each service that generates revenues meeting the threshold limit is necessary if it is to make intelligent rate design decisions. The Commission argues that appropriate levels of contribution can only be rationally fixed if the cost basis is first known. Response to Public Comment, pp. 13-19; Supplementary Response to Public Comment, pp. 2-5.

55. The objecting telephone companies have suggested a variety of amendments to the subpart to lessen or negate its impact. The initial suggestion is to amend subpart 3 by limiting its application to services subject to emerging competition through the following amendment: Insertion of the words "for a telephone company subject to and electing to use the provisions of Minn. Stat. § 237.62, subd. 1a," after "subp. 3", on page 19, line 26 of the proposed rules; and the insertion of "subject to emerging competition" at page 19, line 29 of the proposed rules, after the word "services". MPUC Ex. 7(a), p. 16; MPUC Ex. 7(b), p. 2; MPUC Ex. 7(c), p. 2; Post-hearing Comments of GTE, pp. 1-3; Post-hearing Comments of Vista Telephone Company of Minnesota, pp. 2-4; Post-hearing Comments of GTE, Comments of Michael Chopp; Reply Comments of Vista Telephone Company of Minnesota, pp. 2-11. A second alternative suggested by the opposing telephone companies is that the rule be amended to delete all references to embedded

cost studies, requiring only an incremental cost study, and allowing a phase-in period for the cost study requirement. During the phase-in period, a general rate filing would only require the filing of the part 36 FCC study the companies currently prepare. Post-hearing Comments of United Telephone Company of Minnesota, p. 4; Post-hearing Comments of GTE, pp. 3-4; Post-hearing Comments of Vista Telephone Company, pp. 9-10.

56. The requirement in subpart 3 of an embedded and incremental cost study for noncompetitive services does not conflict with Minn. Stat. § 237.62, subd. 1a(c) (1991). That statute merely requires companies to provide embedded direct and incremental cost studies for services subject to emerging competition that generate annual revenues in excess of the greater of one-tenth of one percent of the company's annual gross revenues for the test year or \$100,000. The fact that the legislature has required such cost studies for services subject to emerging competition in no way implies that the Commission does not have authority to require similar studies with respect to noncompetitive services. The Commission clearly has statutory authority under Minn. Stat. §§ 216A.05, subd. 2(2), 237.075, subd. 6, and 237.09 (1991) to require the filing of such cost studies with a general rate change.

57. It is both necessary and reasonable for the Commission to have the information provided by an embedded direct cost study and an incremental cost study in determining rates. Although the opposing companies rightly note that noncost factors are also appropriate in allocating the revenue requirement amongst services, cost of service is a substantial factor in determining just and reasonable rates. Historically, rates have been set on a value-of-service basis with little or no relationship to cost and local service rates have been set residually. The history of regulation in the 1980s, however, has been a movement toward the primacy of cost factors in setting rates. The often repeated slogan is that the cost causer should bear the resulting cost. Such an approach does not negate the importance of noncost factors. It does, however, recognize that no rational decisions about relative levels of contribution can be made unless one knows the underlying cost of providing the service. One cannot determine how much deviation from cost is justified if the cost of providing the service is unknown.

The cost studies required by the rule will also allow the Commission to prevent cross-subsidization between competitive and noncompetitive services as required by Minn. Stat. § 237.62, subd. 2 (1991). If the Commission has embedded direct and incremental cost studies for all major services, including noncompetitive as well as competitive services, the Commission will have the means of calculating joint and common costs. With this information it may make a reasoned judgment as to the proportion of joint and common costs to be allocated between competitive and noncompetitive services. Having done so, the Commission can evaluate whether the prices for a company's competitive services involve a subsidization by noncompetitive services.

The Commission requires both embedded direct and incremental cost studies to evaluate a proposed rate design and to prevent cross-subsidization. All parties agree that long-run incremental cost is appropriate to set prices. An incremental cost study alone, however, would not be a sufficient basis for the Commission to set rates for noncompetitive services. As recognized by the Commission in its Response to Public Comments, at pp. 16-17, an embedded cost study would be required for the Commission to determine a company's total joint and common costs. Moreover, an embedded cost study is the most

appropriate pricing mechanism for services that use older technology to serve a defined customer base. The legislature has recognized the importance of both types of studies by requiring such studies for services subject to emerging competition under Minn. Stat. § 237.62, subd. 1a(c) (1991). The studies conducted by the companies under part 36 of the FCC rules do not provide the level of information that would be required by the Commission in allocating the revenue requirement amongst all services. The FCC studies are used to separate interstate jurisdictional costs from intrastate jurisdictional costs. These studies allocate costs on a group level. The studies concern only four categories of noncompetitive services: local service; access service; private line service; and EAS service. Supplementary Response to Public Comment, p. 2. A telephone company, however, has a multitude of more refined service categories including business service, residential service and trunk service. Within these additional groupings are a number of individual services. Hence, the studies performed under part 36 of the FCC rules do not provide the level of detail that would be required by the Commission in setting a just and reasonable rate for each service. The Commission requires embedded and incremental cost information at the level of detail of individual services as proposed in subpart 3.

58. Providing the cost studies required by subpart 3 would not be an unreasonable burden. For purposes of this discussion, the Administrative Law Judge accepts the arguments of the objecting companies that the production of the cost studies would require an expenditure of approximately \$500,000. Because of the novelty of these types of studies, the need to select appropriate models and the need to accommodate a company's records to the level of detail required, it is likely that the studies would initially be performed by outside consultants, except, perhaps, for studies done by U.S. West. It is likely that modifications to the initial studies for later rate cases would require a lesser expenditure than \$500,000. However, even for updates, the process would be labor intensive and would require a not insubstantial expenditure. As noted by the Commission, however, the cost of the studies could be amortized over the period the rates are likely to be in effect, a period which has historically included a number of years. The cost would also be recovered from the company's ratepayers in monthly bills. Taking the projected cost of the surveys and dividing that amount by a reasonable period of amortization, an additive to a customer's monthly bill for non-U.S. West companies of approximately \$.15 is likely. It has not been shown that this additional additive would result in rates that are beyond the ability of persons to pay or are confiscatory. St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 312 Minn. 250, 251 N.W.2d 350 (1977); Hibbing Taconite Co. v. Minnesota Public Service Commission, 302 N.W.2d 5 (Minn. 1980).

59. The opposing companies argue that the Commission cannot demonstrate a cost benefit to requiring the studies. In acting in the public interest, the Commission must be satisfied that the benefits to be received from an action outweigh the associated cost. This is not, however, a mechanistic balancing of relative dollars. Here, the cost of providing the studies can be approximated. The benefit to be derived from requiring the studies, greater precision in allocating the revenue requirement amongst all telephone services, cannot be assigned a dollar equivalent. The requirement for that type of dollar equivalency was advocated by several parties in Matter of the Minnesota Independent Equal Access Corporation's Application for a Certificate of Public Convenience and Necessity, Docket No. P-3007/NA-89-76. That

requirement was rejected by both the Administrative Law Judge and the Commission. The benefits associated with more precisely measuring the cost of providing each telephone company service are inherently unquantifiable. That does not mean, however, that the benefits of obtaining the information are not substantial. The Commission has the statutory responsibility to set just and reasonable telephone rates; and, in allocating rates among classes of customers, it acts in a legislative capacity. Hibbing Taconite Co. v. Minnesota Public Service Commission, 302 N.W.2d 5 (Minn. 1980); St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 312 Minn. 250, 251 N.W.2d 350 (1977). The Commission has determined that the proper exercise of that legislative responsibility requires preparation of the cost studies stated in subpart 3. As previously noted, the test of reasonableness is whether a rule is arbitrary and unreasoning. Hurley v. Chaffe, 43 N.W.2d 281, 284 (Minn. 1950); In re Application of Byron N. Hanson, 275 N.W.2d 790 (Minn. 1978). The question to be decided in determining reasonableness is whether a rational person could make the same choice made by the agency from among possible alternatives in order to satisfy its legislative responsibilities. Given that test, requiring the cost studies in dispute is a choice which has a rational basis in public policy and does not result in arbitrary or capricious adverse consequences. Hence, the Administrative Law Judge rejects the argument of the opposing companies that requiring some form of long-run incremental cost study and embedded direct cost study is unreasonable.

60. The phrases "embedded direct cost study" and "incremental cost study" are not, however, self-executing concepts. As recognized by most parties, there could be significant and substantial disputes about the proper methodology to be employed in either cost study, the models to be used to generate the studies and the level of detail required. The companies subject to the cost study requirements vary substantially in the size of their Minnesota operations and in the amount of revenues derived from services subject to such cost studies. Implementation of subpart 3 will require each company to work with the Commission and its staff to select company-appropriate methodologies and to determine the level of detail required.

It could be argued that the lack of definition or specificity with respect to the description of either study makes the rule impermissibly vague. See, In re Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985); Getter v. Travel Lodge, 260 N.W.2d 177 (Minn. 1977); Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980). The concept of an embedded direct cost study and an incremental cost study do, however, have an accepted meaning in both utility regulation and economic theory. Since the methodology for conducting either type of cost study could not be specifically incorporated into the rules, the rule is not impermissibly vague. See, Can Manufacturers' Institute, Inc. v. State, 289 N.W.2d 416, 423 (Minn. 1979).

61. It could be argued, however, that the absence of standards regarding the type of cost study that would be acceptable to the Commission and the level of specificity required leaves unfettered or unbridled discretion in the Commission so that application of the rule would be at the whim or caprice of the Commission. Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964). The Commission recognizes this possibility in its Supplemental Response to Public Comment by stating that it will work in good faith with each company to avoid imposing a cost study requirement that would impose an undue hardship on an individual company's ratepayers. The PUC states that the

application of subpart 3 to each individual company in a specific rate case setting would only be decided after meetings with the Department of Public Service and the Commission staff, typically prior to the filing of a rate case. Supplementary Response to Public Comment, p. 3.

As currently drafted, however, the rule does not contain any standard which must be applied by the Commission to limit its discretion in an individual case. The Administrative Law Judge does not doubt the good intentions of the Commission or its staff. Such good faith is not, however, an adequate substitute for the inclusion in the rule of standards which are as specific as can be formulated given the individual fact situation. Can Manufacturers' Institute, Inc. v. State, 289 N.W.2d 416, 423 (Minn. 1979). The opposing telephone companies have suggested a standard which, if incorporated into the rules, would ensure that the Commission and its staff give the appropriate type of individual, company-specific consideration in the application of the rule. They suggest that language be added to the rule which would require the Commission and its staff to specifically tailor the level of detail required in each cost study to the size of the Company's Minnesota intrastate operations and the revenues derived from each service subject to the cost study requirement. The Commission states that it agrees, in concept, with the suggestion by the opposing company and agrees to take into account the factors suggested. Supplementary Response to Public Comment, p. 3. The Commission, however, finds the language offered by the companies to be misleading in that it "shifts the focus away from the basic purpose of the studies -- the justification of rates --". Supplementary Response to Public Comment, p. 3. The Administrative Law Judge does not understand that Commission objection to the language proposed by the opposing companies. Persons subject to the rules are entitled to have the rules reflect standards for the application of the Agency's discretion to the degree of specificity possible. They cannot be required to surrender this legal right to avoid a "shift of focus", a concept not recognized in the law.

62. The opposing companies also argue that a phase-in period for application of subpart 3 is appropriate. Under the law the telephone company is entitled to commence a general rate proceeding when it believes it can substantiate a change in its revenue requirement. Minn. Stat. § 237.075 (1991). Several of the opposing companies suggest that developing the methodology for the required cost studies would take at least a year. Further, they argue that extensive consultation with the Department and Commission staff would also be required. There is no evidence in the record as to the time that would be required by U.S. West to complete the required cost studies. The Commission states that U.S. West would require no additional time to comply with this subpart. Supplementary Response to Public Comment, p. 4. To make subpart 3 immediately applicable would, then, deprive the opposing companies of the ability to file a general rate case proceeding for a period of at least a year, unless an alternative mechanism were authorized.

The Commission argues that the most appropriate way to surmount this difficulty is to allow the opposing companies to apply for a waiver from subpart 3. The Commission considers a waiver procedure more appropriate because individual companies will require different amounts of time to prepare the required cost studies. Supplementary Response to Public Comment, p. 4. A variance, however, is meant to alleviate undue hardship in the unprovided-for case; it is not appropriate when a lack of ability to comply will be the

norm. Deardorff v. Board of Adjustment of Planning and Zoning Commission of the City of Fort Dodge, 254 Ia. 380, 118 N.W.2d 78 (1962); Livingston v. Peterson, 59 N.D. 104, 228 N.W. 816 (1930). As previously noted, the Commission has stated that U.S. West could comply with the rule immediately. Supplementary Response to Public Comment, p. 4. There is no evidence in the record, other than the unsupported statement of the Commission, that U.S. West could immediately comply. Even if this were true, however, the majority of companies subject to the rule could not comply for some extended period of time. United Telephone Company, for example, believes it would take between 18 and 24 months to develop the required cost studies, Post-hearing Comments of United Telephone Company of Minnesota, p. 3. Vista Telephone Company of Minnesota believes that a 24-month phase-in period would be appropriate, Post-hearing Comments of Vista Telephone Company of Minnesota, p. 8. The shortest amount of time needed to comply estimated by any of the opposing telephone companies was one year. MPUC Ex. 7A, p. 15. Based on the responses of the opposing companies, the minimum reasonable amount of time necessary for the majority of telephone companies subject to subpart 3 to comply with its requirements is 18 months.

63. As a result of Findings 60 - 62, supra, subpart 3 of part 7810.8645 does not contain sufficient standards to guide the Commission in the exercise of its discretion. It is also unreasonable in that it would be immediately effective when compliance would require a period between one and two years for the majority of telephone companies.

64. To correct these defects, the Commission must include in the subpart an amendment specifically requiring it to take into account, in determining the form content and level of detail required for any rate design cost study, the size of the company's Minnesota intrastate operations and the amount of revenues it receives from the services for which the cost studies must be performed. It must also include in the subpart an amendment delaying the effective date of the subpart for a period of at least 18 months. The following amendments to subpart 3, as drafted, would correct the defects noted by the Administrative Law Judge:

Subp. 3. Supporting work papers.

- A. Except as provided in paragraph B of this subpart, a general rate change notice must include an embedded direct cost study and an incremental cost study for each proposed rate change for those services that generate revenues in excess of the greater of either \$100,000 or one-tenth of one percent of the company's annual gross revenue for the test year. The embedded direct cost study and incremental cost study must identify the procedures and underlying reasons for cost and revenue allocations. The company shall explain why the proposed method is appropriate for ratemaking purposes. The form, content and level of detail provided in any cost study required by this subpart must reflect the relative size of the company's intrastate operations in Minnesota and the amount of revenues it receives from the services for which such cost studies are required.

B. Paragraph A. of this subpart is effective on a date 18 months from the date of final adoption of parts 7810.8100 - 7810.8935. For any general rate proceeding filed after the final adoption of parts 7810.8100 - 7810.8935 but before the effective date of paragraph A. of this subpart, the only cost studies the company may be required to file with the Commission relating to rate design or rate structure are any cost studies that it may perform pursuant to Part 36 of the Rules of the Federal Communications Commission or any replacement part.

} cite —

C. The work papers provided pursuant to either paragraph A or paragraph B of this subpart must be filed with the commission, the department, and the attorney general's office, in quantities established by the agencies, and supplied to other parties on request.

65. The amendments stated at Finding 64, supra, do not constitute a prohibited substantial change. The amendments do not result in a rule that is fundamentally different or enlarge the application of the rule. Rather, the suggested amendments are made in response to public comments and limit the application of subpart 3.

7810.8650 - Additional Information

66. Part 7810.8650 is supported in the Commission's Statement of Need and Reasonableness and did not receive any adverse oral or written public comments. It has been shown to be both needed and reasonable.

7810.8655 - Notices

67. Part 7810.8655 describes the contents of an interim rate change notice. It is discussed in the Commission's Statement of Need and Reasonableness. The only public comments received relate to paragraph B, in which the Commission made an erroneous reference to subpart 2 of part 7810.8400. The correct reference is to part 7810.8400, subpart 1. The Commission, in its Response to Public Comment, at p. 8, recognized the need for a technical amendment to correct the erroneous reference. As amended, part 7810.8655 is both needed and reasonable. Since the change to paragraph B was only a technical amendment correcting an erroneous reference, it did not result in a prohibited substantial change.

7810.8660 - Petition

68. Part 7810.8660 describes the required content of an interim rate petition. It is supported in the Statement of Need and Reasonableness and received no adverse oral or written public comment. It has been shown to be both needed and reasonable.

7810.8665 - Expert Testimony and Supporting Exhibits

69. Part 7810.8665 relates to the contents of a notice of proposed interim rates. It is supported in the Commission's Statement of Need and Reasonableness. This part received no adverse oral or written public comment, and has been shown to be needed and reasonable.

7810.8670 - Rate Base Schedules

70. Subpart 1 requires that an interim rate petition include as an exhibit a schedule showing the development of the jurisdictional rate base for interim rates. In its Reply Comments, GTE suggests that subpart 1 be clarified by adding at the end of the subpart the following sentence: "For a projected test year, an average rate base must be used." While the amendment proposed by GTE would be an appropriate clarification of the rule, failure to include that sentence does not affect the need for or reasonableness of the proposed rule. The Commission may, if it chooses, adopt the clarifying suggestion of GTE. The amendment would not constitute a prohibited substantial change. Since subpart 1 is supported in the Commission's Statement of Need and Reasonableness and received no adverse written or oral comments, except the GTE suggested amendment discussed above, subpart 1 is both needed and reasonable.

71. Subpart 2 of this part requires an accompanying written explanation relating to prior treatment of rate base issues. It received no adverse public comment and is needed and reasonable.

72. Subpart 3 requires the filing of a comparison schedule and explanation. Paragraph B of subpart 3 requires comparative data on the corresponding rate base for the most recent fiscal year for which actual data are available before the test year. A number of parties, including U.S. West, commented that paragraph B would require the filing of adjusted data for any interim rate change filing. Compliance with the rule would be extremely burdensome and costly and would provide limited necessary information to the Commission. MPUC Ex. 7D, p. 4. In its Reply Comments, the Commission agreed to amend paragraph B of subpart 3 by substituting the word "unadjusted" for the word "corresponding" in paragraph B. Response to Public Comment, p. 5. Subpart 3, as amended, is both needed and reasonable. Since the amendment does not introduce a new subject matter or result in a rule that is fundamentally different and, in fact, lessens the burden of complying with the rule, it does not constitute a prohibited substantial change.

7810.8675 - Operating Income Schedule

73. Part 7810.8675 describes the operating income schedule and accompanying written explanation that must be filed with an interim rate request. It is supported in the Commission's Statement of Need and Reasonableness, did not receive adverse public comment, and is both needed and reasonable.

7810.8680 - Capital Structure and Rate of Return

74. Part 7810.8680 requires a telephone company to base its interim rate calculation on its proposed cost of equity or the cost of equity allowed by the Commission in the company's most recent general rate proceeding, whichever is lower. A number of commentators stated that the part, as drafted, fails to take into account situations in which a company has not had a general rate proceeding in the last three years or is a new company. MPUC Ex. 7A, p. 20; MPUC Ex. 7B, p. 3; MPUC Ex. 7C, p. 2; MPUC Ex. 7E, p. 7; Post-hearing Comments of the Department of Public Service, p. 12. In the situations noted, Minn. Stat. § 237.075, subd. 3 (1991), requires the company to use the cost of equity allowed by the Commission in its most recent determination "concerning a similar company". The Commission, in its Response to Public Comment, at p. 8, recognizes the need for the rule to comply with Minn. Stat. § 237.075, subd. 3 (1991). It, therefore, offered the following amendment to be inserted at the end of part 7810.8680:

previous In the case of a company which ^{that} has not been subject to a ~~prior~~ commission determination or has not had a general rate adjustment in the preceding three years, the company must use the cost of equity that was allowed by the commission in its most recent determination concerning a similar company.

Response to Public Comment, p. 8.

75. Part 7810.8680, as drafted, is supported by the Commission's Statement of Need and Reasonableness and received no adverse comment from public witnesses. The amendment of the part suggested by several witnesses and adopted by the Commission merely clarifies the rule by recognizing the requirements of Minn. Stat. § 237.075, subd. 3 (1991). Hence, part 7810.8680, as amended, is both needed and reasonable. Since the amendment to the rule proposed by the Commission merely clarifies the rule and accommodates the requirements of the statute, it does not result in a prohibited substantial change.

76. GTE suggests that language be added at the end of the part to make clear that interim rates will be calculated on the basis of an average rate base when a projected test year is used. Reply Comments of GTE, p. 6. The comments made in Finding 70, supra, equally apply to this suggested amendment by GTE.

7810.8685 - Jurisdictional Financial Summary Schedule

77. Part 7810.8685 relates to a financial summary schedule which must be filed with an interim rate change petition. No witness testified adversely about this part and it is supported in the Commission's Statement of Need and Reasonableness. This part is both needed and reasonable.

7810.8690 - Rate Design

78. Part 7810.8690 relates to a rate design exhibit schedule that must be filed with an interim rate change petition. It requires stated information

with respect to each existing and proposed interim rate element for each service provided by the company. GTE argues that the information is irrelevant. MPUC Ex. 7H, p. 3. The Department opposes the suggestion of GTE that the information be provided only for those elements for which a telephone company is proposing rate changes. For the reasons stated at Findings 50 and 51, supra, part 7810.8690 is needed and reasonable as proposed.

7810.8700 - Other Rate Change Notice; Part 7810.8705 - Other Rate Change Petition

79. Part 7810.8700 and 7810.8705 are supported in the Commission's Statement of Need and Reasonableness and did not receive adverse comment either at the hearing or in written comments. The two parts have been shown to be both needed and reasonable.

7810.8710 - Miscellaneous Tariff Change

80. Part 7810.8710 relates to the required contents of a notice for a miscellaneous tariff change filed under Minn. Stat. § 237.63 (1991). Paragraph B of this part requires inclusion of "statements of fact, expert opinions, substantiating documents, and exhibits supporting the change requested". A number of commentators stated that the rule fails to describe the form for presenting the information required by paragraph B. MPUC Ex. 7A, p. 21; MPUC Ex. 7C, p. 2; MPUC Ex. 7D, p. 5; MPUC Ex. 7B, p. 4; MPUC Ex. 7E, p. 7. Additional Comments of U.S. West Communications, Inc., pp. 5-6; Post-hearing Comments of the Department of Public Service, p. 12. As noted by U.S. West, consistency between this part and part 7810.8665 is appropriate. The Commission, in its response to public comment, at pp. 6-7, accepted the comments of the parties and proposed the following amendment:

- B. statements of fact, expert opinions, substantiating documents, and exhibits supporting the change requested. The written statements, opinions and explanations must be in either a question-and-answer format or a descriptive narrative, and must identify the preparer or the person under whose supervision they were prepared;

No comments were made on other portions of part 7810.8710 either in oral testimony or written comments.

81. Part 7810.8710, as amended, is both needed and reasonable. Pursuant to Minn. Stat. § 237.63, subd. 4c (1991), the Commission must review a miscellaneous rate change. The information specified in items A - G are required so that the Commission can evaluate the miscellaneous rate change requests and make an informed decision regarding the change. Statement of Need and Reasonableness, pp. 41-42.

82. The change in the proposed rule is not a prohibited substantial change. The requirements of the rule as drafted, are not enlarged. Rather, a definition which already appears in the proposed rule is applied to this miscellaneous tariff filing section. Including a definition of expert opinion neither changes the rule, nor results in a fundamentally different rule.

7810.8715 - Noncompetitive Service; Language Change; 7810.8720 - Noncompetitive Service; Cost Increase

83. Part 7810.8715 and Part 7810.8720 are discussed in the Commission's Statement of Need and Reasonableness. No witness testified adversely with respect to these two parts. Part 7810.8715 and part 7810.8720 have been shown to be both needed and reasonable.

7810.8725 - Noncompetitive Service; Rate Reduction

84. Part 7810.8725 requires that specified data be filed when a rate reduction is proposed for a noncompetitive service. A number of commentators stated that requiring a demonstration of the relationship between proposed rates and costs of providing the service when a rate reduction for a noncompetitive service is proposed is contrary to Minn. Stat. c. 237 (1991). MPUC Ex. 7A, pp. 21 - 22; MPUC Ex. 7B, p. 3; MPUC Ex. 7C, p. 2. Those witnesses argued that the section should be amended as follows:

In addition to the notice requirements of part 7810.8700, a notice for rate reduction under Minnesota Statutes, section 237.64, subd. 4, must include data showing the ~~relationship between proposed rates and the cost of providing the service with~~ impact of the proposed rate reduction on revenues.

MPUC Ex. 7A, p. 22. The Department of Public Service supported the rule as drafted and rejected the suggestion of eliminating cost information. MPUC Ex. 7E, p. 8. The Commission, in its Response to Public Comment, rejected the position of the Minnesota Telephone Association. Response to Public Comment, p. 25.

85. Part 7810.8725 is both needed and reasonable. Rate reductions, like rate increases for noncompetitive services, should be supported by cost data so that the Commission can determine the propriety of the rate decrease. As previously discussed, the absence in chapter 237 of Minnesota Statutes of a provision relating to cost studies for noncompetitive services should not be construed as a limitation on the authority of the Commission to require the filing of cost information when it determines just and reasonable rates. Also as previously noted, the cost of providing a particular service is important in setting rates. It is also important in determining the propriety of a rate reduction, particularly when the rate reduction is with respect to isolated services and not a general decrease in the company's revenue requirement. In that situation, other services may be required to make up the revenue loss that results from a reduction in the price of an individual noncompetitive service. It is also reasonable to allow the company, in the context of a rate reduction for noncompetitive service, to exercise its discretion as to the type of cost information provided. Response to Public Comment, pp. 25-26.

7810.8730 - Noncompetitive Service; Significant Change in Condition of Service

86. Part 7810.8730 specifies information that must accompany a notice for a significant change in condition of service under Minn. Stat. § 237.63,

subd. 4A (1991) with respect to a noncompetitive service. This part received no adverse comment in either oral testimony or written submissions. It is supported in the Commission's Statement of Need and Reasonableness and is both needed and reasonable.

7810.8735 - Individually Priced Noncompetitive Services

87. Part 7810.8735 specifies what must be filed with a notice for individually priced noncompetitive services under Minn. Stat. §§ 237.07 and 237.071 (1991). The MCI Companies and AT&T argue that the part should be amended by adding the following new item D:

- D. data demonstrating that each individually priced non-competitive service is priced at or above the cost of providing each such service.

MPUC Ex. 7G, p. 5. See also, Post-hearing Comments of AT&T, p. 2. Both MCI Companies and AT&T argue that pricing under this part is meant to relate to Minn. Stat. §§ 237.075 and 237.071 (1991). The only justification for having individually priced noncompetitive services under Minn. Stat. § 237.071, they suggest, is a cost difference in providing the service to an individual person or group. Therefore, it is argued that the cost information and demonstration that the price is above cost must be provided. The Department of Public Service supports the rule as drafted and believes that individually priced noncompetitive services could be provided below cost to meet policy objectives. MPUC Ex. 7E, p. 8; Post-hearing Comments of the Department of Public Service, p. 12. The Commission, in its Supplementary Response to Public Comment, at p. 8, rejects the position of MCI Companies and AT&T and endorses the Department's post-hearing comments. Apparently, the Commission believes that it has the authority to allow individually priced noncompetitive services to be provided below cost to achieve noncost policy objectives.

88. The Administrative Law Judge does not accept the interpretation of Minn. Stat. § 237.071 (1991), advanced by AT&T and MCI Companies. Where the legislature has required that a service, in all circumstances, be provided at a price above cost, it has so stated. See, e.g., Minn. Stat. § 237.60, subd. 4 (1991). While it is true that Minn. Stat. § 237.071 (1991) justifies a different price for a different customer or group of customers on the basis of a cost difference in providing the service, that does not require a conclusion that the service must always be provided on an individual basis above cost. Assume, for example, a service that is generally provided to customers below cost for social policy reasons and a particular customer or group of customers to whom the cost of providing that service would be lower than the public generally. Under Minn. Stat. § 237.071, the particular customer or group of customers to which service could be provided for lesser cost could have a lower price than the public generally, even if the price were below cost in the example stated. The Administrative Law Judge, therefore, does not believe that Minn. Stat. § 237.071 requires the addition of the item D suggested by the MCI Companies and AT&T. Since the addition of an item D is not required and the remaining portions of the part were justified in the Commission's Statement of Need and Reasonableness with no adverse comment at the hearing or in additional written submissions, this part is both needed and reasonable.

7810.8740 - Rate Increase or Decrease

89. Part 7810.8740 relates to a notice for a rate increase or decrease under Minn. Stat. § 237.60, subd. 2, paragraph (a) or (b). Item B of this part requires that the filing include "an incremental cost-of-service study demonstrating that the proposed rate is above incremental cost". The MCI Companies state that Minn. Stat. § 237.60, subd. 2 allows a company to file an incremental cost study "unless the Commission has allowed the telephone company required to do the study to set rates based on a variable cost study". MPUC Ex. 7G, p. 2. Therefore, MCI Companies argue that item B of this part and parts 7810.8755 and 7810.8760 D. should be amended to include language recognizing the option of a company to file a variable cost study, if allowed by the Commission. See, MPUC Ex. 7G, p. 2; Reply Comments of MCI Companies, p. 2. The Department of Public Service in its post-hearing comments supported the amendment advanced by the MCI Companies. Post-hearing Comments of the Department of Public Service, p. 5. In its Supplementary Response to Public Comment, at pp. 8-9, the Commission accepted the modification to item B suggested by MCI and proposed the following amendment:

- B. an incremental cost-of-service study, or if allowed
under pursuant to Minnesota Statutes section 237.60,
subdivision 2, paragraph (h), a variable cost study,
demonstrating that the proposed rate is above
incremental or, if allowed, variable cost;

90. Item B, as amended, is both needed and reasonable. Requiring that the service be provided above cost accomplishes the goals of Minn. Stat. § 237.60, subd. 2 (1991), since it will prevent cross-subsidy between noncompetitive services and services subject to emerging competition. Recognition of the option of using variable cost is needed and reasonable because it is an option that is contained in Minn. Stat. § 237.60, subd. 2(h). The amendment to item B does not result in a prohibited substantial change. The proposed amendment does not change the application of the rule but only recognizes a statutorily authorized alternative to incremental cost pricing.

91. With respect to item D, the rule requires that the notice contain a statement of the following:

- D. the dollar and percentage change in total
jurisdictional annual revenue resulting from the
proposed price list change.

A number of commentators argued that it was inappropriate to require a statement of impact on total jurisdictional annual revenues because this subpart deals with emerging competitive services. Since the Commission does not regulate revenue received by a telephone company from emerging competitive services, the opposing companies argued that the subpart should address only the revenue impact on noncompetitive services, the revenue that is subject to Commission regulation. MPUC Ex. 7G, pp. 5-6; Post-hearing Comments of AT&T Communications of the Midwest, Inc., pp. 5-6; MCI Companies Reply Comments, pp. 4-6; Reply Comments of AT&T Communications of the Midwest, Inc., pp. 4-6. Therefore, the following amendment is suggested to this rule and part 7810.8750 B, 7810.8755 D and 7810.8760 C:

The dollar and percentage change in total jurisdictional annual noncompetitive revenues resulting from the proposed price list change.

MPUC Ex. 7G, p. 6. The Department of Public Service in both its initial and reply comments disagrees with the position taken by AT&T and MCI Companies. Post-hearing Comments of the Department of Public Service, pp. 12-13; Reply Comments of the Department of Public Service, pp. 2-3. The Commission, in its Supplementary Response to Public Comment, at p. 6, argues that no change to this item and part 7810.8750, item B and 7810.8755, item D is appropriate. The Commission asserts that services subject to emerging competition are not "nonregulated" but are subject to Commission regulation. Because the marketplace does not adequately protect the public with respect to emergingly competitive services, the legislature has given the Commission authority to regulate such service. Under Minn. Stat. § 237.60, subd. 2 (1991), the Commission has the responsibility to determine whether the rates for emergingly competitive services are just and reasonable. The Commission cannot properly evaluate a company's rates as to reasonableness without knowing total revenues and the impact of a change on total revenues. Supplementary Response to Public Comment, pp. 6-7.

92. For the reasons stated by the Commission and summarized in the previous Finding, part 7810.8740, item D, 7810.8750, item B and 7810.8755, item D are needed and reasonable as proposed.

93. As a consequence of Findings 90 - 92, supra, and the lack of adverse public comment on the remaining portions of the part, part 7810.8740, as amended, is both needed and reasonable. The amendment to item B proposed by the Commission does not result in a prohibited substantial change. See, Finding 90, supra.

7810.8745 - Language Change

94. Part 7810.8745, supported in the Commission's Statement of Need and Reasonableness, did not receive adverse public comment, and is both needed and reasonable.

7810.8750 - Substantial Change in Application of Price List

95. The only portion of part 7810.8750 that received comment at the hearing or in subsequent written submissions is item B of this part. Item B of this part is identical to item D of part 7810.8740. For the reasons stated at Findings 91 - 93, supra, part 7810.8750, B is both needed and reasonable. Because the remaining portion of part 7810.8750 is supported in the Statement of Need and Reasonableness and did not receive adverse public comment, that portion of part 7810.8750 is both needed and reasonable.

7810.8755 - New Pricing Plan

96. Part 7810.8755 describes the content of a new pricing plan under Minnesota Statutes section 237.60, subd. 2(e) (1991). The only portion of this part that received adverse public comment is item D. Item D is identical

to item D of part 7810.8740. For the reasons stated at Findings 91 and 92, supra, item D of part 7810.8755 is both needed and reasonable. Because the remaining portion of part 7810.8755 is supported in the Commission's Statement of Need and Reasonableness and did not receive adverse public comment, it is both needed and reasonable.

97. In its Supplementary Response to Public Comment, at p. 9, the Commission proposed adding an item E as follows:

under E. An incremental cost-of-service study or, if allowed pursuant to Minnesota Statutes, section 237.60, subdivision 2, paragraph (h), a variable cost study, demonstrating that the rates and rate elements in the proposed new pricing plan are above incremental, or if allowed, variable cost.

This amendment was initially suggested by MCI Companies.

98. For the reasons stated at Finding 90, supra, the amendment to part 7810.8755 adding the item E as stated in the previous Finding is both needed and reasonable and does not result in a prohibited substantial change.

7810.8760 - Individually Priced Emerging Competitive Service

99. Part 7810.8760 specifies what a notice for individually priced emerging competitive service under Minn. Stat. §§ 237.07 and 237.071 must contain. AT&T Communications of the Midwest, Inc., in its post-hearing comments, argues that the entire part should be deleted because it does not relate to a legitimate regulatory purpose of the Commission. Therefore, AT&T proposes amending the part by adding in item A prior to the word "data" the following: "Upon complaint, or upon the Commission's own motion,". This proposed amendment would have the effect of eliminating extensive detail in each such filing, while allowing the Commission to obtain additional information if it had reason to question the filing. Post-hearing Comments of AT&T Communications of the Midwest, Inc., pp. 7-8. AT&T Communications of the Midwest, Inc. also suggests amending item B by substituting the word "targeted" for the word "affected" in the first line of that item. Post-hearing Comments of AT&T of the Midwest, Inc., p. 8. Finally, AT&T suggests that item C be eliminated for the same reasons that were discussed with respect to part 7810.8740 D. See, Finding 91, supra, Post-hearing Comments of AT&T of the Midwest, Inc., pp. 8-9.

100. A number of companies argued that the estimated revenue impact on the company required by item C should either be eliminated or limited to services other than competitive services.

101. For the reasons stated at Finding 91, supra, item C is both needed and reasonable.

102. The Commission, in their Supplementary Response to Public Comment, supported the amendment to item B suggested, in the alternative, by AT&T of the Midwest, Inc. Therefore, the Commission proposed to substitute the word "targeted" for the word "affected" in line 1 of item B. Supplementary Response to Public Comment, p. 7.

103. For the reasons stated by the Commission at p. 7 of their Supplementary Response to Public Comment, the substitution of the word noted in the previous Finding is both needed and reasonable and, as a clarifying amendment, does not result in a prohibited substantial change.

104. In its Supplementary Response to Public Comment, at p. 7, the Commission rejected the amendment to item A proposed by AT&T of the Midwest, Inc.

105. Item A of this part is both needed and reasonable. Under Minn. Stat. § 237.071 (1991), the Commission has a responsibility to determine whether market conditions require individually based pricing in each situation, including those instances in which a complaint has not been filed. To discharge its statutory responsibility, the Commission must have the information stated in item A of this part in every case.

106. For the reasons stated at Findings 99 - 106, supra, part 7810.8760, with the amendment to item B proposed by the Commission, is both needed and reasonable.

107. The MCI Companies, in both its initial and reply comments, suggested that an item D ought to be added to part 7810.8760 to require the filing of an incremental cost-of-service study or, if allowed by Minn. Stat. § 237.60, subd. 2(h) (1991), a variable cost study demonstrating that the price charged is above cost, either incremental or variable. See, MCI Companies Reply Comments, pp. 2-3. The Department of Public Service endorsed adding the suggested subpart to part 7810.8760. Post-hearing Comments of the Department of Public Service, p. 14. Although the Commission endorsed adding language similar to that in proposed item D to other portions of the rules, it did not mention the proposed amendment to part 7810.8760. See, Supplementary Response to Public Comment, pp. 8-9. The Administrative Law Judge cannot determine whether the Commission considered the suggested amendment and rejected it or merely failed to respond through oversight. Consistency suggests that the proposed addition of item D to this part be adopted for the same reasons stated at Finding 90, supra. Such an amendment, if adopted by the Commission, would not constitute a prohibited substantial change for the reasons stated in Finding 90, supra.

108. Omission of the proposed item D from this subpart does not, however, affect the need for and reasonableness of part 7810.8760 as proposed. Although the Commission has the authority to require cost information, it is certainly under no legal obligation to do so. The legality of a price below incremental or variable cost could be determined in a complaint proceeding apart from the rule. The Administrative Law Judge suggests to the Commission that it consider the comment of MCI and the Department with respect to the propriety of adding an item D to this subpart as stated on p. 14 of the Department of Public Service's post-hearing comments.

7810.8800 - Election

109. Part 7810.8800 relates to an election which may be made by a telephone company to have its services subject to regulation as competitive services. This part is discussed by the Commission in its Statement of Need

and Reasonableness and did not receive adverse public comment. Part 7810.8800 has been shown to be both needed and reasonable.

7810.8805 - Service Subject to Emerging Competition

110. 7810.8805 relates to a petition to classify a noncompetitive service as subject to emerging competition. The only comment received on this part was made by the Department of Public Service. In MPUC Ex. 7E, p. 8, with reference to subpart 2A, the Department argues that the phrase "if known", contained in that subpart is inappropriate under Minn. Stat. § 237.59, subd. 5(a)(1) (1991). The Administrative Law Judge does not adopt the Department's suggestion. A company cannot provide in any list information that it does not have or could not, with reasonable inquiry, discover. Therefore, the Administrative Law Judge finds that subpart 2A is both needed and reasonable as proposed. The Commission may, if it chooses, consider the suggestion of the Department to eliminate the phrase "if known" at the end of item A of subpart 2.

111. Since the remainder of the part is supported in the Commission's Statement of Need and Reasonableness and was not the subject of adverse testimony or written comments, the remaining portions of part 7810.8805 have been shown to be both needed and reasonable.

7810.8810 - Service Subject to Effective Competition

112. Part 7810.8810 requires and describes a petition to classify a service as subject to effective competition. Part 7810.8810 is discussed in the Commission's Statement of Need and Reasonableness. The only adverse comment was received from the Department of Public Service. In MPUC Ex. 7E, at p. 8, the Department argues that subpart 2, item B of this part is not consistent with Minn. Stat. § 237.59, subd. 2(B)(b) (1991), because the rule refers to an assessment. The Administrative Law Judge believes that the word "assessment" was inserted in item B for stylistic purposes rather than to alter the requirement of the statute. Adopting the suggestion of the Department would result in a subpart that is not stylistically consistent with the remaining portion of subpart 2. The Administrative Law Judge, therefore, rejects the suggested amendment proposed by the Department to subpart 2, item B of this part. Because part 7810.8810 was supported in the Commission's Statement of Need and Reasonableness and did not, except for the rejected comment of the Department, generate adverse testimony or written submissions, part 7810.8810 has been shown to be both needed and reasonable.

7810.8815 - Noncompetitive Service

113. Part 7810.8815 relates to reclassification of a service that has been classified as subject to emerging competition or effective competition. This part is supported in the Commission's Statement of Need and Reasonableness and was not the subject of adverse comment or written submissions. Part 7810.8815 is both needed and reasonable.

7810.8900 - Requirements, Generally

114. Part 7810.8900 relates to the filing of incentive plans. The part is discussed in the Commission's Statement of Need and Reasonableness. The only party filing a comment on this part was the Department of Public Service. In MPUC Ex. 7e, at p. 8, the Department suggests that the phrase "whose general revenue requirement is determined under section 237.075 and" be inserted after the word "company" and before the word "that" in subpart 1 of this part. The suggestion is made to clarify the rule because only a company whose general revenue requirement is determined under section 237.075 can petition the Commission for approval of an incentive plan under Minn. Stat. § 237.625 and only if the company has first elected to be regulated under Minnesota Statutes § 237.58. Since this is a legal requirement, no company whose revenue requirement is not determined under section 237.075 could legally make a request for approval of an incentive plan. Hence, the amendment suggested by the Department is not legally necessary and does not affect the need for and reasonableness of the rule as proposed. Should the Commission wish to consider the clarifying amendment of the Department discussed in this Finding, it may do so. Failure to adopt the amendment, however, will not affect the need for and reasonableness of the proposed rule. If the Commission adopts the amendment proposed by the Department, that amendment would not constitute a prohibited substantial change since it only makes explicit an implicit legal requirement.

115. Because the part did not receive adverse public comment except by the Department as noted above, and because the part is supported in the Commission's Statement of Need and Reasonableness, it is both needed and reasonable.

7810.8905 - Petition

116. Part 7810.8905 specifies what must be included in an incentive plan petition. This part is discussed in the Commission's Statement of Need and Reasonableness and did not receive adverse public comment at the hearing or in subsequent written comments. It has been shown to be both needed and reasonable.

7810.8910 - Rate Base Schedules; 7810.8915 - Operating Income Statements;
7810.8920 - Rate of Return; Part 7810.8925 - Revenue Deficiency or Surplus;
7810.8930 - Financial Market Schedule

117. The parts enumerated in the heading are supported in the Commission's Statement of Need and Reasonableness and were not the subject of adverse oral or written comments. They have been shown to be both needed and reasonable.

7810.8935 - Operating Efficiency

118. This part relates to the contents of an incentive plan petition as regards the efficiencies the company will accomplish through the incentive plan. The only comment received on the part was made by United Telephone Company. In MPUC Ex. 7B, at page 3, the Company suggests that the entire

section be deleted as inappropriate. The Company argues that the incentive to be gained under an incentive plan is a sharing of increased earnings with customers. Moreover, United argues that items B and C of this part incorrectly state the motivation of the company. As noted by the Commission, however, in its Statement of Need and Reasonableness, at pp. 57-58, the PUC would be unable to determine whether an incentive plan would be appropriate under Minn. Stat. § 237.625 (1991), unless the information requested were received. Only with this information can the Commission determine if the proposed incentive plan is necessary to improve a company's operating efficiency and whether it is likely to have that result. This part is, therefore, both needed and reasonable.

7810.8940 - Shared Earnings

119. Part 7810.8940 requires a company to include the terms and conditions of the company's proposed incentive plan to share its increased earnings with its customers. This part is supported in the Commission's Statement of Need and Reasonableness and was not the subject of any adverse oral or written comments. It is both needed and reasonable.

General Findings

120. The Administrative Law Judge has considered each comment made orally at the hearing and in writing. To the extent that a particular comment was not discussed in this Report, it did not affect the need for or reasonableness of the proposed rules.

121. The rules not otherwise specifically addressed in this Report were shown to be necessary and reasonable with an affirmative presentation of fact in the record. Likewise, any rule amendments proposed by the Commission not specifically discussed were shown to be authorized and not to involve prohibited substantial changes.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Public Utilities Commission gave proper notice of the hearing in this matter.
2. The Commission has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. The Commission has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 61 and 63, supra.
4. The Commission has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 62 and 63, supra.

5. The amendments and additions to the proposed rules which were suggested by the Commission after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register, within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects noted in Conclusions 3 and 4, supra, as noted at Finding 64, supra.

7. Due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Finding which might properly be termed a Conclusion and any Conclusion which might properly be termed a Finding are hereby adopted as such.

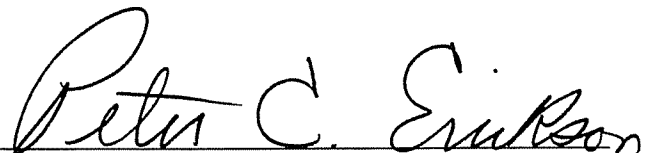
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as amended, be adopted, except where specifically otherwise noted in the Conclusions.

Dated this 18 day of November, 1991.


PETER C. ERICKSON
Administrative Law Judge

Reported: Tape Recorded; No Transcript Prepared.