

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

MARCH 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (GREEN) *4/6*
DIVISION OF LEGAL SERVICES (BARONE, COX) *WPC MCB*

RE: DOCKET NO. 950737-TP - INVESTIGATION INTO TEMPORARY
NUMBER PORTABILITY

AGENDA: APRIL 1, 1997 - REGULAR AGENDA - POST HEARING DECISION -
PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE. THIS ITEM WAS DEFERRED FROM THE MARCH
4, 1997 AGENDA. THE RECOMMENDATION HAS BEEN
REVISED. IT CONTAINS ISSUE A AND THE
CONCLUSION IN ISSUE 1 INCLUDES ADDITIONAL
LANGUAGE.

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950737RE.RCM

CASE BACKGROUND

By Order No. PSC-95-1604-FOF-TP, issued on December 28, 1995, the Florida Public Service Commission (FPSC) established Remote Call Forwarding (RCF) as the temporary number portability mechanism to be provided by January 1, 1996. The Order established the price to be charged and the cost recovery mechanism to be used for RCF. Subsequently on July 2, 1996, the Federal Communications Commission (FCC) released its First Report and Order and Further Notice of Proposed Rulemaking in The Matter of Telephone Number Portability. The FCC Order discusses cost recovery for temporary number portability. This proceeding was initiated to review the impact of the FCC's Order on the cost recovery mechanism set forth in Order No. PSC-95-1604-FOF-TP. The FPSC held a hearing on November 25, 1996 to address the issues identified in this proceeding.

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FPSC-RECORDS/REPORTING

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SUPPLEMENTAL ISSUE
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DISCUSSION OF ISSUES

ISSUE A: Should the FPSC grant United Telephone Company of Florida and Central Telephone Company of Florida's ("Sprint") Motion to Accept Late-Filed Joint Brief and Posthearing Statement?

RECOMMENDATION: Yes. The FPSC should grant Sprint's Motion to Accept Late-Filed Joint Brief and Posthearing Statement.

STAFF ANALYSIS: On January 7, 1997, United Telephone Company of Florida and Central Telephone Company of Florida ("Sprint") filed a Motion to Accept Late-Filed Joint Brief and Posthearing Statement. No party filed a response in opposition to the Motion.

In support of the Motion, Sprint states that the Joint brief and Posthearing statement were complete and ready to be delivered to the Commission prior to the close of business on January 6, 1997, but were inadvertently not delivered and filed. Sprint also asserts that no prejudice or advantage will result to any party as a result of the late filing of the Joint Brief and Posthearing Statement. Staff recommends that the Commission grant the Motion. Staff believes this extension of time is reasonable and is not prejudicial to the other parties in this proceeding.

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ISSUE 1: Is Order No. PSC-95-1604-FOF-TP inconsistent with the Federal Communications Commission's First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Telephone Number Portability in CC Docket No. 95-116?

RECOMMENDATION: Yes, Order No. PSC-95-1604-FOF-TP is inconsistent with the FCC's First Report and Order issued in Docket No. 95-116 (Telephone Number Portability).

POSITION OF PARTIES

AT&T: Yes. The FCC concluded that an appropriate charge should be "competitively neutral."

AT&T WIRELESS: Order No. PSC-95-1604-FOF-TP is inconsistent with the FCC's First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Telephone Number Portability in CC Docket No. 95-116.

BMI: Although the FPSC's order appears to be inconsistent with the FCC's Report and Order, BMI continues to support the stipulation signed by parties and approved by the FPSC in this docket.

BST: Although the pricing structure established by Order No. PSC-95-1604-FOF-TP appears to be inconsistent with the FCC's First Report and Order, BellSouth submits that the FCC's cost recovery principles for interim number portability are unlawful and confiscatory. BellSouth submits that Order No. PSC-95-1604-FOF-TP established the appropriate cost recovery mechanism for temporary number portability in Florida.

FCTA: Yes; FPSC Order No. PSC-95-1604-FOF-TP is inconsistent with the Federal Communications Commission's decisions on number portability.

GTEFL: GTEFL believes the FPSC's Order establishes a competitively neutral cost recovery scheme, as the FCC intended. In any case, the FPSC must follow Florida law which forbids below-cost interim number portability (INP) rates.

ICI: Although the FPSC's order appears to be inconsistent with the FCC's Report and Order, Intermedia continues to support the stipulation signed by parties and approved by the FPSC in this docket.

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MCI: Yes. The FPSC's INP Order identified costs associated with providing RCF and established rates and a cost recovery mechanism under which ILECs would charge ALECs for each ALEC number ported from the incumbent LEC via RCF. This approach is inconsistent with the Act and the FCC's Order, which require that ILNP costs be covered on a competitively neutral basis.

MFS: The FPSC's temporary number portability order is not consistent with the FCC Order as it imposes all costs on the ALECs requesting number portability.

SPRINT: Yes. The portion of the Initial Order which places the full cost recovery of interim number portability on the new entrant appears to be inconsistent with the First Report and Order.

TIME WARNER: Yes. The FCC's Order requires that the costs of temporary number portability be shared among all telecommunications providers. The FPSC's order places all costs on new entrants.

STAFF ANALYSIS: Although the language in this issue only addresses the potential inconsistency between the FPSC Order No. PSC-95-1604-FOF-TP (FPSC's Order) and the FCC's First Report and Order in CC Docket No. 95-116 (FCC's Order), the FPSC has issued two orders in the combined Docket Nos. 960833-TP/960846-TP and 960847-TP/960980-TP that address various interim number portability solutions. The FPSC required the incumbent LECs to offer multiple interim number portability solutions to the ALECs participating in those proceedings. Since the FPSC determined in the combined dockets that it was inappropriate to establish a cost recovery mechanism that did not involve all telecommunications carriers, the FPSC required the incumbent LECs to track their costs for providing interim solutions addressed in the arbitrations until completion of this generic review of interim number portability cost recovery. Once a cost recovery mechanism is established, the FPSC decided to apply it to the arbitrated interim number portability solutions. Therefore, staff intends to apply the cost recovery mechanism established in this proceeding to the arbitrated interim number portability decisions. All of the parties questioned on this issue agreed that the cost recovery mechanism should not vary between interim number portability solutions. (Guedel TR 80; Varner TR 150; Menard, EXH 4, p.12; Kistner, EXH 7, p.12; McDaniel, EXH 11, p. 12; Cresse, EXH 12, p.26)

Before we discuss whether the FPSC's Order is inconsistent with the FCC's Order, we should explain the basis for both orders.

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Basis for FPSC's Order

In July 1995, the Florida Legislature enacted the current Florida Statute which contains provisions for interim number portability (identified in Florida Statute as temporary number portability). Section 364.16(4), Florida Statutes, states:

Each local exchange provider, except small local exchange telecommunications companies under rate of return regulation, shall provide a temporary means of achieving telephone number portability.

This section goes on to state:

If the parties are unable to successfully negotiate the prices, terms, and conditions of a temporary number portability solution, the commission shall establish a temporary number portability solution by no later than January 1, 1996.

In addition, Section 364.16(4), FLORIDA STATUTES states:

In the event the parties are unable to satisfactorily negotiate the prices, terms, and conditions, either party may petition the commission and the commission shall, after opportunity for a hearing, set the rates, terms, and conditions. **The prices and rates shall not be below cost.** (Emphasis added)

The parties to the FPSC's generic investigation into temporary number portability stipulated to use Remote Call Forwarding (RCF) as the solution to provide temporary number portability in Florida. In addition, the parties agreed to continue to negotiate on other mechanisms, such as flexible direct inward dialing (DID), if so desired. (FPSC Order No. PSC-95-1214-AS-TP (FPSC Order 1214)) However, the parties were unable to negotiate a rate. On December 28, 1995, the FPSC issued Order No. PSC-95-1604-FOF-TP establishing the following rates for RCF based temporary number portability: Recurring - \$1.00 per number, \$.50 per additional path; Nonrecurring - \$10.00 per account. In the Order, the FPSC interpreted the term "cost" as it is used in Section 364.16(4), Florida Statutes, as Total Service Long Run Incremental Costs (TSLRIC).

Basis for FCC's Order

In February of the following year, the Telecommunications Act of 1996 (the Act) became effective and established various criteria

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for implementation of local competition, one being number portability. Unlike the Florida Statute, Section 3(46) of the Act specifically defines number portability as:

...the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

Section 251(b)(1) requires **all local exchange carriers** to provide to the extent technically feasible, number portability in accordance with requirements **prescribed by the Commission (the FCC)**. It should be pointed out that this requirement is inconsistent with Section 364.16(4), Florida Statutes, which only requires price cap LECs to provide number portability.

The Act also provides guidance on cost recovery. Section 251(e)(2) states:

The costs of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis **as determined by the Commission (the FCC)**. (Emphasis added)

Requirements of the FCC's Order

On July 2, 1996, the FCC issued its First Report and Order in the Matter of Telephone Number Portability in CC Docket No. 95-116. The order provided the FCC interpretation of the Act and established its requirements for the provision of number portability. (FCC 96-286) Since this proceeding is associated only with cost recovery for interim number portability, staff will limit its overview of the FCC's Order to interim number portability.

The FCC's Order requires all LECs to provide number portability through Remote Call Forwarding (RCF), Direct Inward Dialing (DID), and **other comparable methods** because they are the only solutions that currently are technically feasible. (FCC 96-286, Par 6 and 110) It should be noted that although CMRS carriers do not have to provide interim number portability, CMRS carriers can request interim number portability from a local exchange carrier. (FCC 96-286, Par 152)

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The FCC identified the following three areas that had to be addressed in order to establish standards for number portability cost recovery.

1. Determine the meaning of number portability costs.
2. Interpret the phrase "all telecommunications carriers."
3. Construe the meaning of the phrase "competitively neutral." (FCC 96-286, Par 128)

In determining the meaning of number portability costs, the FCC stated that the costs of currently available number portability are the incremental costs incurred by a LEC to transfer numbers initially and subsequently forward calls to new service providers. (FCC 96-286, Par 129)

The FCC interpreted the Act literally in its attempt to define the phrase "all telecommunications carriers." The FCC believes that the phrase would include any provider of telecommunications service. Section 3 of the Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used. Under this reading the FCC believes that states **may** require all telecommunications carriers, including incumbent LECs, new LECs, CMRS carriers, and IXC's, to share the costs incurred in the provision of currently available number portability arrangements. The FCC states that commissions may apportion the incremental costs of currently available measures among relevant carriers by using competitively neutral allocators, such as gross telecommunications revenues, number of lines, or number of active telephone numbers. (FCC 96-286, Par 130)

In determining what the phrase "competitively neutral" meant, the FCC established two criteria that must be met by any cost recovery mechanism. First, the incremental payment made by a new entrant for winning a customer that ports his number cannot put the new entrant at an appreciable cost disadvantage relative to any other carrier that could serve that customer. (FCC 96-286, Par 132) Second, a cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment. (FCC 96-286, Par 135)

The FCC's Order identified various options that comply with the competitively neutral criteria discussed above. These options will be discussed in Issue 2. However, the FCC did specifically state that imposing the full incremental cost of number portability

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solely on new entrants would contravene the statutory mandate that all carriers share the cost of number portability. (FCC 96-286, Par 140)

Evaluation of Consistency Between the FCC Order and the FPSC Order

All parties, except GTEFL, agree that the FPSC's Order is inconsistent with the FCC's Order. (TR 106; TR 190; TR 307; TR 29; TR 21; TR 353; TR 383; TR 259; EX 4, p.9) Aside from GTEFL and BST, all parties agree the orders are inconsistent due to the fact the cost recovery mechanism ordered by the FPSC does not require that the cost be borne across all carriers in a competitively neutral manner consistent with Paragraph 126 of the FCC Order as required by Section 251(e)(2) of the Act. The FPSC's reciprocal compensation recovery mechanism would force the new entrant to bear all the costs in contradiction to the FCC Order's requirement in Paragraph 138. The FPSC's mechanism would allow ILECs to charge new entrants a rate equal to or greater than the ILECs' incremental cost of providing the portability service. (AT&T BR p. 3; AT&T Wireless BR p. 2; FCTA BR p. 4; MCI BR p. 5; MFS BR p. 4; Time Warner BR p. 4; Sprint BR p. 3-4)

By the FCC's competitive neutrality requirement in Paragraphs 126 and 131, the FCC effectively rejects the notion that the cost-causer should pay for the entire cost of interim number portability (INP or ILNP), as INP is a network function rather than a service. (FCTA BR p. 4; MCI BR p. 3-4; MFS BR p. 3-5) MCI witness Kistner argues it is competition which is the true cost causer. (TR 191; MCI BR p. 4) Time Warner adds further that "INP is required to bridge the gap between incipient competition and the transfer of number administration and ownership to a neutral third party." (Time Warner BR p. 3) Time Warner also notes the costs to the ILECs are de minimis on a cost of service basis. (Time Warner BR p. 6)

Although BST agrees that the two orders are inconsistent, BST and GTEFL believe the FCC has misinterpreted the Act by requiring the cost of interim number portability to be borne by (spread across) all telecommunications carriers. (TR 106-107; TR 157)

BST witness Varner believes the ILEC will be forced to bear most of the incremental cost of interim number portability. (TR 105) The INP cost recovery provisions from the FCC's Order will not allow the ILEC to recover its costs and earn a normal return, a violation of the FCC's own requirements for competitive neutrality. (TR 109; TR 157-158)

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Therefore, BST argues the FCC's cost recovery provisions for interim number portability are confiscatory and unlawful under the Takings Clauses of the United States and Florida Constitutions by authorizing INP rates below BST's cost, "close to zero". (BST BR p. 6-10) BST contends its position is further supported by Section 364.16(4), Florida Statutes, which requires that "the prices and rates shall not be below cost" for interim and permanent number portability. (BST BR p. 11)

Finally, BST argues the FCC lacked authority to preempt the states through its INP guidelines. BST believes that the FCC Order directs the states to follow the FCC's INP cost recovery guidelines and thereby preempts the states in this area. BST witness Varner, however, does agree that there has been no stay of the FCC's Order; the FCC's Order is therefore currently in effect. (TR 137; TR 208; Time Warner BR p. 5)

Both BST and GTEFL interpret the Act to only grant the FCC authority to issue rules implementing permanent number portability. (BST BR p. 7; GTEFL BR p. 8) In contrast, Time Warner argues this lack of specification indicates that Congress intended the FCC's requirements for a cost recovery mechanism should apply to both interim and permanent number portability solutions. (Time Warner BR p. 5) Time Warner also adds that the provision of number portability with a technologically deficient interim solution should not change the appropriate cost recovery mechanism. (TR 366; Time Warner BR p. 5)

In contrast to BST, GTEFL does not believe the guidelines for INP cost recovery mechanisms in the FCC's Order are intended to preempt Florida's established state tariffs or order regarding INP. (GTEFL BR p. 3) GTEFL supports its interpretation of the FCC's Order with the following:

States are also free, if they so choose, to require that tariffs for the provision of currently available number portability measures be filed by the carriers. (FCC's First Report and Order, CC Docket No. 95-116, Para 127)

GTEFL believes that, to the extent a state commission has already required tariffs, it has complied with the FCC's Order. (TR 157) GTEFL also notes that nothing in the FCC's Order expressly preempts the states with regards to INP. (GTEFL BR p. 3) GTEFL witness Menard, however, did agree that portions of the FPSC's Order are inconsistent with the FCC's Order. (TR 172-173) GTEFL nevertheless contends the FPSC's Order should be maintained largely because it meets the economic feasibility test of the FCC Order's competitive neutrality requirement. (GTEFL BR p. 4-5)

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GTEFL also argues the FCC's proposed action constitutes a taking under the Florida and United States Constitutions and violates Section 364.16(4), Florida Statutes, which requires that an ILEC be allowed to recover its costs for INP. GTEFL states the FCC's Order authorizes an unlawful taking and is internally inconsistent. GTEFL maintains the FPSC should follow the clear directive of the state statute to require rates for interim portability not to be below costs. As a result, the FPSC should maintain its current order, which follows the state statutory mandate and provides a fair return to the ILEC for interim number portability services. (GTEFL BR p. 6-9)

Finally, GTEFL argues the FPSC must read the Act and the FCC Order in such a way as to avoid constitutional infirmity. GTEFL believes that the Act and the FCC's Order can be read to authorize the FPSC's Order. By affirming its order as consistent with the FCC Order, the FPSC would avoid any constitutional problems arising from other cost recovery mechanisms suggested by other parties and the FCC. GTEFL believes the FPSC Order satisfies all federal and state legal authorities and should be left in place. (GTEFL BR p. 10.)

Revised Conclusion

As previously stated, all of the parties, except GTEFL, agree the FPSC's Order on interim number portability is inconsistent with the FCC's Order. GTEFL and BST express several concerns with the FCC's Order.

Staff believes the Act preempts the states with regards to the provision of and cost recovery for interim and permanent number portability. Sections 251(b)(2) and 251(e)(2) of the Act grant the FCC express authority to implement number portability to the extent technically feasible with costs borne by all carriers in a manner that is competitively neutral. "Technically feasible" would encompass those methods currently available, interim number portability, and those methods available in the long term, permanent number portability. The Act simply states the FCC shall determine requirements for "number portability", including its provision and cost recovery mechanism. Thus staff believes that the plain meaning of the Act demonstrates that Congress intended for the FCC alone to establish the requirements for number portability, both temporary and permanent.

Staff notes, preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-153 (1982)

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Preemption occurs implicitly when Congress manifests its intent to occupy an entire field of regulation, or through conflict between state and federal law, when it is either impossible to comply with both, or when state law stands as an obstacle to the accomplishment of the full congressional objectives. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369 (1986).

Section 364.16(4), Florida Statutes, requires that the rates and prices for number portability not be below cost to the service provider. The FPSC's earlier INP Order No. PSC-95-1604-FOF-TP, implementing state law, requires that companies pay a uniform monthly charge for each ported number. The FCC Order in Paragraphs 133, 134, and 138, however, expressly rejects this type of reciprocal compensation mechanism adopted by the FPSC. The FCC Order in Paragraph 136 establishes an INP cost recovery mechanism that requires carriers to pay for their own costs. Since the ILECs will incur the majority of the costs of providing INP, such a mechanism would effectively make the rates or prices below costs from an ILEC's perspective. Thus, the FCC Order clearly conflicts with both the FPSC's Order No. PSC-95-1604-FOF-TP and Section 364.16, Florida Statutes. Because Congress' intent is clear that the FCC should establish the requirements for number portability, and because Section 364.16, Florida Statutes, and the FPSC's Order No. 95-1604-FOF-TP conflict with the FCC's Order establishing those requirements, staff believes that the FCC's Order preempts Section 364.16(4), Florida Statutes, and the FPSC's earlier order.

Preemption of a state law requirement can occur through the promulgation of federal regulations authorized by an act of Congress. Fidelity Federal Savings, 458 U.S. at 153; Time Warner Cable v. Doyle, 66 F.3d 867, 875 (7th Cir. 1995). The statutorily authorized regulation of a federal agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Time Warner, 66 F.3d at 875-876; City of New York v. FCC, 486 U.S. 57, 64 (1988). Staff recommends that the federal regulations here, the FCC's Order authorized by the Act, preempt Section 364.16, Florida Statutes, and the resulting FPSC's earlier INP Order.

If the FPSC agrees with staff's conclusion that the FCC Order preempts Florida laws and regulations with regard to INP, the remaining issue is whether the FPSC can adopt a new cost recovery mechanism for INP in this proceeding. Staff believes that the FPSC can and should. First, the FPSC has the authority and a mandate to establish a temporary number portability solution under Section 364.16(4), Florida Statutes. Thus, the FPSC has the necessary statutory base to act in this matter. See Florida Power and Light

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Company v. Florida Public Service Commission, Florida Law Weekly, March 18, 1983, p.116 (FL 1983).

Second, although staff believes preemption has occurred, the FCC's number portability order does not completely occupy the field with regard to temporary number portability, and there is still a role for the FPSC to play. The FCC's Order (§127) specifies guidelines or criteria for adopting an INP cost recovery mechanism. The states still have the discretion and responsibility to establish what that cost recovery mechanism will be.

As a result, the FPSC may adopt any cost recovery mechanism, so long as it is consistent with the INP guidelines provided by the FCC's Order. If the FPSC chooses a cost recovery mechanism for INP that is either expressly provided for or complies with the guidelines in the FCC's Order, the FPSC can not ultimately rule on whether the cost recovery mechanism is constitutional.

Staff does not agree with GTEFL's analysis of the FCC's Order and the FPSC's Order. GTEFL supports its position to maintain the FPSC's Order and current tariff rates by utilizing parts of the FCC's Order out of context. For example, GTEFL cites Paragraph 137 of the FCC Order to support the reciprocal compensation cost recovery mechanism required by the FPSC's Order. Paragraph 137, however, has a limited application in the FCC's Order to the preceding paragraphs which describe pooling mechanisms, mechanisms entirely different from the FPSC Order's cost recovery mechanism.

Although staff believes parts of the FPSC's Order are consistent with the FCC's Order, staff does not believe the FPSC's Order complies with the competitive neutrality requirement in the FCC's Order in Paragraph 126, mandating that the cost of interim number portability be borne by all carriers. This conclusion is based on the fact that the FPSC's Order would require new entrants to bear the entire cost of INP. Paragraphs 133, 134, and 138 of the FCC Order expressly reject the cost recovery mechanism the FPSC ordered in FPSC Order No. PSC-95-1604-FOF-TP. Therefore, staff recommends that the FPSC find that FPSC Order No. PSC-95-1604-FOF-TP is inconsistent with the FCC's First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Telephone Number Portability, CC Docket No. 95-116.

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ISSUE 2: What is the appropriate cost recovery mechanism for temporary number portability?

RECOMMENDATION: The FPSC should require all telecommunications carriers to bear their own cost of providing the interim number portability solutions identified in Table A. Staff believes no matter which cost recovery mechanism is adopted all local exchange companies should be required to modify/file their tariffs to recognize the INP solutions identified in Table A and the rates charged, if any.

POSITION OF PARTIES

AT&T: The FPSC should adopt a mechanism which requires each carrier to pay for its own costs of providing interim local number portability. In other words, the service should be provided as requested (of either the incumbent or the new entrant) at no charge.

AT&T WIRELESS: Each carrier should absorb its own costs. However, regardless of the cost recovery methodology approved, wireless carriers that do not use interim number portability should not participate in any interim cost recovery mechanism.

BMI: BMI continues to believe that LEC prices for remote call forwarding should be cost-based. The FPSC should uphold existing negotiated agreements regarding cost recovery for interim number portability. BMI has no position on the appropriate cost recovery mechanism in the absence of such agreements.

BST: Order No. PSC-95-1604-FOF-TP should be maintained until the solution for permanent number portability is implemented. The FPSC's Order is consistent with Section 364.16(4), Florida Statutes. Alternatively, each carrier should track and record its costs and then recover those by using the same permanent number portability cost recovery mechanism approved by the FCC.

FCTA: Local providers should absorb the incremental costs incurred to provide RCF as the temporary solution. Alternatively, any charges should be based on the incremental costs of providing RCF as a temporary number portability solution. The incremental cost should then be allocated on the basis of active access lines.

GTEFL: The FPSC should leave the existing cost recovery mechanism in place. Alternatively, it could adopt the cost-sharing approach GTEFL proposed in order tracking of INP costs with recovery later using the long-term number portability cost recovery mechanism the FCC is to adopt.

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ICI: Intermedia continues to believe that LEC prices for remote call forwarding should be cost-based. The FPSC should uphold existing negotiated agreements regarding cost recovery for interim number portability. Intermedia has no position on the appropriate cost recovery mechanism in the absence of such agreements.

MCI METRO: The simplest of the cost recovery mechanisms which meet the FCC criteria is one in which each local carrier pays for its own costs of currently available number portability measures. This method is superior in that it does not require cost studies or special reporting between carriers of revenues, minutes of use, number of customer telephone numbers, etc.

MFS: Carriers should absorb their own costs for portability arrangements. This will significantly ease the burden of administration and alleviate the extent of regulatory oversight. Alternatively, the FPSC should require all carriers to contribute to a portability fund in direct proportion to their net total revenues from intrastate telecommunications services.

SPRINT: Sprint proposes a per ported number charge based on a price which is approximately 50% of the cost of providing RCF as a temporary number portability solution.

TIME WARNER: The appropriate cost recovery mechanism is for each LEC to absorb its own INP costs. Alternatively, costs should be recovered based on the percentage of working telephone numbers each local service provider has.

STAFF ANALYSIS: Before staff begins to discuss the appropriate cost recovery mechanism the FPSC should implement in this proceeding, staff believes it is important to identify what interim number portability solutions and rates will be addressed in this recommendation. Essentially, there are three different methods by which interim number portability options can be established for telecommunications carriers:

1. negotiated solutions and rates pursuant to Section 252(a)(1),
2. solutions and rates set by the FPSC prior to the issuance of the Act or FCC Order, and
3. solutions and rates set in an arbitration proceeding.

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BMI and ICI stated that in their position statements, but did not provide any evidentiary support, that the FPSC should uphold existing negotiated agreements regarding cost recovery for INP solutions. (BMI BR p. 1-2; ICI BR p. 1-2) Staff believes the Act provides clear direction on this issue. Therefore, staff believes that only the solutions and rates set by the FPSC (2 and 3 listed above) should be considered in the cost recovery mechanism established in this recommendation. The basis for excluding the solutions and rates set via a negotiated agreement is the language contained in section 252(a)(1) of the Act. Staff believes that the rates contained in the negotiated agreements will be unaffected, unless a carrier seeks to utilize Section 252(i) of the Act. Section 251(a)(1) states:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers **without regard to the standards set forth in subsections (b) and (c) of section 251.**
(Emphasis added)

Staff believes this language allows the incumbent LECs and other telecommunications carriers to negotiate whatever terms they deem appropriate regardless of the requirements of the Act. Although the FPSC is required to approve each negotiated agreement, the standards used for approval of the elements of the agreement only require that it does not discriminate against a telecommunications carrier not a party to the agreement, and is consistent with the public interest. (Section 252(e)(2)(a)(i) and ii)) Therefore, based on our interpretation of section 252(a)(1), staff recommends the FPSC not include the interim number portability solutions and rates offered in a negotiated agreement in this cost recovery mechanism.

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ILNP Solutions Required

The FPSC has required local exchange carriers to provide various ILNP solutions. Listed in Table A are the ILNP solutions required by the FPSC and the type of proceeding in which the solutions were required.

TABLE A

ILNP Solutions	Type of Proceeding Solution Required
Remote Call Forwarding	Generic/Arbitration
Direct Inward Dialing	Arbitration
Route Index Portability Hub	Arbitration
Direct Number Route Index	Arbitration
LERG Reassignment to the NXX Level	Arbitration

Source: FPSC Order 1214, FPSC Order No. PSC-96-1579-FOF-TP, and FPSC Order No. PSC-97-0064-FOF-TP

Although some of these options were required in the arbitration proceedings (which are limited to the parties to the arbitration), staff believes the Act, as well as the FCC's Order, requires all LECs to provide any ILNP solution that is technically feasible. (Section 251(b)(2); FCC 96-286, Par 110).

Methods of Cost Recovery Identified in the Proceeding

The parties to this proceeding have proposed six methods to recover the cost of the ILNP solutions in Table A. (MFS Devine TR 288; AT&T Wireless Giannella TR 22; AT&T Guedel TR 33, 35; BST Varner TR 109-110; GTEFL Menard TR 164; MCI Kistner TR 194, 202; Poag TR 310; Time Warner McDaniel TR 358-359; FCTA Cresse TR 384) The proposals essentially fall into the following four categories.

1. Carriers cover their own costs
2. Pooling mechanism based on telephone numbers, access lines, or revenues
3. Status Quo
4. Split costs between porting carriers

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Table B lists the choices for ILNP cost recovery mechanisms of the parties to this proceeding.

TABLE B

Party	Cost Recovery Mechanism			
	1	2	3	4
AT&T	1st	2nd *		
AT&T Wireless	1st			
BMI	N/A	N/A	N/A	N/A
BST			1st	
FCTA	1st			
GTEFL			1st	
ICI	N/A	N/A	N/A	N/A
MCI	1st	2nd */***		
MFS	1st	2nd **		
Sprint				1st
Time Warner	1st	2nd *		

* Based on Telephone Numbers

** Based on Revenues

*** Based on Access Lines

Source: MFS Devine TR 288; AT&T Wireless Giannella TR 22; AT&T Guedel TR 33, 35; BST Varner TR 109-110; GTEFL Menard TR 164; MCI Kistner TR 194, 202; Poag TR 310; Time Warner McDaniel TR 358-359; FCTA Cresse TR 384

Staff will address each category separately.

Carriers cover their own costs

This option requires all telecommunications carriers to recover the costs they incur in the provision of any of the various ILNP options. (MCI Kistner TR 194) Most of the parties (new entrants) to this proceeding believe this method of cost recovery is the best option to implement due to its simplicity. (MCI Kistner TR 195; AT&T Guedel TR 34; MFS Devine TR 278; Time Warner McDaniel TR 374) MCI's witness Kistner and AT&T's witness Guedel believe that unlike the other proposed options for cost recovery, this

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option does not require a complex mechanism for measuring, billing, and reporting requirements, such as would be necessary with a pooling mechanism based on revenues, access lines, or telephone numbers. (TR 195; EXH 1, p. 17-18) AT&T's witness Guedel believes the development of a complex pooling mechanism is unnecessary due to the short period ILNP solutions will be in place. (TR 46) The FCC's Order states that all local exchange companies, including CMRS carriers, operating in the 100 largest MSAs are to offer long-term (permanent) number portability commencing on October 1, 1997, and concluding on December 31, 1998. After December 31, 1998, each LEC must make long-term number portability available in smaller MSAs within six months after a specific request by another telecommunications carrier in the areas in which the requesting carrier is operating or plans to operate. (FCC 96-286, Par 77) Table C shows the Florida areas that are included in the largest 100 MSAs, the counties associated with the MSA, and the date to implement permanent number portability.

TABLE C

MSA	Counties in MSA	Date of Implementation
Miami	Dade	1Q 98
Ft. Lauderdale	Broward	1Q 98
Orlando	Lake, Orange, Osceola, Seminole	1Q 98
Tampa	Hillsborough, Pinellas, Pasco, Polk	1Q 98
Jacksonville	Clay, Duval, Nassau, St. Johns	3Q 98
West Palm Beach	Palm Beach	3Q 98
Sarasota	Manatee, Sarasota	4Q 98

Source: FCC 96-268 Appendix F

The ILECs do not support this proposal since initially they would incur the majority of the costs. (Poag TR 317; Varner TR 116-117; Menard TR 157-158) GTEFL and BST believe this cost recovery mechanism violates the Takings Clause in the U.S and Florida Constitutions, as well as violates Section 364.16(4), Florida Statutes. (GTEFL BR 8-10; BST BR 8-10) As pointed out in

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Issue 1, staff believes the Act gave the FCC the authority to establish the requirements for number portability. A cost recovery mechanism that requires carriers to bear their own costs is one of the specific options identified in the FCC's Order. (FCC 96-286, Par 136) Therefore, staff believes this cost recovery mechanism is an option to consider. The proper jurisdiction to address the constitutional challenges the ILECs suggest is a court of law, not the FPSC. As for violation of Florida's law, which requires rates not to be below cost, staff believes the Act and the FCC's Order preempt the states in those areas which conflict with state law.

MCI's witness Kistner stated that there would be cost the ALECs would incur due to the use of an ILNP solution; the only cost specifically identified was the cost associated with tracking multiple telephone numbers that are assigned to the ALEC's end user. (EXH 7, p. 15) MCI did not provide any specific cost data to support their claim or a specific level of cost. However, staff believes the administrative cost associated with tracking multiple number for a customer will be very minimal.

Pooling mechanism based on access lines, telephone numbers, or revenues

Various parties have recommended a pooling mechanism based on access lines, telephone numbers, or revenues. (MFS Devine TR 288; AT&T Guedel TR 33, 35; MCI Kistner TR 194, 202; Time Warner McDaniel TR 358-359) Staff believes all of the pooling proposals would comply with the FCC's Order. All of the pooling mechanisms proposed have been as an alternative to the parties' primary cost recovery mechanism in case the FPSC did not accept their primary recovery mechanism. Essentially the pooling cost recovery mechanisms proposed in this proceeding determine the cost incurred in providing ILNP solutions to carriers and divide the cost by either access lines, telephone numbers, or revenues. (MFS Devine TR 288; AT&T Guedel TR 33, 35; MCI Kistner TR 194, 202; Time Warner McDaniel TR 358-359)

MCI's witness Kistner and AT&T witness Guedel have identified various problems associated with implementing such mechanisms. For example, if the FPSC based a pooling mechanism on revenues, it may become very difficult to determine which revenues to use for carriers such as cable television carriers. The main concern the parties expressed about a potential pooling mechanism was the necessity, depending on the basis of the pooling mechanism, to collect various types of information such as telephone number data, cost studies, access line data, and revenue data. Once the data is collected the Commission, in conjunction with the industry, would have to determine the cost of providing each of the ILNP solutions

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identified in Table A and establish a mechanism to administer the pool. (TR 195; EXH 1, p. 17-18) Most parties to this proceeding believe development of a pooling mechanism is too complicated, considering the short period the ILNP solutions will be in place and the limited requests the ILNP solutions. (MCI Kistner TR 195; AT&T Guedel TR 34; MFS Devine TR 278; Time Warner McDaniel TR 374) Staff believes that no matter which pooling mechanism you implement the ILECs will be required to recover most of the cost since they have most of the access lines, telephone numbers and overall revenues.

Status quo

Only BST and GTEFL have proposed the status quo in this proceeding, although for different reasons. (BST Varner TR 109-110; GTEFL Menard TR 164) These companies would propose to continue charging the ALECs the full cost of the ILNP solutions, which is clearly prohibited by the FCC's Order. BST believes the FCC has misinterpreted the Act when it applied the requirement of Section 251(e)(2) to ILNP. Therefore, BST proposes to retain the status quo and track the costs it incurs in the provision of the ILNP solutions. Once a permanent number portability cost recovery mechanism is established, BST believes the ILNP costs could be recovered through the permanent mechanism. (Varner TR 110-111) The FCC's Order clearly contemplates a different cost recovery structure for permanent number portability than interim. (FCC Order 96-286, Par 199) Staff believes it would be inappropriate to complicate the permanent cost recovery mechanism with trying to determine how to recovery ILNP costs. Permanent cost recovery will probably be structured differently and would essential require the development of a special mechanism to recover ILNP costs.

GTEFL recommends the FPSC adopt the status quo in this proceeding because it believes the FPSC's Order is consistent with the requirements of the FCC's Order. (GTEFL Menard TR 164)

As stated in Issue 1, staff believes the FPSC's Order is inconsistent with the FCC's Order. Since that is the case, staff believes retaining the status quo would be a violation of the FCC's Order and inappropriate considering the FCC's authority delegated to it by the Act. Therefore, staff believes the Commission should not consider the status quo as an appropriate cost recovery mechanism for ILNP.

Split costs between porting carriers

Sprint proposes the Commission adopt a cost recovery mechanism that would split the cost of providing ILNP solutions between the

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two carriers involved in the porting of the specific telephone number. Sprint proposes the carrier porting the telephone number will pay 55% while the carrier on the terminating end of the porting will pay 45% of the established rates. Sprint's witness Poag believes its proposal shares the costs of ILNP on an approximately equal basis and on a per number basis and therefore is competitively neutral. (TR 311-312) However, MCI's witness Kistner states that "equal" does not translate to "competitively neutral" when one carrier's share of the market is so substantially greater than that of its competition. (TR 210) Although Sprint is proposing to reduce the recurring rate of its ILNP solutions, it does not propose to discount the nonrecurring portions of the ILNP rates.

Sprint cites two sections of the FCC's Order to justify its proposed cost recovery mechanism. First, Sprint believes the FCC's Order gives the states discretion in establishing how number portability cost will be apportioned by stating: "States may require all telecommunications carriers, including ILECs, ALECs, CMRS providers, and IXCs." (Poag TR 308) Second, Sprint also believes the FCC's Order explains that, "States may apportion the incremental costs of currently available measures among relevant carriers by using competitively neutral allocators such as gross telecommunications revenues, number of lines, or number of active telephone numbers." (FCC 96-286, Par 130; TR 308)

As discussed in Issue 1, the FCC established two criteria that must be met in order for an ILNP mechanism to be considered competitively neutral. First, the incremental payment made by a new entrant for winning a customer that ports his number cannot put the new entrant at an appreciable cost disadvantage relative to any other carrier that could serve that customer. (FCC 96-286, Par 132) The order goes on to state that the incremental payment by the new entrant if it wins a customer would have to be close to zero, to approximate the incremental number portability cost borne by the ILEC. (FCC 96-286, Par 133) It also notes that carriers taking unbundled elements or reselling services do not generate a cost of number portability. Thus, a low incremental payment by a facilities-based carrier is necessary in order not to disadvantage it relative to such resellers. (FCC 96-286, Footnote 379) Second, the cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment. (FCC 96-286, Par 135) The example given to clarify this requirement states that if the total costs of currently available number portability solutions are to be divided equally among four competing local exchange carriers, including both the ILEC and three new entrants, within a specific service area, the new entrants' share of the cost may be so large, relative

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to their expected profits, that they would decide not to enter the market. (FCC 96-286, Par 135)

Staff would agree with Sprint that the FPSC has the ability to determine which carriers should be required to participate in the cost recovery mechanism. However, staff would disagree that the relevant carriers contemplated by the language in the FCC's Order are the carriers involved in porting. Staff would consider all local exchange carriers to be the relevant carriers when determining which carriers should recover some of the costs associated with the provision of ILNP, since all LECs have the ability to request ILNP solutions and are required to provide ILNP solutions.

Staff believes the FCC's Order considers the size of the carriers and the cost per customer, whether porting or not, in its determination of a competitively neutral cost recovery mechanism. Therefore, staff believes that Sprint's proposal would require the ALECs to recover a larger portion of the costs on a per customer basis than Sprint, thus affecting the possible normal return of the ALECs. If that is the case, staff believes Sprint's proposal violates the competitively neutral requirement in the FCC's Order. Therefore, staff believes the FPSC should not consider Sprint's proposal as an appropriate ILNP cost recovery mechanism.

Carriers that Should Participate in Cost Recovery

If the FPSC adopts the cost recovery mechanism that requires all carriers to bear their own costs, then it is not necessary to determine which carriers should participate in ILNP cost recovery. However, if the FPSC adopts any other option, it will be necessary to determine which carriers are required to contribute to ILNP cost recovery. Several parties to the proceeding believe that contribution to a cost recovery mechanism should only include the LECs. (MCI EXH 7, p. 21; AT&T EXH 1, p.11; Time Warner EXH 11, p. 21; FCTA EXH 12, p. 14-15; Varner TR 140) MFS' witness Devine interprets the Act to require all telecommunications carriers to contribute to the ILNP cost recovery mechanism established in this proceeding. (TR 268) AT&T Wireless' witness Giannella believes that no matter which cost recovery mechanism the FPSC adopts, that wireless carriers should be excluded since wireless carriers will not use ILNP solutions. (TR 23)

As stated before, staff believes the relevant carriers should be the carriers that will be the potential beneficiaries of using the ILNP solutions. At this time, staff agrees with most of the parties that the carriers that should contribute to the ILNP cost recovery mechanism are the carriers that provide local exchange

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service. Although AT&T Wireless' witness Giannella stated that wireless carriers would not be using ILNP solutions, the FCC's Order clearly allows the wireless carriers to request ILNP solutions from the LECs. Therefore, staff would recommend the Commission require the ILECs, ALECs and CMRS provider contribute to the ILNP cost recovery mechanism, provided the FPSC does not adopt the option of carriers recovering their own costs.

Cost Methodology

If the FPSC does not adopt the cost recovery mechanism where carriers absorb their own costs, most of the parties to this proceeding believe that the FPSC should use short run incremental cost studies. It should be pointed out that the FCC did not use the term "short run incremental cost" in its order. However, the FCC is clear that the rates established by the state commissions are not required to be set at LRIC or TSLRIC. (FCC 96-286, Par 123)

MCI's witness Kistner and AT&T's witness Guedel believes that the use of a short run incremental cost study is the appropriate methodology to use. (TR 239, 48) MCI and AT&T's main support for the use of a short run incremental cost methodology is essentially the short time that ILNP will be used by telecommunications carriers and that the FCC determined the cost to be approximately zero since the ILNP functions were available in the switch. The FCC is clear in its order that when permanent number portability is available, the LECs can eliminate the ILNP solutions in the areas where permanent number portability is offered. (FCC 96-286, Par 111)

The FPSC has never used short run incremental cost studies. (Poag TR 346) Staff believe the parties have not distinguished what would make up a short run incremental cost study in this proceeding. MCI and AT&T have indicated that permanent number portability will be implemented in the major markets within 12 to 18 months. (Kistner TR 195; Guedel TR 34) However, based on the schedule identified in Table C it may be some time before the entire state realizes permanent number portability. Therefore, staff does not believe the use of a short run incremental study is appropriate.

In proceedings associated with the implementation of local competition the FPSC has adopted TSLRIC as the appropriate cost methodology to use. Staff has seen no evidence that would justify the use of any other cost methodology.

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Access Charges

MCI's witness Kistner proposes the FPSC should implement meet point billing arrangements for the sharing of terminating access. (TR 202) Witness Kistner proposes to split access charges in the following manner.

- (1) The forwarding LEC charges the IXC for transport from the IXC point of presence to the end office where the RCF/DID is provided; and
- (2) The terminating LEC charges the IXC for the terminating switching function, common line and RIC. (TR 201)

The FCC's Order provides some guidance on the distribution of access charges on ILNP solutions. The order states:

We decline to require that all of the terminating interstate access charges paid by IXCs on calls forwarded as a result of RCF or other comparable number portability measures be paid to the competing local service provider. On the other hand we believe that to permit incumbent LECs to retain all terminating access charges would be equally inappropriate. (FCC Order No. 96-286, Par 140)

In addition to not requiring the ILECs to share terminating access charges the order states:

...we direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements. (FCC Order No. 96-286, Par 140)

The ILECs have different positions on the appropriate mechanism to use for sharing of access charges on ported calls. GTEFL's witness Menard believes that the establishment of a distribution mechanism of terminating access charges should be left to the interconnection negotiations. Witness Menard believes ordering such a sharing mechanism would create some very costly billing modifications that may only be in place 12 to 18 months. (TR 180) GTEFL states that what they would do as a sharing mechanism would be to develop a surrogate (percent local usage) to split the access charges. (Menard TR 178) MCI's witness Kistner indicated that she did not have a problem with use of a surrogate. (TR 241)

On the other hand, Sprint's witness Poag believes MCI's proposal represents a fair distribution of the revenues associated with the underlying cost and believes that is how Sprint will

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handle meet point billing where number portability is involved. (TR 344)

Staff believes the FCC's Order focuses on negotiation for establishing the methodology to be used to distribute access charges and does not specifically require the FPSC to determine the methodology outside of a negotiation or arbitration proceeding. Staff believes it is clear that the methodology that will be used by the ILECs will be different. Therefore, staff believes it may be difficult to establish an industry standard.

Based on the discussion above, staff believes the FPSC should not establish a specific distribution methodology for access charges with the use of ILNP solutions. Staff believes the parties should negotiate the methodology and, if they are unsuccessful, should request arbitration.

Summary

Staff believes that cost methodology that best meets the FCC's Order is a pooling mechanism based on access lines. However, implementation of such a mechanism, for the time period that it would be used, is too complicated to implement due to all of the measuring, reporting and billing requirements that would be necessary. To date, only one customer in Florida is using an ILNP solution established by the FPSC, and staff is unsure as to the projected use in the future. It should be noted that ILNP is only needed by facilities based providers since resellers are not required to purchase ILNP in the provision of resold services. Based on these arguments, staff does not believe that the cost incurred in the provision of ILNP solutions would warrant the development of the pooling mechanism. Therefore, staff would recommend the FPSC require all carriers to absorb their own costs of providing ILNP.

If the FPSC decides to implement a pooling mechanism, it should require the ILECs to develop a TSLRIC cost study and file it with the FPSC within 60 days from the issuance of the final order. Until the cost studies have been approved, the ILECs should track the costs incurred in providing the ILNP solutions identified in Table A.

No matter which cost recovery mechanism is adopted all local exchange companies should be required to modify their tariffs to recognize the ILNP solutions identified in Table A and the rates to be charged, if any.

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ISSUE 3: Should there be any retroactive application of the FPSC's decision in this proceeding? If so, what should be the effective date?

RECOMMENDATION: No. Staff recommends that the FPSC's decision in this proceeding should not be applied retroactively to the effective date of the FCC's Order on interim number portability or any other such past date. The FPSC should apply its decision prospectively from the effective date of the Order issued in this proceeding.

POSITION OF PARTIES

AT&T: No.

AT&T WIRELESS: No. Given the very few numbers being ported, the administrative expense of retroactively applying a new system, and the doctrine of retroactive rate making, retroactive application is improper.

BMI: There should be no retroactive application of any decision in this proceeding. Whatever the effective date of the FPSC's order may be, it should not operate to undermine existing agreements previously approved by the FPSC.

BST: No. There should not be any retroactive application of any decision in this proceeding. BST respectfully submits that if such actions were taken by the FPSC, they could be in violation of retroactive rate making principles covered in the Florida Statutes (Section 366.06(2)).

FCTA: No.

GTEFL: No. There is no need for retroactive application of the decision because no ALEC has taken portability under existing tariffs.

INTERMEDIA: There should be no retroactive application of any decision in this proceeding. Whatever the effective date of the FPSC's order may be, it should not operate to undermine existing agreements previously approved by the FPSC.

MCI METRO: Yes. The FPSC's decision should be retroactively applied to the release date of the FCC Order. ILECs should pay full refunds to ALECs of all amounts collected for RCF between that date and the date of the FPSC's order in this proceeding. Depending on the cost recovery method, the cost provided during that period can be reallocated accordingly.

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MFS: Under the Telecommunications Act, the FPSC may do so. MFS takes no position at this time as to whether it should do so.

TIME WARNER: An appropriate effective date could be the date of the FCC Order. If retroactive rate making is of concern, the date of the final order in this case is reasonable.

SPRINT: No. Since there has not been a significant amount of ported number activity, retroactive application would likely cost as much or more to implement than has been spent on ported numbers.

STAFF ANALYSIS: All but three of the parties state the FPSC should not retroactively apply its decision in this proceeding. Time Warner and MFS take no official position but agree the FPSC could apply its decision retroactively. MCI is the only party which affirmatively requests that the FPSC apply its decision retroactively to the effective date of the FCC's Order on interim number portability, July 2, 1996.

Most parties which requested the FPSC not apply its decision retroactively offer several justifications. AT&T and FCTA provide no basis for their recommendation. (AT&T BR p. 8; FCTA BR p. 16) AT&T Wireless offers the following in support of its position: very few numbers ported to date, the administrative expense of retroactively applying a new system, and the doctrine of retroactive ratemaking. (AT&T Wireless BR p. 10) BMI and Intermedia believe the FPSC should not retroactively apply its decision, and this decision should not operate to undermine existing agreements previously approved by the FPSC. (BMI BR p. 2; Intermedia BR p. 2)

BST shares the concerns of AT&T Wireless and adds several other justifications for its recommendation. First, BST believes retroactive application of this decision would be prohibited as retroactive ratemaking under Florida law. (BST BR p. 22) BST notes that Section 366.06(2), Florida Statutes, requires that the FPSC establish its rates prospectively and supports this interpretation with the Florida Supreme Court's decision in City of Miami v. Florida Public Service Commission, 208 So.2d 249, 260 (FL 1968). BST also supports its position with the U.S. Supreme Court's decision in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). BST argues the Court's holding in the Bowen decision requires that retroactive rule-making authority be expressly conveyed to a governmental agency by Congress. Although the Bowen decision involved a federal agency, the FCC, BST believes a similar rationale should be applied to the FPSC. Since the Act does not grant the FCC express retroactive ratemaking authority, the FCC cannot create rules to implement the Act which would be

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retroactively applied. If the FCC does not have such authority, the FPSC does not either. (BST BR p. 23)

GTEFL offers similar arguments to those of AT&T Wireless and BST. Additionally, GTEFL notes only one customer of an ALEC has been ported to date. (GTEFL BR p. 24-25; EXH 8, p. 60) Therefore, as AT&T witness Guedel indicates, it would be unnecessary to apply the new rates in the event the FPSC's decision required the retroactive application of rates. (GTEFL BR p. 25; TR 52) Sprint also cites the lack of numbers ported to date. Sprint adds that the cost of retroactive application of this proceeding's order would be as much or more to implement than already spent on ported numbers. Sprint offers further support by stating that the FCC order on interim number portability does not take effect until 45 days after its publication in the Federal Register. (Sprint BR p. 12; EXH 8, p. 60)

Both MFS and Time Warner take no position on this issue. They do, however, state that the FPSC has the authority to apply retroactively its decision in this proceeding. MFS states nothing in the Act or the FCC's number portability order would prohibit such a retroactive application. MFS also notes nothing in the testimony submitted in this proceeding argues to the contrary. MFS, however, does recognize that the FPSC must follow Florida law with regards to retroactive ratemaking. MFS also requests BST tariffs not be left in place where they violate the FCC's number portability order. (MFS BR p. 11) Time Warner affirmatively argues that it is appropriate to make the effective date of this proceeding the FCC Order's effective date because this proceeding was undertaken at the mandate of the Act and the FCC order. (Time Warner BR p. 15) Time Warner concedes the effective date of the order issued to confirm the FPSC's decision in this proceeding would be appropriate since there has been no porting to date. Such an effective date would also eliminate the concern over retroactive ratemaking. (Time Warner BR p. 16)

In contrast to all other parties, MCI recommends the FPSC apply its decision in this proceeding retroactively to the FCC order's effective date. MCI's proposal would require ILECs to pay full refunds to ALECs of all RCF revenues collected by ILECs from the date of the FCC's order to the date of the FPSC's order in this proceeding. (MCI BR p. 13) MCI does acknowledge that this amount, based on the number ported to date, would be limited. (MCI BR p. 14)

As indicated in issue 1, staff believes the FPSC's decision on the cost recovery mechanism for interim number portability has been preempted by the Act and the FCC's Order. Therefore, the FPSC's

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decision became void. Therefore, it could be argued that if the charges are no longer viable by virtue of the Act and FCC's order, the concept of unlawful retroactive ratemaking is not applicable. Staff is persuaded by Sprint's argument that if we applied this decision retroactively, the costs of retroactive application would be greater than what has already been spent on porting numbers. As discussed above, only one customer of an ALEC has utilized RCF for interim number portability to date.

Therefore, staff recommends that the FPSC's decision in this proceeding should not be applied retroactively to the effective date of the FCC's Order on interim number portability or any other past date. The FPSC should apply its decision prospectively from the effective date of the order issued in this proceeding.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed when all local exchange companies have filed their tariffs to reflect the FPSC's decision in this proceeding.

STAFF ANALYSIS: The ILECs will need to modify their tariffs if the FPSC adopts staff's recommendation in Issues 1-3. This docket can be closed once the tariffs are filed.