

State of Florida



Public Service Commission  
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

**DATE:** JULY 2, 2003

**TO:** DIRECTOR, DIVISION OF THE COMMISSION  
ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (MOORE) *OTM* *DES*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS)

**RE:** DOCKET NO. 030346-TP - PETITION FOR DECLARATORY STATEMENT THAT NPCR, INC. D/B/A NEXTEL PARTNERS, COMMERCIAL MOBILE RADIO SERVICE PROVIDER IN FLORIDA, IS NOT SUBJECT TO JURISDICTION OF FLORIDA PUBLIC SERVICE COMMISSION FOR PURPOSES OF DESIGNATION AS "ELIGIBLE TELECOMMUNICATIONS CARRIER."

DOCKET NO. 030413-TP - PETITION FOR DECLARATORY STATEMENT THAT ALLTEL COMMUNICATIONS, INC., COMMERCIAL MOBILE RADIO SERVICE PROVIDER IN FLORIDA, IS NOT SUBJECT TO JURISDICTION OF FLORIDA PUBLIC SERVICE COMMISSION FOR PURPOSES OF DESIGNATION AS "ELIGIBLE TELECOMMUNICATIONS CARRIER."

**AGENDA:** JULY 15, 2003 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

**CRITICAL DATES:** 7/15/03 - BY STATUTE, DECLARATORY STATEMENT MUST BE ISSUED OR PETITION DENIED IN DOCKET NO. 030346-TP BY THIS DATE; IN DOCKET NO. 030413-TP, BY JULY 7/28/03

**SPECIAL INSTRUCTIONS:** RECOMMENDATION SHOULD NOT BE DEFERRED

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**CASE BACKGROUND**

NPCR, Inc., d/b/a Nextel Partners ("Nextel"), and ALLTEL Wireless Holdings, L.L.C. and New York NEWCO Subsidiary, Inc., subsidiaries of ALLTEL Communications, Inc. ("ALLTEL"), collectively "the petitioners," commercial mobile radio service (CMRS) providers in Florida, filed petitions for declaratory statements on April 16, 2003, and April 29, 2003, respectively. Nextel and ALLTEL seek a declaratory statement that, as CMRS providers, they are not subject to the jurisdiction of the Florida Public Service Commission for purposes of designation as an eligible telecommunications carrier ("ETC"). A carrier that qualifies for designation as an ETC is eligible to receive federal universal service funding. 47 U.S.C. § 254(e).

The federal Telecommunications Act of 1996 places responsibility on the states to determine which carriers are qualified for universal service funding. 47 U.S.C. § 214(e). In cases where the state does not have jurisdiction to make the ETC designation, the Federal Communications Commission (FCC) will determine the carrier's eligibility. 47 U.S.C. § 214(e)(6). Before the FCC will consider an application for eligibility designation, however, the carrier must provide the FCC with an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction. Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (released June 30, 2000) at ¶ 93.

Where a state has jurisdiction, it is required to designate all qualified applicants, except in areas served by rural telecommunications companies. For these areas, the state commission must first make a finding that designating more than one ETC is in the public interest. 47 U.S.C. § 214(e)(2).

Northeast Florida Telephone Company ("Northeast Florida") and GTC, Inc. d/b/a GT COM ("GT Com") filed petitions to intervene in these dockets on May 22, 2003. TDS TELECOM/Quincy Telephone ("Quincy") filed petitions to intervene on May 29, 2003. ALLTEL filed a response but did not oppose the intervention. The petitions were granted by Order Nos. PSC-03-0712-PCO-TP and PSC-03-

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0713-PCO-TP on June 16, 2003. Intervenors, who are incumbent local exchange companies (ILECs), urge the Commission to deny the petitions on the grounds that they do not meet the threshold requirements for a declaratory statement; and that the Commission has jurisdiction to make the ETC designation.

Notice of receipt of Nextel's Petition for Declaratory Statement was published in the May 2, 2003, issue of the Florida Administrative Weekly. Notice of receipt of ALLTEL's Petition was published in the May 16, 2003, issue.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission issue a declaratory statement?

**RECOMMENDATION:** Yes. The petitions satisfy the threshold requirements for a declaratory statement.

**STAFF ANALYSIS:** Section 120.565, Florida Statutes, governs the issuance of a declaratory statement. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, Florida Administrative Code, further explains that:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

The intervenors urge the Commission to deny the petitions for declaratory statement on several grounds. First, Intervenors assert that to receive ETC status in the service area of a rural LEC, a non-ILEC must file a petition proposing an appropriate

service area and demonstrating that designation as an ETC is in the public interest, a determination that can properly be made only after a formal administrative hearing and not in a declaratory statement proceeding. Second, Intervenor's assert that the petitions require a response that amounts to a rule--a rule stating that CMRS providers are not subject to the jurisdiction of the Commission for purposes of designation as an ETC. Third, Intervenor's assert that the petitions fail to allege an uncertainty about a Commission statute, rule or order and thus, fail to meet the pleading requirements of Rule 28-105.001, Florida Administrative Code.

In its response to the intervenor's assertions, ALLTEL points out that it has not filed its application for ETC status which would address the relevant requirements, and that it may not file such an application with this Commission because the Commission lacks jurisdiction over the matter. Because the issue of jurisdiction has not been determined, and because ALLTEL and Nextel take the position that the Commission does not have such jurisdiction, staff agrees that it is unnecessary and premature to file an application that addresses the eligibility requirements to be designated an ETC.

Staff also disagrees with the intervenor's assertion that the Commission should deny the petitions because the statement they ask for would amount to a rule. The Commission has on numerous occasions interpreted its jurisdiction and resolved controversies about it in declaratory statement proceedings. See, In re: Petition of St. Johns Service Company for declaratory statement on applicability and effect of 367.171(7), F.S., Order No. PSC-99-2034-DS-WS, issued October 18, 1999 in Docket No. 982002-WS; In re: Petition of PW Ventures, Inc., for declaratory statement in Palm Beach County, Order No. 18302, issued October 16, 1987 in Docket No. 870446-EU. Such a determination is typically a one-time occurrence, while rulemaking is more appropriate for such matters as recurring issues, implementation of statutes, and codification of policy.

Intervenor's cite Florida Dept. of Business and Professional Regulation v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999) to support their argument that the Commission should deny the petition and that the petitioners should seek relief through the rulemaking process. The Court in Investment Corp., however, recognized the desirability of an agency answering the declaratory

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statement petition and subsequently initiating rulemaking if the agency anticipates broader application and similar issues arising. The Court remanded the case to the agency for consideration of the merits of the declaratory statement petition.

Staff further disagrees that the petitions should be denied for failing to allege an uncertainty about a Commission statute, rule or order. As ALLTEL states in its response, its petition seeks a statement from the Commission that the statutes, rules and orders of the Commission are not applicable to ALLTEL, a CMRS provider, for the purposes of determining its ETC status. On the facts presented, this determination is properly made in a declaratory statement proceeding.

**ISSUE 2:** Should the Commission issue a declaratory statement that Nextel and ALLTEL are not subject to the jurisdiction of the Commission for purposes of determining eligibility for Eligible Telecommunications Carrier ("ETC") status pursuant to 47 U.S.C. § 214(e)?

**PRIMARY RECOMMENDATION:** Yes.

**ALTERNATIVE RECOMMENDATION:** No. The Commission should issue a declaratory statement that it has the authority to determine the eligibility of Nextel and ALLTEL for Eligible Telecommunications Carrier ("ETC") status pursuant to 47 U.S.C. s. 214(e).

**STAFF ANALYSIS:** Sections 214(e)(1), (2) and (6) of Title 47, U.S.C., provide, in pertinent part:

(e) Provision of universal service.

(1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 . . .

(2) Designation of eligible telecommunications carriers. A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

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(6) Common carriers not subject to State commission jurisdiction. In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

Nextel and ALLTEL assert that this Commission's jurisdiction derives from Chapter 364 and exists only with respect to telecommunications companies. § 364.01(2), Fla. Stat. Section 364.02(12), Florida Statutes, specifically excludes a commercial mobile radio service (CMRS) provider from the definition of "telecommunications company." In addition, the Commission does not have any rules that regulate CMRS providers.

Nextel also asserts that although section 364.02(12), Florida Statutes, makes CMRS providers liable to pay any universal service fees that are assessed pursuant to section 364.025, there is nothing in the statutes providing for the Commission to exercise regulatory jurisdiction over CMRS carriers. It also notes that this statute allows for alternative local exchange companies (ALECs) to apply to this Commission for ETC status, but that an ALEC is a form of "telecommunications company" and therefore cannot be a CMRS provider. Florida law makes no similar provision for CMRS providers because they are not regulated as a "telecommunications company" under state law. Nextel further cites to Order No. PSC-00-1243-PAA-TC, issued on July 10, 2000, in Docket No. 991821-TC, in which the Commission acknowledged that CMRS providers are "not regulated by this Commission" in accordance with section 364.02(12)(c), Florida Statutes, and that CMRS providers



are "not subject to Commission rules." ALLTEL also asserts that because it is not a telecommunications company under Florida law, this Commission has no jurisdiction over it, including for purposes of granting ETC status.

The intervenors state that 47 U.S.C. § 214(e)(6) can only apply to transfer the designation authority to the FCC if this Commission lacks the authority under state law to designate a wireless carrier (CMRS provider) as a competitive ETC. Intervenors assert that the Commission has already held, without limitation, that it has the statutory authority to make the ETC designation. Intervenors cite to Commission Order No. PSC-97-1262-FOF-TP, issued October 14, 1997, in Docket No. 970644-TP, In re: Establishment of eligible telecommunications carriers pursuant to Section 214(e) of the Telecommunications Act of 1996, to support this assertion. In relevant part, the order states:

We believe that the requirements of the 1996 Act can be met initially by designating the incumbent LECs as ETCs. Upon consideration, we hereby designate the incumbent LECs (ILECs) as ETCs. LECs should continue to serve their current certificated service areas. All other carriers (non-ILECs) who wish to receive ETC status in the service area of a non-rural LEC should file a petition with the Commission for ETC status and should propose what they believe is an appropriate service area. Any carriers that wish to be designated as an ETC in the service area of a rural LEC must show why it is in the public interest to have more than one ETC in that service area. Further, if approved, such carriers must serve the entire service area of the rural LEC to be considered an ETC or make a showing as to why some other lesser area would better serve the public interest.

(Emphasis added; Order at page 4.) The Commission also noted in the order that under Florida law, ALECs may not offer basic local telecommunications services within the territory served by a small LEC before January 1, 2001, unless the small LEC has elected price regulation, but that "mobile carriers [CMRS] may serve those areas, and may apply for ETC status." The intervenors assert that the Commission's authority to designate ETCs is buttressed by its express authority in section 364.02(12), Florida Statutes, over CMRS providers for purposes of assessment of fees to support universal service obligations under section 364.025.

Intervenors contend that it would not be in the public interest for a competitive carrier, including a CMRS or wireless provider such as ALLTEL, to be designated as an ETC in a rural area, concluding that the Commission is best situated to examine the facts and determine whether the public interest factor has been met. This, however, is not the issue presented by the petitions for declaratory statements. Only if the Commission determines it has the authority to make the ETC designation and has an application before it, will this be an issue.

In its response to the intervenors, ALLTEL asserts that the Commission cannot create statutory authority over CMRS carriers by its own order. While Order No. PSC-97-1262-FOF-TP states that all other carriers that wish to receive ETC status in a rural area must show why it is in the public interest to have more than one ETC in that service area, ALLTEL asserts that the order cannot lawfully require such petitions to be filed with the Commission rather than the FCC, as the Commission has no such jurisdiction with respect to CMRS carriers. ALLTEL further asserts that there is no procedure provided for CMRS carriers to apply for designation like that provided in section 364.025(5) for ALECs.

#### **Primary Staff Analysis**

Under federal law, the states have primary jurisdiction to determine whether a carrier should be designated an eligible telecommunications carrier. 47 U.S.C. § 214(e)(2). It is only "[i]n the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission" does the FCC have the duty to make the designations. 47 U.S.C. § 214(e)(6). Chapter 364, Florida Statutes, limits the Commission's jurisdiction to telecommunications companies:

364.01 Powers of commission, legislative intent.--

(1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.

(2) It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, . . . .

(Emphasis added.)

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The Commission does not have jurisdiction over CMRS providers because section 364.02(12), Florida Statutes, explicitly excludes CMRS providers from the definition of "telecommunications company" for all purposes except one, which is liability for any fees assessed pursuant to section 364.025 and taxes imposed pursuant to Chapters 203 and 212.<sup>1</sup> Section 364.025 requires the Commission to establish an interim mechanism for maintaining universal service objectives and funding carrier-of-last-resort (COLR) obligations, and states the legislature's finding that "each telecommunications company" should contribute its fair share to the support of universal service objectives and COLR obligations.

The intervenors cite to Commission Order No. PSC-97-1262-FOF-TP, issued October 14, 1997, in Docket No. 970644-TP, In re: Establishment of eligible telecommunications carriers pursuant to Section 214(e) of the Telecommunications Act of 1996, for the proposition that the Commission has already held that it has the statutory authority to make the ETC designation. In contrast, Nextel cites to Order No. PSC-00-1243-PAA-TC, issued on July 10, 2000, in Docket No. 991821-TC, in which the Commission acknowledged that CMRS providers are "not regulated by this Commission" in accordance with section 364.02(12)(c), Florida Statutes, and that CMRS providers are "not subject to Commission rules." In neither docket, however, was the precise issue whether the Commission has the authority to determine whether a CMRS provider is eligible for ETC status.

Order No. PSC-00-1243-PAA-TC granted a rule waiver in conjunction with an application for a pay telephone provider certificate to Radio Communications Corporation (RCC). RCC was unable to provide access to all locally available long distance carriers as required by Commission rule because it used wireless public telephone equipment and relied upon the ability or willingness of the local cellular air time provider to provide equal access. Although the order states that the Commission does not regulate CMRS providers and that they are not subject to Commission rules, the basis for the rule waiver was that it would not result in impairing the provision of service to the public and

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<sup>1</sup>Effective July 1, 2003, this exception has been expanded to include assessment of fees pursuant to section 364.336, Florida Statutes, the regulatory assessment fee statute. Chapter 2003-32, § 3, Laws of Fla.

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that application of the rules would create a substantial hardship for RCC because it relies on CMRS providers who are not subject to Commission rules. In addition, the Commission noted that CMRS providers of pay telephone service are required to obtain a pay telephone certificate, even though they use cellular telephone equipment. *Id.* at page 5, citing Order Nos. 25264 and 25799, issued in Docket No. 910470-TP.

Order No. PSC-97-1262-FOF-TP addressed 47 U.S.C. § 214(e) and designation of ETCs. The Commission implemented the requirements of section 214(e) and designated ILECs as ETCs, but the precise issue of whether the Commission has the authority to determine if a CMRS provider is eligible for ETC status was not presented. The order was issued in October, 1997. Section (214)(e)(6), authorizing the FCC to make ETC designations when a state does not have jurisdiction, had not been adopted at the time the Commission issued its order. That section was subsequently added by Congress to fill a gap for carriers that had no access to a forum in which they could obtain ETC status and thereby receive universal service support. See, Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket No. 96-45, 16 FCC Rcd 18133; 2001 FCC LEXIS 5313, FCC 01-283 fn. 46 (released October 5, 2001).

In a relatively recent case involving a rural electric cooperative, where the issue was the extent of the Commission's jurisdiction over a cooperative's rate structure, the Commission relied on case law that holds that any doubt about the existence of a Commission power should be resolved against it:

We note that this Commission's powers and duties are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of a particular power compels us to resolve that doubt against the exercise of such jurisdiction. City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973). Chapter 366, Florida Statutes, does not expressly indicate that this Commission has jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative. While the statute also does not define our rate structure jurisdiction as limited to retail rate structures, this Commission has exercised its rate

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structure jurisdiction with respect to retail rate structures only.

In re: Complaint and petition by Lee County Electric Cooperative, Inc. for an investigation of the rate structure of Seminole Electric Cooperative, Inc., Order No. PSC-01-0217-FOF-EC, issued January 23, 2001, in Docket No. 981827-EC, affirmed, Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297 (Fla. 2002).

Following this rationale, the Commission should issue a declaratory statement that Nextel and ALLTEL, as commercial mobile radio service providers, are not subject to the jurisdiction of the Florida Public Service Commission for purposes of designation as an eligible telecommunications carrier under 47 U.S.C. § 214(e).

### **Alternative Staff Analysis**

Staff believes that the exclusion of CMRS providers from the definition of "telecommunications company" does not prevent the Commission from deciding whether a CMRS provider should be designated as an ETC. By determining whether Nextel and ALLTEL should be designated as ETCs, the Commission would not be attempting to regulate whether or how a CMRS provider provides service. Rather, the Commission will be determining whether the CMRS provider is eligible for interstate universal service support when the CMRS provider chooses to become a provider that is also eligible to receive universal service support. If a CMRS provider wishes to receive such support (that is, be designated as an ETC), in an area that is already served by a rural telecommunications company, then section 214(e)(2) requires the Commission to determine whether the designation is in the public interest.

ALLTEL asserts that section 364.025, Florida Statutes, allows for ALECs to apply to this Commission for ETC status, but there is no similar provision for CMRS providers because they are not regulated as a "telecommunications company" under state law. This statute, however, says nothing about being designated an ETC or application for universal service support by an ALEC, any other type of telecommunications company, or a CMRS provider. Section 364.025(5) only addresses an ALEC applying to be the universal service provider and carrier of last resort, and contributing its fair share to the funding. Thus, the fact that it also does not mention CMRS is meaningless in staff's opinion.

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Under section 364.02(12), a CMRS provider is liable for any fees that are assessed to support universal service objectives. Staff does not believe that the legislature intended to put CMRS providers in the class of providers that must contribute to universal service support, but not in the class of providers that are eligible to receive such support. By implication then, if a CMRS provider is in the class of providers that must contribute, then a CMRS provider is in the class of providers that can participate in the benefits, and receive universal service support. Further, if CMRS providers can participate in the benefits of such a fund, but only if it is in the public interest, then logically the Commission has the authority to make the public interest determination.

This authority stems from the Commission's statutory duty to exercise oversight over the transition from the monopoly provision of local exchange service to competitive provision in order to protect consumers and provide for the development of fair and effective competition, to ensure that all providers of telecommunications services are treated fairly, and to ensure the availability of basic local telecommunications services to all consumers in the state at reasonable and affordable prices. § 364.01, Fla. Stat. Staff does not believe that by excluding CMRS providers from the definition of telecommunications company that the legislature intended to place CMRS providers, who clearly provide telecommunications services and who may receive public universal service support, outside the reach of Florida's universal service policies--especially as to their eligibility to receive the support--when it has clearly made CMRS providers subject to state universal service fund obligations. § 364.02(12), Fla. Stat.

The intervenors cite to a Commission order stating that all non-ILEC carriers who wish to receive ETC status should file a petition with the Commission for ETC status. Order No. PSC-97-1262-FOF-TP, supra at page 4. Nextel, on the other hand, asserts that the Commission has acknowledged that CMRS providers are "not regulated by this Commission" in accordance with section 364.02(12)(c), Florida Statutes. Order No. PSC-00-1243-PAA-TC, issued on July 10, 2000, in Docket No. 991821-TC. As stated earlier in this recommendation, in neither of those dockets was the specific question presented here at issue.

Staff does not believe that determining ETC status equates to regulating CMRS providers. This conclusion is supported by federal

law, 47 U.S.C. § 332(c)(3)(A), that preempts states from regulating the entry of or the rates charged by any commercial mobile service providers, but elsewhere authorizes states to designate ETCs:

Notwithstanding sections 2(b) and 221(b) [47 U.S.C. § 152(b) and § 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

In addition, federal law prescribes the standards to be applied by a state commission in designating ETCs. 47 U.S.C. § 214(e)(1)-(2). Thus, there is no need for the Commission to create or impose any standards that might require having additional authority under Florida law. The statutory requirements under federal law are that an ETC must offer and advertise the service supported by the federal universal service mechanisms throughout the designated service area. For areas served by a rural telephone company, the commission, whether it is this Commission or the FCC, must also determine whether designating an additional ETC is in the public interest.

In order to make the public interest determination after it receives a petition seeking designation as an ETC, the FCC issues a public notice soliciting comments on the petition, and provides a response time of 10 days from publication in the Federal Register. The authority to designate carriers as ETCs has been delegated to the Chief of the Common Carrier Bureau. Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (released December 29, 1997). Staff believes a state commission is in a better position than the FCC to assess the relevant local conditions and decide what is in the public interest.

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Further, staff does not believe there is enforcement or any other action required subsequent to designation as an ETC that would necessitate additional statutory authority. FCC rules require states that designate ETCs to annually certify that all federal high-cost support provided to the ETCs "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. § 54.314(a). Carriers not subject to state jurisdiction file certification directly with the FCC and the Universal Service Administrative Company (USAC). 47 C.F.R. § 54.314(b). In states in which the state commission has limited jurisdiction over ILECs or competitive ETCs, the FCC has provided the annual certification method this Commission follows for ILECs. Rather than the state commission initiating the certification process, it is sufficient according to the FCC for the ETCs to voluntarily submit an affidavit certifying compliance to the Commission. Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, 16 FCC Rcd 11244 at ¶188 (released May 23, 2001) (Rural Task Force Order). The Commission, in turn, submits the certification to the FCC. See, In re: State certification of rural telecommunications carriers pursuant to 47 C.F.R. 54.314, Order No. PSC-02-0880-FOF-TL, issued July 1, 2002, in Docket No. 010977-TL. Thus, there is no action that the Commission would have to take that would require jurisdiction or statutory authority that it does not presently have.

Florida case law holds that the Commission has only "those powers granted by statute expressly or by necessary implication." Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977). Since the jurisdictional question raised by the petitions for declaratory statements is not addressed expressly by statute, the question is whether jurisdiction is necessarily implicated by statute. Based upon the analysis above, staff believes that it is.

In Florida Public Service Commission v. Bryson, 569 So. 2d 1253, 1254-1255 (Fla. 1990), the Supreme Court instructed:

The PSC has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and to issue orders accordingly. PW Ventures, Inc. v. Nichols, 533 So. 2d 182 (Fla. 1988). It follows that the PSC must be allowed to act when it has at least a colorable claim that the matter under consideration



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falls within its exclusive jurisdiction as defined by statute.

See also Charlotte County v. General Dev. Utils, 653 So. 2d 1081, 1084-5 (Fla. 1st DCA 1995) (Commission had jurisdiction of a rate dispute between County and utility when the complaint seeking damages for alleged overcharges for water services was filed after the utility had been sold to a local government and its certificate was cancelled, but the charges giving rise to the dispute took place over an 18-month period when General Development Utilities was subject to the regulatory jurisdiction of the Commission.)

Applying the analysis in Cape Coral, Deltona, and Bryson, staff believes that the Commission has at least a colorable claim that the matter under consideration is encompassed by section 364.025, Florida Statutes, and that the Commission has the requisite authority to determine whether a CMRS provider should be designated as an ETC.

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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

**STAFF ANALYSIS:** If the Commission answers the petition, a final order can be issued and the docket closed.

CTM