State of Florida

Public Service Commission

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

DATE: AUGUST 21, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (BANKS, CHRISTENSEN, B.KEATING)
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (SIMMONS)

RE: DOCKET NO. 030846-TL - IMPLEMENTATION OF SECTION 364.164, FLORIDA STATUTES

AGENDA: 09/02/03 - REGULAR AGENDA - PROCEDURAL MATTER - DECISION PRIOR TO HEARING- INTERESTED PERSONS MAY PARTICIPATE/ORAL ARGUMENT RECOMMENDED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030846.RCM

CASE BACKGROUND

During the 2003 Regular Session, the Florida Legislature enacted the Tele-Competition Innovation and Infrastructure Act (Tele-Competition Act or Act). The Act became effective on May 23, 2003. The Legislature created a process for an intrastate switched network access rate reduction and rebalancing.

Pursuant to Section 364.164, Florida Statutes, the Legislature created a process by which each local exchange telecommunications carrier (ILEC) may petition the Commission to reduce its intrastate switched network access rate in a revenue-neutral manner. The Commission is required to issue its final order granting or denying any such petition within 90 days of the filing of a petition. In reaching its decision, Section 364.164 sets forth the criteria the Commission shall consider in determining whether to grant the petition. Those criteria are outlined below:

(a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers;

(b) Induce enhanced market entry;

(c) Require intrastate switched network access rate reductions to parity over a period of not less than 2 years or more than 4 years; and

(d) Be revenue neutral.

Due to the short time frame in which the Commission must act to approve or deny an ILEC's petition, this docket was opened to facilitate the Commission's review of the intrastate switched network access rate reduction and rebalancing petitions. Staff believes that it would be beneficial for the Commission to address some preliminary matters given the time frame. Thus, this recommendation provides options for the Commission's consideration of these petitions regarding: (1) scheduling, (2) procedure, (3) scope of discovery, and (4) scope of review.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission hear oral arguments from the ILECs and other interested persons?

RECOMMENDATION: Yes, staff recommends that the Commission hear oral argument from the ILECs and other interested persons. **(CHRISTENSEN)**

STAFF ANALYSIS: As noted in the Case Background, Section 364.164, Florida Statutes, permits ILECs to file rate reduction and rebalancing petitions. Since this is a case of first impression, staff believes it is appropriate for the Commission to address some preliminary matters regarding (1) scheduling, (2) procedure, (3) scope of discovery, and (4) scope of review.

Rule 25-22.0021(1), Florida Administrative Code, provides that

> Persons who may be affected by Commission action on certain items on the agenda for which a hearing has not been held . . . will be allowed to address the commission concerning those items when taken up for discussion at the conference.

Staff believes that it would beneficial for the Commission to hear from the ILECs and other interested persons regarding these preliminary matters. Although there could be no specific request for oral argument prior to the filing of this recommendation, staff believes that the ILECs and other interested persons will want to provide their opinions regarding the options and recommendations presented in this recommendation based upon comments at a previous workshop conducted by staff. Thus, staff recommends that the Commission hear oral arguments from the ILECs and other interested persons.

ISSUE 2: What overall procedural schedule should be adopted in order to meet the statutory requirement of the issuance of a final order within 90 days?

RECOMMENDATION: Staff recommends that the Commission follow the procedural time frame outlined in the staff analysis. **(CHRISTENSEN)**

STAFF ANALYSIS: As noted previously, Section 364.164, Florida Statutes, requires the Commission to issue its final order granting or denying any intrastate switched network access rate reduction and rebalancing petition within 90 days. In order to meet the 90 day statutory requirement, staff recommends that the Commission approve a schedule to govern the key activities. Further, the specific dates should be subsequently identified in the Order Establishing Procedure, and correspond to the approved schedule as closely as possible.

Staff recommends the following schedule be approved:

Day 1	Petition filed including Direct Testimony and Exhibits, if any
Day 7	Order Establishing Procedure
Day 22	Staff and Intervener Direct Testimony and Exhibits, if any
Day 36	Rebuttal Testimony and Exhibits, if any
Day 36	Prehearing Statements
Between Day 56 - Day 67	Prehearing Conference
Between Day 64- Day 74	Hearing (Option of Bench decision or oral recommendation at subsequent Special Agenda)
Between Day 77- Day 81	Hearing (Bench decision only, with an oral recommendation)
Between Day 77- Day 81	Special Agenda (if Hearing held between Day 64- Day 74)
Day 90	Order
Day 120	Close Docket or Revise CASR

The above schedule proposes two alternatives regarding rendering a decision after the hearing depending on the date the hearing is scheduled. If the hearing is held approximately three weeks before the order is due to be issued, the schedule provides time for the Commission to adjourn at the conclusion of testimony and closing arguments, then to resume on a later date for a Special Agenda.

If the Commission chooses to hold a Special Agenda, staff recommends that the Special Agenda be scheduled one week after the conclusion of the hearings. At the Special Agenda, staff would present an oral recommendation, and the Commission would render its bench decision. To facilitate the Commission's discussion of the issues and decision making, staff will prepare a written outline of the oral recommendation to be handed out at the beginning of the Special Agenda. Staff notes that in lieu of post-hearing briefs, the parties should be given the opportunity to present closing arguments at the hearing. Participation at the Special Agenda, however, should be limited to Commissioners and staff. Staff notes that this is the preferable method.

However, if the hearing cannot be scheduled until approximately one to two weeks before the order is due, there would be insufficient time to adjourn for a Special Agenda. Thus, it would be necessary for the Commission to render a decision at the conclusion of the testimony and closing arguments. Staff notes that at the conclusion of closing arguments, the hearing could be recessed for an hour or two to allow time for a staff oral recommendation prior to a decision on the petition.

In addition to the other procedural scheduling issues addressed above, staff would recommend that the Commission also adopt a compressed time schedule for discovery. Moreover, regardless of the Commission's decision regarding the scope of discovery, discovery should be expedited because of the 90-day schedule. Staff recommends the following:

Discovery:

a. All discovery requests should be served by e-mail or fax, as well as by overnight mail;

b. Discovery responses should be served within 15 calendar days of receipt of the discovery request by either e-mail or fax, as well as by overnight delivery;

c. No extra time should be allowed for mailing;

d. All discovery requests and responses should be served on staff;

e. Any objection to or requests for clarification of discovery requests should be made within five business days[1] of service of the discovery request; and

f. Unless authorized by the Prehearing Officer for good cause shown, all discovery should be completed by one week before the hearing.

As outlined above, staff recommends that the Commission approve the procedural schedule set forth in this analysis.

[1]See Rule 28-106.103, F.A.C.

ISSUE 3: How should the discovery limitation set forth in Subsection 364.164(3), Florida Statutes, be construed?

PRIMARY RECOMMENDATION: The discovery should be limited to the plain meaning of Subsection 364.164(3), Florida Statutes, which provides that any discovery on the petitions filed pursuant to Section 364.164, Florida Statutes, shall be limited to verification of the pricing units. **(BANKS)**

ALTERNATIVE RECOMMENDATION: The limiting provision contained in Subsection 364.164(3), Florida Statutes, should be construed in its narrowest sense to limit discovery only to the extent that said discovery pertains to the pricing units referenced in Subsection 364.164(3). **(KEATING)**

PRIMARY STAFF ANALYSIS: In regards to a petition for rebalancing, Subsection 364.164(3), Florida Statutes, provides the basis for how much discovery should be had in a rebalancing proceeding. It reads as follows:

> Any filing under this section must be based on the company's most recent 12 months' pricing units in accordance with subsection (7) for any service included in the revenue category established under this section. *The commission shall have the authority only to verify the pricing units for the purpose of ensuring that the company's specific adjustments, as authorized by this section, make the revenue category revenue neutral for each filing. Any discovery or information requests under this section must be limited to a verification of historical pricing units necessary to fulfill the Commission's specific responsibilities under this section of ensuring that the company's rate adjustments make the revenue category revenue neutral for each annual filing.*

Subsection 364.164(3), Florida Statutes (emphasis added).

On its face, Subsection 364.164(3), Florida Statutes, appears to be clear and unambiguous. It provides the Commission shall have authority only to verify the pricing units for purposes of ensuring that the company's specific adjustments make the revenue category revenue neutral for each filing. If we look at the plain meaning of the language in this Subsection, it is evident that the Legislature intended to limit the discovery regarding the ILEC's

petitions only to the verification of pricing units. Staff notes the statute reads "The commission shall have the authority **only** to verify the pricing units. . . " The term "only" denotes that a limitation applies to the discovery. Further, the next sentence in this Subsection further emphasizes the limitation of discovery by stating that "discovery or information requests under this section must be limited to a verification of historical pricing units." There is no basis for interpretation of Subsection 364.164(3), Florida Statutes as the statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities Service Co. v. Redding, 131 So.2d 1 (Fla. 1950).

Furthermore, given the expedited nature of the proceeding for the rebalancing petitions filed under Subsection 364.164(3), Florida Statutes, the reasoning behind the Legislature's limitation on discovery was logically to avoid unnecessary delay and discovery not pertinent to the determination or decision in these proceedings.

Even if a statute is remotely ambiguous, the first means one should use to construe the statute is to look at the legislative intent, because the primary guide to statutory interpretation is to determine the purpose of the Legislature. See Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963). In this instance, it is not necessary to look to the legislative intent because Subsection 364.164(3), Florida Statutes, is unambiguous. However, staff has taken a look at the legislative history behind this section, and found that it is silent regarding the discovery limitation in Subsection 364.164(3), Florida Statutes. Because the Legislature has not provided any basis to help in guiding the interpretation of this Section, staff believes that the only appropriate statutory construction is the plain meaning of the statute.

Accordingly, staff believes that the plain meaning of Subsection 364.164(3), Florida Statutes, is clear. Therefore, staff recommends that Subsection 364.164(3), Florida Statutes, be interpreted to limit discovery regarding petitions filed pursuant to Section 364.164, Florida Statutes, to the verification of pricing units, only.

ALTERNATIVE STAFF ANALYSIS: Subsection 364.164(3), Florida Statutes, reads as follows:

> Any filing under this section must be based on the company's most recent 12 months' pricing units in accordance with subsection (7) for any service included in the revenue category established under this section. The commission shall have the authority only to verify the pricing units for the purpose of ensuring that the company's specific adjustments, as authorized by this section, make the revenue category revenue neutral for each filing. *Any discovery or information requests under this section must be limited to a verification of historical pricing units necessary to fulfill the Commission's specific responsibilities under this section of ensuring that the company's rate adjustments make the revenue category revenue neutral for each annual filing.*

Subsection 364.164(3), Florida Statutes. (Emphasis added).

When interpreting statutory provisions, one first should look to the provision at issue to determine whether the "language is clear and unambiguous and conveys a clear and definite meaning. . . ." Holly v. Auld, 450 So. 2d 217 (Fla. 1984), citing A.R. Douglass Inc. v. McRainey, 102 Fla. 1141 (1931). If the meaning is clear, there is no need to resort to statutory interpretation. Furthermore, an unambiguous statutory provision cannot be construed to extend, modify, or limit its express terms or its reasonable and obvious implications. Holly, at 219. On this, staff agrees with the primary recommendation analysis. However, a statute should not be given its literal reading if such reading would lead to an unreasonable conclusion. Id.

In this instance, staff believes that it is appropriate to use the rules of statutory interpretation to decipher the true intent behind Subsection 364.164(3), Florida Statutes. Staff believes that this provision is ambiguous in that a literal reading leads to an unreasonable result. If read in its most literal sense, the discovery limitation in Subsection 364.164(3), Florida Statutes, would prevent parties, as well as the Commission's own staff, from conducting any discovery on the ILECs' petitions to reduce intrastate switched access rates beyond discovery necessary to verify the historical pricing units in the companies' filings.

Staff believes that this must not be the Legislature's intent, because in subsection 1 of Section 364.164, the Legislature clearly delineated a number of factors that the Commission must consider in addressing the ILECs' petition. Specifically, the Commission must consider whether granting the petitions will:

> (a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential customers;
>
> (b) Induce enhanced market entry;
>
> (c) Require intrastate switched network access rate reduction to parity over a period of not less than 2 years or more than 4 years; and
>
> (d) Be revenue neutral as defined in subsection (7) within the revenue category defined in subsection (2).

In order to give full effect to the Legislature's expressed intent that the Commission consider these factors, sufficient information must be obtained and verified, and thereafter, entered into the record of this proceeding for the Commission's consideration. In a proceeding under Chapter 120, Florida Statutes, discovery is the proper means by which information may be obtained from parties. See Sections 120.569(2)(f) and 120.57(1)(h), Florida Statutes. Thus, staff believes that the Legislature must have anticipated, and intended, that sufficient discovery would be conducted in order for the Commission to receive enough information to fully address the factors identified in Subsection 364.164(1), Florida Statutes. Arguably, an interpretation to the contrary relegates the Commission's review of the ILECs' petitions and consideration of the factors in Subsection 364.164(1) to merely that information provided by the companies in their filings - at best, and at worst, requiring the Commission to make unsupported assumptions in considering the factors.

Staff believes that its alternative interpretation is supported by the placement of the language limiting discovery in Subsection 364.164(3), Florida Statutes. The location of the language being interpreted is a valid consideration when the

provision at issue is ambiguous. See State of Florida v. Robarge, 450 So. 2d 855(Fla. 1984)(noting validity of Baeumel[2] rule, whereby placement of statutory exception is means for determining whether it is an element of a statutory offense.); and Bolden v. State Farm Mutual Automobile Insurance Co., 689 So. 2d 339 (Fla. 4th DCA 1997)(construing the placement of a provision on timing of benefits within body of Section 627.736(4), Florida Statutes, to demonstrate the general purpose of coordinating coverage, instead of providing additional coverage.) Here, the limiting language is located at the end of subsection 3 of Section 364.164. The subsection is dedicated to addressing the pricing units upon which the parties' filings must be based, and it discusses the Commission's verification of those pricing units. The limitation on discovery follows that discussion. As such, staff believes that the Legislature must have intended the limitation only to apply to discovery regarding the actual pricing units. Had the Legislature intended that discovery be limited regarding all aspects of the parties' petitions, the Legislature would have located that discovery language in a more prominent location in Section 364.164, clearly delineating its application to the entire provision. Staff believes that had the Legislature intended the limiting language to apply to Section 364.164 in its entirety, the language would have been located much earlier in the Section and would likely have been a separately numbered provision. Staff does not believe the language would have been buried at the end of a subsection that addresses a specific aspect of the petitions.

Staff recommends that the above interpretation is a reasonable and supportable one. It is well-settled that a reviewing court will give deference to an agency's interpretation of its own statutes. Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1977). Accord Morris v. Division of Retirement, 696 so. 2d 380 (Fla. 1st DCA 1997); Okeechobee Health Care and Associated Industries Insurance Company, Inc. v. Ann Collins, 726 So. 2d 775)(Fla. 1st DCA 1998); and P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988).

Based on the foregoing, staff recommends that the Commission construe the language in Subsection 364.164(3), Florida Statutes, that limits discovery to apply only to discovery regarding the pricing units upon which the parties' petitions must be based.

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[2]Baeumel v. State, 26 Fla. 71 (1890).

ISSUE 4: What is the pertinent scope of this proceeding, and what analyses should be included within the proper standard of review?

RECOMMENDATION: Staff makes the following recommendations:

A. Staff recommends that the Commission define the scope of its review of large ILECs' petitions under the criteria set forth in subsection 364.164(1)(a), Florida Statutes, as including a review of whether support exists. For the small ILECs, staff recommends that support be assumed.

B. Staff recommends that the cost standard for quantifying the current amount of support for large ILECs should be Total Service Long Run Incremental Cost (TSLRIC). Regarding the appropriate geographic level for calculating the current amount of support for large ILECs, staff recommends that analyses be performed at two levels, exchange and total company. Staff recommends that the Commission, to the extent possible, express preliminary guidance regarding its preferred cost standard and geographic level for calculating current support, but refrain from precluding the use of other options. To the extent a party is able to adequately support and justify use of a different approach, it should be allowed to do so.

C. Staff recommends that the Commission define the scope of its review under the criteria set forth in subsection 364.164(1)(b), Florida Statutes, to include a review of profitability in terms of both stand-alone basic service and a basic/nonbasic service bundle, as well as the potential effects on various market entry strategies.

D. Staff does not believe that the criteria set forth in subsections (c) and (d) of 364.164(1), Florida Statutes, need interpretation beyond the plain language of the statute.

E. Staff also recommends that large ILECs be required to submit their "interstate switched network access rate" calculated on the same basis prescribed for their "intrastate switched network access rate," although they should have the opportunity to present evidence whether or not this is the appropriate definition. They should also provide the supporting calculations for the derivation of the "intrastate switched network access rate" and the "interstate switched

network access rate." Small LECs should provide the supporting calculations for the derivation of the "intrastate switched network access rate."

F. All petitioning LECs should be required to provide a price-out for each planned annual filing for the revenue category, showing pricing units, old rates, new rates, and revenue effect. In addition, staff recommends that the petitioning LEC provide a price-out summary, demonstrating that each annual filing will be revenue neutral within the revenue category, pursuant to subsections 364.164(2) and (7), Florida Statutes. While a petitioning LEC should not be precluded from presenting evidence that other methods are more appropriate for making the actual determination on revenue neutrality, staff recommends that the price-outs and summary be required.

(SIMMONS, KEATING)

STAFF ANALYSIS: As set forth in Section 364.164, Florida Statutes, the Commission is to consider certain criteria in reviewing companies' petitions filed pursuant to this section. The Commission is to consider whether granting the petitions will:

(a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential customers.

(b) Induce enhanced market entry.

(c) Require intrastate switched network access rate reductions to parity over a period of not less than 2 years or more than 4 years.

(d) Be revenue neutral as defined in subsection (7) within the revenue category defined in subsection (2).

The criteria set forth above are contained in subsection 1 of Section 364.164, Florida Statutes. While the language of (c) and (d) is fairly plain on its face, (a) and (b) are subject to interpretation. As such, staff believes there is merit in defining the scope of this proceeding from the outset in view of the limited time frames under which the Commission will be required to act.

Staff is hopeful that defining the scope of the proceeding will limit time-consuming motion practice by parties and allow the Commission to focus its energies on the substantive considerations required by statute.

For the following analysis, staff addresses each statutory consideration separately. Within the context of each consideration, staff sets forth separate conclusions, as appropriate, to address the three large ILECs (BellSouth, Sprint, and Verizon) and the seven smaller ILECs (SmartCity, ALLTEL, GT Com, TDS Telecom, Frontier, Indiantown, and Northeast). At the outset, staff notes that there is statutory basis for the Commission to review the petitions of the small ILECs on a different basis than that applied to review of the large ILECs' petitions. See Section 364.052(2)(b), Florida Statutes.

I. Removal of Current Support

At a threshold level, the Commission must first determine (1) whether the statutory language indicates that support inherently exists and acts to prevent the creation of a more attractive market, or (2) whether support may exist and could prevent creation of a more attractive market. Under the former interpretation, support is assumed to exist, and any filing would have the effect of removing this assumed support and creating a more attractive market for the benefit of residential customers. Under the alternative interpretation, support might exist, but a showing would have to be made that it does. The alternative interpretation would necessitate that the Commission first evaluate the petition to determine if support exists. Thereafter, if support does in fact exist, the Commission would proceed with consideration of whether removal of the quantified support as proposed by the petition would be sufficient to create a more attractive market for the benefit of residential customers.

A. Large LECs

For large LECs (more than one million access lines), staff favors the view that support might exist and could prevent creation of a more attractive market. Staff believes that this view is appropriate because large LECs tend to serve both high density, urban areas and low density, rural areas. Accordingly, a large LEC's cost of providing basic service could vary significantly, depending on location. Thus, staff recommends that the scope of

subsection 364.164(1)(a), Florida Statutes, for the large ILECs should include consideration of whether support does in fact exist.

If scope is defined as staff recommends, staff believes this raises the following issues regarding the appropriate information and analyses for consideration within the defined scope. First, there is the issue of the appropriate cost standard to use for the analysis. Second, there is the issue regarding at what geographic level support should be quantified. Quantifying the current amount of support for basic service can be done at different geographic levels (wire center, exchange, rate group, or total company level).

1. Cost Standard

As for the cost standard, there are various options available: (1) incremental cost; (2) UNE-P rates as an incremental cost proxy; and (3) embedded cost.

Since UNE-P rates are set in accordance with Total Element Long Run Incremental Cost (TELRIC), it is possible to use these rates as a cost proxy. However, a problem associated with this approach is that UNE-P rates often include features and do not include a directory listing. Pursuant to subsection 364.02(1), Florida Statutes, features are not included in the definition of basic service, while a directory listing is specifically included.

While either of these three options is available, staff views option (2), UNE-P rates as a proxy, to be somewhat problematic. Of the remaining two options, staff favors Total Service Long Run Incremental Cost (TSLRIC) based upon the Commission's practice of using incremental cost for rate setting purposes. See,e.g., Rule 25-4.046, Florida Administrative Code. Staff recommends that the Commission, to the extent possible, express preliminary guidance regarding its preferred method, but refrain from precluding the use of either of the other two options. To the extent a party is able to adequately support and justify use of a different approach, it should be allowed to do so.

2. Geographic Level of Analysis

The amount of any support computed depends on the geographic level of analysis. The finer the analysis, the higher the support calculated, since any compensatory areas would not be included in the calculation of the total support. Staff believes that there

are rational arguments for performing the analysis at each of the four geographic levels mentioned previously. These arguments are briefly summarized below.

Wire Center - Competitors may make entry/exit decisions at this low a level.

Exchange - Basic rates are currently uniform within an exchange and should remain uniform for ease of customer understanding; competitors may make entry/exit decisions at this level.

Rate Group - Basic rates currently vary by rate group, not by exchange or wire center. (Rate groups are based on the number of access lines in the local calling area at the time the LEC elected price regulation.)

Total Company - Support calculation can combine non-compensatory and compensatory (if any) areas, since the LEC could reduce basic rates in any compensatory areas and increase basic rates in non-compensatory areas (i.e., geographic rebalancing).

In quantifying the current amount of support for large LECs, staff recommends exchange level analyses since basic rates are currently uniform within an exchange, and staff believes that these rates should remain uniform for ease of understanding. Also, staff believes that there is a significant likelihood that competitors make entry/exit decisions at a level akin to an exchange.

Staff does not recommend that analyses be performed at the wire center or rate group level. The natural extension of performing analyses at the wire center level would be that rates could be differentiated by wire center. If rates within an exchange varied by wire center, staff believes this would be confusing to end use customers.

From staff's perspective, rate group level analyses may have been logical in the past, but do not seem in keeping with today's competitive environment. The rate group system is predicated on the value-of-service principle that was integral to traditional, rate base/rate-of-return regulation. Rate groups do not reflect differences in the cost of providing basic service and seem to have questionable relevance in a competitive environment.

Finally, staff also recommends that analyses be performed at the total company level on the basis that the support calculation could combine non-compensatory and compensatory (if any) areas, since the LEC could conceivably reduce basic rates in any compensatory areas and increase basic rates in non-compensatory areas (i.e., geographic rebalancing). Whether Section 364.164, Florida Statutes, contemplates geographic rebalancing is unclear to staff. Therefore, staff believes that the merits of exchange level and total company level analyses should be explored fully through the hearing process.

As with the previous subsection regarding the costing methodology, staff recommends that the Commission, to the extent possible, express preliminary guidance regarding the preferred method, but refrain from precluding the use of either of the other two options. To the extent a party is able to adequately support and justify use of a different approach, it should be allowed to do so.

B. Small LECs

For small LECs, staff observes that these companies typically operate in low density areas, where the cost of providing basic service is the highest. In addition, since small LECs typically have limited resources, more latitude is often afforded pursuant to statute and Commission rules. For both of these reasons, staff believes that the Commission could reasonably take the position for the small LECs that support is implied and acts to prevent the creation of a more attractive market. As previously noted, there is statutory basis for the Commission to review the petitions of the small ILECs on a different basis than that applied to review of the large ILECs' petitions. See Section 364.052(2)(b), Florida Statutes. Furthermore, staff also notes that in 1999, pursuant to subsection 364.025(4), Florida Statutes, the Commission was required to use an incremental cost proxy model for large LECs in order to determine and report the cost of providing basic service to the Legislature, but elected to rely on fully distributed embedded costs for small LECs. For these reasons, staff recommends that the scope of subsection 364.164(1)(a), Florida Statutes, for the small ILECs should assume that support does in fact exist. As such, no analysis to quantify support would be necessary.

C. Attractiveness of Market

The latter portion of subsection 364.164(1)(a), Florida Statutes, refers to creation of a more attractive market. This language can be interpreted to assume that removal of current support creates a more attractive market. However, it could also be interpreted as requiring consideration of to what extent removal of any current support is necessary in order to create a more attractive market. Creating a more attractive competitive local exchange market may or may not hinge on removing the identified support. The attractiveness of the local exchange market may depend on the profitability of stand-alone basic service or the profitability of providing a combination of basic and nonbasic services. Different competitors may even view the market differently. For these reasons, staff believes that review of this question should be addressed in conjunction with criteria (b) regarding inducement of enhanced market entry.

D. Conclusion

For large LECs, consistent with the premise that support may exist and could prevent creation of a more attractive market, staff recommends quantifying the current amount of support for basic local telecommunications services. For small LECs, staff recommends assuming that such support exists and acts to prevent creation of a more attractive market.

Further, staff recommends that the cost standard for quantifying the current amount of support for large LECs should be Total Service Long Run Incremental Cost (TSLRIC). Regarding the appropriate geographic level for calculating the current amount of support for large LECs, staff recommends that analyses be performed at two levels, exchange and total company. Staff recommends that the Commission, to the extent possible, express preliminary guidance regarding its preferred cost standard and geographic level for calculating current support, but refrain from precluding the use of other options. To the extent a party is able to adequately support and justify use of a different approach, it should be allowed to do so.

II. Induce Enhanced Market Entry

The focus here is whether granting the petition will "[i]nduce enhanced market entry." What creates a more attractive market and induces enhanced market entry will likely depend on a company's view of the market.

A. Alternative Market Definitions

A company may compete for only basic service or may compete for a bundle of basic and nonbasic services. Depending upon a company's focus, there may be differing conclusions as to current profitability and whether or not granting the petition will create a more attractive competitive local exchange market and induce enhanced market entry.

One premise which would support using the more limited market definition is that stand-alone basic service would not be subsidized in a competitive marketplace. Also, a risk-averse company might not consider discretionary (i.e., nonbasic) services in developing a business plan.

The more expansive market definition could be supported on the basis that it recognizes the propensity with which customers subscribe to features. In addition, the more expansive definition could be supported on the premise that business plans would be based on the total profitability of serving a typical customer. If consideration is made in this context, UNE-P rates could serve as a useful proxy for the cost of providing a basic/nonbasic service bundle.

Staff believes that both market definitions have merit.

B. Types of Entry

Competitors' market entry strategies (resale, UNEs, facilities-based) may also impact whether rate changes "induce enhanced market entry." A simple argument can be made that any increase in local rates will "induce enhanced market entry." Finally, "enhanced" market entry could be interpreted as more entry of any form, or only additional facilities-based entry. As with the market definition, staff believes that various market entry strategies should be considered.

C. Conclusion

Staff believes that there are plausible arguments for viewing profitability in terms of both stand-alone basic service and a basic/nonbasic service bundle. Staff recommends that all petitioning LECs be directed to address both viewpoints, including the relative merits of each. In addition, a petitioning LEC should address how the profitability of the various entry strategies would change if its petition is granted.

III. Intrastate Switched Access Rate Reductions to Parity

Staff believes that this criteria is clear on its face and does not present any fundamental questions regarding the scope of the Commission's review. It does, however, raise certain questions regarding the definition of terms, as well as implementation matters, for which the Commission should provide direction.

A. Definition/Calculation of "Interstate Switched Network Access Rate"

For LECs with more than one million access lines (large LECs), the parity standard is expressed as equivalency between the "intrastate switched network access rate" and the "interstate switched network access rate." While subsection 364.164(6), Florida Statutes, defines the "intrastate switched network access rate," there is no analogous statutory definition for the "interstate switched network access rate." For large LECs, staff believes the "interstate switched network access rate" as of January 1, 2003, should be developed using the same calculation method prescribed for the "intrastate switched network access rate." Thus, while large LECs should have the opportunity to present evidence regarding whether or not this is the appropriate definition, staff recommends that they be required to submit their interstate switched network access rate calculated on the same basis prescribed for their intrastate switched network access rate. For small LECs with one million or fewer access lines, the parity standard is defined as $.08 per minute; thus, the same question does not arise.

B. Nature of Parity Demonstration

As part of any rebalancing petition, a large LEC would need to demonstrate that its planned annual filings will result in its

"intrastate switched network access rate" being at or below "parity" with its "interstate switched network access rate," pursuant to subsections 364.164(5) and (6), Florida Statutes. Staff recommends that the petitioning large LEC provide the supporting calculations for its derivation of the "intrastate switched network access rate" and the "interstate switched network access rate." A small LEC would need only to provide the supporting calculations for its derivation of the "intrastate switched network access rate."

IV. Revenue Neutrality

As with the criteria addressed in Section III above, there do not appear to be any fundamental questions regarding the scope of the Commission's review with respect to the revenue neutrality standard, but only implementation questions for which the Commission should provide direction. Staff recommends that the petitioning LEC should be required to provide a price-out for each planned annual filing for the revenue category, showing pricing units, old rates, new rates, and revenue effect. In addition, staff recommends that the petitioning LEC provide a price-out summary, demonstrating that each annual filing will be revenue neutral within the revenue category, pursuant to subsections 364.164(2) and (7), Florida Statutes. While a petitioning LEC should not be precluded from presenting evidence that other methods are more appropriate for making the actual determination on revenue neutrality, staff recommends that the price-outs and summary be required.

V. Conclusion

Based on the foregoing, staff recommends that the Commission define the scope of its review of large ILECs' petitions under the criteria set forth in subsection 364.164(1)(a), Florida Statutes, as including a review of whether support exists. For the small ILECs, staff recommends that support be assumed.

Staff recommends that the cost standard for quantifying the current amount of support for large LECs should be Total Service Long Run Incremental Cost (TSLRIC). Regarding the appropriate geographic level for calculating the current amount of support for large LECs, staff recommends that analyses be performed at two levels, exchange and total company. Staff recommends that the Commission, to the extent possible, express preliminary guidance

regarding its preferred cost standard and geographic level for calculating current support, but refrain from precluding the use of other options. To the extent a party is able to adequately support and justify use of a different approach, it should be allowed to do so.

Staff recommends that the Commission define the scope of its review under the criteria set forth in subsection 364.164(1)(b), Florida Statutes, to include a review of profitability in terms of both stand-alone basic service and a basic/nonbasic service bundle, as well as the potential effects on various market entry strategies.

Staff does not believe that the criteria set forth in subsections (c) and (d) of 364.164(1), Florida Statutes, need interpretation beyond the plain language of the statute.

Staff also recommends that large ILECs be required to submit their "interstate switched network access rate" calculated on the same basis prescribed for their "intrastate switched network access rate," although they should have the opportunity to present evidence whether or not this is the appropriate definition. They should also provide the supporting calculations for the derivation of the "intrastate switched network access rate" and the "interstate switched network access rate." Small LECs should provide the supporting calculations for the derivation of the "intrastate switched network access rate."

Finally, all petitioning LECs should be required to provide a price-out for each planned annual filing for the revenue category, showing pricing units, old rates, new rates, and revenue effect. In addition, staff recommends that the petitioning LEC provide a price-out summary, demonstrating that each annual filing will be revenue neutral within the revenue category, pursuant to subsections 364.164(2) and (7), Florida Statutes. While a petitioning LEC should not be precluded from presenting evidence that other methods are more appropriate for making the actual determination on revenue neutrality, staff recommends that the price-outs and summary be required.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. This Docket should remain open pending receipt of the first LEC petition filed pursuant to Section 364.164, Florida Statutes, and establishment of a Docket to address that petition. Thereafter, this Docket should be closed administratively. The provisions of the Order resulting from this recommendation should, however, be considered applicable to each petition filed pursuant to Section 364.164, Florida Statutes, and should be so recognized in each corresponding Docket. **(BANKS, CHRISTENSEN, B. KEATING)**

STAFF ANALYSIS: This Docket should remain open pending receipt of the first LEC petition filed pursuant to Section 364.164, Florida Statutes, and establishment of a Docket to address that petition. Thereafter, this Docket should be closed administratively. The provisions of the Order resulting from this recommendation should, however, be considered applicable to each petition filed pursuant to Section 364.164, Florida Statutes, and should be so recognized in each corresponding Docket.