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January 6, 1997

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 950737-TP
Investigation into Temporary Local Number Portability Solution to Implement Competition in Local Exchange Telephone Markets

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen copies of GTE Florida Incorporated's Posthearing Statement in the above matter. Also enclosed is a diskette with a copy of the Posthearing Statement in WP 5.1 format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2617.

Very truly yours,

Kimberly Caswell/dm

Kimberly Caswell

KC:tas
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into temporary local telephone number portability solution to implement competition in local exchange markets.	Docket No. 950737-TP Filed: January 6, 1997

GTE FLORIDA INCORPORATED'S POSTHEARING STATEMENT

Basic Position

GTE Florida Incorporated (GTEFL) and other incumbent local exchange carriers (ILECs) have filed cost studies that show they will incur significant expense to provide interim number portability (INP). The alternative local exchange carriers (ALECs) in this case have not shown any such expenses associated with number portability. Indeed, there is general consensus that the ILECs, for some time, will do most of the number porting. It is not surprising, then, that the ALECs have recommended that each carrier pay its own portability costs--which is just another way of saying that the ILECs should subsidize their competitors' entry into the local market.

Just a few months ago, before the FCC, this Commission rejected the cost absorption proposal the ALECs now advocate. (Comments of the Florida Pub. Serv. Comm'n, CC Dkt. No. 95-116 (filed Aug. 15, 1996.) The Commission cannot adopt the ALECs' recommendation without violating Florida law, which states that rates for portability "shall not be below cost." Fla. Stat. sec. 364.16(4). The ALECs would have this Commission ignore Florida law and change its INP cost recovery approach solely because of an FCC Order interpreting the Telecommunications Act of 1996 (Act). That Order, however, is ambiguous, at best, and unconstitutional, at worst. Its muddy language can be used to support GTEFL's views just as well as those of the ALECs. Most importantly, the FCC's Order provides no authority for the Commission to ignore the Florida Legislature's mandate of above-costs rates for INP.

Instead of seeking a definitive answer in the FCC's imprecise Order, GTEFL urges the Commission to rely heavily on its own reading of the Act, Florida law, and the sound policies it has already elaborated for INP cost recovery. In doing so, the Commission will produce an INP solution that harmonizes Florida and federal law, as well as the FCC's statements. Based on the record in this proceeding, three such solutions are possible: (1) leave the existing tariff-based cost recovery mechanism in place, as GTEFL has recommended; (2) implement the cost-sharing mechanism GTEFL proposed as a secondary option; or (3) adopt BellSouth's alternative approach of having each carrier track its INP costs, with cost recovery in accordance with the FCC's eventual decision on cost recovery for permanent number portability.

Specific Issues and Positions

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?

****GTEFL believes this Commission's Order establishes a competitively neutral cost recovery scheme, as the FCC intended. In any case, the Commission must follow Florida law which forbids below-cost INP rates.****

Because the FCC Order regarding cost recovery for INP is confusing and internally inconsistent in several respects, it is difficult to draw any definitive conclusions about what kind of recovery mechanism is permissible under that Order. (See Menard/GTEFL, Tr. 172; Varner/Bell, Tr. 124, 138-39.) However, GTEFL believes the FCC Order can be read to support this Commission's INP cost recovery decision.

The FCC knew about this Commission's Order, but did not preempt it. Indeed, the only statement specifically addressing the Florida approach was an approving one--"in Florida, carriers have negotiated appropriate rates for currently available measures." (Telephone No. Portability, FCC 96-286 (July 2, 1996) at ¶ 65 (FCC Order) [emphasis added].) The FCC confirmed its intention to "give the states some flexibility during this interim period to continue using a variety of approaches that are consistent with the statutory mandate," adding that "[t]he 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." (Id. at ¶ 127 [emphasis added].)

If the FCC wishes to preempt state policies, it has no trouble doing so explicitly. As noted above, the FCC was well aware of this Commission's INP rates and policies. If those rates and policies were impermissible under the FCC's Order, it is reasonable to conclude that the FCC would have said so.

To the contrary, FCC statements in the Order are consistent with the tariffed cost recovery approach approved by this Commission. The FCC found that Section 252(e)(2) of the Act requires the costs of INP to be borne by all telecommunications carriers on a competitively neutral basis. It stated that "To be competitively neutral, the incumbent LEC would have a reciprocal compensation arrangement with each new entrant. That is, the incumbent LEC would pay to the new entrant a rate for number portability that was equal to the rate that the new entrant pays the incumbent LEC." (FCC Order at ¶ 137.) This is exactly the arrangement for the parties: "The price charged for Remote Call Forwarding offered by an ALEC will mirror the price charged by the LEC." (Stipulation and Agreement, reprinted in Order no. PSC-95-1604-FOF-TP at 27.)

The FCC further interprets the competitive neutrality standard to mean that the cost recovery mechanism must not make it "economically infeasible for some carriers to utilize number portability when competing for customers served by other carriers." (FCC Order at ¶ 131.) It suggests two criteria for a competitively neutral cost recovery approach. First, it "should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber." (FCC Order at ¶ 132.) The FCC then opines that the incremental payment by the new entrant would have to be "close to zero." (FCC Order at ¶ 133.)

The FCC's second criterion is that 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 Order at ¶ 135.) To this end, the new entrant's share of the cost should not be so large that it decides not to enter the market. Id.

The existing INP cost recovery mechanism meets the FCC's baseline test of competitive neutrality, which is economic feasibility. None of the ALECs have complained that this mechanism has made entry economically infeasible. The best and most obvious proof that the structure now in place will not hinder competition is that it was created, for the most part, by the parties themselves. The above-cost rates, the reciprocal compensation structure, and all the other conditions, aside from rates, were established by stipulation among the companies in this docket. <u>Investigation into Temporary Local Tel. Number Portability solution to Implement Competition in Local Exchange Tel. Markets</u>, Order Approving Stipulation and Agreement, Order no. PSC-95-1214-AS-TP (1995).

Moreover, no party can legitimately claim that the RCF rates will stop them from entering the local market. If existing rates were unduly high, it is reasonable to assume that the ALECs would have sought reconsideration and/or appeal of those rates, but they did not. Instead, since establishment of those rates, new ALECs continue to be certificated, and vigorous marketing campaigns continue unabated. In GTEFL's territory, for instance, Intermedia Communications Inc. already provides facilities-based and resale-based local exchange service. (Tr. 396.)

No ALEC has made or even attempted to make any showing that existing INP rates will remove their ability to earn a normal return. In this regard, Commissioner Deason asked Mr. Guedel if AT&T had "made any determination as to whether the methodology previously ordered by this Commission for recovery of ported numbers would prevent AT&T from earning a normal rate of return." (Tr. 93.) Mr. Guedel was "not aware of any such studies." (Guedel/AT&T, Tr. 93.)

Instead of testing the Commission's Order against the FCC's economic feasibility standard, however, the ALECs focus on certain language in the FCC Order indicating that below-cost rates--"close to zero"--may be acceptable. This tack is unconvincing, even in terms of the FCC Order itself. That Order also requires that the cost recovery approach allow all carriers to earn "normal returns" on their investment.[1] An ILEC cannot earn any return, let alone a "normal" one, if it is forced to sell number portability below its costs of providing it, as the ALECs' preferred cost absorption approach would require. (Varner/Bell, Tr. 139.)

The bottom line is that every party in this case, no matter what its interest, can isolate particular language in the FCC's Order to support its position. This is because there is no way to neatly square the FCC's incongruent statements--allowing tariffing, reciprocal rates, state flexibility and normal returns, on the one hand, but ostensibly sanctioning non-cost-based rates close to zero, on the other. Given this predicament, the best course--particularly given the recent fate of FCC pricing rules for ILEC network features and services[2]--is to rely most heavily on the clearer and more definite standards this Commission is obliged to consider aside from any FCC guidelines.

To this end, Florida law gives this Commission unambiguous direction about cost recovery for INP: "The prices and rates shall not be below cost." Fla. Stat. sec. 364.16(4). This standard properly guided the parties' Stipulation in the earlier stage of this docket, as well as the Commission's establishment of INP rates. (Order no. PSC-95-1214-

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[1] The FCC does not define "normal return." However, this concept resonates in longstanding common carrier precedent holding that the constitution requires regulators to ensure utilities fair and nonconfiscatory returns on their investment. (See GTEFL's response to Issue 2, infra.)

[2] As the Commission knows, the Eighth Circuit Court of Appeals has stayed the pricing provisions in the FCC's Order interpreting the Act (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325 (Aug. 8, 1996).) Iowa Util. Board et al. v. FCC, Stay Pending Judicial Review, Nos. 96-3321 et al. (8th Cir. Oct. 15, 1996).

AS-TP at 15, 17.) The Commission noted that the rates set were above GTEFL's stated costs as reflected in the record. (Id. at 17.)[3] It cautioned that justification would be required for any carrier's rate that appeared to be below cost. (Id. at 18.) The Commission's Order thus properly reflects its statutory obligation to ensure above-cost rates.

The Commission cannot ignore the Florida statutory directive to set rates that cover the ILECs' costs. This Commission's Order setting INP rates is explicitly grounded on that directive. A Commission finding that its Order is now inconsistent with the FCC Order is thus tantamount to ruling that the FCC has preempted section 364.16(4) of the Florida Statutes. As noted above, the FCC itself has made no preemption ruling.

This Commission cannot lawfully hold that Section 364.16(4) has been preempted. The Commission receives its delegation of authority from the Legislature--not the other way around. See Grove Isle, Ltd. v. State Dep't of Env'tl Reg., 454 So.2d 571 (Fla. 1st DCA 1984). It cannot summarily decide that part of its governing statute is no longer valid and, in effect, tell the Legislature that the agency need no longer comply with it. This principle has particular force in this case because the asserted basis for deviation from the legislative mandate is a facially ambiguous and internally inconsistent FCC order that is

[3] The cost study GTEFL submitted in the earlier stage of this docket did not include the GTD-5 switches that serve 75% of GTEFL's access lines. (Menard/GTEFL, Tr. 170-71.) Since that time, GTEFL filed a more thorough, updated study of INP costs in its arbitration proceedings. (Menard/GTEFL, Tr. 169.) Based on that study, the RCF rates the Commission set do not, in fact, cover GTEFL's costs. (Menard/GTEFL, Tr. 170.) As such, new rates should be established based on this more accurate study. Regardless of the rates however, the point for purposes of this issue is that the Commission understood the statutory mandate to set rates above cost and acted in accord with that understanding.

now subject to reconsideration and a $20 million challenge in the U.S. Court of Claims. (Varner/Bell, Tr. 125.)

"Actions by an agency inconsistent with legislative purposes or beyond the scope of the agency's authority are considered ultra vires and without legal effect." Burris, Administrative Law, 1987 Survey of Florida Law, 12 Nova L. Rev. 299, 316 (1988). See also State Dep't of Insurance v. Ins. Svcs. Office, 434 So.2d 908 (Fla. 1st DCA 1983). To avoid taking action beyond its authority, the Commission is obliged to interpret the Act and the FCC Order interpreting that Act in accordance with Florida law if there is any way to do so.

Aside from satisfying the Florida statute, the current cost recovery scheme is consistent with the Act's overriding emphasis on negotiations as the best way to create competitive markets. Except for the specific RCF rates, that cost recovery scheme was established on a negotiated basis by the parties to this docket. Regulatory intervention to upset this negotiated structure undermines the preference of Congress, as well as the Florida Legislature, for voluntary negotiations among market participants. Indeed, the best interpretation of the Act gives no role to the FCC in establishing INP cost recovery. As BellSouth has explained, the FCC's authority to address cost recovery applies only to permanent number portability as defined in section 251(e)(2), and not to INP. (Varner DT at 9-10.) Section 252(e)(2), the purported source of the FCC's cost recovery guidelines, does not even mention INP. (Menard DT at 3.) Moreover, the FCC's idea of competitive neutrality seems to assume that there are costs incurred by all carriers to support a single system, such as a database system for long-term number portability. This concept makes little sense in the context of INP, which is just a temporary measure, the costs of which will be incurred only by the ILECs. (Menard DT at 3.)

Finally, renouncing the Commission's Order in favor of a scheme that would deny ILECs full INP cost recovery from the ALECs would violate the Fifth and Fourteenth Amendments of the U.S. Constitution, as well as Article 10, section 6 and Article 1, section 9 of the Florida Constitution. Those provisions prohibit the government from taking GTEFL's property without just compensation. They require the regulator to ensure the utility a fair, non-confiscatory rate of return. See, e.g., Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). A utility must be permitted sufficient recovery of its invested capital to maintain its credit, to attract capital, and to obtain a return commensurate with investments of a similar risk. Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 692-93 (1923); Tenoco Oil Co. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1020 ("to be just and reasonable, rates must provide not only for a company's costs, but also for a fair return on investment").

In this case, the ALECs urge the Commission to deny the ILECs not just a fair return on investment, but even basic cost recovery. As GTEFL explains more fully in response to Issue 2, all of the ALECs' proposals would force the ILECs to pay all or virtually all of the costs of INP. The Commission cannot accept these recommendations without violating constitutional requirements that the ILECs receive a fair return. (Varner/Bell, Tr. 124; Menard DT at 4-5.)

It is no answer that the ILEC may have an overall rate of return that covers its costs, based on sales of other services. The U.S. Supreme Court's Brooks-Scanlon decision long ago established the rule that the Takings Clause forbids a regulator from forcing a utility to operate a segment of its business at a loss because the firm happens to be profitable elsewhere in another segment of its business. Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana, 251 U.S. 396, 399 (1920). Thus, the Commission cannot expect the ILECs to subsidize below-cost INP rates with earnings from other services, as the ALECs' cost absorption proposal would force them to do.

This Commission is bound to read the Act (and the FCC Order interpreting the Act) in a manner that avoids constitutional infirmity. See, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Ashwander v. Tenn. Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). GTEFL believes the FCC's Order can be interpreted to support maintenance of the currently tariffed INP rates in Florida. In any case, this Commission need not follow any FCC interpretation that it believes may raise constitutional concerns, particularly when those concerns may be eliminated in the ongoing reconsideration process or through legal challenges to the FCC's Order. This Commission should instead determine on its own what INP pricing is proper under the Act, the Florida and federal Constitutions, and the Florida Statutes. Because the existing cost recovery scheme satisfies all these authorities, the best course is to leave it in place.

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

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

As explained above, the Commission can, as a matter of law, leave intact the existing INP cost recovery scheme. As a matter of policy, nothing has changed to justify replacing this scheme.

The cost recovery structure for INP was not foisted upon the parties by this Commission. It was, instead, the product of industry consensus achieved through voluntary negotiations in which all parties to this proceeding participated. The parties stipulated, among other things, that "The price charged by an individual LEC for Remote Call Forwarding shall not be below the costs of that LEC to provide Remote Call Forwarding for purposes of providing temporary number portability" and "The recurring price for Remote Call Forwarding will be on a per-line per-month basis." (Order no. PSC-95-1214-AS-TP at 7.) Although the parties settled on RCF as an immediate means of INP, they resolved to continue negotiations for provisioning flexible direct inward dialing as well and again emphasized the statutory command that "The prices and rates shall not be below cost." Id.

Because the stipulated cost recovery structure provides that the company receiving the ported number will pay the company providing the ported number, the only issue remaining for Commission decision was the price to be charged for RCF. (Order PSC-95-1604-FOF-TP at 15.) Even on this point, there was substantial conceptual agreement. With regard to the types of costs to be recovered, "Most parties that stated a position on this issue agree that the costs associated with RCF fall into three broad categories: service implementation, central office equipment and software costs, and interoffice routing." (Id. at 11.) All of these were understood to be ILEC costs. To GTEFL's recollection, there was no mention of costs incurred by the party receiving the ported number.

The Commission further noted that "The method of determining costs is also not in dispute. The parties agree that total service long-run incremental cost (TSLRIC) is an appropriate measure." (Id. at 12.) The chief disagreement was not over the proper cost measures, but rather whether firms should be recover anything above TSLRIC. The Commission considered the parties' various positions on this matter through a full evidentiary hearing.

Despite the parties' agreement on almost all of the principles for an INP cost recovery mechanism, the ALECs have now reversed the positions that they earlier took, both in the Stipulation and in their sworn testimony at the rate-setting hearing. The only reason for this change of heart is the FCC's Order. As Mr. Guedel agreed, for example, he has no problem conceptually with the positions he took earlier; AT&T revised its recommendations only because of the FCC Order. (Guedel/AT&T, Tr. 55-56.)

Resolution of Issue 2, then, will turn on the answer to Issue 1. If the Commission finds, as it should, that its Order remains lawful, then there is no evidentiary basis to revise the cost recovery decision made there. No ALEC has offered any legitimate rationale for its deviation from its earlier stipulations and sworn testimony, except for the intervening FCC Order. Because nothing else has changed from the time of the Commission's evidentiary hearing, there is no basis to change the conclusions the Commission reached there.

The existing cost recovery scheme is properly competitively neutral with respect to all parties, not just the ALECs. (Menard DT at 4, Tr. 164.) Reciprocal tariffs recognize that the ALECs, as well as ILECs, will have portability costs to the extent that they are required to switch and transfer calls to the ILEC. Each party thus recovers its respective costs and none is precluded from earning a fair return on its investment. (Menard DT at 5.) Additionally, there are no artificial subsidies to undermine the efficiency that is the hallmark of truly competitive markets.

Conversely, the solutions the ALECs suggest would be disastrous for competition and for consumers. The ALECs' preference for all carriers to absorb their own costs associated with number portability is not surprising, since most INP costs will indisputably be incurred by the ILECs. (Guedel/AT&T, Tr. 47; Kistner/MCI, Tr. 218; Ex. 11 at 35-36.) The patent inequity of the ALECs' cost absorption recommendation led this Commission to reject it at the FCC. Commenting on the FCC's cost pooling and allocation proposal, the Florida Commission stated:

> This method appears preferable to the...option which requires individual carriers to bear their own costs. In the early stages of local competition, most number porting will be from the incumbent local exchange companies (LECs) to entrants, which means that the incumbent will incur a disproportionate amount of the cost, while the entrants will receive a disproportionate amount of the benefit.

(Comments of the Florida Public Service Commission in FCC CC Docket No. 95-116 at 5 (filed Aug. 15, 1996.)

These observations still hold true and still justify rejection of any cost absorption proposal, especially since the ILECs have proven the magnitude of their INP costs. In the earlier stage of this case, GTEFL showed a recurring per-line, per-month RCF cost of $1.11, plus $.50 for each additional path. (The Commission found GTEFL's TSLRIC costs to be $.88 on a recurring basis, and $0.40 per additional path.) As explained above, however, GTEFL's costs were shown to be much higher in its updated study, which reflects the GTD-5 switches which serve three-quarters of GTEFL's access lines.

In any event, the point is that portability costs have been quantified and they are significant. There is no evidence otherwise. None of the ALECs attacked the figures in the ILECs' cost studies in this stage of the proceeding. In fact, the ALECs did not appear interested in even reviewing these studies. (Devine/MFS, Tr. 290.) Instead, those offering an opinion as to costs merely assume--without any analysis whatsoever--that they will be extremely small. (Guedel/AT&T, Tr. 65; Kistner/MCI, Tr. 233.) These unsupported assumptions have no probative value; they are not the kind of competent and substantial evidence needed to sustain a Commission decision. See, e.g., Duval Util. Co. v. Fla. Pub. Serv. Comm'n, 380 So. 2d 1028, 1031 (1980); Atlantic Coast Line R.R. Co. v. King, 135 So. 2d 201, 202 (1961).

If the ILECs are to absorb their portability costs, as the ALECs suggest, the necessary consequence is higher prices for all ILEC consumers, regardless of whether they receive any direct benefits from number portability. (Menard, DT at 4.) As MCI witness Don Price testified in the rate-setting stage of this case, "It is axiomatic that all costs must, eventually, be recovered in the prices paid by end users." (Price DT at 11.) In keeping with this precept, Ms. Kistner, MCI's witness in this phase, recommended that ILECs recover INP costs from their end users. (Kistner/MCI, Tr. 232.) Asked by Commissioner Deason how ILECs were supposed to recover their costs under the ALECs' cost absorption recommendation, Mr. Guedel allowed that the large ILECs' price caps could move up if their costs increase. (Guedel/AT&T, Tr. 86.) Ms. Kistner likewise noted that the ILECs "have options for increasing their service prices." (Kistner/MCI, Tr. 234-35.)

To this end, Commissioner Deason asked whether the Commission's approving the cost absorption proposal could "be characterized as a government mandate on a local exchange company, thereby allowing them to increase local rates regardless of the cap on those rates." (Tr. 86-87.) This concern is well-founded. It is reasonable to expect the ILECs to take every possible opportunity to recover the subsidies they would be forced to grant their competitors under the ALECs' primary proposal. (See Menard DT at 4.)

Most consumers would not consider higher prices to be in their best interest, particularly if they do not benefit from INP. In this regard, the ALECs' broad platitudes that number portability will benefit all customers everywhere (see, e.g., Devine/MFS, Tr. 298) collapsed upon examination at the hearing.

For instance, number portability is a relevant consideration only for facilities-based carriers. (Resellers will have no need for portability.) It is likely that facilities-based competition will develop initially only in the more densely populated metropolitan areas. As Mr. Guedel testified, "It would be unrealistic...to assume that alternative vendors throughout the state are going to deploy switches within the next 12 months." (Guedel/AT&T, Tr. 87.) The ALECs' proposal will thus force customers throughout the state--even where there is no facilities-based competition and no need for portability--to pay for this feature.

It is, moreover, a mistake to assume that all customers leaving the ILEC will insist on keeping their existing telephone numbers. Commissioner Deason made some observations about the more likely situation. He posited an example of two customers; "One wants their same telephone number; one does not. The one that does not would be more inclined to switch if he had a lower rate and he would be imposing lower cost on the system because he's willing to take a new telephone number." Commissioner Deason then asked: "Why is it not competitively neutral and competitively effective to give that customer the lower rate and impose the cost on the customer who wants their number ported? Doesn't that send the right price signal in a competitive environment?" (Tr. 90.)

Basic economic theory dictates a yes answer to this question. Even Mr. Guedel had to admit that "I guess you could craft a situation that would give a positive answer to the question." (Guedel/AT&T, Tr. 90.)

Higher ILEC prices are, of course, good for the ALECs. If ILEC prices must cover the costs of providing number portability to the ALECs, the ILECs will not be able to meet the ALECs' prices, regardless of the ILECs' market skills. (Menard DT at 4.) Only an efficient marketplace can yield maximum benefits for consumers. The mandatory subsidies inherent in the cost absorption proposal are anathema to efficiency, as Commissioner Deason's insight suggests.

Perhaps because of its patent unfairness and its anticompetitive nature, the ALECs tried several creative means of making their cost absorption proposal more palatable. Ms. Kistner, for example, attempted to argue that the ALECs receiving ported numbers would have costs, too--presumably to show that cost absorption is not all that inequitable. (Ex. 7 at 12-13, Kistner/MCI, Tr. 215-16.) This contention deserves no credence. None of the parties in the rate-setting stage of this case indicated that ALEC costs should be factored into the cost recovery scheme, as they would be expected to have done if there were any significant costs. More importantly, neither MCI nor any other ALEC offered any evidence of its alleged costs of number portability. The matter of ALEC costs does not appear to have been raised at the FCC either; the FCC observed that "the costs of providing number portability in the immediate term are incurred solely by the carrier providing the forwarding service." (FCC Order at ¶ 122.) True to this observation, AT&T's Mr. Guedel recommended including only the ILECs' costs in developing any INP charges. (Guedel/AT&T, Tr. 51.)

Another ALEC strategy for framing cost absorption in the most favorable way was to claim that while the ILECs' would bear most of INP costs "in the aggregate,"the ILECs and ALECs would experience similar costs on a "per-customer" basis. (Kistner/MCI, Tr. 216, 233.) This opaque phrasing can't conceal the inequity of the ALECs's proposal--"in the aggregate" is just a fancy way of saying "all"--that is, the ILECs will bear all the INP costs. The punitive nature of this approach is obvious even in the ALECs' own arguments that cost absorption will incent the ILECs to more quickly implement long-term portability. The purported incentive, of course, is due to the fact that making the ILECs alone pay for INP is so unfavorable to them. Indeed, Mr. McDaniel openly advocated that the Commission should ensure that the ILECs "are actually recovering less than the direct economic cost of providing [INP]." (Ex. 11 at 32.)[4]

[4] In any case, no incentive is necessary because the FCC has established an ambitious timetable for implementation of long-term portability.

With regard to the per-customer element of the ALECs' justification of cost absorption, this seems to mean only that the ILECs have more customers to pick up the tab for the INP provided to the ILECs. (McDaniel/Time Warner, Tr. 379.) But no matter how many customers an ILEC has, it's still not fair to impose all the cost burden on those customers, particularly when all won't share equally in any benefits of number portability. In addition, to the extent that the ALECs' language implies costs for the ALECs receiving ported numbers, as GTEFL pointed out above, the ALECs have done no studies concerning the magnitude--let alone the very existence--of their per-customer costs of portability. (Guedel/AT&T, Tr. 48.)

In another attempt to make light of the undue burden the ILECs would bear under the cost absorption scheme, some ALECs called INP expenses "just general routing costs," much like SS7 or AIN costs in a network. (Kistner/MCI, Tr. 232; McDaniel/Time Warner, Ex. 11 at 12.) This theory makes no sense unless one ignores the fact that the ILEC and ALEC networks remain distinct, even though they may be interconnected. The Act and the Florida Statutes require ALECs to pay ILECs for the network functions they use. In fact, in GTEFL's recent arbitration with MCI and AT&T, the Commission set prices MCI and AT&T must pay GTEFL for the SS7 and AIN features that Ms. Kistner apparently believes are just part of GTEFL's network routing. Just as Ms. Kistner is mistaken about the nature of SS7 and AIN, she is mistaken about number portability. The ALECs must pay the ILECs for number portability, just as they must pay for other ILEC network capabilities.

The ALECs' wordplay extended to the concept of "recovery" of costs. They would have this Commission find that the prescribed cost recovery for INP could mean simply recovery of costs from end users. (Guedel/AT&T, Tr. 59.) Under this logic, it would be acceptable to forego establishing <u>any</u> cost recovery system, despite any statutory mandate, and simply allow the companies to pass on costs to the customers--which is, in effect, what cost absorption would do. As Mr. Guedel admitted, the Commission's Order does not share this understanding of cost recovery. (Guedel/AT&T, Tr. 59-60.) Indeed, Mr. Guedel's cost recovery theory makes all of the language about cost recovery and covering costs in both Chapter 364 and the Act meaningless. Certainly, there would be no need for legislators to lay down complex rules for cost recovery if that recovery was to come from end users in the course of business, rather than from the competitors causing the costs.

Finally, the ALECs have tried to manipulate the cost standard for pricing INP in the event the Commission rejects their cost absorption recommendation. As the Commission stated in its rate-setting order, there was no dispute that TSLRIC should be used to set RCF prices. Suddenly, some of the ALECs are proposing a different standard--a so-called "short-run incremental cost" methodology. (Guedel/AT&T, Tr. 48; Kistner/MCI, Tr. 240; Ex. 11 at 8.) They have offered no policy rationale for this reversal of position. Again, the ALECs are simply using the FCC Order as a platform for advancing new and extreme theories that they did not and would not have otherwise raised, in an attempt to obtain lower INP rates.

But the FCC Order does not--either explicitly or implicitly--require the use of short-run incremental cost to set INP rates. (Poag/Sprint, Tr. 347.) Instead, it talks about "the incremental costs of currently available measures." (FCC Order at ¶ 130.) Currently available measures are those features, like RCF, that already exist in most ILECs' networks. (FCC Order at ¶ 122.) The ILECs' studies reflect the RCF solution the parties chose and the Commission approved. As Mr. Varner explained, it would make no sense to identify what it would cost to provide call forwarding and then try to identify what it would cost over and above providing call forwarding used for INP. This process does not reflect reality. The ALECs "are not coming in and saying, 'We want call forwarding and then we want to buy something else that is unique.'" Rather, the ALECs will use call forwarding and that is what the ILECs' cost studies properly calculate. (Varner/Bell, Tr. 134-35.)

In any event, it is not even clear what a short-run study would look like. No rules or guidelines exist with regard to this novel approach. GTEFL has never performed a short-run cost study. (Menard/GTEFL, Tr. 180.) The ALECs that advocate this approach have not detailed how it would be done, and this Commission has never required or endorsed the use of a short-run methodology to set prices. (Menard/GTEFL, Tr. 180; Poag/Sprint, Tr. 346.)

Long-run studies are the norm for pricing services in Florida. The duration of the offering is irrelevant to how a cost study should be performed; for instance, the cost/rate relationship for even temporary promotions is assessed under a long-run standard. The preference for a long-run cost standard is not just regulatory, but statutory. The Florida Legislature has specified the use of TSLRIC to determine whether a price is above its costs. Fla. Stat. sec. 364.051(6)(b), 364.3381. The statutory directive that INP rates shall be above cost thus does not admit the interpretation of "cost" in any "short-run" sense.

Moreover, requiring new studies using a novel methodology would be infeasible, given the short time INP will be in effect. It would likely take months just for the Commission and the parties to develop standards for a short-run study, and for the ILECs to execute a study. The Commission and the ALECs would then need sufficient time to review the studies, and the Commission would need to address the almost certain ALEC challenges to them. The total time spent addressing these new studies could well exceed the October 1997 date the FCC has set for initial phase-out of INP. (FCC Order at ¶ 121.)

Maintaining the status quo, on the other hand, will require no new cost studies. GTEFL and other ILECs have already submitted long-run studies that were the basis of the RCF rates the Commission set (so Ms. Kistner is wrong in thinking that GTEFL's proposal will require Commission review of cost studies (Kistner/MCI, Tr. 217)). All the parties had the opportunity to examine these studies and to participate fully in the hearing process through which the rates were derived.

As GTEFL has explained, keeping the existing cost recovery mechanism intact is the best option from both legal and policy perspectives. If, however, the Commission is inclined, for some reason, to replace that mechanism, there are two acceptable alternatives.

First, the Commission could implement GTEFL's proposed cost pooling and allocation mechanism, which recognizes that all costs of number portability eventually pass to the consumer. The pool would be funded through an explicit end user charge which would be identified on the customer's bill, uniform for all customers, and mandatory for all carriers, including local and interexchange carriers. (Menard DT at 5-6.) Ms. Menard's

Direst Testimony explains in detail the method of determining the funding level for the pool, as well as the establishment and collection of the end-user charge. (Menard DT at 6-8.)

This pooling mechanism is, of course, more complicated than maintaining the status quo. However, the relatively more complex details of GTEFL's allocation method should not be a barrier to its adoption. GTEFL's proposal is consistent with the FCC's thinking on recovery for permanent portability, (Menard/GTEFL, Tr. 168), and GTEFL's system could easily be adapted for use in recovering permanent number portability costs. (Menard DT at 8.) From a long-term perspective, then, it might be simpler and more efficient to set up the final allocation method now, especially if the Commission is considering changing its existing INP scheme.

The second acceptable alternative would be the proposal advanced by BellSouth's witness Varner in his prefiled Rebuttal Testimony. (Menard/GTEFL, Tr. 164-65.) Under this approach, each company would track and record its costs of providing INP. Those costs, plus interest, would later be recovered using the long-term cost recovery mechanism approved by the FCC. (Varner RT at 9.) This approach (which Sprint would also accept as an alternative to its primary proposal, (Poag/Sprint, Tr. 341)) is simple and cost-efficient, and it avoids the plain unfairness of the ALECs' approaches.

* * *

Finally, GTEFL is compelled to point out that, contrary to MCI's unique view, the matter of sharing terminating access charges as between an ILEC and an ALEC cannot fairly be understood as part of this issue concerning the appropriate cost recovery mechanism for INP (or, for that matter, any other issue in this case) . MCI's opinion about the scope of the designated issues met only with opposition from the other parties. (Statements of counsel for GTEFL, Sprint, MFS, and Bell, Tr. 397-99.) Chairman Clark's initial observation about the access charge matter was likewise, "As far as I know, it's not an issue." (Tr. 397).

The treatment of access charges is not an inherent part of an INP cost recovery scheme; it is, rather, a subject to be addressed in interconnection agreements. Consistent with GTEFL's view, the access compensation issue was not treated in the Commission's INP rate-setting order or in the parties' Stipulation establishing cost recovery structure. The compensation aspect was not proposed as an issue at the prehearing conference, nor did it appear in MCI's discussion of Issue 2 in its prehearing statement.

MCI's discussion of the access charge matter in its Direct Testimony cannot enlarge the scope of this issue as understood by the other parties. Prefiled testimony is supposed to address the issues presented for resolution. It is unfair to allow parties to add wholly new issues through testimony, let alone reward them for doing so by ruling on the issues they raise. All parties' concerns are supposed to be raised and discussed at the issues identification conference. It is each party's responsibility to ensure, at that time, that the issues as framed include all of the matters they wish the Commission to resolve. If the Commission is to sanction MCI's end-run around its prehearing procedure, it might as well abolish the formal issue designation process.

GTEFL and others had no notice that the compensation issue would be resolved in this case, and thus did not address it in their Direct Testimony. (Menard/GTEFL, Tr.

174.) It would, moreover, be extremely prejudicial to expect parties to have responded to MCI's compensation proposal in their rebuttal testimony. First, rebuttal testimony is just what its name suggests--an opportunity to reply to other parties' testimony, not to present their direct case on the issues slated for resolution.[5] Second, expecting parties to respond to MCI's non-issue is tantamount to forcing their complicity in MCI's circumvention of mandatory issue identification procedures.

GTEFL cannot believe the Commission would seriously consider making the due process violation that will occur if it rules on the compensation issue MCI has unilaterally raised.

Issue 3: Should there be any retroactive application of the Commission's decision in this proceeding; if so, what should be the effective date?

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

The retroactivity issue is moot at this time. There is no evidence in the record that any carrier has taken number portability under the ILECs' existing tariffs. (Guedel/AT&T, Tr. 51-52; Kistner/MCI, Tr. 221, 248.) (The only portability used at all was by one customer of one ALEC under the terms of an agreement (not a tariff) between Sprint and

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[5] In response to cross-examination, GTEFL witness Menard noted that GTEFL would advocate using a surrogate or proxy to determine the access revenues an interexchange carrier was due in conjunction with call termination to ported numbers. (Menard/GTEFL, Tr. 177.) GTEFL opposes any meet-point billing scheme, which would require expensive billing system modifications that are not cost-justified, given the temporary nature of INP. (Menard/GTEFL, Tr. 176-77.) This brief exposition of GTEFL's position during limited cross-examination is not an adequate substitute for a full and fair opportunity to develop and advocate a position, as a lawful issue identification process would have allowed.

that ALEC. (Ex. 8 at 60).) As such, no adjustments will be necessary if this proceeding yields different rates. (Guedel/AT&T, Tr. 52.)

In any event, retroactive application of the decision here is unwarranted and impermissible. GTEFL's tariffs were filed in accordance with a valid and effective Order that was never appealed or even reconsidered. (Menard DT at 8.) After-the-fact changes in those rates solely because of a revised policy would thus constitute retroactive ratemaking. (Varner/Bell, Tr. 125-26.) Even the FCTA, which represents numerous actual or potential ALECs, agrees that any rate change effected in this case should not be retroactive. (Cresse/FCTA, Tr. 390.)

* * *

For all of the reasons GTEFL has discussed here, the Commission should adopt all of GTEFL's positions on each of the issues slated for resolution in this docket.

Respectfully submitted on January 6, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Posthearing Statement in Docket No. 950737-TP were sent by U.S. mail on January 6, 1997, to the parties on the attached list.

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