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May 24, 2000

Ms. Ann Cole, Clerk
State of Florida
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

980253-TX

Re: GTE Florida Incorporated v. Florida Public Service Commission - Case No. 99-5368RP; BellSouth Telecommunications Inc. v. Florida Public Service Commission - Case No. 99-5369RP

Dear Ms. Cole:

Please find enclosed an original and one copy of GTE Florida Incorporated's Proposed Order for filing in the above matters. 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.

Sincerely,

Kimberly Caswell

KC:tas
Enclosures

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INCORPORATED, Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent	)	Case No. 99-5368RP
BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5369RP

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STATE OF FLORIDA
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GTE FLORIDA INCORPORATED'S PROPOSED ORDER

Pursuant to the Post-hearing Order issued on May 3, 2000, GTE Florida Incorporated ("GTE") files its Proposed Order in this case.

STATEMENT OF THE ISSUE

Whether the Florida Public Service Commission's proposed rules 25-4.300, 25-4.301, and 25-4.302 (referred to herein as "the fresh look rule") are an invalid exercise of delegated legislative authority. Specifically, Petitioners GTE and BellSouth have challenged the rule as exceeding the powers, functions, and duties delegated to the Commission by the Legislature because it (1) would enlarge, modify or contravene the specific portions of the law purported to be implemented (Fla. Stat. ch. 120.52(8)(c)); (2) is not supported by competent, substantial evidence (Fla. Stat. ch. 120.52(8)(f)); (3) is arbitrary and capricious (Fla. Stat. ch. 120.52(8)(e)); (4) results from a material failure

by the Commission to follow applicable rulemaking procedures (Fla. Stat. ch. 120.52(8)(a)); and (5) would impose regulatory costs on ILECs that could be avoided by not adopting the rules, a result that would accomplish the same objectives (Fla. Stat. ch. 120.52(8)(g)).

GTE will not specifically address point 5 in this Proposed Order, but instead adopts the position of BellSouth as set forth in its Proposed Order in this case.

DESCRIPTION OF THE CHALLENGED RULE

The proposed fresh look rule would allow customers of incumbent local exchange carriers (ILECs), including GTE and BellSouth, to terminate their contracts and tariffed term plans for local exchange services without paying the termination liability stated in those contracts and tariffs. Instead, customers need only pay the ILEC "any unrecovered, contract specific nonrecurring costs" associated with the contracts. (Proposed Rule 25-4.302(3)(b).) For tariffed term plans (but not contracts), termination liability will be recalculated as the difference, if any, between the amount the customer paid and the amount he would have paid under a plan corresponding to the period during which he actually subscribed to the service. (Proposed Rule 25-4.302(3)(a).) The fresh look rule applies to agreements entered before June 30, 1999 and that remain in effect for at least one year after the rule takes effect. (Proposed Rule 25-4.300(1).) The window for contract termination starts 60 days after the effective date and lasts for one year thereafter. (Proposed Rule 25-4.301.)

The purpose of the fresh look rule, as reflected in the Commission's official notices, is to "enable ALECs to compete for existing ILEC customer contracts covering local exchange telecommunications services offered over the public switched network,

which were entered into prior to switch-based substitutes for local exchange telecommunications services." (Stip. Exs. 27, 22, 19.)

FINDINGS OF FACT

1. In 1995, the Florida Legislature revised Chapter 364, Florida's telecommunications statute, to allow the entry of alternative local exchange carriers (ALECs) into ILECs' markets, in exchange for measures better enabling the ILEC to operate in a competitive environment. (Stip Ex. 45 at 82; Stip. Ex. 36 at 4-5; Simmons/Hearing Transcript ("Tr.") 58; Menard/Tr. 348.).

2. The State Legislature in 1995 codified and expanded the ILECs' ability to use contracts and term and volume agreements to meet local service offerings by competing providers. (Menard/Tr. 348; Johnston/Tr. 408; Fla. Stat. ch. 364.051(6)(a); Stip. Ex. 45 at 82-83; Stip. Ex. 46 at 4-5.)

3. At the same time, the Legislature removed statutory language requiring the Commission to determine that there was effective competition for a particular service before the ILEC could be granted pricing flexibility for it. (Former Fla. Stat. ch. 364.338; Stip. Ex. 45 at 83-84; Stip. Ex. 46 at 5-6.)

4. In 1996, the U.S. Congress passed the Telecommunications Act of 1996 ("Act"), which, like the 1995 revisions to Florida's Chapter 364, opened the ILECs' local exchange markets to full competition; the Act imposed upon the ILECs a number of obligations designed to encourage competitive entry, including (1) allowing ALECs to interconnect their networks with those of the ILECs; (2) "unbundling" their networks to sell the unbundled elements to competitors; and (3) reselling their telecommunications

services to ALECs at a wholesale discount. (Telecommunications Act of 1996, 47 U.S.C. secs. 151 *et seq.*; BellSouth Ex. 1 at 13-18; Simmons/Tr. 58.)

5. The Commission had, as early as 1984, given the ILECs authority to use contracts (often referred to as contract service arrangements (CSAs)) for certain services upon the condition that there was a competitive alternative available. (Johnston/Tr. 387-88, 390-91; Menard/Tr. 205-06, 332, 347, 355-56; Simmons/Tr. 96, 99; Marsh/Tr. 205-06; FPSC Order No. 13830 in Docket 840228-TL (Nov. 5, 1984); FPSC Order 15317 in Docket 840228-TL (Oct. 31, 1985).)

6. Tariffed term plans, which have been used since at least 1973, were developed as a response to competition. (Johnston/Tr. 392-93; Tuttle/Tr. 365.)

7. Tariffed term plans and contracts allow customers to take service for extended (usually multi-year) periods in exchange for lower rates than they would get if they committed to take service for shorter periods or under the regular tariff. (Johnston/Tr. 388-89, 392; Simmons/Tr. 61; Larsen/Tr. 169-70; Stip. Ex. 67 at 13; Stip. Ex. 68 at 12).)

8. The Commission has long been aware of the ILECs' use of termination liability provisions in contracts and tariffs, and has not determined that the use of such provisions is anticompetitive, discriminatory, or otherwise impermissible. (Simmons/Tr. 84-86, 58-61 (ILECs offered tariffed term plans and CSAs for certain services before the 1995 revisions to Chapter 364), 62-63 (tariff filings before 1995 required prior Commission approval).)

9. The fresh look rule pertains only to business customers, and predominantly to relatively large business customers. (Menard/Tr. 330; Martin/Tr. 373, 376-377; Stip. Ex. 66 at 17-18, 23.)

10. The customers potentially affected by the fresh look rule are knowledgeable and sophisticated enough to have factored into their contract negotiations the possibility or actuality of greater competitive choices engendered by the 1995 State and 1996 federal legislative changes. (Stip. Ex. 67 at 10; Menard/Tr. 333-34, Johnston/Tr. 387, 393-94; Tuttle/Tr. 362-63; Stip. Ex. 1 at 3; Stip. Ex. 45 at 19, 64-65, Direct Testimony of David E. Robinson at 10-11, Rebuttal Testimony of David E. Robinson at 1-5 (Robinson Testimony was included as part of Stip. Ex. 45); Stip. Ex. 69 at 25; Stip. Ex. 46 at 39-42.)

11. Switch-based substitutes for the ILECs' local exchange services were widely available to consumers prior to June 30, 1999. (In this regard: The very reason the Commission allowed the ILECs to use contracts before 1995 was to meet competition. (Stip. Ex. 66 at 16, 19; Stip. Ex. 68 at 11-12; FPSC Order No. 13603 in Docket 840228-TL (Aug. 20, 1984); FPSC Order No. 13830 in Docket 840228-TL (Nov. 5, 1984); FPSC Order 15317 in Docket 840228-TL (Oct. 31, 1985).) ILECs would not have sold services below ordinary tariffed rates if there had been no competitive alternatives. (Stip. Ex. 69 at 11.) Private branch exchanges (PBXs), which are switches, (Larsen/Tr. 174), competed with the ILECs' Centrex systems from the early 1980s. (Johnston/Tr. 384-85.) The Commission confirmed that PBX systems and Centrex-type services were directly competitive in a 1994 Order. (*Investigation into Which Local Exchange Services Are Effectively Competitive in 1993*, Order No. PSC-

94-1286-FOF-TP ("Effective Competition Order"), at 17 (1994) (attached for convenience) ("Centrex systems are in direct competition with Private Branch Exchange (PBX) systems for medium to large size business customers and key telephone systems for smaller businesses").) ALECs entered Florida markets rapidly and in steadily increasing numbers after the 1995 State legislative changes; as of June 30, 1999, over 80 ALECs were known to be serving customers across the State. (Hewitt/Tr. 302, 320; BellSouth Ex. 4 at 7.) One hundred more expressed their intention to serve customers before the end of 2000. (BellSouth Ex. 4 at 73.) By June 30, 1999, GTE alone had executed 101 agreements that allowed ALECs to provide service by interconnecting their networks with GTE's, reselling GTE's services, and/or taking "unbundled" parts of GTE's network. (Menard/Tr. 340.) While market share data does not, in itself, prove whether customers had alternatives to the ILECs, it is one useful indicator; in this regard, ALECs had obtained significant shares (up to 50%) of the business lines in numerous exchanges. (BellSouth Ex. 4, at 47-55.)[1] In GTE's Tampa Bay serving area, there were at least 9 facilities-based competitors in GTE's area as of June 30, 1999, (Menard/Tr. 341). One of these ALECs alone (MCI) was serving over 10,000 lines. (Menard/Tr. 344; GTE Ex. 1, at IV-4.) In addition, competitors operated 20 switches in GTE's area (GTE Ex. 1, at IV-4), and 83% percent of the buildings in GTE's franchise area were within 18,000 feet of a competitor's switch (GTE Ex. 1 at 11).

[1] For various reasons, the line share statistics from the Commission's annual Local Competition Reports are understated. (BellSouth Ex. 4 at 64-65; Menard/Tr. 346.) For instance, for the 1999 Report, the Commission received responses from only 181 of the 265 ALECs certificated as of June 30, 1999. (BellSouth Ex. 4, at 34.) Also, the Reports do not include competition from providers of local service other than ALECs (such as PBX providers, shared tenant services providers, or alternative access vendors). (Johnston/Tr. 402.)

In most cases where a customer has taken a GTE contract or tariffed term agreement, the customer actually had a competing bid for the service. (Tuttle/Tr. 362-63, 364-65.)

12. The competitive alternatives existing prior to June 30, 1999 were available to businesses of all sizes. (GTE Ex. 1, at IV-4; Martin/Tr. 374 (61% of GTE's small business customers had been contacted by other providers as of second quarter 1998; the number would be even larger for medium and large business customers).)

13. The Commission admits that competitive alternatives to the ILECs' services existed before June 30, 1999. (Marsh, Tr. 214, 224, 229; Stip. Ex. 19 at 2 (Staff Recommendation, dated Nov. 19, 1998, noting that "ALECs are now offering switched-based substitutes for local service"); Stip. Ex. 22 at 2; Stip. Ex. 45 at 64, *citing* Commission Order No. PSC-97-1459-FOF-TL.)

14. ALECs and other kinds of companies can and do serve the local exchange market in many different ways, providing service through their own facilities, reselling the ILECs' services and contracts, and/or using the ILECs' unbundled network elements to provide service, as well as by providing PBX systems, wireless telephone services, shared tenant service, and alternative forms of access to the ILEC's network. (Menard/Tr. 340-41; Johnston/Tr. 402; Stip. Ex. 19 at 2; BellSouth Ex. 4, at 37.)

15. The Commission requires ILECs to resell their telecommunications services (including contracts and tariffed term plans) to competitors at a wholesale discount. (Menard/Tr. 340, 347-48; Joint Stip. Ex. 1; Joint Stip. Ex. 14 at 1-2; Stip. Ex. 67 at 24-25.)

16. The contract resale requirement has been very effective in stimulating resale competition. (Stip. Ex. 45 at 15 (Time Warner witness testified that the resale requirement has been "incredibly effective" in stimulating resale).)

17. Customers do not distinguish between resellers and facilities-based providers in evaluating competing bids for local services. (Tuttle/Tr. 360; Larsen/Tr. 175-76; *see also* Hewitt/Tr. 295.)

18. The ILEC's sales force, likewise, does not distinguish between resellers and facilities-based competitors in trying to meet competing offers. (Tuttle/Tr. 360.)

19. Neither long-term ILEC contracts nor termination liability provisions in those contracts are a barrier to competition. (*Compare* BellSouth Ex. 1 at 8 and BellSouth Ex. 4 at 7 (six ALECs were providing service in late 1996; there were over 80 as of June 30, 1999); Marek/Tr. 143-44, 154-155 (ALECs have steadily increased their share of business access lines); Johnston/Tr. 404-05; Marek/Tr. 156-57 (there is nothing to stop ALECs from competing for new entities' business or for additional business from existing ILEC customers).)

20. The Commission has not shown that customers regard termination liability provisions in ILEC contracts to be a barrier to their exercise of competitive choice. (Menard/Tr. 329; Hewitt/Tr. 301, 304; Marsh/Tr. 225. (Commission had no data about how many customers opt out of their ILEC contracts prior to their expiration); Marsh/Tr. 420 (Commission had no evidence that customers subject to the affected contracts had filed any Commission complaints about being "locked in" to their ILEC contracts); Simmons/Tr. 107-08 (only customers can indicate whether termination liability provisions in the ILECs' contracts are a problem for them); Menard/Tr. 329

(Commission never reviewed the ILECs' termination liability provisions during the rulemaking proceeding).)

21. There was no evidence from customers that they did not have competitive alternatives when they signed their contracts with the ILECs. (Stip. Ex. 68 at 8; Marsh/Tr. 210-11, 214-15, 421 (no customers testified at the rulemaking hearing); Simmons/Tr. 102-03; Marsh/Tr. 210-11, 223; Hewitt/Tr. 296 (Commission did not conduct any investigations to determine whether customers had alternatives to the ILECs' services); Larsen/Tr. 172-73, 184-85 (the only customer to testify at the rule challenge knew about other providers (at least one of which had solicited his business) when he renegotiated a contract with an ILEC in 1999).)

22. There was ample public notice of the Commission's consideration of the fresh look rule. (Stip. Ex. 5 (Commission's Notice of Proposed Rule Development); Stip. Ex. 6 (Florida Administrative Weekly ("FAW") Notice of Proposed Rule Development); Stip. Ex. 25 (Commission Notice of Rulemaking); Stip. Ex. 26 (FAW Notice of Prehearing Conference); Stip. Ex. 27 (FAW Notice of Proposed Rulemaking); Stip. Ex. 29 (Order Establishing Procedures for Rulemaking Hearing; includes time for presentations from members of the public); Stip. Ex. 45 (FPSC Chairman offers opportunity for public to comment at hearing); Stip. Ex. 55 (Notice of Agenda Conference); Stip. Ex. 56 (FAW Notice of Agenda Conference); Stip. Ex. 60 (FAW Notice of Change).

23. ALECs use long-term contracts. (Hewitt/Tr. 317; Stip. Ex. 45 at 19.)

24. ALECs use termination liability provisions in their contracts. (Marek/Tr. 137; Hewitt/Tr. 317; Stip. Ex. 45 at 19-20.)

25. The ILECs' use of long-term service commitments and termination liability provisions presents no different considerations than the ALECs' use of long-term service commitments and termination liability provisions. (Larsen/Tr. 178-79, 184; *see also* Stip. Ex. 45 at 61 and Marek/Tr. 141.)

26. Local competition has not developed uniformly across Florida; ALECs have typically targeted businesses and located in densely populated areas, where businesses would tend to be located. (Marsh/Tr. 212, 217; Johnston/Tr. 384, 396; Marek/Tr. 132; GTE Ex. 1 at 11; Stip. Ex. 45, Rebuttal Testimony of David E. Robinson at 8-9 (included in Stip. Ex. 45).)

27. The fresh look rule would not remedy witness Larsen's asserted problem of lack of synchronization of his various contracts' termination dates, because at least one of his contracts was executed after June 30, 1999 and so will not be subject to fresh look. (Larsen/Tr. 171, 178, 180; PSC Ex. 1.)

28. The Commission never defined "sufficient" or "meaningful" competition for purposes of the fresh look rule. (Marsh/Tr. 245; Menard/Tr. 336.)

29. The Commission never performed any economic analysis as to whether competition was sufficient or meaningful. (*See generally* Stip. Ex. 57; Marsh/Tr. 244-45; Simmons/Tr. 101-02.)

30. The Commission has in the past performed detailed analyses to determine whether a particular market or service is competitive. (Menard/Tr. 336-37; Effective Competition Order, *supra.*)

31. The Commission's choice of June 30, 1999 as the cut-off date for contract eligibility for fresh look was motivated primarily by a consideration of the number of

contracts that would be subject to fresh look using that date. (Stip. Ex. 68 at 24, 27-30; *see also* Marsh/Tr. 232-34 & Stip. Ex. 57 at 10.).

32. Most states asked to consider fresh look rules for local exchange services have rejected them on legal or policy grounds or both; only two states have fresh look rules and they are much less extreme than the rule under review here. (Menard/Tr. 330-333; Stip. Ex. 45 at 84; Stip. Ex. 46 at 47-54 and cases cited therein; Stip. Ex. 67 at 33-34.)

33. The Commission received a letter from the Joint Administrative Procedures Committee, dated April 28, 1999 ("JAPC Letter"). (Stip. Fact 2/Tr. 119.)

34. The JAPC letter was a written inquiry from a standing committee of the Legislature concerning the fresh look rule. (Ex. 70; Moore/Tr. 430-31.)

35. The Commission did not respond in writing to the JAPC letter. (Stip. Fact 5/Tr. 120.)

36. The JAPC letter was never placed into the rulemaking record. (Stip. Fact 4/Tr. 119-20.)

37. The JAPC inquiry was disclosed only six months after it was received, in a Staff Recommendation that did not indicate the date of the inquiry or the existence of any letter. (Stip. Ex. 57.)

38. The parties to the rulemaking did not have an opportunity to address the merits of the letter before the Commission. (Menard/Tr. 334-35; Joint Ex. 68 at 3-4.)

CONCLUSIONS OF LAW

I. The Agency Has the Burden of Proof

39. The Commission has the burden to prove that the proposed fresh look rule is not an invalid exercise of delegated legislative authority. Fla. Stat. ch. 120.56(2)(a) (1997).

II. The Proposed Rule Would Enlarge, Modify, and Contravene the Provisions of the Law the Commission Purports to Implement.

A. The Rule Does Not Implement Any Specific Law.

40. Florida's Administrative Procedure Act (APA) defines "invalid exercise of delegated legislative authority" as "action which goes beyond the powers, functions, and duties, delegated by the Legislature." (Fla. Stat. ch. 120.52(8).) The test for evaluating the sufficiency of the agency's claimed legislative delegation for a rule appears in both sections 120.52(8) and 120.536(1) of the APA:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

41. The Legislature adopted this new rulemaking standard in 1996, in an effort to increase agency accountability. *See* Martha C. Mann, *St. John's River Water Management District v. Consolidated-Tomoka Land Co.: Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act*, 26 Fla.

St. U.L. Rev. 517, 526, 544 (1999). The rulemaking constraints introduced in 1996 were intended to overrule previous cases holding agency rules to be valid as long as they were reasonably related to the purpose of the enabling legislation and not arbitrary and capricious. *Id.* at 529. As the new language indicates, agency rules now have to be based upon a specific statute.

42. In this case, the Commission cites Florida Statutes, sections 364.01 and 364.19, as the law implemented by the rule and sections 350.127(2) and 364.19 as the specific authority for the rule. (Stip. Ex. 60.) None of these provisions (or any other section of Chapter 364) directs the Commission to adopt fresh look rules or otherwise disapproves of long-term ILEC contracts or termination liability. Absent such explicit language, then, the inquiry is "whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction." *St. Johns Water Mgmt. Dist. v. Consolidated-Tomoka Land Co. et al.*, 717 So. 2d 72, 80 (Fla. 1st DCA 1998). For a number of reasons, the Commission's fresh look rule does not satisfy this standard.

43. Section 364.01 is entitled, "Powers of commission, legislative intent," As its title indicates, this provision sets forth legislative intent and generally describes the Commission's authority to oversee telecommunications companies. This section cannot service as an independent basis to justify the fresh look rules in light of the above-discussed statutory revisions to the APA. Section 364.01 is not a specific grant of authority, but rather the kind of "general legislative intent or policy" statement that is expressly deficient to support a rule under the new standard of sections 120.52(8) and 120.536(1).

44. Section 350.127(2), likewise, does not itself constitute a delegation of authority adequate to support the fresh look rule. This provision is the general grant of rulemaking authority to the Commission. Under sections 120.52(8) and 120.536(1), this general grant is necessary, but not sufficient, to justify the fresh look rule.

45. Having eliminated section 350.127(2) as a legitimate source of specifically delegated authority, section 364.19 is the only other provision left for consideration in this regard. Section 364.19 states, in its entirety: "The commission may *regulate*, by *reasonable* rules, the *terms* of telecommunications service contracts between telecommunications companies and their patrons" [emphasis added]. For a number of reasons, this language does not constitute the grant of specific legislative authority necessary to sustain the fresh look rule.

46. The proposed rule does not "regulate" contract "terms" at all. It contemplates not regulation of particular contract terms, but unilateral termination of entire *existing* contracts regardless of their terms. A contract cannot be "regulated" if it ceases to exist. And regulation of particular contract terms necessarily requires consideration of the contract terms themselves. Here, however, the Commission did not review any of the ILEC termination provisions to determine whether they were reasonable. Contracts before June 30, 1999 will be available for fresh look, regardless of their terms and even regardless of whether they even specify any termination liability.

47. Even if the proposed fresh look rule could be construed as regulating contract terms under section 364.19, it fails to satisfy that provision's reasonableness criterion in a number of regards.

48. The Commission's fresh look rule purports to allow customers to take advantage of competitive options unavailable they signed contracts with the ILECs. But the Commission openly admits that such options were, in fact, available. It is not reasonable for the Commission to provide a blanket fresh look opportunity that ignores the fact that customers already had competitive alternatives when they signed their contracts with the ILECs.[2]

49. If the Commission had specific concerns--for instance, about a purported lack of competitive alternatives in certain areas or for certain types of customers, or a purported lack of facilities-based competition—then it would have been more reasonable to tailor a rule to those concerns. This was the approach taken by the Ohio and New Hampshire Commissions, the only states to have adopted fresh look rules in the local exchange context.[3] In both cases, the fresh look opportunity is triggered on an exchange-by-exchange basis, when a single facilities-based provider enters a particular local exchange. These rules, unlike Florida's, thus recognize the critical fact that local exchange competition has not developed uniformly on a statewide basis. It also bears note that the Ohio and New Hampshire rules were adopted well before Florida's (Ohio's in 1996 and New Hampshire's in 1997); the fresh look window in both cases is only 180 days long (as opposed to Florida's one-year period); and both states require end users

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[2] See sections II.B. and II.C, *infra*, for the related discussion of the lack of competent, substantial evidence to support the rule and its arbitrary and capricious nature.

[3] *See* Stip. Ex. 46 at 47-54 for an account of other states' reactions to fresh look rule proposals, including citations to a number of decisions rejecting such rules. Oregon has since joined the list of states declining to adopt a fresh look rule. (Oregon P.U.C. Order No. 00-177, AR 371, March 29, 2000.)

As is the case in Florida, GTE believes the Ohio and New Hampshire Commissions lacked the requisite authority to enact fresh look rules, but this discussion leaves aside the question of legal authority to adopt a fresh look rule.

to have two years remaining on their contracts to exercise fresh look (Florida requires only one year remaining). *Re: Freedom Ring, L.L.C.*, NH PUC DR 96-420, Order No. 22,798 (Dec. 8, 1997); Ohio PUC Case No. 95-845-TP-COI, June 12, 1996 decision and Case No. 97-717-TP-UNC, etc., July 17 1997 decision. While decisions from other states have no precedential value in Florida, they provide a useful perspective on the patently unreasonable nature of the fresh look rule under challenge.

50. Likewise, neither the U.S. Congress nor the FCC has ordered fresh look for local exchange service contracts or indicated any general disapproval of long-term contracts. When the FCC has adopted limited fresh look requirements in other contexts, it has done so mostly as a means of addressing unreasonable contract provisions. *See, e.g. Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677 (Apr. 16, 1992). These narrow rules have been much more reasonable than the fresh look rule proposed here.[4] In the special access area, for instance, the fresh look opportunity was triggered by the availability of expanded interconnection arrangements the FCC had recently ordered; the fresh look window was open for only 180 days; and contract repricing to the actual term taken, plus interest, was required. *Expanded Interconnection with Local Tel. Co. Facilities*, Second Memo. Op. and Order on Recon., 8 FCC Rcd 7341 at para. 41 (1993).

51. Like many Commissions around the country, Florida was constrained to follow the FCC's lead in adopting a fresh look policy in the expanded interconnection context. Again, this limited policy was much less extreme than the Commission's

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[4] Importantly, the FCC, as a federal agency, is not subject to the Contracts Clause of the U.S. Constitution. That clause applies only to the States, as discussed, *infra*, at section II.A.2.

proposed fresh look rule under review. The Commission in that case used the FCC's contract repricing approach and allowed only a 90-day fresh look window, which opened after expanded interconnection arrangements were first available in a given central office. (Stip. Ex. 46 at 53 n. 2, *citing Petition for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Co. Central Offices by Intermedia Comm. of Florida, Inc.*, 94 FPSC 3:399, 420 (1994).) Like the other fresh look rules in other states and other contexts, the expanded interconnection fresh look policy was specifically designed for a nascent competitive market—not for a market like the one at issue, with significant competitive options already available.

52. Additional reasons why the fresh look rule does not meet section 364.19's reasonableness standard include: (1) it is contrary to other, directly relevant statutory language; (2) it ignores constitutional guarantees against contract impairment; (3) it is impermissibly retroactive in effect; (4) it is unsupported by any record evidence; and (5) it is arbitrary and capricious. Each of these points, discussed in turn below, is an independent basis for concluding that the fresh look rules exceed the powers granted to the Commission by the Legislature.

1. The Fresh Look Rule Contravenes Explicit Legislative Permission for the ILECs to Use Contracts and Term and Volume Agreements to Meet Emerging Competition.

53. Statutes are not to be construed in isolation. *Consolidated-Tomoka*, 717 So. 2d at 80. "A law should be construed together with any other statute relating to the same subject matter or having the same purpose if they are compatible." *Florida Jai Alai, Inc. v. Lake Howell & Reclamation Dist.*, 274 So. 2d 522, 524 (1973), *citing Garner v. Ward*, 251 So. 2d 252 (1971). If any doubt remains as to whether the Commission

has authority to nullify ILEC contracts under section 364.19, it is removed by the Legislature's discussion of the ILECs' contract authority elsewhere in chapter 364. Specifically, section 364.051(6)(a)2 provides:

> Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, not unreasonably discriminate among similarly situated customers.

54. This provision, which was added to Chapter 364 in 1995, expressly confirmed and expanded the ILECs' ability to use individual contracts and term and volume discounts, such as those reflected in the ILECs' tariffed term plans. It fits within the Legislature's overhaul of Chapter 364, in which ILECs lost their exclusive local franchises, but gained greater flexibility to respond to emerging competition. Certainly, the Legislature knew that the local exchange market would not become fully competitive as soon as it adopted these revisions. Nevertheless, it did not see fit to condition the ILECs' use of contracts or volume and term discounts on the development of a certain level of competition in the market; its sweeping revisions did not include anything to constrain the ILECs' use of long-term contracts or termination liability provisions.

55. In fact, the 1995 legislative revisions *removed* constraints on the ILECs' pricing flexibility. Before that time, Chapter 364 contained language permitting the ILECs pricing flexibility for a particular service only after the Commission had determined that that service was "effectively competitive." (Former Fla. Stat. ch 364.338.) The Commission's contention that fresh look is necessary because there was

not "sufficient" or "meaningful" competition is an impermissible attempt to reintroduce into Chapter 364 the kind of effective competition condition that the Legislature deliberately eliminated in 1995. The explicit permission to use contracts and discounts, along with the elimination of the "effective competition" condition elsewhere, confirms that the Legislature did not intend for the Commission to condition the ILECs' use of competitive tools on any particular level of competition. Rather, these tools were made available to help the ILEC meet emerging competition.

56. Under section 364.051(6)(a)2, if the ILECs' actions in meeting competition are not unreasonably discriminatory or anticompetitive, then they are permissible. If the Legislature meant for the Commission to have the discretion to adjudge a whole class of individual contracts and term and volume discounts to be anticompetitive, it would have made no sense to list them as permissible approaches to meeting competition.

57. In any event, as noted above, the Commission has never made any finding that the ILECs' use of contracts and tariffed term plans is discriminatory or anticompetitive. In fact, it did not even review any of these agreements. Given the specific language conferring contract authority on the ILECs, it is unreasonable to interpret section 364.19 to permit the Commission to "render the ILECs' contracts meaningless," as the FPSC Chairman admits the fresh look rule will do (Stip. Ex. 68 at 21).

2. The Constitutional Dimensions of the Fresh Look Rule Demand Particularly Close Scrutiny of the Commission's Claimed Legislative Authority.

58. In evaluating whether the power an agency purports to exercise has been delegated by the Legislature, particularly close scrutiny must be given to rules that raise

constitutional issues. This was the key to the decision in *Department of Business and Professional Regulation v. Calder Race Course, Inc. et al.*, 724 So. 2d 100 (Fla. 1st DCA 1998). Because that case has many parallels to the instant rule challenge, it merits particular attention.

59. *Calder* involved a challenge to rules of the Division of Pari-Mutuel Wagering that permitted the Division to search persons and places within pari-mutuel facilities. As authority for its rules, the Division cited a statute empowering it to conduct investigations to enforce its governing statute. *Id.* at 102-03. In affirming the administrative law judge's invalidation of the Division's rules, the Court emphasized the constitutional implications of the investigative power the Division purported to implement: "The distinction between an investigation that does not involve a search and one that does is highly significant. In the former situation, the benefits of the Fourth Amendment to the United States Constitution are not implicated, whereas in the latter they generally are." *Id.* at 103.

60. The Court acknowledged the heavily regulated nature of wagering facilities, explaining that heavily regulated businesses enjoy no reasonable expectation of privacy. Nevertheless, it allowed that such businesses are "not altogether excluded from the Fourth Amendment's benefits." *Id.* at 103. The Court concluded that "if the government is to be given the right to conduct a warrantless search of a closely regulated business, the Fourth Amendment demands that the language of the statute delegating such power do so in clear and unambiguous terms." *Id.* at 104. Because the Legislature had not particularly identified a right to search, the Division's rules could not be upheld.

61. Because the *Calder* Court found no legislative delegation sufficient to support the Division's rules, it did not need to reach the question of whether a specifically delegated power to search would be constitutionally permissible. The Court nonetheless commented: "we do not believe the legislature would so cavalierly disregard the warrant requirement of the Fourth Amendment by delegating to the Division, in the most general and, indeed, vague terms, the power to conduct searches, as the Division has contended." *Id.* at 104.

62. Finally, the Court stated that a restrictive interpretation of the statute cited by the Division was warranted in view of the language in sections 120.58(8) and 120.536(1), "empowering an agency to 'adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute,' and stating specifically that 'statutory language...generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.'" *Id.* at 104.

63. As in the *Calder* case, the rule under challenge here implicates constitutional guarantees. The JAPC correctly identified this guarantee in its inquiry to the Commission about its legal authority to adopt the rule: "Article 1, Section 10 of the Florida Constitution prohibits the passage of laws impairing the obligation of contracts. Inasmuch as the rules effectively amend the terms of existing contracts, please reconcile the rules with the Constitution." (Stip. Ex. 70.)

64. Article 1, section 10 of the United States Constitution contains the same prohibition against impairment of contracts: "No State shall...pass any...Law impairing the obligation of Contracts."

65. The fresh look rules cannot be reconciled with these constitutional prohibitions against impairment of contracts.

66. Under Florida law, almost no degree of contract impairment is permissible: "any realistic analysis of the impairment issue in Florida must logically begin...with...the well-accepted principle that virtually no degree of contract impairment is tolerable in this state." *Pomponio et al. v. The Claridge of Pomponio Condominium, Inc., etc., et al.*, 378 So. 2d 774, 780, *citing Yamaha Parts Distributors Inc. v. Ehrman*, 316 So.2d 557 (1975). Florida Courts have emphasized, time and again, the constitutional repugnance to state action adjusting contract rights in Florida. *See, e.g., State Farm Mutual Auto Ins. Co. v. Hassen and Hassen*, 650 So. 2d 128, 134 (1995) ("essentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy consideration of the statute may be"); *Sarasota County v. Andrews et al.*, 573 So. 2d 113, 115 (Fla. 2d DCA 1991) ("Although...Pomponio suggests that some impairment is tolerable, it specifies that the bedrock of its analysis is the principle that virtually no degree of impairment will be allowed and indicates that the amount of impairment that might be tolerated will probably not be as much as would be acceptable under a traditional federal analysis"); *Gans v. Miller Brewing Co.*, 560 So. 2d 281, 283 (Fla. 4th DCA 1990) ("virtually no degree of contract impairment has been tolerated in this state"); *Park Benziger & Co., Inc. v. Southern Wines & Spirits, Inc.*, 391 So. 2d 681, 683 (1980) ("Exceptions have been made to the strict application of [the federal and Florida Contract Clauses] when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state"); *State of Florida, Dep't of Transp. v. Chadbourne, Inc.*, 382 So. 2d 293, 297

(1980) ("This Court has generally prohibited all forms of contract impairment"); *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (1978) ("It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution"); *United Gas Pipe Line Co. v. Bevis,* 336 So. 2d 560, 564 n. 18 (1976) ("We have generally prohibited all forms of contract impairment").

67. There is no doubt that the fresh look rule substantially impairs, and thus abrogates, the ILECs' contracts. It would rewrite termination liability provisions with the specific intent of allowing customers to terminate their contracts. Without termination liability provisions, the ILECs can no longer enforce their contracts. After the exercise of fresh look, nothing would remain of a contract. Even the Commission Chairman recognized the plain fact that the rule would render the ILECs' contracts "meaningless" (Stip. Ex. 68 at 21), and the Staff's legal analysis did not dispute the fact of abrogation. (Stip. Ex. 57 at 7.)

68. Following the *Calder* analysis, the constitutional implications of the Commission's fresh look rule are highly significant in evaluating whether the claimed delegation of legislative authority is sufficient to support that rule. These constitutional implications require that any delegation of the power to abrogate contracts must be made "in clear and unambiguous terms," *Calder* at 104, particularly in view of Florida's institutionalized aversion to any degree of contract impairment. Section 364.19's general permission to regulate the terms of contracts by reasonable rules does not meet this standard.

69. This conclusion holds true even though the ILECs, like the pari-mutuel facilities in *Calder*, operate in a regulated environment. Florida Courts have explicitly

affirmed a utility's "constitutional right to be protected against the impairment of contracts." *See, e.g.*, *Brevard County, Florida v. Florida Power & Light Co.*, 693 So. 2d 77, 78 (Fla. 5th DCA 1997). They have repeatedly found state action to constitute unconstitutional impairment of contracts even though an industry at issue is heavily regulated. *Geary Distributing Co., Inc. v. All Brand Importers Inc.*, 931 F. 2d 1431 (1991)*; Miller Brewing Co.*, 560 So. 2d 281 (Fla. 4th DCA 1990); *Park Benziger*, 391 So. 2d 681; *Chadbourne*, 382 So. 2d 293 (1980); *Dewberry,* 363 So. 2d 1077 (1978). Courts have permitted impairment of regulated companies' contracts only where the contracts attempt to circumvent by contract a power (typically, ratemaking) that was expressly vested in the regulatory agency. (Stip. Ex. 46, *citing H. Miller and Sons, Inc. v. Cooper City Utils., Inc.*, 373 So. 2d 913 (1979); *Energy Reserves Group Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *Miami Bridge Co. v. Railroad Comm'n of the State of Florida*, 155 Fla. 366, 20 So. 2d 356, 376 (1944); *City of Plantation Utils. Operating Co.,* 156 So. 2d 842, 843 (1963). That is not the case here, where the Legislature has specifically given the ILECs contract and discounting authority.[5]

70. A restrictive interpretation of section 364.19 is further justified by the APA's admonition, emphasized in *Calder*, that statutes shall be construed to "extend no further than the particular powers and duties conferred by the same statute." (Fla. Stat. ch. 120.58(8) and 120.536(1).) This observation is consistent with the more general tenet that "[I]f there is a reasonable doubt as to the lawful existence of a particular

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[5] A comprehensive treatment of Florida courts' impairment analysis would not fit within the page limit for this filing and is probably beyond the scope of this rule challenge, in any event. However, it is worthwhile

power being exercised, the further exercise of the power should be arrested." *United Tel. Co. of Fla. v. Pub. Serv. Comm'n*, 496 So. 2d 116, 118 (1986). In light of these principles, section 364.19 cannot reasonably be interpreted to give the Commission the requisite, specific authority for contract abrogation. There is nothing in the class of powers or duties identified in the statute that delegates to the Commission the right to sanction unilateral termination of valid, lawful contracts that were knowingly entered to gain a pricing or other advantage.

71. Even if the Legislature had specifically delegated to the Commission the power to sanction abrogation of contracts, such a power would be constitutionally impermissible. But it is not necessary to engage in such an analysis to decide this case because, as explained above, the claimed source of authority cannot reasonably be interpreted to include a delegation specific enough to allow contract impairment. Nevertheless, it is implausible to believe that the Legislature would "cavalierly disregard" the federal and State contract clause guarantees by conferring the extreme right to sanction contract abrogation in general terms, as the Commission contends.

3. The Law the Commission Purports to Implement Does Not Include Any Grant of Retroactive Rulemaking Authority.

72. In addition to constitutional concerns, the JAPC's inquiry to the Commission identified a retroactive rulemaking problem. The JAPC attorney correctly observed that "the rules appear to operate retroactively by changing the terms of existing contracts" and that section 364.19 "does not provide authority for retroactive rulemaking." (Ex 70.) He pointed out that "courts have held that administrative rules

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to review this analysis (at Stip. Ex. 46 at 10-37) to fully understand the extreme nature of the power the Commission purports to exercise in adopting the fresh look rule.

generally have only prospective application" and asked the Commission to "explicate the statutory authority which empowers the Commission to promulgate rules with retroactive application." (Ex 70.)

73. There is no such authority. There is nothing in sections 364.01, 350.127(2), 364.19, or any other provision of Chapter 364 that authorizes retroactive rulemaking. Indeed, even the Commission has not claimed that it has such authority. Rather, the Commission Staff's legal analysis of the fresh look rule summarily dismissed the retroactivity issue by simply denying that the rules have any retroactive effect:

> The proposed rule operates on a going-forward basis, and does not retroactively affect the contracts. It only modifies the termination liability provisions of the contracts from the date of adoption of the rules to further the development of competition, and it provides that the ILECs will receive the compensation they would have received if the contracts had been made for a shorter term.

(Stip. Ex. 57 at 5.)

74. It is plainly incorrect that the fresh look rule does not retroactively affect contracts. In fact, that is exactly what it is intended to do. The fresh look rule manifests the Commission's notion that the ILECs' long-term contracts signed before June 30, 1999 are a barrier to competition and customers should not be held to them. The rule thus rewrites these *existing* contracts (as the JAPC has recognized) replacing the contractually agreed-upon termination liability provisions with the reduced measure the Commission has adopted.[6] This effect is purely retrospective; no contracts after June 30, 1999 are affected by the rule. A rule that purports to apply to pre-existing contracts is obviously retroactive. *See Fleeman et al. v. Case et al.*, 342 So. 2d 815 (1976).

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[6] Although the above-quoted passage from the Staff Recommendation indicates the ILEC will receive compensation for the term the customer actually took under a contract, that is not what the rule says. The rule allows repricing only for tariffed term plans, not for contracts. (Proposed Rule 25-4.302(3).)

75. "Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hospital, et al.*, 488 U.S. 204, 208 (U. S. S. Ct. 1988). Retroactive legislation " 'presents problems of unfairness...because it can deprive citizens of legitimate expectations and upset settled transactions.' " *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), *quoting General Motors Corp. v. Romein*, 503 U.S. 181, 191, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992). " 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.' " *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 128 L.Ed. 2d 229, 114 S. Ct. 1483 (1994). "A subsequent enactment should not disturb the substantive rights and duties created by [a] contractual relationship." *Walker & LaBerge, Inc. and Bituminous Casualty Corp. v. Jack Halligan*, 344 So. 2d 239, 243 (1977).

76. The fresh look rule presents exactly the kind of unfairness that is at the heart of the retroactivity concerns expressed time and again in the courts and the legal literature. The contracts and tariffed term plans affected by fresh look are entirely lawful, and legally binding. Parties have already undertaken performance under these contracts—in some cases, for years. The ILECs had no reason to expect that the Commission would alter the contracts' termination liability provisions, thereby removing the ILECs' ability to enforce these valid contracts. These provisions are customary in both ILEC and ALEC contracts (as well as in commercial contracts, in general). The Commission has been aware of such provisions for many years—for example, they appear in Commission-approved tariffs setting forth the ILECs' term plans. The agency has never disallowed or disapproved of the ILECs' use of termination liability provisions

or the long-term contracts and term plans in which they appear. In fact, it was reasonable to presume that the Commission could not do so after the 1995 revisions to Chapter 364 affirming the ILECs' ability to use contracts and term discounts.

77. Because the fresh look rule operates retroactively to disrupt pre-existing contracts, a clear statutory conveyance of the power to promulgate retroactive rules is absolutely necessary to overcome the presumption that laws and rules operate only prospectively. *See, e.g.*, *Gulfstream Park Racing Assoc., Inc. v. Division of Pari-Mutuel Wagering*, 407 So. 2d 263 (1981); *The Environmental Trust and Sarasota Environmental Investors v. Florida Dep't of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998). If the Legislature intends for a measure to reach backward, the Florida Supreme Court will "insist that a declaration be made expressly in the legislation." *Walker & LaBerge, Inc. and Bituminous Casualty Corp. v. Jack Halligan*, 344 So. 2d 239 (1977). " 'The power to require readjustments for the past is drastic. It...ought not to be extended so as to permit unreasonably harsh action without very plain words.' " *Bowen, supra,* at 208, *quoting Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928). No such plain words appear anywhere in Chapter 364. Therefore, the fresh look rule exceeds the powers delegated to the Commission by the Legislature.

B. THE FRESH LOOK RULE IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

78. A proposed rule is an invalid exercise of delegated legislative authority if it is not supported by competent substantial evidence. Fla. Stat. ch. 120.52(8)(f). Substantial evidence is "such evidence as will establish a substantial basis of fact from

which the fact at issue can reasonably be inferred." "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (1957). In this case, even if the Commission had the requisite legislative authority to adopt the fresh look rule, it must still be invalidated because it is not based on competent substantial evidence.

79. The purpose of the fresh look rule is to enable ALECs to compete for existing ILEC contracts that were "entered into prior to switch-based substitutes for local exchange telecommunications services." The primary fact at issue is, thus, whether there were, in fact, alternatives to the ILECs' switch-based local exchange services when customers executed contracts for these services before June 30, 1999. The rule necessarily maintains that there were not; thus, customers must be permitted to opt out of their contracts with ILECs.

80. The findings of fact reflect the evidence that customers did, in fact, have competitive choices well before June 30, 1999. Even the Commission admits that there was competition for the services at issues before that date. This admission alone is enough to invalidate the rule because it contradicts the rule's plainly stated premise that there were no substitutes for the ILECs' local exchange services when customers contracted with the ILECs.

81. Despite the Commission's repeated and unambiguous description of the fresh look rule's purpose, Staff testimony at the hearing indicated that it isn't really premised on the view that there were no competitive alternatives to the ILECs. Commission Staff indicated, rather, that the rule was adopted because competition was

not "sufficient" or "meaningful" enough to let pre-existing ILEC contracts finish out. Even if we allow this departure from the stated purpose of the rule, there is no competent, substantial evidence to support this view.

82. Accepting the Commission's view of the rule's premise as expressed at the hearing, the ultimate fact at issue was whether competition was "sufficient" before June 30, 1999. The Commission concluded that it was not. But the "substantial basis in fact" necessary to support this conclusion is nowhere to be found in the record. Even if the Commission had the discretion to determine the point at which competition was "sufficient" for purposes of adopting a rule, it had to exercise that discretion in a rational manner. But the Commission never did any competitive analysis in this case. It never even defined what "sufficient" or "meaningful" competition might mean. As such, it was necessarily impossible for the Commission or the parties to identify in a deliberative manner when the point of "sufficient" competition was reached.

83. Further, there is no evidence supporting the rule's assumption that customers did not have competitive choices when they executed their contracts prior to June 30, 1999. The Commission did no investigation or customer interviews in this regard. No customers testified at the rulemaking hearings, and the only customer appearing at the rule challenge testified that he renegotiated an ILEC contract with the knowledge that there were competing alternatives.

84. The Commission clearly knows how to perform a competitive analysis. Before Chapter 364 was revised in 1995, it conducted proceedings to determine if numerous ILEC services were "effectively competitive" for purposes of potentially relaxing the regulation of those services. It reviewed factors like comparability of

substitute services, performance of competitors, and competitors' size and product lines, among others. (*See* Effective Competition Decision.) In this case, there was never even a hint of any such objective, economic analysis.

85. In sum, the Petitioners have come forward with substantial evidence that the business customer set at issue had plenty of competitive alternatives to the ILECs' switched services--and, just as importantly, a high degree of awareness of competition--long before June 1999. This evidence, significantly, includes testimony of individuals who deal with customers on a daily basis and are thus in a position to know that these sophisticated customers knew about competitive developments and had commonly been contacted by the ILECs' competitors.

86. No reasonable mind could accept the Commission's presentation as constituting competent, substantial evidence necessary to sustain the rule. There is simply nothing material from which to infer that customers lacked competitive alternatives to ILEC services before June 1999. As such, the fresh look rule must be invalidated.

C. THE FRESH LOOK RULE IS ARBITRARY AND CAPRICIOUS.

87. A proposed rule is an invalid exercise of delegated legislative authority if it is arbitrary or capricious. Fla. Stat. ch. 120.52(8)(e). "An 'arbitrary' decision is one not supported by facts or logic. A 'capricious' action is one taken irrationally, without thought or reason." *Board of Clinical Laboratory Personnel v. Fla. Ass'n of Blood Banks, etc.*, 721 So. 2d 317 (Fla. 1st DCA 1998), *citing Board of Trustees, Internal Improvement Trust Fund v. Levy*, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). As explained above, there was no competent, substantial evidence to support the

Commission's adoption of the fresh look rule. The same reasoning compels a conclusion that the rule was arbitrary and capricious. That is, because the decision is not based on competent substantial evidence, it is necessarily unsupported by facts or logic. Certain aspects of the rule, however, draw particular attention to its arbitrariness.

88. The Commission claims that the rule is "designed to assist in the transition" to competition from "existing monopoly service." (Joint Pre-Hearing Stip. at 3.) But the rule is not rationally related to this objective.

89. Commission testimony indicated that the agency decided to implement the rule precisely because of the *presence* (not the absence) of competition, at the point when it deemed the market competitive enough to "warrant a little extra boost to competition." (Marsh/Tr. 197-98, 224, 235.) This is illogical. If the objective is to encourage local markets to move from monopoly to competitive environments, the Commission's action would need to focus on markets that are not yet competitive. Yet the fresh look rule is directed solely to the business market—mostly the large business market--where customers have had the most competitive choice for the longest time, and where competitors continue to enter in ever larger numbers. It is arbitrary and capricious to take a market that is admittedly not an "existing monopoly" and design a rule to move it from monopoly to competition.

90. The rule is, likewise, arbitrary in that it applies only to the ILECs' contracts. Both the ILECs and the ALECs use termination liability clauses. If the Commission deems such provisions to be barriers to competition, then they would constitute such barriers regardless of which company used them. If giving customers more choices is

the point of the rule, then it follows that this effect would be enhanced if the rule extended to existing ALEC contracts.

91. Finally, the Commission's choice of the June 30, 1999 date underscores the arbitrary and capricious nature of the Commission's decision making process in this case. The Commission set June 30, 1999 as the date before which competitive choices did not exist (or at least were not "sufficient"). The choice of the date for cut-off of eligibility for fresh look is thus the critical factual issue in this case. Choosing a date that would allow customers to opt out of a contract entered when that customer, in fact, did have alternatives other than the ILEC, would make no sense in terms of the rule's stated purpose and would unfairly disadvantage the ILEC. Thus, the Commission would have had to carefully analyze the competitive developments in the local exchange market to settle on the correct date.

92. As discussed above, in relation to the competent and substantial evidence standard, there is no evidence that the Commission engaged in this kind of deliberative process. Rather, the June 30, 1999, date was literally a last-minute pick by one of the Commissioners who relied on facts about the number of contracts covered by the rule, rather than on any factual evidence about the level of competition in the market.

93. For this reason and the others discussed in this section, the rule is arbitrary and capricious and must be invalidated.

D. THE AGENCY FAILED TO FOLLOW THE APPLICABLE RULEMAKING PROCEDURES AND REQUIREMENTS OF THE APA.

94. A proposed rule is an invalid exercise of delegated legislative authority if the agency materially failed to follow applicable rulemaking procedures or requirements

in adopting it. Fla. Stat. ch. 120.52(8)(a). The Commission committed such material error in failing to place the JAPC Letter (Ex. 70) into the rulemaking record.

95. APA section 120.54(8)(h) provides that an agency's rulemaking record shall include copies of "all written inquiries from standing committees of the Legislature concerning the rule."

96. APA section 120.56(1)(c) states: "The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired."

97. The JAPC Letter, an inquiry from a standing legislative committee, was not made a part of the PSC's rulemaking record. The only mention of the JAPC's concerns about the Commission's legal authority to adopt the rule appeared in the Staff's final, November 4, 1999, Recommendation, and even then, there was no reference to any letter. At the November 16, 1999 agenda where the rule was adopted, parties had no opportunity to speak to the merits of the proposed rule, and thus could not discuss the substance of the JAPC Letter.

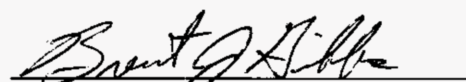
98. Failure to include the JAPC Letter in the record is a material failure to follow the procedure set forth in APA sections 120.54(8)(h). The Commission's legal authority to adopt a fresh look rule was a key issue in the case and a subject of intense debate and Commission interest. The JAPC Letter identified the same serious concerns about the proposed rule that GTE and BellSouth had. Since the Commission receives its authority from the Legislature, and the Legislature itself had questioned the

Commission's authority to implement the proposed rule, the JAPC's inquiry should have figured prominently in the rulemaking. But because it was left out of the record, parties were denied the opportunity to comment on it during the Commission proceedings and it was not considered in any meaningful way by the Commission. Given these facts, the Commission cannot overcome the presumption of materiality that attaches to its failure to include the letter in the record. The rule must be invalidated because the Commission failed to follow applicable rulemaking procedures.

RECOMMENDED ACTION

In adopting the fresh look rule, the Commission has, for the several reasons discussed herein, exceeded the powers, functions, and duties the Legislature has delegated to it. The rule represents exactly the kind of abuse of delegated authority the 1996 revisions to the APA were intended to prevent. The rule is thus declared invalid.

Respectfully submitted on May 24, 2000.

By: 

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into which local exchange company (LEC) services are effectively competitive in 1993.	DOCKET NO. 930046-TP ORDER NO. PSC-94-1286-FOF-TP ISSUED: October 17, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING CERTAIN MOTIONS

AND

NOTICE OF PROPOSED AGENCY ACTION
ORDER REGARDING COMPETITIVE STATUS
OF CERTAIN LEC PROVIDED SERVICES

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the actions discussed in Sections III, IV, V and VI of this Order are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. BACKGROUND

Chapter 364, Florida Statutes was substantially revised during 1990, resulting in an increased statutory emphasis on allowing competitive forces to guide markets where possible. In particular the Legislature created Section 364.338, Florida Statutes, establishing the methodology by which the determination as to whether and under what conditions services would be subjected to competition.

Pursuant to 364.338(2), a determination of whether a LEC service is subject to effective competition may be made "on motion by the commission or on petition of the telecommunications company or any interested party." In addition, Section 364.338(2)

describes the relevant factors to be considered in making a determination of whether or not a LEC service is "effectively competitive." The factors include both economic criteria and public interest considerations.

In conjunction with a determination that a service is effectively competitive, several other matters must also be considered including anticompetitive safeguards, the level and nature of regulatory oversight, as well as the initial pricing and costing parameters for the services to avoid cross subsidies.

The first to be examined, pursuant to Section 364.338, was pay telephone service. By Order No. PSC-93-0289-FOF-TL we found that this service was not effectively competitive.

By Order No. PSC-93-1768-FOF-TP (93-1768), we began the systematic examination of all LEC services to determine the level of competition for each service. Certain services, as set forth in that Order, were found to be not effectively competitive. Certain other services were determined to warrant further investigation and analysis before a final decision could be made.

The investigation included review of information from four major LECs consisting of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell), GTE Florida Incorporated (GTEFL), United Telephone Company of Florida (United), and Central Telephone Company of Florida (Centel); three major interexchange carriers, AT&T Communications of the Southern States Inc. (ATT-C), Sprint Communications Company (Sprint), and LDDS; two alternative access vendors, Intermedia Communications, Inc. (Intermedia) and Time-Warner AxS of Florida, L.P. (Time Warner); the Florida Cable Television Association; and 78 telecommunications equipment vendors. All information was collected via formal discovery or data requests, with the exception of the equipment vendors who were contacted through a written survey.

II. PROCEDURAL MATTERS

A. Motion to Strike Pleading

On May 6, 1994 United and Centel filed a Motion to defer further action in Docket No. 930046-TL. On May 23, 1994, Southern Bell filed "Southern Bell Telephone and Telegraph Company's Response to and Concurrence with Motion to Defer of United and Centel." In its Motion, Southern Bell adopts the arguments of

United and Centel. Southern Bell further argues that the lack of immediacy driving this docket coupled with the potential that legislative changes will render this docket moot warrant deferring the docket.

On June 3, 1994, Time Warner and FCTA filed a Joint Response to and Motion to Strike Southern Bell's Concurrence with United and Centel. In support of its motion to strike, Time Warner and FCTA argue that Southern Bell's response is untimely pursuant to Rule 25-22.037(2), Florida Administrative Code. They further argue that Rule 25-22.037(2) permits only responses in opposition to a motion, not "concurrences." Since Southern Bell's motion is a concurrence and not in opposition, it is precluded by Rule 25-22.037(2) and should be stricken.

Rule 25-22.037(2)(b) states, in pertinent part:

> Other parties to a proceeding may, within seven (7) days after service of a written motion, file written memoranda in opposition.

FCTA is correct when it states that Southern Bell's Motion is not in opposition to a motion. However, it is incorrect in its conclusion that a "concurrence" is precluded by this rule. Substantively, Southern Bell's concurrence is simply another motion seeking to defer the docket. There is no time limit set by Rule 25-22.037 for filing such motions; the rule is silent on such motions. Accordingly, we find it appropriate to deny the motion to strike.

B. Motions to Defer Proceeding

On May 6, 1994, United and Centel filed a motion to defer further action in Docket No. 930046-TP. In support of its Motion, United and Centel argue essentially that in light of the potential for legislative change and the lack of urgency in this proceeding, the parties' resources and efforts will be better spent focusing on legislation.

GTEFL and Southern Bell filed motions joining and concurring in United's and Centel's Motion on May 16, and May 23, 1994, respectively. Both of these companies echoed the arguments raised by United and Centel.

FCTA and Time Warner jointly responded timely in opposition to the Motion to defer on May 16, 1994. Intermedia also responded timely in opposition on May 16, 1994. In opposition to the Motion to defer, FCTA and Time Warner argue the following: any legislative changes are too speculative to justify deferral; the Commission

should not ignore the legislative mandate to encourage technological innovation and competition; the LEC's arguments are self-serving; and the determination of which services are effectively competitive is critical to promotion of a full and fair telecommunications environment. Intermedia echoes the arguments of Time Warner and FCTA. Specifically, Intermedia argues that the notion that deferral in this case on the basis of speculative legislative change would apply in every case now pending before the Commission, as well as every docket opened in the next nine months.

There is clearly the potential for legislative change in 1995. However, any argument that the our actions in this case would be rendered useless is too speculative to justify stopping our actions to foster a competitive environment. To cease the actions specifically directed to encourage competition based on such speculation would be inappropriate. Accordingly, we find it appropriate to deny the motions to defer this docket.

III. ANALYTICAL METHODOLOGY

Section 364.338(2)(a)-(g), sets forth the framework for the analytical methodology utilized to determine whether a service is effectively competitive. The statutory criteria are:

> (a) The effect, if any, on the maintenance of basic local exchange telecommunications service.
>
> (b) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.
>
> (c) The ability of competitive providers in the relevant geographic or service market to make functionally equivalent or substitute services available at competitive rates, terms, and conditions.
>
> (d) The overall impact of the proposed regulatory change on the continued availability of existing services.
>
> (e) Whether the consumers of such service would receive an identifiable benefit from the provision of the service on a competitive basis.
>
> (f) The degree of regulation necessary to prevent abuses or discrimination in the provision of such service.

(g) Such other relevant factors as are in the public interest.

Paragraphs (b) and (c) deal with economic criteria, while the remaining paragraphs deal with public interest factors.

The nature of the information relevant to the economic criteria can be classified into the following five categories, along with many of the questions staff analyzed in making a determination in each category:

1. Comparability of Substitutes - are the products being sold true functional equivalents, i.e. do they actually perform the same or nearly the same function? Could one really be substituted for another and provide the same service for the consumer?

2. Market Coverage of Competitors - (based on size and types of customers) - how much of the total market do competitors compete for?

3. Size and Product Line Scope of Competitors - are the competitors sizable enough to impact the market? Do their competitive product lines compare with the others they are competing against?

4. Performance of Competitors (level and barriers) - are the competitors profiting from their efforts in the market? Are competitors staying in the market for substantial lengths of time? Are their market shares increasing over time, or decreasing?

5. Level of LEC Performance - is the LEC profiting from its efforts in the market? Is its market share increasing over time, or decreasing? Have its prices risen or fallen for its competitive services?

Our examination of each service focuses first on the five categories set forth above. Significant adverse findings regarding categories 1, 2, 4 or 5 indicates that the service in question clearly fails the economic criteria. This failure necessitates a finding that the service is not effectively competitive.

Adverse findings regarding category 3 may not, alone, indicate that a service is not effectively competitive. Even with a limited size or scope of competitors, a service could possibly be effectively competitive. For example, competitors with the LECs' Centrex products may not be large in size, or may not offer all of

the features of Centrex systems. However, if in aggregate the LEC's competitors are large enough or their products sufficiently substitutable to drive the LEC to reduce its price near incremental cost over time to maintain its market share, or if the LEC's market share dwindles over time, the service may be effectively competitive. This may be true even if the size of the competitors or the scope of their products "fails" our category 3 analysis.

Those LEC services which have no significant adverse findings in any category must be further analyzed according to the other "public interest" factors set forth in Section 364.338(2). If no adverse factors are discovered in those areas, the services can be deemed "effectively competitive."

IV. REGULATORY TREATMENT FOR EFFECTIVELY COMPETITIVE SERVICES

Once the determination is made that a service is effectively competitive, the decision must be made as to the appropriate level of regulatory oversight for such service. Section 364.338(3)(a) provides that we may:

1. Exempt the service from some of the requirements of this chapter and prescribe different regulatory requirements than are otherwise prescribed for a monopoly service, or

2. Require that the competitive service be provided pursuant to a fully separated subsidiary or affiliate.

In our review, there are three basic levels of regulatory treatment for effectively competitive services: minimum price tariffs, detariff, or deregulation.

A. Minimum Price Tariffs

Under minimum price tariffs, tariffs would continue to be filed for the service and we would continue to regulate the service. The revenues, expenses and investments attributable to the service will be included in the calculation of the company's revenue requirement or "above the line". However, the tariff requirements would be relaxed for more price flexibility. A price floor would be set, but the floor would then be reflected in the LEC's tariff. The LEC would then be free to change the price or terms for the service to any price above the floor to be effective seven days from the date the change is filed. Any such changes would not be subject to direct Commission approval prior to becoming effective.

Minimum price tariffs are appropriate if the service is not severable from regulated services and continues to be sold as part of a regulated service package. Minimum price tariffs help ensure that competitive services are not priced below their relevant costs in either stand-alone versions or as part of regulated packages.

B. Detariff

Detariffing means that the service would still be regulated but the LEC's rates and terms for the service would no longer be filed and published in the LEC's tariffs. Revenues, expenses and investments attributable to the service could go either above or below the line. An initial minimum price floor would be set by the Commission. The LEC would then be free to price the service at any point at or above the approved price floor. LECs could also negotiate unlimited individual contracts for these services, as long as the contracted rates were above the floor price.

C. Deregulation

Under deregulation, all revenues, expenses and investments attributable to the service are removed from calculation of the LEC's revenue requirement and placed below the line either through a separate subsidiary or accounting separations. The Commission would then no longer oversee any aspect of the provisioning of the service, other than to make sure any accounting separations effectively negated the possibility of anticompetitive cross-subsidies benefitting the deregulated service. All facets of providing the service such as prices, quality of service, customer relations, and conditions of service, would be regulated by the competitive market.

Generally, a service should be deregulated if it is severable from regulated services and the public as a whole would benefit the most if it is no longer regulated. Ideally, the operations associated with the service are totally severable and can be placed in a separate subsidiary. Totally severable means two things: severable both operationally - the service can be efficiently provided autonomously with separate personnel and facilities; and functionally - the service, or parts of it, are not monopoly inputs to either LEC or competitors' services, and they are not bundled with monopoly services. If a service is severable functionally but not operationally, it may still be deregulated, but with accounting separations instead of a separate subsidiary.

We note that any decision to set minimum prices, detariff, or deregulate a service deemed to be effectively competitive may be reviewed and, if necessary, subjected to added regulation pursuant to Section 364.338(4), Florida Statutes. Any decision to deregulate a service does not send such service beyond our authority to determine whether and under what circumstances a company may provide the deregulated service. We retain jurisdiction to examine the provision of any service at a future date and subject the service to more or less regulation as deemed in the public interest.

V. COMPETITIVE STATUS OF CERTAIN LEC SERVICES

By Order No. 93-1768, we determined to systematically review each LEC service to determine which, if any, were effectively competitive. The initial group of services to be examined in the first phase was: Call Forwarding/Call Waiting, Private Line Service, Foreign Exchange Service, Centrex/ESSX, and Custom Calling Services - Business.

As will be seen below, we have expanded the number of services under consideration from those specifically set forth in Order No. 93-1768. The expansion is appropriate to maximize our efficiency in the review process. The full list of services examined herein are:

- Call Waiting (Residence, Business)
- Call Forwarding (Residence, Business)
- Three-Way Calling (Residence, Business)
- Speed Calling (Residence, Business)
- Centrex/ESSX
- Foreign Exchange Service
- Dedicated Services (Private Line, Special Access)

A. Call waiting

1. Comparability of Substitutes

Call Waiting functions by sending a tone to a customer's premises while the customer is on a call, alerting her/him that another caller is trying to reach them. This necessitates more "calls" than lines, something that currently only the local exchange company can provide.

Several vendors in the survey indicated that they sold Call Waiting as part of a PBX function package, but realized on examination that the function of their Call Waiting was not the same as the LEC's. For instance, if a PBX station is busy, the PBX can send a tone to the station that another call is waiting for that station, but only if an additional trunk line (path to the outside world) is open. If all trunks are busy, the next caller simply gets a busy signal. This is fundamentally different from allowing more calls to go through to the customer than the customer has lines/trunks/paths, as the LEC's Call Waiting does. From this we conclude that the features sold by the competitive vendors are not functional equivalents to the LECs' offerings for Call Waiting.

2. Market Coverage of Competitors

The vendors surveyed marketed almost entirely to business customers, and even then mostly to businesses of some size such as those with 15 or more stations. This coverage, or lack of coverage, suggests that even if the products were functionally equivalent the competition for customers would not include small businesses or residences. This is inconsistent with Southern Bell's current residential penetration rates for Call Waiting of 51%, which suggest the residential market is much larger than the business market penetration rate for this service of 14%. It does not appear that the competitors' market coverage is sufficient for an effectively competitive service.

3. Size and Product Line Scope of Competitors

The vendors surveyed varied in size from fewer than 4 employees to 20 or more employees. Although none of the vendors appeared substantial enough in size to compete with a local exchange company's resources, the combination of vendors appears to be substantial enough to influence the LECs' behavior in sales and pricing for some services.

The vendors' product line scope for medium to large businesses appears to be sufficient. Their PBX systems perform most of the functions that the LECs' Centrex systems do, as well as some additional functions. However, none of the vendors surveyed offered a stand-alone Call Waiting feature; they only offered it in conjunction with a PBX system.

Although the competitors' size does not appear to be a hindrance to competition, their lack of a directly-competing product indicates that they have an insufficient product line scope to be effective competitors to the LECs for Call Waiting service.

4. Performance of Competitors

The vendors' responses to survey questions were slightly misleading on this subject. Even though most vendors indicated they had been in business for over two years and sales for Call Waiting were generally increasing over time (two positive indicators of competition), their responses were actually citing PBX sales and their competition against Centrex/ESSX services. This indicates any competition for Call Waiting (as the PBX version is not functionally equivalent to the LECs', it is inaccurate to state that any true competition can exist between the services) is between a PBX feature and a Centrex/ESSX feature. Since no competitors actually sold the Call Waiting feature separately, It appears that the competitors' performance is insufficient for an effectively competitive service.

5. Level of LEC Performance

The LECs' responses indicated that their residence and business penetration rates for Call Waiting were generally the highest of any Custom Calling Feature and increasing over time, while prices have remained stable or increased. This indicates a lack of competition. Additionally, we are is perplexed at how Southern Bell's residential penetration rate of 51% in 1993 can be so far above Centel's rate of 14% and GTE's rate of 27% . It appears that the LECs' performance in the Call Waiting market appears to be more that of a monopolist than a competitive provider.

6. Conclusion

As discussed above, Call Waiting failed all five of the economic dimensions for effective competition. We, therefore, find that it is not effectively competitive pursuant to Section 364.338. Further, it appears that its potential for competitiveness is minimal. Since no non-LEC vendor markets the feature by itself, and its function necessitates local switching, there are no potential competitors in the near term.

B. Call Forwarding

1. Comparability of Substitutes

Call Forwarding simply forwards a customer's calls to a predetermined number when the customer is not home or the customer's phone is busy, not answered, or both. Remote Call Forwarding and Call Forward Busy/No Answer are all derivations on the same idea.

Telephone instruments can simulate this feature today. Most PBXs and key systems offer this as part of their feature packages; even relatively non-sophisticated devices available to consumers such as multiline telephones in the $200-300 range, or PC-based voice mail systems in the $100-300 range, can provide a similar function. However, there is one main component that is critically different. When calls are forwarded through LEC-provided Call Forwarding, only one telephone line is required. The function is performed in the LEC's central office. For Call Forwarding to work through a customer's telephone, two or more lines are needed. An incoming call is placed on hold while the forward-to number is dialed through another line, then the two calls are "bridged" together. This eliminates all single-line residences and single-line businesses, a substantial segment of the market.

2. Market Coverage of Competitors

As discussed above, the LECs' competitors concentrate on medium to large size businesses, ignoring a substantial segment of the Call Forwarding market. Market coverage for this service appears insufficient for effective competition.

3. Size and Product Line Scope of Competitors

The competitor's sizes and numbers appear sufficient for a competitive market; however they do not offer stand-alone Call Forwarding features. Therefore, it appears that the product scope is insufficient for effective competition.

4. Performance of Competitors

Again, since the products marketed are not directly substitutable, particularly for single-line businesses and residences, the performance of the competitors is not indicative of a competitive market.

5. Level of LEC Performance

The LECs also enjoy healthy penetration rates that have generally increased over time for Call Forwarding, as they do for Call Waiting. These factors indicate a lack of real competition.

6. Conclusion

Call Forwarding suffers much the same fate as Call Waiting. In our analysis, the service fails in each of the five economic categories for competitiveness. Therefore we find the service is not effectively competitive.

We note that separating business and residential markets in a competitive analysis may lead to conclusions that a service is not effectively competitive for residences, but is for businesses or certain size businesses, or vice versa. We recognize this and anticipate such a conclusion at some point for certain services. However, we do not believe it applies here.

Call Forwarding for medium to large businesses with PBXs or Centrex systems provided by either the LEC or PBX vendor more closely resemble functional equivalents. However, there is still the problem that if all the outside trunks are busy on a PBX, a busy/no answer station cannot forward any additional calls because the calls are given a busy at the LEC central office. But if some trunks are free, the services perform similarly.

However, we do not believe that this equivalency warrants a finding of effective competition or further investigation. Call Forwarding is not sold by PBX vendors as a stand-alone feature; it is merely packaged in with several other features that any PBX can perform. Call Forwarding for medium to large business appears to simply be a minor element in the analysis of PBX versus. Centrex competition.

C. Three-Way Calling

1. Comparability of Substitutes

LEC-provided Three-Way Calling allows a customer to put one call on hold, call another number, and bridge all three locations together, all with one telephone line. Many of the same telephone instruments and devices discussed in the previous two issues will perform this function, but again need at least two lines to operate. A customer must put caller one on hold, then make a separate call over another line, then bridge them all together. This again negates the functional equivalency for the residential and small business market in the same fashion as Call Forwarding discussed above.

2. Market Coverage of Competitors

As discussed above, the LECs' competitors concentrate on medium to large size businesses. This is only partial market coverage, and even this coverage would not warrant attempting to segment the businesses into separate markets, as Three-Way Calling is not offered as a stand-alone feature. Accordingly, it appears that market coverage for this service is insufficient for effective competition.

3. Size and Product Line Scope of Competitors

Although the competitors' sizes and numbers appear sufficient for a competitive market, they do not offer stand-alone Three-Way Calling features. Therefore, it appears that the product scope is insufficient for effective competition.

4. Performance of Competitors

Again, since the products marketed are not directly substitutable, particularly for single-line businesses and residences, the performance of the competitors is not sufficient for a competitive market.

5. Level of LEC Performance

The LECs also enjoy healthy penetration rates that have generally increased over time for Three-Way Calling, as they do for Call Waiting and Call Forwarding. These rates indicate a lack of real competition.

6. Conclusion

Again, this service suffers from the same limitations as the other features discussed previously. For the same reasons, we find that Three-Way Calling is not effectively competitive. Also, because Three-Way Calling is sold by PBX vendors the same way as Call Forwarding and other features for medium-large businesses, this feature also appears to be a minor element in the PBX versus. Centrex analysis.

We note that Three-Way Calling should not be confused with larger conference calling products that allow several customers to reserve space and "dial in" to a central conference bridge. These services go by various trade names such as Conference Service, Meet-Me, and Conference Line, and are offered by most major LECs and IXCs. Many of these services appear to be functionally equivalent and may have a significant amount of competition for customers. These conferencing services should be examined at a later date with other services.

D. Speed Calling

1. Comparability of Substitutes

LECs provide Speed Calling in either eight number or 30 number variations. These features allow customers to program telephone numbers to memory so that they can be recalled by

dialing two or three digits. The vendors surveyed also sold telephone sets that performed the same functions, as well as PBX Speed Calling features.

Additionally, virtually all telephone sets that sell for more than $15.00 at any retail outlet also feature Speed Calling memories. Although the LECs' Speed Calling features rely on central office processors, while most of its competition use small memory chips inside telephone instruments, the service is the same to the end user. Therefore, it appears that the products are functionally equivalent.

2. Market Coverage of Competitors

51 out of 60 respondents to the vendor survey indicated Speed Calling as the most often sold feature. Coupled with the sale of one and two-line telephone sets with number memory from many retail outlets, it appears that all the market segments - residences and small, medium, and large businesses - are adequately covered by the competitive firms.

3. Size and Product Line Scope of Competitors

The size and number of PBX vendors does not appear to be a hindrance to effective competition for medium to large size businesses. Adding the telephones manufactured by AT&T, other Bell companies, Sony, Mitsubishi, and others sold through large retail outlets, it appears that the size and number of Speed Calling competitors is more than sufficient for each segment of the market.

The product line scope of competitors is also adequate. Telephone sets and speed dialers sold at outlets such as Radio Shack have up to 100 number memories, and PBX vendors claimed that PBXs can have number memories in the thousands. It appears the breadth of products sold by the LECs' competitors is also more than a sufficient scope when compared to the LECs' offerings.

4. Performance of Competitors

The vendor survey indicated that, in general, the vendors had high confidence that their Speed Calling sales were above average and that they could compete effectively with the LECs. Also, the continued availability and increasing pervasiveness of speed dialing telephones to the average consumer indicates that other competitors are also performing well. The vendor survey also indicated that many vendors actually predicted that their

Speed Calling sales would decrease over the next two years; their responses to other services were generally that their performance would increase over time. This also indicates increasing competition.

5. Level of LEC Performance

LEC performance also indicated significant competition. LEC penetration rates for Speed Calling have steadily declined from 1990-1993. For example, Southern Bell's residential penetration for Speed Calling fell from 18.25% in 1990 to 8.02% in 1993, a decrease of 56%. This decline occurred notwithstanding a rate decrease in 1989 to the bottom of Southern Bell's approved rate band in an attempt to answer the competition from telephones and autodialers. This performance, coupled with the vendors' prediction of declining sales, indicates that there are numerous competitive pressures in addition to the LECs' and telephone system vendors' competition with each other.

6. Other Statutory Factors

Since speed calling has passed the economic analysis, we must also examine the remaining statutory factors necessary to determine the competitive status.

a) Effect on maintenance of basic local service

There does not appear to be any detrimental effect on basic service should Speed Calling be declared effectively competitive. Southern Bell still has a high contribution from this service, in spite of the rigorous competition it faces. As long as a reasonable price floor is set for this service, it does not appear there will be any adverse impact on local service.

b) Availability of Existing Services

It also appears that Speed Calling has little or no effect on the availability of existing services. One possible exception could be the packaging of Speed Calling with other Custom Calling features. Relaxing price regulation for Speed Calling may result in reducing the price of regulated Custom Calling packages. This should benefit consumers, as long as Speed Calling is not sold below its cost.

c) Consumer benefits from competition

The consumer benefits from competition are already evident in this market. The relaxation of price regulation, as mentioned in the previous paragraph, will only add to those benefits so long as cross-subsidies are avoided.

7. Conclusion

Speed Calling has passed the competitive analysis in all five of the critical economic areas, as well as the other statutory areas examined. Accordingly, we find that Speed Calling is an effectively competitive service. We also believe that we should relax regulation over the price of Speed Calling. At this point, the most appropriate regulatory treatment is a minimum price tariff. The next step is to set a minimum price for each LEC for Speed Calling. This will avoid any potential for cross-subsidy.

Ideally, the price floors should be equal to or greater than each company's incremental cost for the service. Unfortunately, we currently have no reliable cost data upon which to make the determination. Therefore, we find it appropriate that a temporary price floor be set until cost data is submitted and approved.

The existing tariffed rate for Speed Calling shall be the temporary floor for each LEC that does not have approved banded rates. For each LEC that has approved banded rates for Speed Calling, the temporary floor shall be set at the bottom of the approved band. This will assure that each company's rate is above its incremental costs until such costs can be determined. We note that banded rates were initially set with the bottom of the band adequately covering incremental costs. Each LEC shall file a current incremental cost study for all Speed Calling features within 90 days of the date this portion of this Order becomes final. This will assure that the proper permanent price floor can be established. Our directive herein is consistent with recently adopted Rule 25-4.045(3), Florida Administrative Code, which states in part:

> When a LEC service has been deemed to be subject to effective competition and an order issued, the local exchange company shall file incremental cost data . . . within 90 days after the date of the order.

The cost study shall include sufficient backup documentation for a complete analysis.

LECs shall continue to file tariffs for Speed Calling features, and the revenues, expenses, and related investments for Speed Calling shall remain above the line. Detariffing Speed Calling is not appropriate because Speed Calling is frequently packaged with other Custom Calling features that are not competitive and that will be fully regulated for the foreseeable future. However, we also find that any tariffs dealing solely with Speed Calling features may become effective without direct Commission action seven days from the date of filing. This will allow the LECs the flexibility to change prices as the market dictates while allowing the Commission to continue to monitor the competitive service's relationship to LEC monopoly services.

E. Centrex/ESSX

1. Comparability of Substitutes

Centrex systems[1] are in direct competition with Private Branch Exchange (PBX) systems for medium to large size business customers and key telephone systems for smaller businesses. The size threshold for these customers is generally 25 or more station lines. Either system can provide a number of features including attendant-less answering, automatic call distribution, queuing, voice mail access and direct numbers to stations.

Although the exact lists of services are not identical, the LECs and vendors agreed that the features of each are sufficiently comparable to make them direct substitutes for one another. From this it appears that Centrex/ESSX systems and PBXs are functionally equivalent.

2. Market Coverage of Competitors

The responses to the vendor survey indicated that the level of competition for businesses with 25 or more station lines was quite vigorous. This market segment is also where the majority of Centrex/ESSX systems are sold by LECs. Of the 60 vendors surveyed, 46 stated that they sold PBX systems in competition with the LEC. This was second only to Speed Calling, discussed above. The vendors generally stated that their principal competitive efforts were directed squarely at the PBX versus. Centrex markets and that these efforts were significantly more strenuous than in any other area.

[1] The terms "Centrex" and "ESSX" describe the same service. ESSX is a Southern Bell trade name for the service. Other LECs sometimes provide the service under different trade names.

Although some LECs sell Centrex/ESSX systems to customers with as few as two access lines, it does not appear that these customers are vigorously courted by the LECs. Also, many vendors also sell key systems to small businesses as an alternative to a small Centrex/ESSX system. Although the concentration of efforts is for larger customers, sufficient market coverage is present for the entire range of Centrex/ESSX products.

3. Size and Product Line Scope of Competitors

It appears from our review that the size and product scope is sufficient for an effectively competitive market. Although the size of even the largest PBX vendor is minuscule compared to Southern Bell, the number of competitors in any market area is substantial. Further, the vendors' products have comparable features to Centrex/ESSX, but also come in several size variations to more directly compete with the scope of products the LECs sell.

4. Performance of Competitors

The vendors indicate that, for the most part, their performance in the market was at or above average (85%). Our review of this information, although inconclusive, indicates that there is some kind of competitive equilibrium in the PBX-Centrex market. We do not know, however, whether this equilibrium is market driven or controlled by the LECs.

5. Level of LEC Performance

Our review of LEC performance is also inconclusive, but it suggests significant competition. Southern Bell was the only company that provided aggregate contribution figures for Centrex services. Southern Bell stated that its average contribution from ESSX service was 16%. This margin was the lowest contribution level of any service polled. This is a strong sign that there are competitive forces at work in this market.

6. Other Statutory Factors

Since Centrex/ESSX has passed the economic tests, we must now evaluate the service according to the other statutory factors.

a) Effect on maintenance of basic local service

We are unaware of any detrimental effect on the maintenance of basic local service from policy decisions in this recommendation. However, it is not certain that such possibilities do not exist. We note that we have some concerns regarding the rate relationships among rates for PBX trunks and Centrex station lines, DID numbers and Centrex features, as well as marketing practices, cost allocations and loop costs. However, any impact on local service would necessitate that we change existing access line or feature rates for PBX or Centrex systems. No such decisions are being made here to change those rates. Therefore, we do not believe that there will be any adverse affect on basic service as a result of any decisions made in this Order.

b) Impact on availability of existing services

We are unaware of any adverse impact on the availability of existing services.

c) Consumer benefit from competition

As with Speed Calling, the consumer benefits from the competition between PBX and Centrex/ESSX marketers are: more features, lower price, better service and more choices. We believe these benefits exist today; we do not believe they will be adversely affected if we declare the service effectively competitive.

7. Conclusion

Upon consideration of our analysis above, we find that Centrex/ESSX Service is effectively competitive. We further find that the appropriate regulatory treatment is to detariff this service. Pursuant to Section 364.338, we have broad discretion in the regulatory treatment of effectively competitive services. We can use that discretion to relax our regulatory oversight to any degree necessary to extract the maximum benefit to ratepayers. We believe it questionable that the public at large will benefit most from deregulation. Keeping all of the revenues, expenses and investment attributable to this service in the regulated operations will continue to help keep local rates affordable and promote new service development. We believe that detariffing Centrex/ESSX will both maximize that benefit, while allowing the LECs to vigorously pursue new customers under similar parameters as their competitors.

Consistent with our decision to detariff this service, we find that price floors should be set for each LEC's Centrex/ESSX services. Each LEC's existing rates shall be the temporary floors until each LEC's actual costs can be determined. This will ensure that rates do not fall below costs until an accurate floor is determined. Each LEC shall file a current incremental cost study for all Centrex/ESSX features within 90 days of the date this portion of this Order becomes final. The cost study should include sufficient backup documentation for a complete analysis. Once the review is complete, we will establish appropriate price floors. Finally, each LEC shall also file tariff revisions removing Centrex/ESSX services from their respective tariffs within 90 days of the date this portion of this Order becomes final.

F. Private Line and Special Access Services

Private Line service is the provision of a point-to-point or multipoint telephone line for the private use of one party. Local exchange companies offer private line service on an analog and digital basis. Private Line is offered via various transmission speeds. Speeds range from as low as 2.4 Kbps to as high as 45 Mbps. This all depends on the configuration and applications needed by the customer. Private line service can be used to transmit voice, data, or video on either an intraexchange basis or an interexchange basis.

Special Access service provides a transmission path to directly connect an IXC's terminal location in a LATA to either an end-user's premises; two IXC terminal locations; or a HUB. A HUB is a facility where bridging and multiplexing functions are performed. Special Access is used to connect a HUB and an end-user's premises. Special Access service is also used to provide a link for private line service. Special access service is offered at various speeds, grades of service, and bandwidth specifications. Speeds range from 75 baud to 274.176 Mbps depending on grade of service. Special Access service can also be offered on an analog or digital basis. Special Access service can be used to transmit voice, data, or video either on a point to point or multipoint basis. Special Access service is necessary for an IXC's provision of private line service to its customers.

1. Comparability of Service

The principal providers of private line and special access services, other than the LECs, are alternative access providers (AAVs). Other alternative sources include IXC private line

services, private line service resellers, bypass facilities such as microwave, Very Small Aperture Terminals (VSAT), coaxial cable networks, and spare capacity on electric utility private networks.

AAVs provide functionally equivalent alternatives to the LECs' private line and special access services. AAVs can provide the same type of digital and analog facilities from an IXC's point of presence (POP) to an end-user's premises, or between an end user's premises. These facilities can range from a DS0 to a DS4 facility.

There are indications that cable television companies may not be able to provide private line or special access services that are comparable to those of the LECs, at least at this time. For example, one-way coaxial cable does not provide the simultaneous two-way data transmission that customers are demanding. John Holobinko, Vice President of Marketing and Strategic Planning, American Lightwave Systems, concluded that while there may be potential in the future, cable TV's current network architecture cannot provide for such services as local broadcast-quality video feeds to access carrier points of presence (POPs), video conferencing, or T1 access links. Accordingly, it appears that cable TV providers do not provide alternatives to LEC private line services or special access services at this time. However, it also appears that with the appropriate network electronic upgrades, cable TV companies may provide functionally equivalent alternatives in the near future.

Cable companies such as Time Warner have proposed experiments that provide customer access to IXC POPs, bypassing LEC networks. The current and proposed mergers of AAV and cable television networks will make cable television a viable provider of special access and private line services. Continued emergence of cable and AAV technologies will remove the current technical barriers that cable television faces in providing private line and special access services. When a cable company decides to participate in this market, they will do so as an AAV. Some cable companies such as Time-Warner have already been certificated as AAVs.

The absence of cable companies from this market at the present time is <u>not</u> a crucial determinant of the competitive level of private line or special access service. AAVs and IXCs could provide effective competition in some geographic areas if all legal restrictions are lifted. Also, AAVs and cable companies are experiencing increasing cross-ownership, and their

networks are beginning to intertwine. This will increase the AAVs' competitiveness in the future, while making the cable companies less of a direct competitive threat and more like holding companies for AAVs.

In conclusion, we find that AAVs and IXCs offer functionally equivalent private line and special access services.

2. <u>Market Coverage of Competitors</u>

AAVs are restricted by statute from providing private line services between unaffiliated entities. AAVs are also restricted from providing the special access portion of private line service between unaffiliated entities. While AAVs provide a technically comparable alternative to the LECs' private line/special access services, the markets that they can target are limited to the affiliated entity market. For example, an AAV can only provide private line service between a bank's main office and its branches. It could not provide private line service between a bank branch and an information service provider, or a bank and the Federal Reserve Bank. AAVs also are restricted from providing the special access portion of a private line that connects two nonaffiliated entities, such as connecting a local bank in Miami with a brokerage house in Jupiter. AAVs <u>can</u> presently provide a special access line from an end user to an IXC's POP for the IXC's switched services. However, this ability is only a part of the special access market. Providing special access connections for private lines is a significant part of the special access market as a whole.

AAVs continue to maintain that the statutory prohibition on providing their own switched services impedes their ability to compete more effectively in the private line/special access markets. This restriction prohibits AAVs from using packet switching to further enhance their networks' efficiencies. Although we recognize this as a limitation that should be removed, we do not believe that the switched service restriction is a crucial determinant of the competitiveness of these markets. AAVs can still compete with LECs if they are allowed to sell their services to the same customers.

Intermedia Communications of Florida (ICI), AT&T, and Sprint indicated that they target large business customers with remote locations and those who have high bandwidth needs. ICI indicated that the type of customers more likely to purchase LEC dedicated services versus those of an alternative provider are those

customers who cannot access an AAV's network, customers with a large portion of their connectivity requirements within a LEC service area, and customers requiring connectivity between unaffiliated entities.

An independent study submitted by United supports the contention of ICI as to the type of customers targeted by AAVs. In the study "Competitive Assessment of the Market for Alternative Local Transport", Dr. Joseph Kraemer found that large end-users identify a number of competitive advantages obtained by using AAVs. These advantages included a focus on high capacity services, price, flexibility in provisioning and service levels, 24-hour centralized network monitoring capability, diverse routing by means of an urban ring architecture, and higher levels of customer service based on a "we try harder" philosophy. AAVs tend to be less expensive, charging rates ten to twenty percent lower than LECs.

Dr. Kraemer also notes that AAV penetration tends to be highest among end-users that are telecommunications-intensive, such as those providing financial services. This is the very market on which LECs concentrate their marketing efforts. In certain geographic areas such as dense, urban areas, AAVs are expected to be significant competitors in the market within three years of entering the market. As long as a LEC does not compete in terms of price, service, and technology, an AAV is expected to garner a 40 to 50 percent share of DS1 and DS3 markets in the relevant geographic area.

While Kraemer argues that the market for transport is increasingly competitive and growing significantly, Dr. Lee Selwyn and Dale N. Hatfield argue that the expansion of AAVs has contributed to the perception that local competition has arrived. In their article, "The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers", they conclude that AAV economic impact on LECs has been "more smoke than fire." Based on a review of access revenues, Selwyn and Hatfield concluded that AAVs have captured 0.8% of the market. While academics may differ on the existence or extent of competition, the question for us becomes the extent of competition in Florida.

United indicated that private line and special access services are extremely competitive in geographic areas where AAVs and other providers have constructed or leased facilities. While United did not cite specific evidence of market expansion of AAVs within its Florida service area, the Company provided independent nationwide studies supporting its contention of expanding market coverage by AAVs. The pattern of AAV growth begins with an

entrance into large urban areas. AAVs then follow large end-users and IXCs to progressively smaller urban areas. AAVs were expected to operate in over 60 of the 75 largest cities in the United States by the early 1990s. Initially, AAVs develop relationships with IXCs to interconnect local IXC facilities with DS3 services, then move on to providing end-user access to IXCs with DS3 and DS1 services. AAVs also support end-user point-to-point service with DS3, DS1, DS0, and fractional T1 services.

Southern Bell has indicated that competition from AAVs is most likely present in densely populated metropolitan areas such as Jacksonville, Tampa, Orlando, and Miami. As an example, Southern Bell cited ICI's completion of 240 miles of fiber networks surrounding the cities of Orlando, Tampa, Miami, and Jacksonville.

GTEFL also indicated that it faces significant competition from AAVs, specifically ICI and Metropolitan Fiber Systems (MFS). The Company indicated that ICI has concentrated its fiber network around large customers such as the University of South Florida, Tampa International Airport, and the large business districts. ICI's fiber network, in some cases, runs parallel with GTEFL's, specifically around the Downtown Tampa area and the Westshore Business District.

Of the thirteen LATAs and Market Areas in the state of Florida, certificated AAVs either provide or have proposed to provide private line and special access services in the following:

-Tallahassee Market Area
-Jacksonville LATA
-Orlando LATA
-Tampa Market Area
-Southeast LATA

In the Tallahassee Market Area, one AAV, Comcast, has proposed to provide private line services to the Tallahassee/Leon County area. The Jacksonville LATA currently has four certificated AAVs that are providing or have proposed providing private line service. They include ICI, Jacksonville Teleport, Continental Fiber Technologies, and Commercial Communications. The Orlando LATA has three certificated AAVs that either provide or propose providing private line service. They include ICI, Time Warner, and FiberCap. The two certificated AAVs servicing the Tampa

Market Area are ICI and Digital Media partners. The Southeast LATA is served by ICI, Metropolitan Fiber Systems of Miami, TCG America, Hyperion Telecommunications, Commercial Communications, and Access Transmission Services.

There are also indications that AAVs and IXCs market their private line and special access services to business customers in densely populated urban areas. Almost all AAVs either provide or have proposed providing service in central and south Florida. AAVs in Florida have specifically targeted the cities of Jacksonville, Miami, Orlando, and Tampa for service provision. A review of AAV applications for each of the currently certificated AAVs indicated that business customers were the primary customers to which private line services were being marketed. The review also indicated that AAVs market high bandwidth services from DS1 to 100 Mbps, plus other services. A review of 45 of the 306 IXC tariffs on file at the Commission indicates that 16 (45%) provide private line services. These services are also targeted at business customers with high bandwidth needs.

The number of companies that received certification as AAVs peaked in 1992 and has been decreasing since then. Ten of the current 15 AAVs received their certifications in 1992. Four were certified in 1993 while only one has been certified in 1994.

In summary, it appears that the provision of private line and special access services by alternative sources is mostly in geographic areas with large urban populations. The customers for whom the AAVs and IXCs compete in this area are business customers with high bandwidth needs. While AAVs and LECs compete for the high bandwidth market, AAV market coverage is limited by Florida statutes. AAVs can only provide private line services between affiliated entities. Because of legal barriers AAVs are locked out of the non-affiliated entity market. The legal restriction on AAVs eliminates their ability to provide technically similar private line/special access services to the nonaffiliated market. Removal of the current statutory restrictions will increase the market coverage of AAV private line/special access service. However, until this is done, Private Line and Special Access Service do not pass muster under this criteria.

3. Size and Product Line Scope of Competitors

AAVs and IXCs concentrate on providing high bandwidth digital private line/special access services. AAVs provide DS0-DS4 facilities. These facilities may be used to provide intraexchange and interexchange private line service, tie line

service for a customer's Local Area Network, special access, video imaging, and video conferencing. LECs provide both analog and digital private line services as well as low bandwidth and high bandwidth services. LEC private line services are also used for LAN to LAN connectivity, special access, and video imaging/conferencing. LECs have focused their concerns regarding private line competition on the high bandwidth digital market.

Since AAVs and IXCs have targeted the high capacity market, it appears that any competition in the supply of private line services is primarily in the high bandwidth, digital private line area. This area appears to be the focus of competition for private line and special access services.

4. Performance of Competitors

Of the IXCs that reported revenues from private line services, we attempted to determine their rate of growth during the period 1990 through 1993. The results varied from IXC to IXC. Wiltel, RealCom, and Cable & Wireless realized significant growth in revenue between the years 1992 and 1993. ATT-C indicated a decline in revenues. Without information on AAV private line revenues we cannot assess how well AAVs did during the same time period.

5. Level of LEC Performance

The performance of the LECs varies depending on the Company during the period 1991-1993. Southern Bell has enjoyed significant positive growth in private line service revenues over the past three years. United's growth in private line service revenues has been positive but not as strong as Southern Bell's. Centel experienced a significant decrease in revenues in the last year of our survey but experienced significant positive growth in the prior year. The rate of growth in special access revenues has declined for each company in the three year period.

6. Other Statutory Factors

Our review of the economic criteria indicates a substantial level of competition notwithstanding the lack of market coverage due to legal limitations. Accordingly we find it appropriate to evaluate the service pursuant to the other statutory criteria.

a) Effect on maintenance of basic local service - As the LECs lose market share, they will lose contribution. Contribution plays an integral part in the maintenance of affordable residential rates. This loss of

contribution should ultimately be offset with contributions toward universal service from LECs, AAVs, and other competitors.

b) Overall impact on availability of existing services - We anticipate no negative impact on the availability of existing services.

c) Consumer benefits from competition - Consumer benefits from competition are already evident in this market. The biggest benefit available to consumers is the benefit of choice. Further competition will only add to those benefits in the short and immediate run via further reductions in prices. As prices charged by one competitor move closer to the other competitor as well as closer to costs, future emphasis will be placed on service quality. We expect this to happen so long as cross-subsidies are avoided.

7. Conclusion

Upon consideration of the above analysis, we find that private line and special access services are not effectively competitive at this time. Our analysis shows that private line and special access service does not pass the market coverage criterion. Legal barriers face potential alternative providers, leaving customers with no comparable alternatives. Customers that demand private line connectivity between their premises and those of a nonaffiliate are limited in choice to the LECs due to statutory restrictions and technical barriers.

We note that once the legal barriers are removed, market coverage of AAV private line and special access services will increase and these services service will become effectively competitive in certain geographic areas. In addition, with the continued merger of AAV and cable company technology and upgrades in cable television networks, the technical barriers to cable companies will be removed. Moreover, even if the restrictions on AAVs were removed and the restrictions on cable were not, private line and special access services would still be effectively competitive since customers would still have adequate choices for private line service.

G. Foreign Exchange Service

Foreign exchange service is exchange service furnished to a subscriber from an exchange other than the one from which the subscriber would normally be served. A local telephone number

from the foreign exchange is provided to the subscriber. This allows subscribers to have local presence and two-way communications in an exchange different from their own. The service is provisioned via dedicated facilities from the subscriber's premises to the foreign office. Foreign exchange service is provided as a voice grade service and is not represented as suitable for satisfactory transmission of data. While LECs make use of private lines when providing foreign exchange service, foreign exchange service differs from private line service in one primary aspect. The provision of foreign exchange involves the use of a central office switch that is used to provide dial tone and access to the network by subscribers physically located in the foreign exchange. Private line as a stand alone service, does not involve the use of a switch.

There are four components necessary for providing foreign exchange service. They include the closed end facility, the home wire center, the open end facility, and dial tone. The closed end facility is the dedicated portion that runs from the customer's premises to the open end facility. The open end facility denotes the dial tone end of the foreign exchange service. This is where network switching within the foreign exchange occurs. The home wire center denotes the wire center from which a customer would normally be served local exchange service. Finally, dial tone refers to the audible tone sent from an automatic switching system to a customer to indicate that the equipment is ready to receive dial signals.

An example of foreign exchange service would be an airline's reservation service. Because of the advertised low air fare, a customer in Vero Beach decides to reserve a flight on D'Haeseleer Airlines. She looks up the number for D'Haeseleer Airlines in the Yellow Pages. While the number she dials is a local number, the call is being answered in Riviera Beach. D'Haeseleer Airlines maintains a local presence in Vero Beach via the foreign exchange service it has purchased from the LEC. To the Vero Beach customer the call is toll free.

1. Alternative Providers of Foreign Exchange Service

Southern Bell was the only LEC that identified alternative providers of foreign exchange service. Southern Bell listed Sprint's Foreign Exchange service and discounted outbound and inbound long distance services offered by IXCs. The listed services include AT&T's "The i Plan" and MCI's "Friends and Family."

2. Comparability of Alternative Services

The IXC services identified by Southern Bell do not appear to be comparable to LEC provided foreign exchange service. The IXC services cited by Southern Bell require use of the LECs' switched network. The LEC's switch is necessary for the provision of dial tone in the foreign exchange. IXCs are not allowed to provide local switching; therefore, they cannot provide dial tone.

3. Conclusion

Since our review of foreign exchange service did not reveal any comparable alterations, we find that the seminar is not effectively competitive. As a result, a discussion of the remaining factors is unnecessary.

VI. SERVICES FOR FURTHER INVESTIGATION

Consistent with our plan to systemically examine LEC services as established in Order No. PSC-983-1768-FOF-TP, the next group of services to be reviewed is:

WATS
800 Service
Hot Line/Warm Line Service
Recording service
Bill Processing Service
Selective Class of Call Screening
Customized Code Restrictions
976 Service
Watch Alert Service
UniServ
Conference Calling
Video transport services

We have investigated only a portion of the list of potentially competitive services. Our investigation shall continue with the services listed above.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Time Warner's and FCTA's Motion to Strike the response and concurrence filed by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company is denied as set forth in body of this Order. It is further

ORDERED that the Motions to Defer this Proceeding filed by United and Centel as well as the associated Motions to join and concur in the motions to defer are denied as set forth in the body of this Order. It is further

ORDERED that the appropriate analytical methodology to determine the competitive status of a service are as set forth in the body of this Order. It is further

ORDERED that the appropriate regulatory treatments for effectively competitive services is as set forth in the body of this Order. It is further

ORDERED that Call Waiting is not effectively competitive as set forth in the body of this Order. It is further

ORDERED that Call Forwarding is not effectively competitive as set forth in the body of this Order. It is further

ORDERED that Three-Way Calling is not effectively competitive as set forth in the body of this Order. It is further

ORDERED that Speed Calling is effectively competitive as set forth in the body of this Order. It is further

ORDERED that the appropriate regulatory treatment for Speed Calling is minimum price tariffs. It is further

ORDERED that each LEC shall file a current incremental cost study for all Speed Calling features within 90 days of the date this Order becomes final as set forth in the body of this Order. It is further

ORDERED that the initial minimum floor price for Speed Calling shall be the current tariffed rate or the bottom of the approved band, whichever is applicable. It is further

ORDERED that tariff changes for Speed Calling shall be allowed to go into effect after seven days from the date that the tariff seeking the change is filed without further Commission review. It is further

ORDERED that Centrex/ESSX Service is effectively competitive as set forth in the body of this Order. It is further

ORDERED that the appropriate regulatory treatment for Centrex/ESSX is to detariff the service. It is further

ORDERED that each LEC shall file a current incremental cost study for all Centrex/ESSX features within 90 days of the date this Order becomes final as set forth in the body of this Order. It is further

ORDERED that the initial minimum floor price for Centrex/ESSX Services shall be the current tariffed rates or the bottom of the approved band, which ever is applicable. It is further

ORDERED that Private Line Service and Special Access Services are not effectively competitive as set forth in the body of this Order. It is further

ORDERED that Foreign Exchange Service is not effectively competitive as set forth in the body of this Order. It is further

ORDERED that the Commissions' investigation shall continue with the additional services set forth in the body of this Order. It is further

ORDERED that any protest filed to any of the actions proposed in Sections III, IV, or VI, or to the determination of the competitive status of any service set forth in Section V of this Order shall be specific as to the action and Section or specific service being protested. If no protest is filed to any specific action in Sections III, IV, or VI or to the specific determination of the competitive status of any service in Section V within 21 days of the issuance of this Order, then such action or the determination of the competitive status of such service shall become final. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 17th day of October, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

TWH

by: Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on November 7, 1994. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the actions in Sections III, IV, V and VI of this Order become final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in Section II of this Order may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and

Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Proposed Order in Case Nos. 99-5368-RP and 99-5369-RP were sent via U.S. mail on May 24, 2000 to:

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