



# Public Service Commission

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**DATE:** DECEMBER 9, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYON)

**FROM:** DIVISION OF AUDITING AND FINANCIAL ANALYSIS (WRIGHT, HACKNEY)  
DIVISION OF TELECOMMUNICATIONS (SIMMONS) SAS  
DIVISION OF LEGAL SERVICES (CALDWELL) D

**RE:** DOCKET NO. 950146-TL - DETERMINATION OF APPROPRIATE SUBSCRIBER PLANT FACTOR TO APPLY TO ALLTEL FLORIDA, INC.

**AGENDA:** 12/21/99 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\AFA\WP\950146.RCM

### CASE BACKGROUND

In 1995, the Commission ordered ALLTEL to hold \$1.353 million plus interest in annual revenues subject to further disposition beginning January 1, 1995. ALLTEL was so ordered because in determining the Company's level of earnings for 1995, one of Staff's concerns was the proper interpretation of 47 Code of Federal Regulations (C.F.R.) § 36.154(f), Limit on Change in Interstate Allocation, and how ALLTEL's earnings would be affected.

In 47 C.F.R. § 36.154(f), a limit on the decrease in the interstate allocation of five percent was adopted by the FCC to help mitigate a large shift in revenue requirements from the interstate to the intrastate jurisdiction in one year during the transition to a flat 25 percent Subscriber Plant Factor (SPF) in 1993. In an effort to prevent Local Exchange Companies (LECs') interstate allocations from dropping precipitously, the FCC elected to phase in the flat allocation rate over a period of eight years,

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ending in 1993. In addition, the FCC created a Universal Service Fund (USF) to assist high cost LECs in maintaining universal telephone service. The FCC describes the USF as "a formula that allocates an additional percentage of the costs of high cost companies to the interstate jurisdiction, over and above the basic 25 percent allocation. The additional percentage of interstate allocation is calculated each year depending upon whether the amount of any particular LEC's costs substantially exceed the national average." To prevent a LEC's interstate allocation from decreasing too rapidly, the FCC provided that no LEC's interstate allocation for non-traffic sensitive costs "shall decrease by a total of more than five percentage points from one calendar year to the next," when taking into account the combined effect of the reduction in SPF and the possible additional costs allocated to the interstate jurisdiction under the USF.

It was not clear in 47 C.F.R., § 36.154(f) whether the limit on the five percent decrease applied after 1993 and after a company's SPF has reached 25 percent. ALLTEL took the position that once its SPF reached 25 percent, the five percent decrease limit no longer applied. Staff's interpretation of the relevant FCC rules was that there was no prohibition against applying the five percent decrease limitation after 1993 and after a study area's SPF had reached 25 percent. This interpretation of the FCC rule meant that ALLTEL's intrastate earnings would be increased by approximately \$1,353,000 in 1995 due to an estimated interstate allocation higher than 25 percent.

Through Order No. PSC-95-0370-FOF-TL, issued in March, 1995, the Commission directed ALLTEL to place the \$1.353 million plus interest in annual revenues subject to further disposition of the Commission pending a ruling by the FCC on the Commission's Request for Interpretation of § 36.154(f). This declaratory ruling was requested by the Commission due to the fact that the LECs in Florida were interpreting the rule in two different ways. Some LECs in Florida believed the five percent limitation applied and some did not. The Commission's Request for Interpretation of the Applicability of the Limit on Changes in Interstate Allocation, § 36.154(f) of the FCC's Rules, was filed in May, 1995. In March 1996, the FCC's Accounting and Audits Division (AAD) staff issued an order that clarified that the five percent limitation does not apply to LECs that had already reached the desired 25 percent interstate allocation.

Certain affected National Exchange Carriers Association (NECA) members filed requests to the FCC to review the AAD Staff Order. In 1997, after soliciting public comment, the FCC agreed with and affirmed the AAD's interpretation of 47 C.F.R. § 36.154(f). The FCC also rejected the contentions of several commenters, including the Florida Commission, that its ruling should apply only prospectively because the ruling adopted an interpretation of the

rule different from that subscribed to by NECA. The FCC then went on to require NECA to correct any improper data it had submitted based on its faulty interpretation of the rule.

NECA members, who would have been adversely affected by NECA's efforts to make intrapool adjustments, then filed petitions for review of the FCC order with the Ninth Circuit and Tenth Circuit Court of Appeals. Both petitions, which were from small LECs serving areas outside Florida, were transferred to the Tenth Circuit Court and consolidated. In November 1997, the appeal was placed in abeyance so that the petitioners could seek clarification from the FCC as to whether the FCC order was to have retroactive effect. In 1998, the FCC clarified the order and asserted that neither the Staff Order nor the FCC Order required NECA to require intrapool adjustments between NECA members for any period of time preceding the Staff Order issued in 1996.

Unsatisfied with the 1998 Clarification Order, the petitioners resumed their appeal to the Circuit Court. Their position was that the FCC's interpretation of the rule was wrong, the rule should not be applied retroactively, and that the Court should order the FCC to prohibit NECA from requiring intrapool adjustments for any period of time prior to the issuance of the Staff Order.

In May 1999, in Denver, Colorado, hearings were finally held on the petitions. On July 19, 1999, the Tenth Circuit Court of Appeals issued its decision. The Court upheld the FCC's interpretation of 47 C.F.R. § 36.154(f), stating the Court "must give substantial deference to the FCC's interpretation of its own regulations." The Court also found that the FCC's ruling has no prohibited retroactive impact stating in its decision: "We do agree with petitioners that a retroactive application of the FCC's interpretation will impose a burden on them. However, this burden arises not from their reliance on any previous FCC policies, but from their reliance on NECA's faulty interpretation of the regulation." Finally, on the petitioners' request of the Court to enjoin NECA from requiring intrapool adjustments for any period prior to the Staff Order, claiming that NECA should be bound by its faulty interpretation of 47 C.F.R. § 36.154(f), the Court refused to address the merits of this request on appeal, stating that this issue is a matter between NECA and its members.

No appeals were filed by the petitioners on the Tenth Circuit Court of Appeal's ruling. According to the FCC's interpretation, since ALLTEL's SPF reached 25 percent in 1993, the five percent limit test can no longer be applied. Therefore, ALLTEL's interpretation of 47 C.F.R. § 36.154(f) was in line with the FCC's and the Circuit Court's interpretation.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission allow ALLTEL to release the \$1,353,000 plus interest held subject to further disposition since the January 1, 1995 effective date?

**RECOMMENDATION:** Yes. The Commission should allow ALLTEL to release the funds previously held subject to further disposition. (WRIGHT, HACKNEY)

**STAFF ANALYSIS:** The Commission ordered ALLTEL, beginning January 1, 1995, to hold \$1.353 million plus interest in annual revenues subject to further disposition pending a ruling by the FCC on the Commission's Request for Interpretation of the Applicability of the Limit on Changes in Interstate Allocation, § 36.154(f) of the FCC's Rules. The FCC filed their interpretation of 47 C.F.R. § 36.154(f) in 1997. Several small LECs serving areas outside Florida appealed the FCC's interpretation. In August, 1999, the Tenth Circuit Court of Appeals upheld the FCC's interpretation. No appeals were filed by the petitioners on the Tenth Circuit Court of Appeal's ruling.

According to the FCC's interpretation, since ALLTEL's SPF reached 25 percent in 1993, the five percent limit test can no longer be applied. Therefore, ALLTEL's interpretation of 47 C.F.R. § 36.154(f) was in line with the FCC's and the Circuit Court's interpretation and different than NECA's original interpretation of the rule. Because of this, Staff has inquired of NECA as to whether ALLTEL could apply for additional monies since they did originally file using the 25 percent interstate allocation. These additional monies could result in ALLTEL overearning for prior years, and this is the reason for the Commission holding the \$1.353 million subject to further disposition. NECA has assured Staff that ALLTEL cannot apply for any additional amounts of Universal Service Funds (High Cost Loop Fund) for prior years due to the use of the 25 percent interstate allocation. Staff therefore recommends that the Commission allow ALLTEL to release the \$1.353 million plus interest in annual revenues being held subject to further disposition since the January 1, 1995 effective date.

ALLTEL elected price cap regulation effective March 1, 1999, pursuant to § 364.051(2)(b), Florida Statutes. ALLTEL's earnings are currently under review up through February 28, 1999, as required by § 364.052, Florida Statutes, to determine the need for disposition of any overearnings. The release of the \$1.353 million will not have an effect on the earnings of the company.

DOCKET NO. 950146-<sup>^</sup>  
DATE: December 9, 1999

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period. If no timely protest of Issue 1 is filed, this docket may be closed upon issuance of a consummation order. (CALDWELL)

**STAFF ANALYSIS:** This docket should be closed if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period. If no timely protest of Issue 1 is filed, this docket may be closed upon issuance of a consummation order.