SUPREME COURT OF FLORIDA

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| BELLSOUTH TELECOMMUNICATIONS, INC., Appellant, v. JULIA L. JOHNSON, etc., et al., Appellees. | CASE NO. 90,671 |

**INITIAL BRIEF OF APPELLANT SPRINT-FLORIDA, INC.**

On Appeal From Florida Public Service Commission Order No. PSC-97-0488-FOF-TL

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## STATEMENT OF CASE

This is an appellant's brief by Sprint-Florida, Incorporated in this direct appeal of a final order of the Florida Public Service Commission pursuant to Section 364.381, Florida Statutes (1995), and Rule 9.030(A)(1)(b)(ii), Florida Rules of Appellate Procedure. The Final Order was issued on April 28, 1997, and a Notice of Appeal was timely filed by BellSouth Telecommunications, Inc. on May 27, 1997. Sprint Florida, Incorporated, which was also a party, timely filed its Notice of Joinder as Appellant on June 24, 1997. Sprint-Florida, Incorporated is hereafter referred to in this Initial Brief as "Sprint."[1]

This matter arose from an attempt by BellSouth Telecommunications, Inc. ("BellSouth") to reassign or reclassify certain local exchanges into higher rate groups. This process, known as rate regrouping, was undertaken pursuant to Rule 25-4.056, Florida Administrative Code, which requires a local exchange telecommunications company to reclassify exchanges when access lines in an exchange area increase or decrease to the extent that the exchange falls into a different (higher or lower) rate group.

The Florida Public Service Commission ("the Commission") has described rate regrouping in the following manner:

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[1] In the Florida Public Service Commission Docket No. 951354-TL, Sprint Florida, Incorporated was identified variously as Sprint United Telephone Company of Florida, Central Telephone Company of Florida and Sprint/United Centel. The proper corporate name is Sprint-Florida, Incorporated. Effective December 31, 1996, United Telephone Company of Florida and Central Telephone Company of Florida were merged, and the surviving entity is named Sprint-Florida, Incorporated.

> Rate regrouping is a rate design mechanism that has been used historically to insure that the rates for certain customer classes are equalized. Rate groups are premised on the number of access lines an end user can call on a local flat-rate basis. As the number of access lines an end-user can call increases, the **rate** for flat-rate **local** service also increases. The increase in rates is rooted in an historic value-of-service pricing philosophy; as the number of lines a person can call increases, the more valuable the person's local flat-rate service becomes. As the service becomes more valuable, customers should pay more for it. The rates for each rate group are set for each LEC. Pursuant to Rule 25-4.056, Florida Administrative Code, rate regrouping has been accomplished on an automatic basis by the LECs based on subscribership in an exchange,

Order No. PSC-96-0036-FOF-TL, p.3. More simply stated, local exchange companies ("LECs") historically have had their prices set by the Commission so that every one of its basic service subscribers within a geographical area, known as an exchange, pays the same price or rate for basic local exchange service. Additionally, the local exchanges for a LEC are grouped according to the number of subscribers within the exchange. For example, exchanges with the smallest number of subscribers are grouped together, and the subscribers in these exchanges pay the same, lowest price for basic local exchange service. The next rate group includes all exchanges with the next larger number of subscribers, and so on. [R. 135-136] If one of the exchanges within a group, because of growth in the population in the area served by the exchange, experiences an increase in the number of subscribers to the point where its subscribers equal those in the exchanges in the next larger rate group, then the Commission's rules require that that exchange be reclassified to the next larger rate group. If the size of an exchange were to decrease, then the reverse would

occur. The overall rate effect on subscribers is that each subscriber will pay the same rate for basic local exchange service as is paid in other exchanges with a similar number of subscribers.

Despite the continued applicability of Rule 25-4.056, Florida Administrative Code, on mandatory and automatic rate regrouping, the Commission's order of April 28, 1997, has abandoned that policy as to LECs that have elected price regulation. In response to BellSouth's regrouping application, the Commission issued Proposed Agency Action Order No. PSC-96-0036-FOF-TL, which ordered BellSouth to cancel the proposed exchange regroupings on the basis that "rate regroupings were not permitted by Section 364.051, Florida Statutes, because BellSouth's local exchange rates are capped at the rates in effect on July 1, 1995." Order No. PSC-96-0036-FOF-TL, page 4. [R. 121 On January 31, 1996, BellSouth filed a protest to the portion of the Proposed Agency Action Order that required it to eliminate the rate group reclassification and requested a hearing. Sprint intervened in that proceeding. Although Sprint has not requested exchange reclassification pursuant to Rule 25-4.056, Florida Administrative Code, Sprint anticipates that it will have exchanges which will qualify for reclassification prior to January 1, 1999. The administrative proceeding thus instituted went forward on an informal basis with stipulated facts and briefs submitted by the parties. [R. 551 The Commission and its Staff filed nothing in that proceeding.

Thereafter, at its Regular Agenda Conference, the Commission heard oral argument and voted 3 to 2 to require BellSouth to

"reduce basic rates in the Jensen Beach, West Palm Beach and Holly-Navarre exchanges to eliminate the rate increases stemming from the reclassification of those exchanges." Order No. PSC-97-0488-FOF-TL, page 2. [R. 1421

The Commission bases its decision on the apparent belief that rate regrouping or reclassification constitutes a price increase prohibited by Section 364.051, Florida Statutes (1995). That section provides that local exchange companies may elect price regulation, effective January 1, 1996. The statute also provides in subsection (2) (a) that the basic local telecommunications service rates of any local exchange company electing price regulation will be capped at the rates in effect on July 1, 1995, and such rates cannot be increased prior to January 1, 1999, except for a local exchange telecommunications company with more than 3 million basic local telecommunications service access lines in service (BellSouth) which cannot increase basic local telecommunications service rates prior to January 1, 2001. This statute does not prohibit rate regrouping nor does it state that rate regrouping or reclassification of exchanges is an increase in capped rates. BellSouth and Sprint, among other local exchange carriers, have elected price regulation.

From its inception, the rate regrouping required by Rule 25-4.056, Florida Administrative Code, was designed and intended to eliminate undue price discrimination. The unrefuted record in this proceeding demonstrates the magnitude of this undue discrimination

which the Commission's Order now mandates. For example, BellSouth's witness Mr. Varner testified:

> Presently there are ten (10) exchanges within Florida that are classified as Rate Group 9, with an average calling scope of approximately 433,000 access lines and trunks. Currently, West Palm Beach has access to 485,000 access lines and trunks, which is 52,000 greater than the average Rate Group 9 exchange, and 35,000 greater than the upper limit on Rate Group 9. At the same time there are three other existing Rate Group 10 exchanges which have a calling scope of between 450,001 and 555,000 local access lines (as does the West Palm Beach exchange). [R. 135-1361

Mr. Varner goes on to point out:

> Under the normal regrouping process, customers in the West Palm Beach exchange would be charged the tariffed rates for services in Rate Group 10. [R. 1361

As Mr. Varner notes, the undue discrimination is obvious:

> Without regrouping, customers in the West Palm Beach exchange would pay less than the customers in the three exchanges that are currently in Rate Group 10, even though these exchanges have the same numerical range of access lines to which they can place a call. Conversely, customers in the West Palm Beach exchange would pay the same price for local service as these customers in the ten exchanges that are currently in Rate Group 9, even though customers in these exchanges have a smaller calling scope. [R. 136]

## SUMMARY OF ARGUMENT

The Commission's Order is inconsistent with its own rules and previous orders which require reclassification of exchanges in the situation presented in this case. Further, the Commission's Order creates an unreasonable price discrimination between customers similarly situated, in violation of Sections 364.08, 364.09 and

364.10, Florida Statutes (1995), by preventing price regulated local exchange companies from assigning communities with similar numbers of customers into the same rate grouping. Additionally, the Commission misinterprets Section 364.051, Florida Statutes (1995), by erroneously concluding, without evidence or supporting law, that rate regrouping constitutes a price increase.

## ARGUMENT

### 1. The Commission's Order is Blatantly Inconsistent with Existing Commission Rules and Prior Decisions.

Without question, an agency must follow its own rules, Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 493 So.2d 1055 (Fla. 1st DCA 1986); Central Florida Resional Hospital v. Department of Health and Rehabilitative Services, 582 So.2d 1193 (Fla. 5th DCA 1991), rev. denied, 592 So.2d 679 (Fla. 1991). If the existing rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, "[a]bsent such amendment, expedience cannot be permitted to dictate its terms." Cleveland Clinic v. Agency for Health Care Administration, 679 So.2d 1237, 1242 (Fla. 1st DCA 1996). The instant order prohibiting BellSouth's rate group reclassification is inconsistent with Rule 25-4.056(1) which requires that "[w]henever the number of access lines in the local calling area of an exchange increases or decreases to the extent that such exchange would fall into a different rate group, the company shall file a revised tariff with the Commission requesting authority to

reclassify the exchange to its appropriate group." (Emphasis added.)

The Commission chose not to follow its own rule because it believes that the rule is no longer appropriate for local exchange companies that have elected price regulation. Contrary to the existing rule, the Commission now believes that rate regrouping "is not appropriate to provide regulated revenue streams for price-regulated LECs, unless the statute specifically contemplates, and provides for, such an aberration, which it does not." [R. 1471 As will be shown later, this is an erroneous conclusion. However, even assuming arquendo that the Commission is correct in its analysis that the 1995 statute makes the current rule inappropriate, that fact alone does not give the Commission the authority to disregard its own rules. If the Commission believes the rule needs changing, then it must do so in accordance with the requisite statutory framework, but it must follow that rule until it is amended or repealed. Cleveland Clinic at 1242. The local exchange telecommunications companies are required to comply with the rules, just as the agency which promulgated the rule.

2. **The Commission's Order Creates Unreasonable and Unlawful Price Discrimination Among Telecommunications Users.**

Florida Statutes clearly prohibit unreasonable and unlawful discriminatory treatment between customers and localities. Sections 364.08, 364.09 and 364.10, Florida Statutes. A discriminatory rate is held to be unreasonable and unlawful when

there is no cost or operational basis for customers similarly situated paying different prices for the same service. Competitive Telecommunications Ass'n. v. Federal Communications Commission, 998 F.2d 1058 (DC Cir. 1993)[2], State ex. rel. DePaul Hospital School of Nursing v. Missouri Public Service Commission, 464 S.W.2d 737 (Mo. Ct. App. 1971); United States v. Pennsylvania Public Utility Commission, 135 A.2d 93 (Pa. Super Ct. 1957). The Commission's order creates unreasonable and unlawful discrimination.

If rate regrouping is not allowed, there will be an ever increasing number of situations in which customers served by price regulated local exchange companies in different exchanges with substantially similar local calling areas served by the same local exchange company will be paying different rates for the same basic local exchange service. This disparity, which Rule 25-4.056(1), Florida Administrative Code, was intended to eliminate, constitutes an undue discrimination in violation of Sections 364.08, 364.09 and 364.10, Florida Statutes.

Section 364.08 (1), Florida Statutes, provides, in part, that:

> (1) . . . . A telecommunications company may not . . . . extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

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[2] The Florida Commission has held that the prohibitory language in 47 U.S.C. § 202 is substantially the same as the Florida Statutes which prohibit undue or unreasonable discrimination. In re: Investigation into NTS Cost Recovery - Phase II, Docket No. 860984-TP, Order No. 19677, issued 7/15/88, 88 FPSC 7:144, 169.

Additionally, Section 364.09, Florida Statutes, requires as follows:

> A telecommunications company may not, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect, or receive from any person a greater or lesser compensation for any service rendered or to be rendered with respect to communication by telephone or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person for doing a like and contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions.

Finally, Section 364.10(1), Florida Statutes, states as follows:

> (1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Read together, these three statutory sections impose a prohibition against pricing a service provided to similarly situated customers at different rates where no difference in circumstances and conditions exist. All other things being equal, requiring or allowing different prices for basic local exchange services provided to customers in geographic areas with substantially similar local calling scopes constitutes an undue or unreasonable discrimination. In re: Investisation into the Desirability of a Statewide Uniform Coin Telephone Charge, 84 FPSC 9:26 (1984).

Regulatory commissions in other jurisdictions have likewise determined that an unlawful discrimination occurs when users in one exchange are charged less than similarly situated users in another exchange. As was noted by the Maine Public Utilities Commission when addressing the need for regrouping exchanges:

> Over the years regulatory commissions in the United States have generally adopted exchange rates by classes dependent upon the total number of telephones in the various exchanges.... It obviously becomes a matter of discrimination when the users of one exchange are charged less for telephone service than the users of another exchange, even though both exchanges should be, by virtue of total number of telephones, in the same rate grouping. We not only concur that this is discrimination, but we fully expect, at some future date, to explore the system being used in other jurisdictions whereby there would be an automatic regrouping to bring such exchanges into their proper rate category.

Re: New England Telephone & Telegraph Comsanv, 46 PUR 3d 143, at 144-45 (Me. P.U.C. 1962).

Similarly, the New York Public Service Commission, when confronted with a situation in which exchanges of approximately equal size were charged different rates, concluded that:

> Varying the rate with the size of an exchange, as determined by the number of telephones therein, recognizes the difference between exchanges of different size in the value of service inherent in their calling potential.... Absent any special or compelling reason to depart from the principle [statewide rate group classification1 in a given case, a failure to apply the appropriate group classification to an exchange would create either an unreasonably preferential or discriminatory situation.

Re: New York Telephone Company, 72 PUR 3d 309, at 310 (N.Y. P.S.C. 1968).

Likewise, the Kansas State Corporation Commission, in addressing the need for exchange regrouping, found that:

> The application of charges prevailing in one particular exchange group for service rendered to subscribers in an exchange which has grown out of or retrogressed from that particular rate group constitutes a preference or discrimination prohibited by Kansas law. Section 66-107, Kan GS 1949, provides in part as follows: . . . . every unjust or unreasonable discriminatory or unduly preferential , . . rate . . . . or charge demanded, exacted, or received is prohibited and hereby declared unlawful and void.

Re: Southwestern Tell Telephone Company, 34 PUR 3d, 257, at 321 (Ka. S.C.C. 1960).

In a more recent proceeding, the Virginia State Corporation Commission, in a review of its LEC incentive regulation plan, which includes a moratorium on basic local exchange service rate increases, held, nonetheless, that "rate regrouping due to growth in access lines will continue in order to avoid rate discrimination between similarly sized exchanges." Re: Telephone Regulatory Methods, 157 PUR 4th 465, at 506 (Va. S.C.C. 1994).

Sections 364.08, 364.09 and 364.10, Florida Statutes 1995, were unaffected by the Florida Telecommunications Act of 1995 ("1995 Act") which created Section 364.051. Indeed, while local exchange companies electing price regulation are specifically exempted by Section 364.051, from certain provisions of Chapter 364 that apply to earnings regulated local exchange companies, price

regulated local exchange companies are not exempted from Sections 364.08, 364.09 and 364.10, Florida Statutes.

Contrary to the assertions in the Commission's Order that the 1995 Act has deregulated local telecommunications, and deregulation has obviated the need for rate regrouping which is a mechanism having only earnings regulation applicability [R. 148], Chapter 364 still prohibits price regulated local exchange companies from pricing basic local exchange services in a manner which will unduly or unreasonably advantage or disadvantage any person or community. Moreover, although the 1995 Act opened the local exchange to competition, the Commission's primary responsibility is still regulation. See Florida Cable Television Association v. Deason, 635 So.2d 14 (1994). Clearly, the Commission cannot solve the unlawful discrimination resulting from its ruling by turning its back on the continuing regulatory responsibility mandated by the Legislature.

Indeed, the Commission's "deregulation" rationale for ignoring the continued application of Sections 364.08, 364.09 **and** 364.10, Florida Statutes, is inconsistent with the Commission's imposition of these very same non-discrimination requirements on certificated interexchange carriers - like AT&T Communications of the Southern States, Inc. ("AT&T") - which have for years been far less regulated than the local exchange carriers.[3] In rejecting a tariff

[3] For example, in 1988, the Commission granted AT&T's request for forbearance from earnings regulation and set AT&T's then current MTS and WATS rates as the "appropriate price caps for the forbearance experiment," which is tantamount to the price regulation regulatory scheme made available to the local exchange

proposed by AT&T to offer long distance calls at no charge to patients of a Miami Hospital, the Commission concluded the tariff constituted an unlawful discrimination, stating:

> However, Sections 364.08, 364.09, and 364.10, Florida Statutes, require that a utility, or a "common carrier", must treat all persons in similar circumstances equally. This fundamental legal precept, which derives from the English common law and is echoed in the equal protection clause of the Fourteenth Amendment of our federal Constitution, means, in plain English, that every member of the public has a right to the same treatment from those who hold themselves out as providers of products or services to the public. This requirement is of far greater significance when that provider is a utility certificated by the State of Florida, through this Commission, to provide service to the public. . . . It is simply inappropriate for this Commission to approve a tariff providing for different treatment for one children's hospital than that provided for others similarly situated. Such an offering would be equally inappropriate by any minor interexchange carrier.*

In re: Proposed Tariff Filins by AT&T Communications of the Southern States, Inc., etc., Docket No. 891171-TI, Order No. 22197, issued November 20, 1989, 89 FPSC 11:308, 311.

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companies in the 1995 Act. In re: Forbearance from Earnings Resulation of AT&T and Waiver of Rules 25-24.495(1) and 25-24.480(1) (b), Docket No. 870347-TI, Order No. 19758, issued August 3, 1988, 88FPSC 8:54.

[4] Until recently, interexchange carriers were classified by the Commission for regulatory purposes as "major" and "minor" interexchange carriers. AT&T was classified as a "major" interexchange carrier, while all other certificated interexchange carriers were classified as "minor" interexchange carriers. These minor interexchange carriers were even more lightly regulated than AT&T. Rule 25-24.460, Florida Administrative Code, repealed March 13, 1996.

3. **The Commission's Order Erroneously Concludes that the Reclassification of an Exchange (rate regrouping) Subsequent to Election of Price Regulation is a Price Increase Prohibited by Section 364.051, Florida Statutes (1995).**

The Court must defer to the Commission's interpretation of Section 364.051, Florida Statutes (1995), only if that interpretation is reasonably consistent with the plain meaning of the statute or is a reasonable construction of an ambiguous statute. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837, 842-45 (1984); Florida Interexchanse Carriers Association v. Clark, 678 So.2d 1267 (1996). However, the Court is empowered to overturn the Commission's interpretation of Section 364.051 when the interpretation conflicts with the plain meaning of the statute; where the interpretation is an unreasonable construction of an ambiguous statute; or when the Commission acts arbitrarily or capriciously in adopting its interpretation. Chevron, 467 U.S. at 344; Florida Cable Television Association v. Deason, 635 So.2d 14 (1994). The Commission's order in this case is based upon an interpretation of Section 364.051 which is strained, irrational and arbitrary. Section 364.051(2)(a) states in effect that no local exchange company electing price regulation shall increase the prices for its basic local exchange service in effect on July 1, 1995 for a period of years; five years for BellSouth and three years for any other local exchange company. Nowhere does this section, or any other section of Chapter 364, state that a rate regrouping constitutes "a price increase." Nevertheless, the Commission interprets Section 364.051 so that it does just that.

The basic local exchange service rates in effect on July 1, 1995 were rates that had been ordered and approved by the Commission. These rates were approved for each rate group for each local exchange company. [R. 1281 It is these rates by rate group that have been capped and cannot be increased for three years and five years. The process of rate regrouping - that is, moving an exchange from one rate group to another (higher or lower) - does not require, or even propose, that the previously established rate group prices be increased. [R. 128] In other words, the rates for each rate group, which were in effect on July 1, 1995, will remain unchanged and, therefore, no "rate increase" will occur even though an exchange is transferred from one rate group to another. As the Commission noted in its Order, the rate regrouped customer pays more because the customer gets more benefits for the new price than he or she got for the old price; not because the price was increased. [R. 1471 However, the policy adopted by the Commission, that a rate regrouping is a rate increase for individual customers, must be premised on the mistaken belief that a basic local exchange customer who receives greater benefit because of increased calling scope should, nonetheless, never pay more that he or she is currently paying for local exchange service. Yet, the benefited customer will pay less than similarly situated customers - which, as demonstrated above, constitutes a violation of state law.

The illogic of the Commission's interpretation of Section 364.051, that the prohibition on price increases applies to

customers not rate groups [R. 1481, is further demonstrated as follows: Suppose, for example, an individual subscriber resides in an exchange served by a local exchange carrier which has elected price regulation and the exchange is included in, **say,** rate group 3; suppose further that the subscriber voluntarily relocates his or her residence to an exchange served by the same local exchange company which is included in, say, rate group 4. By doing so, that subscriber will pay more for basic local exchange service, even though the local exchange company has not increased the rate. Using the Commission's analysis, this scenario constitutes a price increase and is **a** prohibited price increase; however, following the Commission's logic, it would have to be concluded, therefore, that the subscriber should pay no more than he or she was paying when his or her residence was located in the exchange included in rate group three. [R. 128] But that situation occurs daily and is not prohibited by the Commission - nor should it be prohibited. Yet, in both cases - the rate regrouping and the subscriber moving - the effect is the same; the price the customer pays is not as a result of a price increase, but is directly related to the service the customer receives and in both cases the customer receives a different basic local exchange service in rate group 4 than he or she received in rate group 3.

Additionally, the Commission's strained interpretation of Section 364.051, to mean that a rate regrouping is a rate increase, forever bars any further rate regroupings by local exchange companies who have elected price regulation. Although the price

caps remain in place for at least three to five years, under Section 364.051(4), any price increases thereafter are limited to once annually and to an amount not to exceed the change in inflation less one percent. Thus, unless the difference in rates between two rate groups does not exceed the amount produced by the index, an exchange may not be moved to the next higher rate group even if it otherwise qualifies according to the Commission Rules. In that event, there will, over time, be many exchanges whose customers will be paying rates for basic local exchange service that will be different from the rates paid by customers in exchanges of exactly the same size. There is no statutory, or rational statutory interpretation, basis for the pricing anomaly which flows from the Commission's order.

Thus, it is readily apparent that a policy that would restrict rate regrouping for price-regulated LECs is a policy that: (a) is not based upon any requirement of Section 364.051, Florida Statutes, (b) is not based on a rational interpretation of Section 364.051, and (c) if adhered to, would permanently eliminate rate regroupings by price-regulated LECs for any purpose.

## CONCLUSION

The unrefuted evidence presented to the Commission demonstrates that the Commission's decision to prohibit price-regulated local exchange companies from rate regrouping violates the requirements of Rule 25-4.056, Florida Administrative Code. Additionally, Section 364.051, Florida Statutes, (1995), does not

prohibit rate regrouping for LECs that elect price regulation because the prices in effect on July 1, 1996, were the prices for rate groups, not individual customers, and those prices are not increased by rate regrouping. Moreover, denying rate regroupings will require the LECs to charge different rates to similarly situated customers for the same service, resulting in an unreasonable or undue discrimination in violation of Sections 364.08, 364.09 and 364.10, Florida Statutes, (1995). Accordingly, the Commission's **Order** should be reversed with directions to grant the requested reclassification.

Respectfully submitted,

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