SUPREME COURT OF FLORIDA

Case No. SC02-2647

VERIZON FLORIDA INC.,

Appellant,

v.

LILA A. JABER, et al.

Appellees.

REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL OF VERIZON FLORIDA INC.

MARVIN E. BARKIN, ESQ.
Florida Bar No. 003564

MARIE TOMASSI, ESQ.
Florida Bar No. 772062
TRENAM, KEMKER, SCHARF,
BARKIN, FRYE, O'NEILL & MULLIS,
Professional Association
200 Central Avenue, Suite 1230
Bank of America Tower
St. Petersburg, FL 33701
(727) 898-7474

KIMBERLY CASWELL, ESQ.
Florida Bar No. 874310
P. O. Box 110, FLTC0007
Tampa, FL 33601-0110
(813) 483-2617

Attorneys for Verizon Florida Inc.

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PREFACE

Appellant and Cross Appellee, Verizon Florida Inc., is referred to as AVerizon.@ Apellees and Cross Appellees, the Florida Public Service Commission and its Commissioners, are referred to collectively as Athe Commission.@ Cross Appellant, AT&T Communications of the Southern States, LLC, is referred to as AAT&T.@ The Federal Communications Commission is referred to as the AFCC.@

References to the transcript of the October 14, 2002 special agenda conference at which the Commission established Verizon=s unbundled network element rates are designated by AT@, followed by the page number within the transcript. (This transcript begins at page 2643 of the appellate record.) References to the transcript of the April 29-30, 2002 administrative hearing in this case are designated by AHT@, followed by the page number within the transcript. References to the record on appeal are designated by AR@, followed by the volume and page number within the record. Exhibits entered into the record at the hearing are designated by AEx.@, followed by the page number within the exhibit.

References to Verizon=s Initial Brief appear as AIn. Br.@, references to the Commission=s Answer Brief appear as AComm. Br.@, and references to AT&T=s Answer Brief and Brief on Cross Appeal appear as AAT&T Br.@.

Incumbent local exchange carriers (like Verizon) are referred to as AILECs.@ Alternative local exchange carriers (like AT&T) are referred to as AALECs.@

This matter is before the Court on review of the Commission=s Final Order on Rates for Unbundled Network Elements Provided by Verizon Florida, Order number PSC-02-1574-FOF-TP, issued November 15, 2002 (R 15: 2775-17:3137) (referred to as "*UNE Order*").

UPDATED STATEMENT OF THE CASE

Since Verizon submitted its Initial Brief, the Commission issued an order granting Verizon=s request for a stay of the *UNE Order* pending conclusion of this appeal. Order No. PSC-03-0896-PCO-TP (Aug. 5, 2003).

REPLY ARGUMENT[1]

The rulings Verizon appeals are based on off-the-record information, unsworn Atestimony@ of non-witness Staff, and calculation errors. These rulings must be reversed because they violate Verizon=s due process rights and are not based on competent, substantial evidence.

I. THERE IS NO EVIDENCE SUPPORTING THE DEPRECIATION RULING.

To set UNE rates, the Commission must determine the depreciation lives of the facilities required to provide those UNEs. On a 3-2 vote, the majority rejected the lives Verizon itself uses for financial reporting purposes in favor of the lives the Commission had chosen for BellSouth in BellSouth=s UNE rate-setting case.

The Commission made no findings of fact to support its decision.[2] As support, it offered only an assumption: Awe find that it is reasonable to assume that a similar plant exposed to similar factors of obsolescence

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[1] AT&T did not address Verizon=s arguments in any detail, but made some of the same general arguments the Commission did; Verizon=s rebuttal to the Commission thus responds to those same points in AT&T=s Reply Brief.

[2] This is a violation of Fla. Stat. ' 120.569(2)(m), which requires findings of fact, accompanied by Aan explicit statement@ of supporting facts in the record.

such as technology, market competition, and physical wear and tear would exhibit similar depreciation lives and salvage values.@ *UNE Order* at 75, R 16:2849. There is nothing in the record about BellSouth=s plant or the factors affecting it. There is thus no evidence justifying the Commission=s opinion that Verizon=s plant, and the factors affecting that plant, are so similar to BellSouth=s plant, and the factors affecting that plant, that the same depreciation lives are appropriate for both companies.

The Commission does not deny that it had no factual basis for its depreciation ruling. Nor does the Commission deny its own finding that it is Adangerous and incorrect@ to compare companies= depreciation lives without a complete understanding of Athe underlying assumptions and the basis for those lives, including whether technological obsolescence, wear and tear, or tax considerations are the driving forces for those lives.@[3]

The Commission instead argues that adopting BellSouth=s depreciation inputs for Verizon was within its discretion because: (1) the ALEC witness suggested that the Commission could do so; (2) the Commission did not find Verizon=s testimony convincing; and (3) the Commission is Aable to recognize its own actions and orders and

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[3] Final Order on Rates for Unbundled Network Elements Provided by BellSouth, 01 FPSC 5:377, at 494 (May 25, 2001).

rely on them.@ (Comm. Br. 25). None of these explanations entitles the Commission to disregard its legal obligation to base its decision on competent substantial evidence.

First, neither the ALEC witness, Dr. Ankum, nor anyone else provided any testimony about BellSouth=s plant or the development of its depreciation factors. Dr. Ankum merely proposed that if the Commission rejected his recommendation to use the depreciation rates the FCC last prescribed for Verizon, then it should use BellSouth=s depreciation rates Asince they are relatively close to those approved by the FCC@B*not* because of any facts making Verizon and BellSouth comparable for depreciation purposes. (HT 8:1158). In fact, Dr. Ankum Acompletely agreed@ with the Commission=s earlier holding that, in the absence of record evidence about companies= respective equipment and how they develop their respective life projections, it is Adangerous and incorrect@ to compare one company=s depreciation lives with another=s. (Ex. 29:29). Dr. Ankum=s erroneous advice that the Commission could use BellSouth=s depreciation lives is not evidence of Verizon=s and BellSouth=s comparability for depreciation purposes.

Second, while the Commission may reject evidence if it has valid reasons for doing so,[4] it cannot reach outside the record for an alternative basis for its decision, as it did here. Its decisions must *always* be based on competent and substantial evidence in the record. Fla. Stat. ' 120.68(7)(b). In fact, this Court has expressly admonished the Commission not to set a company=s rates based on off-the-record information about other companies.[5]

Third, an agency=s right to Arecognize its own actions and orders and rely on them@ (Comm. Br. 25) does not mean that it can rely on evidence in one case to support its decision in another. AIt is improper for an...agency or commission to base its decision or findings upon facts gathered from its own records without introducing the records into evidence.@ *Thorn v. Fla. Real Est. Comm=n*, 146 So. 2d 907, 910 (Fla. 2d DCA 1962). The fact that

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[4] *Gen. Dev. Utils., Inc. v. Hawkins, et al.*, 357 So. 2d 408, 409 (Fla. 1978). Verizon strongly disagrees with the Commission=s view that Verizon=s depreciation testimony and exhibits failed to support its depreciation proposal.

[5] *Hawkins*, 357 So. 2d at 409. Just this month, the Commission itself refused to apply Verizon=s expense calculation methodology to Sprint to set Sprint=s UNE rates, because A[t]here [was] no record@ to do so. *Investigation into Pricing of Unbundled Elements (Sprint)*, Order Denying Reconsideration, Order No. PSC-03-0918-FOF-TP, at 30 (Aug. 8, 2003).

the Commission Ahad confidence@ in BellSouth=s depreciation evidence in its UNE case is not evidence supporting use of BellSouth=s depreciation factors to set Verizon=s UNE rates.

The Commission has not shown Asuch evidence as will establish a substantial basis of fact@ to justify using BellSouth=s depreciation lives to set Verizon=s rates. *See Duval Util. Co. v. Pub. Serv. Comm=n*, 380 So. 2d 1028, 1031 (Fla. 1980). AA mere general opinion of the Commission, unsupported by findings of fact based on substantial evidence, is of no effect.@ *Metro. Dade County Water and Sewer Board v. Comm. Utils. Corp*., 200 So. 2d 831 (Fla. 3d DCA 1967).

II. THE COST OF CAPITAL RULING VIOLATED VERIZON'S DUE PROCESS RIGHTS AND IS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Commission argues that it Arelied on the testimony of staff witness David Draper to establish the cost of capital component of UNE rates.@ (Comm. Br. 13). But that is just what the Commission did *not* do. It ignored Mr. Draper=s testimony acknowledging flaws in his original analysis and made its cost of capital decision based on that original, flawed analysis.

1. Exclusion of SBC. For reasons Verizon explained in its Initial Brief (at 11 n. 17), it is necessary to develop a list of Aproxy companies@ whose cost of capital can be used to calculate Verizon=s cost of capital for setting UNE rates. Commission witness Draper excluded SBC Communications (ASBC@) from his proxy list, but his written testimony did not explain this exclusion. At his deposition, Mr. Draper testified Asubject to check@ that SBC met his criterion of receiving at least 75% percent of its annual revenue from telecommunications, as well as his other two criteria for the proxy list. (Ex. 37:56). Mr. Draper clarified that he had not included SBC in his index only because SBC was Anot followed by Value Line,@ the publication Mr. Draper used to develop his proxy list. (*Id*. 55-56).

Despite Mr. Draper=s acknowledged, incorrect omission of SBC from his proxy group, Staff advised the Commission to accept his original, flawed cost of capital recommendation based on that omission. Staff member Lester, who wrote the recommendation, conceded that Mr. Draper Adid agree, subject to check, that SBC has greater than 75 percent of its revenue@ from telecommunications operations. But Mr. Lester Ajust chose[] to go with what he [Mr. Draper] put in his direct testimony@ (T 62), based on his view that Mr. Draper Amisspoke in his deposition@ (T 63, 71). This unsworn speculation was based on Mr. Lester=s claim that he Adid independently check@ the C.A. Turner reports and concluded that less than 75% of SBC=s revenue came from telecommunications. (T 63-64). Verizon was given no opportunity to test or refute Mr. Lester=s incorrect analysis.

The Commission accepted Staff=s Recommendation, despite its concerns that the C.A. Turner Reports Mr. Lester assertedly used were not in the record and that there were no Ahard data@ to substantiate Mr. Lester=s comments. (T 64-65, 68-69, 72). In doing so, the Commission disregarded the uncontroverted evidence (of Mr. Draper himself and Verizon witness VanderWeide) that SBC should have been included in Mr. Draper=s proxy group.

The Commission dismisses Verizon=s due process concerns with the same kind of conjecture that tainted its ruling. It speculates that Mr. Draper Ajust as likely as not@ checked and confirmed that his original position was correct (Comm. Br. 18); that it Aseems just as likely@ as not that Mr. Draper consulted the C.A. Turner reports and Acame to the same conclusion that Mr. Lester did@ (*Id*. at 19); that Mr. Draper *might* have relied on the C.A. Turner Reports to develop his proxy group (*Id*. at 19-20); and that the Commission *might* have made the same cost of capital decision even if Mr. Draper had not testified. (*Id*. at 15).

More speculation cannot cure the Commission=s legal errors. This Court will not consider what might have happened, but only what did happen, as reflected in the record. Mr. Draper *did* testify and the Commission *did* base its decision solely on his original, flawed cost of capital recommendationBnot any other expert=s testimony. Mr. Draper *did not* point out any error in his deposition testimony;[6] he *did not* say that he agreed with Mr. Lester=s Aindependent check@; and he repeatedly testified that he *did not* consult anything other than Value Line to develop his proxy list of companies. (HT 235, Ex. 37:40-41, 55-57; *See UNE Order* at 80, R 16:2854).

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[6] As Chairman Jaber observed, Asubject to check@ means the witness Areserves the right to go back and take a look at it [the fact at issue] and if there is a problem, point it out.@ (T 73).

Verizon agrees that the Commission may weigh experts= differing opinions in making its decisions. But this is not Aa classic case in which the Commission=s prerogative to evaluate competing testimony should be recognized.@ (Comm. Br. 14). The Commission may not weigh the competing testimony of the *same* expert and disregard the later, more accurate analysis because a non-witness claims that the expert Amisspoke@ in his sworn deposition. It was, moreover, a due process violation for Mr. Lester, as advisory Staff, to also act as an advocate, as he did when he informed the Commission of the results of his own analysis of the C.A. Turner Reports. *Cherry Comm., Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995). Whether or not a cost of capital determination involves a measure of opinion, it must still be rational and based on the evidence. As the Commission knows, it must conduct A>an analysis of the methods by, and the basis upon, which the experts had reached their respective opinions.=@ (Comm. Br. 16, *quoting Utils. of Fla. v. Fla. Pub. Serv. Comm=n*, 420 So. 2d 331, 333 (Fla. 1st DCA 1982). An analysis of the basis for Mr. Draper=s opinion would have included consideration of his revising a critical aspect of his original cost of capital recommendation.

The findings of administrative hearing officers will not be given deference Aat the expense of due process.@ *Miami-Dade County v. Reyes*, 772 So. 2d 24, 30 (Fla. 3d DCA 2000). The Commission=s cost of capital ruling

must be reversed because it is not based on the requisite Acompetent and substantial evidence adduced by the parties consisting of sworn testimony of witnesses and properly authenticated documents bearing the required indicia of credibility.@ *Deel Motors, Inc. v. Dep=t of Commerce*, 252 So. 2d 389 (Fla. 1st DCA 1971).

2. Inclusion of AT&T and CenturyTel. Mr. Draper disregarded his own criterion that companies Asubject to@ a merger or acquisition must be excluded from the proxy group. In his deposition, Mr. Draper agreed that CenturyTel was Asubject to a merger with Alltel@ and that AT&T Awas considering whether to sell their broadband division.@ (Ex. 37:54-55). Mr. Draper=s failure to exclude these companies thus violated his own proxy list criterion. The long quote from Mr. Lester that the Commission includes in its Brief (at 21) does not prove otherwise. As Mr. Draper=s own testimony shows, AT&T and CenturyTel were Asubject to@ a merger or acquisition, regardless of whether the transactions were likely or completed. There is thus no rational basis for the Commission to accept a cost of capital recommendation that included these companies in the proxy group.

III. THE COMMISSION'S LOADING FACTOR ADJUSTMENTS ARE BASED ON OFF THE RECORD INFORMATION ABOUT ANOTHER COMPANY.

Although no party contested Verizon=s proposed loading factors, the Commission Ajust reduced them by 50

percent@ in some cases and by 15%-40% in others. (T 98-99, *UNE Order* at 178-79). The Commission cites no evidence supporting these adjustments, because there is none. Indeed, it admits that the adjustments were made to bring Verizon=s factors Amore in line with BellSouth=s factors in which the Commission had more confidence.@ (Comm. Br. 28).

The Commission mistakenly believes it can ignore the competent substantial evidence rule any time it rejects Verizon=s evidence. It apparently found a so-called Alinearity@ problem in BellSouth=s loading factors, so it assumed the same problem existed, to the same degree, in Verizon=s cost study--even though Staff itself identified a Akey difference@ between Verizon=s and BellSouth=s cost studies that was relevant to the linearity assessment. (*See* T 96).

BellSouth=s cost studies are not in Verizon=s record, so Verizon had no opportunity to prove that its study did not present the same perceived linearity problem that BellSouth=s purportedly did. Contrary to the Commission=s assertions,[7] the only time linearity came up was in a Staff interrogatory asking Verizon if its loadings

[7] Verizon was never asked to Aexplain the deviation of its factors@ (presumably from BellSouth=s factors), as the Commission claims (Comm. Br. 27). Verizon could not have done so, in any event, because there was no evidence about BellSouth=s factors in the record. The document request the Commission cites (Ex. 19:40) was an AT&T (not Staff) request, it had nothing to do with linearity, and AT&T did not, in any event, file a motion to compel a more complete answer. And it is not true that there were AALEC concerns with Verizon=s loading

were linear. Verizon responded that it did not understand what linear loadings meant and asked Staff to clarify the question. (Ex. 19:92). Staff never did so. Nevertheless, the Commission blames Verizon for failing to address a linearity problem that no one ever identified in Verizon=s case.

Verizon agrees that the Commission may Arely on its staff to >test the validity, credibility, and competence of the evidence presented= and to accept or reject the company=s position based on that evaluation.@ (Comm. Br. 25). But the Staff did not test Verizon=s evidence; if it had cared to do so, it would have told Verizon what Alinear@ meant when Verizon asked. In the absence of any conflicting evidence, the Commission had no valid reason to reject Verizon=s loading factors, and there was nothing in the record to support any alternative factors. Moreover, although the Commission=s purported justification for changing Verizon=s factors was linearity, it admits that its adjustments do not remedy the claimed linearity problem. (*UNE Order* at 178, R 16:2952). The Commission merely fabricated loading factors for Verizon to get them closer to BellSouth=s. Selection of rate-setting factors based on off-the-record information about another company Aplainly violates the notions of agency due process

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factors,@ as the Commission claims. (Comm. Br. 27). No one but Verizon provided testimony on loading factors. *UNE Order* at 170, R 16:2944.

which are embodied in the administrative procedure act.@ *Hawkins*, 357 So. 2d at 409.

IV. THE ORDERED UNE RATES DO NOT REFLECT THE ORDERED ADJUSTMENTS.

There is no dispute that changing inputs to a cost model will change the results the model produces. The cost results shown in the *UNE Order* do not reflect certain of the Commission=s own changes to Verizon=s proposed model inputs. There is no indication that this mismatch was intentional, so it is arbitrary.

1. *The Commission's Incorrect Calculation of the Common Cost Allocator*. The FCC requires state commissions to include a reasonable share of a company's common costs in the UNE rates they set. *See UNE Order* at 184, R 16:2958. The Commission accepted Verizon's methodology for computing its common cost allocator, but correctly recognized that Verizon's proposed 14.09% common cost allocator "will change, based on other changes to the model" that were made in the *UNE Order*. (*Id*. at 188). But the Commission did *not* change the proposed cost allocator to reflect other changes it made. It is impossible to tell why from the *UNE Order* itself, because it does not identify the common cost allocator the Commission used to set rates, or the numbers or source of the numbers it used to derive the common cost allocator. Based on the Order and the record evidence, it is possible to determine that the ordered rates do not correspond to the ordered adjustments, but it is not possible to

determine why. Verizon was only able to discern the cause of this error (an incorrect investment figure) through a public records request for Staff=s workpapers.

The UNE rates also fail to account for the Commission=s decision to disable the cost model=s calibration option. The calibration option is intended to ensure that the investments used to calculate the model=s expense-to-investment ratios are consistent with the investments underlying the UNE costs to which they will be applied. Mr. Tucek testified that disabling this option (while retaining Verizon=s inputs) caused an expense shortfall of $79.1 million in the UNE costs, and explained how to remedy this shortfall by adjusting the common cost allocator. (HT 5:816; Ex. 51:10 (DGT-6 at 2); *UNE Order* at 183, R 16:2957). Although no one disputed the calculation of the shortfall or how to correct it, the Commission failed to perform the requisite offsetting calculation and never explained why it did not. Verizon thus concluded that it was an error.

The Commission does not deny the discrepancies between its rulings and the resulting UNE rates, and does not cite anything in the Order or the record to justify its common cost calculations.[8] In fact, it acknowledges

[8] AT&T ignores Verizon=s arguments addressing the computational errors in the *UNE Order* and states that A[t]he issue is whether the Commission correctly granted the Motion to Strike@ Verizon=s October 9, 2002 letter (R: 15:2620) identifying these errors. (AT&T Br. 8). The Commission also spends pages defending its decision to

Verizon=s concern about Amismatched cost allocators.@ (Comm. Br. 35). Its only defense is to criticize Verizon for using off-the-record workpapers to identify the source of the error in the Commission=s common cost calculation and to state cryptically that Ain the end, the staff had to make its calculations using what Verizon had provided and made its recommendation to the Commission accordingly.@ (Comm. Br. 35).

Verizon=s point, of course, is that the Commission did *not* base its common cost calculations on what Verizon had provided, but rather on undisclosed information, which could only be discovered through review of Staff=s workpapers. The common cost allocator is a key component in setting UNE rates. The Commission has no right to keep its chosen allocator and the basis for its determination a secret. If the Commission=s view is correct, then it can order any rates it wants, whether or not they reflect the Commission=s own adjustments and the evidence, and the company will have no choice but to accept them on faith.

Commission Orders Amust provide visible proof that the [agency] is proceeding rationally within the bounds

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strike Verizon=s letter. (Comm. Br. 29-33). All of this argument is irrelevant to this appeal. Although Verizon mentioned, in a footnote, that it was improper for the Commission to strike the letter as improper argument without ever having read it, that is not the issue on appeal. Whether or not the letter was properly stricken, the substantive problems identified in the letterBand here in the appealBremain and must be corrected.

of its discretion and not arbitrarily.@ *Couch Constr. v. Dep=t of Transp*., 361 So. 2d 172, 175 (Fla. 1st DCA 1978). The common cost ruling fails to meet this requirement of decision-making on the record. If the Commission does not correct its errors, its Order should be remanded with instructions to explain, on the record, what common cost allocator the Commission used, the numbers used to calculate it, the source of the numbers and why the source was chosen, and why the allocator was not adjusted to account for the investment shortfall caused when the calibration option was turned off.

2. *The Commission=s Incorrect Computation of Verizon=s UNE-P Rates*. The UNE platform (AUNE-P@) is a combination of certain UNEs that permits a competitor to provide its own local telephone services. The Commission reduced Verizon=s UNE-P cost estimates because it believed Verizon could provide the UNE-P using a less expensive AIDLC@ technology. Mr. Tucek explained that using IDLC technology would reduce Verizon=s proposed UNE-P rate by $1.39 a month, *assuming no other changes to Verizon=s model inputs*. (HT 5:786-87). As noted, the Commission did make numerous adjustments to Verizon=s model inputs, and Staff advised the Commission that these adjustments would change the $1.39 figure. (T 118). Staff also admitted that Verizon had given Staff instructions for recalculating the UNE-P rate using IDLC technology and Staff=s inputs. But Staff was

unable to perform the correct calculation, so it simply advised the Commission to approve the incorrect $1.39 figure. (T 118).

The Commission does not deny that the $1.39 figure fails to account for its adjustments to Verizon=s cost study. Its only excuse for *knowingly* approving this erroneous figure is to blame the Aquality of evidence@ Verizon presented (Comm. Br. 36), rather than the Staff=s failure to calculate the right number. Knowingly relying on incorrect information for a finding unquestionably violates the competent substantial evidence rule. *Fla. Rate Conf. v. Fla. R.R. and Pub. Utils. Comm=n*, 108 So. 2d 601, 607-08 (Fla. 1959).

ANSWER TO AT&T=S CROSS APPEAL

SUMMARY OF ARGUMENT

Unlike the holdings Verizon challenges on appeal, the Commission findings that AT&T appeals should not be disturbed because they are lawful and supported by competent, substantial evidence.

AT&T complains that the cost study the Commission approved cannot produce UNE rates that comply with the FCC=s total element long-run incremental cost (ATELRIC@) standard, because they include certain switching-related costs and do not include others, and because they assume placement of Adigital loop carrier@ equipment that

reflects Verizon=s existing network characteristics in some instances. AT&T impermissibly asks the Court to act as a trier of fact to decide complex factual issues about whether sophisticated telecommunications technologies and network configurations meet the FCC=s TELRIC standard for UNE rate-setting.

The Court=s role in AT&T=s appeal is no different than in any other review of agency action. That is, the Court must determine whether the Commission had a sufficient evidentiary basis for its rulings. For the discrete points AT&T appeals, the Commission weighed the evidence and made well founded conclusions about the equipment and facilities to be included in the TELRIC-compliant Integrated Cost Model used to set UNE rates.

STATEMENT OF FACTS

The federal Telecommunications Act of 1996 (AAct@) requires ILECs, like Verizon, to lease parts of their networks to ALECs, like AT&T, so that these ALECs can provide their own services using these UNEs. 47 U.S.C. ' 251(c). The Act provides that, when ILECs and ALECs fail to agree on UNE prices, the state commissions shall set Ajust and reasonable@ prices Abased on the cost. . . . . of providing the interconnection or network element.@ 47 U.S.C. ' 252(d)(1).

The FCC prescribed the cost standard states must use to set UNE rates soon after the Act was passed in

1996. It is called total element long-run incremental cost (ATELRIC@).[9] TELRIC is intended to reflect the costs a particular ILEC would incur to provide UNEs in the future using Athe most efficient technology for reasonably foreseeable capacity requirements@ and that is Acompatible with the existing infrastructure.@ *Local Competition Order* at && 685. The FCC believed the TELRIC methodology would most closely approximate Athe incremental costs that incumbents actually expect to incur in making network elements available to new entrants.@ *Id*.

[9] *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (A*Local Competition Order*@), at && 672-93, 679 (1996).

The FCC directed the states to Aimmediately@ apply the TELRIC standard to set UNE rates, to the maximum extent feasible. *Local Competition Order* at && 619. However, it also recognized that in some cases, it might not be possible for a company to prepare, or a state commission to review, TELRIC studies in the initial rate arbitrations under the Act in the months following its August 1996 *Local Competition Order*. *Id.* at && 619, 767, 782. The FCC, therefore, established optional default proxy rates for such states to use only until they could complete or approve such a cost study. The Florida Public Service Commission never used these proxy rates, but has always set UNE rates based on cost studies.

There are no rules, either at the state or federal level, establishing any filing requirements for cost studies in TELRIC proceedings. *See UNE Order* at 64. The FCC has repeatedly recognized that application of the TELRIC standard in UNE rate-setting cases is an intensely fact-specific inquiry that varies with each case and each cost model.[10] Because there is no single answer as to which models, assumptions, and inputs represent a most efficient

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[10] *Joint Application by BellSouth Corp., et al. For Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, at && 23, 25, 37, 49, 52, 58, 60, 78, 82 (2002); *Application of BellSouth Corp., et al. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, at &&20, 22, 61 (2002).

and least-cost, forward-looking network, the application of the TELRIC principles is typically contentious in UNE rate-setting cases.

TELRIC costs are determined by means of cost models. The FCC does not require the use of any particular TELRIC model. A TELRIC-based cost model reconstructs or Amodels@ a particular ILEC=s network to estimate its cost of providing specific UNEs in the future with the most efficient, currently available technology and network configuration. It does so through a set of decision rules about the network, along with inputs and assumptions that may be changed by the user (*e.g.*, depreciation, cost of capital, loading factors). A cost study is the output of the cost model. The same cost model will produce different cost studies if the model inputs are changed.

ILECs typically present their own cost models (and cost studies) in UNE rate-setting cases. ALECs often present competing models, but none did so in Verizon=s UNE case. Verizon used its Integrated Cost Model (AICM@) to develop its TELRIC-compliant UNE costs.

In its *UNE Order*, the Commission approved the network design reflected in ICM, but adjusted many of Verizon=s proposed model inputs to produce UNE cost results that differed substantially from those in Verizon=s cost study. *UNE Order* at 68, R 16:2842.

On appeal, AT&T asks the Court to reverse the *UNE Order* based on its argument that ICM cannot produce UNE rates that are TELRIC-compliant. Specifically, AT&T contends that the ICM study the Commission approved violates TELRIC by including the GTD-5 switch and Verizon=s digital loop carrier (ADLC@) placement inputs, and by excluding asynchronous transfer mode (AATM@) switching technology.

STANDARD OF REVIEW

The rule requiring competent substantial evidence to support agency decisions applies to AT&T=s cross appeal (as well as to Verizon=s appeal). This Court Awill not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or constitutionally guaranteed right.@ *Shevin v. Yarborough*, 274 So. 2d 505, 509 (Fla. 1973). Competent, substantial evidence is evidence Asufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.@ *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

ARGUMENT

I. THE COMMISSION CORRECTLY APPROVED VERIZON'S MODELED SWITCHING TECHNOLOGY AND DLC PLACEMENTS FOR USE IN SETTING TELRIC RATES.[11]

On appeal, AT&T complains that the ICM cost study the Commission approved with adjustments cannot be used to set UNE rates because it does not comply with the FCC=s TELRIC standard. Specifically, AT&T takes issue with the Commission=s acceptance of Verizon=s modeled switching technology (*i.e.*, inclusion of GTD-5 switches and exclusion of ATM switching[12]) and DLC[13] placements. Because of these alleged errors in the Commission=s application of TELRIC, AT&T asks the Court to invalidate the UNE rates the Commission approved and instead to impose the interim default proxy rates the FCC established in 1996.

As discussed in Verizon=s Reply Brief, the Court should reverse the Commission=s *UNE Order*, but not for

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[11] This section addresses only AT&T=s specific criticisms of the Commission=s decision approving ICM. Verizon does not endorse any of the Commission=s adjustments to the ICM cost study Verizon proposed.

[12] ATM is a very high speed digital communications technology suitable for transmitting voice or video along with data.

[13] A DLC system is electronic equipment necessary to provide a digital, fiber optic communications link between customers and the Verizon switching center serving those customers.

the reasons AT&T suggests. AT&T is asking the Court to re-evaluate the evidence and conclude that the Commission erred in applying the TELRIC standard to that evidence. Application of the law to disputed facts is the Commission=s job, not the Court=s. Because there is competent, substantial evidence supporting the Commission=s findings that ICM will produce TELRIC-compliant rates using Verizon=s switching technology and network configuration inputs, they must be sustained.

A. The Commission's Application of TELRIC is Supported by the Record.

AT&T=s entire Brief on Cross Appeal is a discussion of the evidence allegedly undermining the Commission=s decisions approving Verizon=s ICM inputs for switching technologies and DLC placement. All of this discussion is irrelevant to whether the Commission=s conclusions on these matters should be affirmed. The Court=s function on appeal is to review the Commission=s action to determine if it is supported by competent, substantial evidence. *See, e.g., Schreiber Express, Inc. v. Yarborough et al.*, 257 So. 2d 245 (Fla. 1971). Once the Court finds competent, substantial evidence supporting the Commission=s findings, it will not search the record for evidence that might have led to a different ruling: Athe fact that there was evidence which would lead to a different conclusion is of no import. *Fla. Industrial Comm'n v. Nordin*, 101 So. 2d 890 (Fla. 1st DCA 1958).

The Court will not act as a trier of fact, as AT&T asks it to do.

AT&T asks the Court to make a substantive evaluation of whether various kinds of complex telecommunications equipment, technologies, and network configurations are sufficiently Aforward-looking@ to satisfy TELRIC--all without giving the Court the merest hint of what, for example, a ADLC@ might do or what AATM switching technology@ is. Obviously, the Court is in no position to make this factual assessment.

The Court does not, however, need to grasp the complexities of telecommunications technology to conclude that the Commission had a sufficient evidentiary basis for its conclusion that the approved switch technology and DLC inputs are compatible with TELRIC-based rates. Indeed, conspicuously absent from AT&T=s Brief is any claim that the Commission=s decisions are not supported by the evidence. Below, Verizon summarizes that evidence to show that the Commission was justified in approving Verizon=s switching technology and DLC inputs to set TELRIC-based rates.

1. ***Switching Technology Inputs***. The ICM estimates costs for a number of switches and switch features, including the GTD-5 switch. (*UNE Order* at 133-34, R 16:2907). The Commission approved all of Verizon=s proposed switching-related items for inclusion in the ICM study: AWe believe that Verizon=s inputs and

assumptions, as they relate to *its* switching costs and associated variables, are generally reasonable.@ *UNE Order* at 141, R 16:2915 (emphasis in original). AT&T asks the Court to find that the Commission erred in approving Verizon=s switching inputs and assumptions, because the GTD-5 switch should have been excluded and ATM switching should have been included.

The GTD-5 switch was a particular point of contention between Verizon and the ALECs, so the *UNE Order* addresses this controversy in detail. Verizon witness Tucek explained that the purpose of a forward-looking TELRIC study is to estimate the costs an ILEC expects to incur to provide UNEs in the future. (HT 5:716-17, 747-52). In this regard, Mr. Tucek testified that Verizon uses GTD-5 switches extensively in its network today, it has no plans to replace them, and it plans to purchase more GTD-5 switches. (HT 5:807-08, 827; Ex. 19:35, 42, 60, 85-86; Ex. 25:25). Mr. Tucek explained that AVerizon will provision UNEs out of a network in Florida that contains GTD-5s in the vast majority of its wire centers because it is economically efficient to do so.@ (*See UNE Order* at 139, R 16:2913). He testified further that replacement of all Verizon=s GTD-5 switches would be inefficient, unnecessarily costly, and might not even be feasible. (Ex. 25:27; HT 5:757-58).

Any Areasonable mind@ would accept this evidence as sufficient to support the Commission=s decision that

the GTD-5 switch is an appropriately forward-looking technology for use in a cost study to set Verizon=s UNE rates. Because competent, substantial evidence supports the Commission=s findings concerning the GTD-5 switch, the Court will not examine the record for conflicting evidence. *See, e.g., Fla. Industrial Comm=n*, 101 So. 2d at 891-92.

Moreover, the Commission c`onsidered the same allegations that AT&T presents in its Cross Appeal--that use of the GTD-5 switch impermissibly models Verizon=s existing, rather than future, network; that other ILECs do not use the GTD-5; and that the GTD-5 is not Verizon=s primary switching technology. *UNE Order* at 134-35, 142-43, R 16:2908-09. The Commission weighed AT&T=s evidence and found nothing in the record to contradict Verizon=s evidence that the GTD-5 switch was a forward-looking technology appropriate to include in a TELRIC model. *Id*. at 142, R 16:2916.

The Commission also corrected AT&T=s misrepresentation--made again here on appeal--that the Commission previously decided that the GTD-5 switch did not reflect Verizon=s forward-looking switching costs. (AT&T Br. 15). The Commission agreed with Verizon that it had A>never determined that the GTD-5 switch was not representative of Verizon=s costs--the only costs that are at issue in this proceeding.=@ *UNE Order* at 143, R

16:2917. The Commission explained that the order AT&T cites in its Brief was from a generic proceeding about universal service funding; it was not intended to determine the forward-looking network costs of Verizon or any other particular ILEC. *Id.*

In addition to urging the Court to conclude that the GTD-5 switch violates the TELRIC standard, AT&T argues that ATM switching technology should have been included in the ICM. AT&T implies that the Order is deficient because it does not discuss why Verizon did not include ATM switching in its ICM study. (AT&T Br. 16).

The reason the *UNE Order* does not discuss ATM switching is that neither AT&T nor any other party testified or submitted other evidence that ATM switch technology should be included in the network modeled by ICM. The Commission had no obligation to rule on ICM inputs that no one supported with any evidence.

The Court should disregard AT&T=s attempted evidentiary presentation and decline its invitation to second-guess the Commission=s holding that Verizon=s switching technology inputs were appropriate for use in a TELRIC study to set UNE rates.

2. ***DLC placement.*** AT&T takes issue with the Commission-approved inputs and assumptions for DLC

placement, because they reflect the characteristics of the existing network in some instances. The DLC modeling issue presented the same general controversy as the GTD-5 issue (and many others in the case) did: that is, whether the modeled network should represent, within the constraints of TELRIC, the costs a particular carrier expects to incur in providing UNEs in the future (Verizon=s position); or whether the model should calculate the costs of a hypothetical new entrant=s network that will never exist anywhere (AT&T=s position). (HT 5:747-52). The Commission has consistently accepted Verizon=s view--as it did in this case--that a TELRIC model should consider an ILEC=s existing network characteristics in determining its forward-looking costs: Athere needs to remain a basis in reality if the costs developed for the network are to have any relevance to the cost of . . . services."[14]

Verizon=s testimony regarding DLC placement adhered to this principle. Modeling DLCs in some locations where they exist in the real network was consistent with the FCC=s intention for TELRIC Ato estimate the costs ILECs expect to incur in providing UNEs out of their own networks, not out of some fantasy or hypothetical network.@ *(See HT 5:750).* Mr. Tucek repeatedly discussed ICM=s DLC placement inputs in his deposition and in

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[14] *Determination of the Cost of Basic Local Telecomm. Service*, Final Order, 99 FPSC 1:226, at 322 (Jan. 7, 1999).

response to discovery. (Ex. 19:67; HT 5:41-43, 58-61, 88-89).

Neither AT&T nor any other party submitted any testimony concerning placement of DLCs. Although DLC placements raised some concern with the Commission Staff, there is ample evidence to satisfy a reasonable mind that an ICM cost study including Verizon=s DLC inputs is TELRIC-compliant. This evidence includes 200 pages of testimony given by Mr. Tucek. (HT 5:712-834, 6:839-890; Ex. 25:6-91). The Commission did not find the ALECs= competing testimony compelling (*UNE Order* at 66, R 16:2840), and AT&T has no right to a second hearing on the merits in this appeal.

II. IMPOSITION OF THE FCC'S PROXY RATES OR BELLSOUTH'S UNE RATES WOULD BE UNLAWFUL.

After asking the Court to forbid the Commission to use ICM to set UNE rates, AT&T urges it to remand the case with instructions for the Commission to apply the FCC=s default interim UNE proxy rates to Verizon Auntil such time as Verizon can prepare and produce a TELRIC compliant study.@ (AT&T Br. 19). Although not clearly stated, it appears that AT&T may be seeking alternative relief in the form of a remand with instructions to the Commission to order a combination of the rates AT&T proposed in BellSouth=s UNE rate-setting case and the

rates the Commission approved in that case.[15] Either form of relief would be unlawful.

As Verizon explained earlier, the FCC established temporary default proxy rates for UNEs in 1996, for potential use in the initial rate arbitrations just after the Act was passed. The Florida Commission never applied the proxy rates, and it cannot use these obsolete rates now, after having used cost studies to set UNE rates since 1996. As the FCC has stated, its proxy rates Awere designed for a past period in which no cost studies could have been made available to the state commissions.@[16] Applying the proxy rates now would violate the FCC=s 1996 directive to Aimmediately@ apply TELRIC principles to set UNE rates. *Local Competition Order* at && 619.

AT&T also suggests that the Court might apply some combination of the rates that AT&T proposed (and the Commission rejected) in BellSouth=s UNE case and other rates the Commission approved in that case. The

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[15] Although AT&T does not specifically ask the Court to remand with instructions to adopt the BellSouth rates, it alleges that a Aviable alternative@ to using ICM to set Verizon=s rates would be Athe rates proposed by AT&T and WorldCom in this proceeding. These rates are shown in Exhibit 43. For those UNEs for which rates are not shown in Exhibit 43, AT&T and WorldCom urge the Commission to adopt the rates approved for BellSouth@ in its UNE case. (AT&T Br. 18). (WorldCom, of course, is not a party to this appeal.)

[16] Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents, *FCC v. Iowa Utils. Board, et al. and Related Cases*, Nos. 97-826, et al. (June 17, 1998) (citations omitted).

Act, however, requires the Commission to set UNE rates based on *Verizon*=s costs, not some other company=s costs. *See* 47 U.S.C. ' 252(d)(1). In addition, there is nothing in the record below about the development of BellSouth=s UNE rates (as Verizon discussed in its Initial and Reply Briefs), so imposition of BellSouth=s rates would be beyond the Commission=s discretion and would violate Verizon=s due process rights. *See*, *Hawkins*, 357 So. 2d at 409; *Marco Island Utils., v. Fla. Pub. Serv. Comm'n*, 566 So. 2d 1325, 1329 (Fla. 1st DCA 1990).

CONCLUSION

The *UNE Order* should be reversed for all the reasons discussed here in Verizon=s Reply Brief and in its Initial Brief. The Court should, however, decline to reverse that Order on the points AT&T has raised in its Cross Appeal.

Respectfully submitted,

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Marvin E. Barkin
Florida Bar No. 003564
Marie Tomassi

Florida Bar No. 0772062
TRENAM, KEMKER, SCHARF, BARKIN,
FRYE, O'NEILL & MULLIS,
Professional Association
200 Central Avenue, Suite 1230
Bank of America Tower
St. Petersburg, Florida 33701
Phone: (727) 898-7474
Fax: (727) 820-0835

and

Kimberly Caswell, Esquire
Florida Bar No. 874310
Post Office Box 110, FL TCOOO7
Tampa, Florida 33601-0110
(813) 483-2617

Attorneys for Verizon Florida Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Reply Brief and Answer Brief on Cross-Appeal of Verizon Florida Inc.** has been furnished by U.S. Mail, on August ___, 2003 to the parties on the attached service list.

_____
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Attorney