IN THE SUPREME COURT OF THE STATE OF FLORIDA

SPRINT-FLORIDA, INC., ET AL.	)	
	)	CASE NO. SC03-235
Appellants,	)	
	)	
v.	)	
	)	
LILA A. JABER, ET AL.	)	
	)	
Appellees.	)	
_____	)	
	)	
VERIZON FLORIDA, INC., ET AL.	)	
	)	CASE NO. SC03-236
Appellants,	)	
v.	)	Lower Tribunal
	)	Docket No. 000075-TP
LILA A. JABER, ET AL.	)	
	)	
Appellees.	)	
_____	)	

CONSOLIDATED REPLY OF APPELLANTS SPRINT-FLORIDA, INC. AND SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP TO THE ANSWER BRIEFS OF APPELLEES FLORIDA PUBLIC SERVICE COMMISSION AND AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, ET AL. IN CASE NO. SC03-235

On Appeal From an Order of the Florida Public Service Commission

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STATEMENT OF THE CASE

Appellants Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership (collectively "Sprint) appeal Order No. PSC-02-1248-FOF-TP ("Final Order") issued by the Florida Public Service Commission ("FPSC") on September 10, 2002. Appellant Sprint argues in its Initial Brief that: a.) the FPSC lacks authority to establish, and is actually prohibited by statute from establishing, "the originating carrier's local calling area" as the default mechanism for determining which intercarrier compensation amount shall apply ("default mechanism"); b.) the FPSC's Final Order is inconsistent with its previous *Telenet* decision and it has offered no reason for the inconsistency; c.) the FPSC has improperly relied upon an alleged "grant of authority" from the Federal Communications Commission ("FCC"); and d.) there is insufficient evidence in the record to support the FPSC's selection of the originating carrier's local calling area as the default mechanism. The Appellees, the FPSC and AT&T Communications of the Southern States, LLC and TCG South Florida (collectively "AT&T"), have filed Consolidated Answer Briefs ("Briefs") arguing that the FPSC's Final Order was a.) supported by authority granted by the Florida Legislature and the FCC; b.) is consistent with the FPSC's previous *Telenet* decision; and c.) is supported by competent, substantial evidence.

[1] The arguments advanced by the Appellees' demonstrate that the FPSC still fails to grasp the true impact of its Final Order.

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[1] AT&T also submitted its *Initial Brief as Cross-Appellant* challenging the Final Order's imposition of additional requirements on AT&T for eligibility for the tandem interconnection rate, alleging that the FPSC's ruling is preempted by federal law and violates federal law. Sprint neither supports nor addresses AT&T's cross-appeal.

ARGUMENT

I. The FPSC has not been delegated authority by the FCC to establish the originating carrier's retail local calling area as the default mechanism for intercarrier compensation purposes.

In its Final Order, the FPSC claims that the FCC has delegated to the FPSC the authority to establish the originating carrier's local calling area as the default mechanism for reciprocal compensation purposes (R.11:2074) The FPSC relies upon ¶ 1035 of the FCC's *Local Competition Order*

[2] for this proposition, focusing upon the phrase ". . . state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under Section 251(b)(5), consistent with the state commission's historical practice of defining local service areas for wireline LECs." As noted in Sprint's Initial Brief, this reliance is misplaced.

Sprint argued in its Initial Brief that there has been no "delegation" of authority by the FCC. (Sprint Initial Brief at 23-25) The FPSC's arguments now suggest that the FPSC has abandoned its previous position that its authority to establish a default mechanism is based upon a *delegation of authority* from the FCC. (FPSC Brief at 11) In fact, the FPSC actually adopts Sprint's argument by noting that the FCC "left state commissions to act where state commissions previously had authority to act." (FPSC Brief at 11) "Leaving the states to act" is a far different concept than "delegating authority to the states." That being the case, the FPSC can no longer rely upon its claim that the FCC's *Local Competition Order* provides the FPSC with any

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[2] *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, First Report and Order, FCC 96-325, CC Dockets 96-98, ¶ 1035 (1996) ("*Local Competition Order*").

derived authority. As Sprint pointed out in its Initial Brief, the FPSC's claim was, in any event, unsupported. The FCC's *Local Competition Order* simply *observed* that the FPSC would have only that authority to define the local calling area for local compensation purposes that the state has given to the FPSC. The Florida Legislature has given the FPSC no such authority. (Initial Brief at 23-25)

The FPSC also attempts, in its Brief, to respond to an argument that Sprint is not making; namely, that the FCC's Order "forecloses the Commission from defining the default local calling area as the originating carrier's retail local calling area." (FPSC Brief at 10) Sprint's point was, and is, that the FCC's Order does not provide the FPSC with the authority that the FPSC claims it received from the FCC to change the local calling areas for intercarrier compensation purposes. Sprint has not argued that the FCC Order forecloses state action, but rather that the FCC Order does not create authority where the authority does not already exist. (Sprint Initial Brief at 24)

The FPSC next argues that its default mechanism is not "in conflict" with the FCC's "state commission authority." (FPSC Brief at 11) Again, Sprint did not argue that the FPSC's Final Order and the FCC's ¶ 1035 language are in conflict. In any event, the FPSC's "lack of conflict" argument is unpersuasive. Although the FPSC's Final Order establishing the default mechanism may not conflict with the FCC's ¶ 1035 language, it is in conflict with Section 364.16(3)(a), Florida Statutes. This conflict is found in the fact that not only does the FPSC lack state authority to establish the default mechanism, Section 364.16(3)(a) actually prohibits the FPSC from establishing the default mechanism.

AT&T's Brief does not address Sprint's argument that the FPSC cannot find

authority in ¶ 1035 of the FCC's *Local Competition Order* to establish the originating carrier's local calling area as the default compensation mechanism. Instead, AT&T merely states that "the FCC squarely placed the responsibility to determine local calling areas on state commissions." (AT&T Brief at 19; emphasis added) Although AT&T goes on to quote the entire ¶ 1035 from the FCC's *Local Competition Order*, AT&T says nothing further. It would appear that AT&T, like the FPSC, has abandoned the claim that the FCC *delegated* authority to the FPSC to establish the originating carrier's local calling area as the default mechanism for determining intercarrier compensation amounts in favor of placing *responsibility* on the FPSC. As noted previously, the language of ¶ 1035 requires that the state commission act consistent with its "historical practice of defining local service areas for wireline LECs." The FPSC's default mechanism is not consistent with "historical practice." Thus, even if, *arguendo*, the FPSC had the *responsibility*, the FPSC does not have the *authority* to establish the default mechanism.

II. The FPSC's establishment of the default mechanism for intercarrier competition purposes violates Section 364.16(3), Florida Statutes.

Contrary to the FPSC's bald assertion that Section 364.16(3), Florida Statutes, has nothing to do with the FPSC's authority to establish the default mechanism, Section 364.16(3), Florida Statutes, has everything to do with the FPSC's authority - or more correctly - its lack of authority. Section 364.16(3), Florida Statutes, addresses, like the FPSC's default mechanism, the delivery of traffic "through a local interconnection arrangement." In fact, the FPSC's default mechanism promotes the very "local interconnection" activity prohibited by Section 364.16(3), Florida Statutes.

Clearly, the FPSC misunderstands the significance of its own default

mechanism. The Commission argues that while its default mechanism may adversely impact Sprint's access revenues, that is of no consequence because the Commission is only prevented by Section 364.163 from setting access charges, and neither Section 364.163 nor Section 364.16(3) "guarantee" Sprint a recovery of a certain amount of "access charge revenue." (FPSC Brief at 14) Although the Florida Legislature does not guarantee Sprint a recovery of a certain amount of access revenues, it does guarantee that entities using Sprint's local network to complete long distance calls must pay Sprint its tariffed access charges. Section 364.16(3), Florida Statutes, by its plain meaning, prevents the siphoning off of Sprint's access revenues through the device of delivering long distance calls to Sprint as if those calls were local calls. It is the access revenues resulting from the delivery of long distance calls to Sprint which the Legislature intended to be protected. But, the FPSC's default mechanism defeats that protection.

The FPSC also argues that Section 364.01, Florida Statutes, provides the requisite authority for establishing the originating carrier's local calling area as the default mechanism because the general provisions of Section 364.01 and the more specific provisions of Sections 364.16(3) and 364.163 are not in conflict (FPSC Brief at 15-16), and because Section 364.01 authorizes the FPSC to act "where necessary to define the local calling area for reciprocal compensation purposes to ensure the widest range of consumer choice and to eliminate barriers to competition." (FPSC Brief at 16) These arguments are the very same arguments the FPSC advanced in its Final Order to justify its action. In its Initial Brief, Sprint demonstrated how the general propositions set forth in Section 364.01, Florida Statutes, - actually more of

a mission statement - cannot give the FPSC a roving license to disregard specific statutory language which, as the FPSC concedes, limits the FPSC's authority. (FPSC Brief at 16)

Reliance by the FPSC on *Level 3 Communications LLC v. Jacobs*, 841 So.2d 447 (Fla. 2003) for the proposition that the FPSC's interpretation is entitled to "great deference," is misplaced. In *Level 3 Communications*, unlike the case here, the FPSC's reliance upon the alleged general authority found in Section 364.01 was backed up with specific authority at Section 364.336, Florida Statutes, to impose regulatory assessment fees, even when the entity claims it is not regulated by the FPSC. As discussed in more detail in Sprint's Initial Brief (Initial Brief at 13-20), the FPSC not only cannot find *specific* authority in Chapter 364, Florida Statutes, to establish the default mechanism, the relevant specific language, Section 364.16(3), Florida Statutes, actually *prohibits* the FPSC's action.

AT&T, in its Consolidated Answer Brief, presents the same basic arguments made by the FPSC, which have been addressed above. Additionally, AT&T contends that: a.) Sprint, by electing price regulation, "has relinquished any right to a guaranteed level of revenues" (AT&T Brief at 22-23); and b.) Sprint's "lost access revenue" argument "runs directly contrary to the Legislature's recently enacted amendments to Chapter 364 (CS/SB 654), which provide clearly defined procedures for the ILECs to decrease access charge revenues and increase local rates on a revenue neutral basis." (AT&T Brief at 23) Contrary to supporting AT&T's conclusion that the FPSC's establishment of the originating carrier's local calling area as the default mechanism for intercarrier compensation purposes was correct, AT&T's additional

arguments, in reality, support Sprint's argument that the Legislature has foreclosed the FPSC from establishing the "default mechanism" in order to protect Sprint's access charge revenues.

AT&T's first argument - that Sprint has relinquished its rights to a guaranteed level of access revenues - is simply wrong. Florida's 1995 legislation established "price regulation" pursuant to Section 364.05, and at the same time established Section 364.16(3), which prevents local interconnection from being used to circumvent payment of Sprint's intrastate access charges which, if it occurred, would erode Sprint's intrastate access revenues. It is clear, then that the Legislature did not intend that Sprint is no longer entitled to its intrastate access revenues by electing "price regulation," but rather, despite its election of "price regulation," that Sprint remains entitled to its access revenues to support universal service.

AT&T's second argument - that the Legislature's recent enactment of CS/SB 654 somehow defeats Sprints' "lost access revenue" argument - is also plainly wrong. CS/SB 654 was not the law at the time the FPSC improperly established its default mechanism. In any event, Sprint must, pursuant to CS/SB 654, petition the FPSC to reduce access rates in a revenue neutral manner, and the FPSC could deny such petition if filed. Moreover, the enactment of CS/SB 654 shows just how concerned the Legislature has been in protecting Sprint's intrastate switched network access revenue stream.

[3] CS/SB 654 requires that any reduction in Sprint's access revenues must be offset,

[3] Furthermore, CS/SB 654 (Section 364.164(8), Florida Statutes) provides that should the FPSC or the FCC determine that entities using voice-over-internet protocol service are not obligated to pay access charges to Sprint, Sprint may immediately accelerate its access charge reductions in a revenue neutral manner. Again, contrary to AT&T's argument, this provision of CS/SB 654 demonstrates that maintaining

dollar-for-dollar, with increases in Sprint's basic service revenues. *See* Section 364.164, Florida Statutes. The FPSC's default mechanism, however, allows entities - who would otherwise be obligated to pay access charges to Sprint - to circumvent that obligation by unilaterally invoking an artificial "local calling area" which then qualifies the entity to pay the lower-priced local interconnection ("reciprocal compensation") rate.

III. The FPSC's Final Order is inconsistent with the FPSC's *Telenet* decision.

As argued in Sprint's Initial Brief at 20-23, the FPSC's Final Order is inconsistent with the FPSC's previous decision in *In re: Petition for Arbitration of Dispute With BellSouth Telecommunications, Inc. Regarding Call Forwarding, by Telenet of South Florida, Inc. ("Telenet")*, 97 F.P.S.C. 4:519 (1997), and the FPSC has offered no reason for the inconsistency. Despite the FPSC and AT&T's efforts to argue a lack of inconsistency (FPSC Brief at 18-20; AT&T Brief at 29-32), these arguments lack credibility.

The FPSC and AT&T both seek to distinguish *Telenet* and the Final Order based upon alleged *factual* differences. (FPSC Brief at 17; AT&T Brief at 29) Although there are some factual differences - as would be expected - where the facts count, the two decisions are indistinguishable. In *Telenet* - where Telenet had established a different retail local calling area from BellSouth's local calling area, the FPSC concluded that Telenet, nonetheless, was required to compensate BellSouth for the termination of traffic on the basis of BellSouth's local calling area, not Telenet's

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Sprint's level of access revenues remains important to the Legislature.

retail local calling area. As the FPSC stated in its *Telenet* Order: "Therefore, while an ALEC may have a different local calling area than the incumbent LEC, it is required to pay the applicable access charges." *Telenet* at 21-22. In its Final Order, the FPSC decided, contrary to its *Telenet* Order, that using the originating carrier's local calling area will result in local reciprocal compensation rates applying to terminating calls regardless of whether the call actually originated outside of the terminating carrier's local calling area. In other words, access charges would no longer be paid, even though in *Telenet* the FPSC concluded access charges must be paid. This inconsistency remains unexplained by the FPSC, and it remains an unlawful inconsistency.

IV. The FPSC lacked competent, substantial evidence for its decision.

The FPSC and AT&T attempt to demonstrate that the FPSC based its decision on competent, substantial record evidence; however, their efforts fail. The FPSC asserts that the record shows that the default mechanism is the most competitively neutral option available to the FPSC. (FPSC Brief at 21) Despite an extensive discussion of the three options considered by the FPSC and the rationale for rejecting two of those three (FPSC Brief at 22-24) the FPSC fails to demonstrate the factual basis for the FPSC's determination that the originating carrier’s local calling area was any more competitively neutral than the others, other than rank speculation. Similarly, the FPSC's conclusion that local calling areas will even out over time lacks any shred of factual evidence in the record. (FPSC Brief at 26) According to the FPSC and AT&T, because the FPSC determined that the ILECs preferred their local calling area and the ALECs preferred the LATA, the originating local calling area (which only

BellSouth, an ILEC, appeared to support) must be the middle the ground between the two and, therefore, more competitively neutral. (FPSC Brief at 24, AT&T Brief at 28) The FPSC's reasoning is entirely erroneous, as Sprint and Verizon clearly explained in the their Motions for Reconsideration. (R.11:2123-2127; R.12:2212-2214) Contrary to the FPSC's unsubstantiated assumption, the only fact-based evidence in the record demonstrates that the competitive flaws in the LATA-wide local calling area apply equally to the originating carrier alternative (May 8 2002, Hearing Tr., Vol 1, at 97-98**)** In fact, the originating carrier's local calling area is skewed toward the ALECs as completely as the LATA-wide local calling area and that fact is amply demonstrated by the AT&T's enthusiastic embrace of that standard. (AT&T Brief at 24- 29)

The FPSC and AT&T also attempt to defend as fact-based the FPSC's rejection of Sprint and BellSouth's evidence regarding the administrative burden imposed upon them by the FPSC's open-ended adoption of the originating carrier's local calling area. As support, both the FPSC and AT&T cite to the single statement by BellSouth's witness that BellSouth had no difficulty implementing the alternative through the use of billing factors. (FPSC Brief at 25; AT&T Brief at 24) This single statement, without any factual evidence describing the language in BellSouth's interconnection agreements or the manner in which billing factors were derived or evaluated for accuracy is plainly inadequate as a factual basis for the FPSC to unilaterally impose this same standard on Sprint. In fact, BellSouth's witness even recognized that implementation of the standard might pose unacceptable administrative burdens on other ILECs. (May 8, 2002, Hearing Tr., Vol. 1, at 22)

Finally, recognizing that the facts in the record fall far short of the competent,

substantial evidence necessary to support its ruling, the FPSC attempts to excuse these inadequacies by describing the originating carrier's local calling area as merely a "default," not binding on the parties. (FPSC Brief at 27) This facile characterization by the FPSC ignores the FPSC's stated intent in adopting the default mechanism and its consequent effect on the course of negotiations. (R.11:2086) In fact, as Sprint and Verizon predicted, the FPSC's ruling has made the default the standard in negotiations by the ALECs (R.11:2126; R.12:2214), and subsequent arbitrations bear this out. (Sprint Response in Opposition to the FPSC's Motion to Dismiss at 4 and 5)

The FPSC asserts that Sprint and Verizon are asking the FPSC to "reevaluate the evidence." (FPSC Brief at 26) To the contrary, Sprint is simply asking the FPSC to base its decision, which has far-reaching economic and operational impacts on Sprint, on a modicum of rationale, fact-based record evidence. The FPSC clearly did not have such a factual record for its adoption of the originating carrier's local calling area as the default mechanism. The FPSC's decision should be rejected because it is not based on competent, substantial evidence, according to the clear standards set forth in Section 120.68(7)(b), Florida Statutes, and in relevant case law. *GTC v. Garcia*, 791 So. 2d 452 (Fla. 2000); *Duval Utility Company v. FPSC*, 380 So. 2d 1028 (Fla. 1980).

V. Sprint and Verizon did not improperly rely on the rulemaking standard.

The FPSC also argues that Sprint and Verizon improperly relied on the rulemaking standard set forth in Section 120.56, Florida Statutes, to support their assertions that the FPSC lacks the requisite authority to adopt its order imposing the originating carrier's local calling area to determine reciprocal compensation. (FPSC

Brief at 27) Consequently, the FPSC reasons, Sprint and Verizon have chosen the wrong procedural mechanism for challenging this "rule." (FPSC Brief at 28) The FPSC's argument is entirely without merit.

First, the FPSC improperly characterizes the basis for Sprint's arguments. Sprint's argument that the FPSC acted outside the scope of its authority is not based on the rulemaking standard found in Section 120.536, Florida Statutes, as the FPSC asserts, but relies on the standards for challenging administrative orders set forth in Section 120.68 and applicable case law. (Sprint Initial Brief at 12-19)

Nonetheless, the FPSC's adoption of the default mechanism fits the definition of a rule in Section 120.52, Florida Statutes, and the cases interpreting an agency's authority to adopt a rule do not support the FPSC's authority to adopt the originating carrier's local calling scope as a default mechanism. (Sprint Initial Brief at Footnote 6) Therefore, a discussion of the rulemaking standard is relevant in the context of the FPSC's adoption of a forward looking policy of general application.

The FPSC's argument that because the parties correctly recognize that the order resembles a rule the parties have chosen the improper procedural mechanism for challenging the decision, is patently wrong and attempts to set a circular trap for a party wishing to challenge the decision. The FPSC chose the procedural mechanism for considering and adopting the default. It's choice was to conduct a hearing under Sections 120.569 and 120.57, Florida Statutes, to evaluate material factual disputes through evidence presented in the record and to issue an order based on its consideration of this evidence. (R.11:2039) Because of the procedural mechanism selected by the FPSC, the parties were bound to appeal the order in accordance with

the applicable provisions of Section 120.68, Florida Statutes, rather than through the procedures outlined in Section 120.56, Florida Statutes.

The FPSC cannot now come back and refute the parties' proper challenge of its actions on an alleged faulty procedural basis. Clearly, the form of the underlying proceeding does not change the nature of the FPSC's action, which closely resemble the definition of a rule. This rulemaking character of the FPSC's actions makes the rulemaking standards elucidated in Section 120.536, Florida Statutes, and the related case law entirely appropriate as a basis for asserting the FPSC's improper exercise of the authority delegated to it by the Legislature. Under the standards established in either Section 120.68(7)(e), Florida Statutes, or Section 120.536, Florida Statutes, the FPSC has clearly exceeded the scope of its authority and its decision should be reversed.

CONCLUSION

The Appellees have failed adequately to address Appellant Sprint's arguments that the FPSC's establishment of the "default mechanism" a.) is without the requisite authority, b.) is prohibited by the Legislature, c.) is contrary to the FPSC's previous *Telenet* decisions; and d.) is not supported by competent, substantial evidence. Additionally, the FPSC's attempt to assert a different standard for challenging its Final Order is without merit. The FPSC's Final Order should be reversed.

CERTIFICATE OF TYPE SIZE AND STYLE

This answer brief is typed using Times New Roman 14 point, a font that is proportionately spaced.

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