IN THE SUPREME COURT OF FLORIDA

SPRINT-FLORIDA, INC., ET AL. Appellants, v. LILA A. JABER, ET AL. Appellees.	)	CASE NO. SC03-235
VERIZON FLORIDA INC., ET AL. Appellants, v. LILA A. JABER, ET AL. Appellees.	)	CASE NO. SC03-236

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

CONSOLIDATED ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION TO INITIAL BRIEFS OF SPRINT-FLORIDA, INC., ET AL. IN CASE NO. SC03-235 AND VERIZON FLORIDA INC., ET AL. IN CASE NO. SC03-236

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission." Appellants, Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership, are referred to collectively as "Sprint." Appellants, Verizon Florida Inc., ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, TDS TELECOM/Quincy Telephone, Smart City Telecommunications LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc., Frontier Communications of the South, Inc., and GTC Com, are referred to collectively as "Verizon." Cross Appellees, AT&T Communications of the Southern States, LLC, and TCG South Florida are referred to collectively as "AT&T." BellSouth Telecommunications, Inc., is referred to as "BellSouth."

References to Sprint's Initial Brief are designated (Sprint Initial Brief at [Page #]). References to Verizon's Initial Brief are designated (Verizon Initial Brief at [Page #]).

References to the record on appeal (which is identical for both Case No. SC03-235 and Case No. SC03-236) are designated (R. [Vol. #: Page #]). References to the transcript of the July 5-6, 2001, hearing are designated (TR. [Page #]). References to the transcript of the May 8, 2002, hearing are designated (TR2. [Page #]).

Order No. PSC-02-1248-FOF-TP, issued September 10, 2002, entitled Order on Reciprocal Compensation is designated (Final Order at [Page #]). Order No. PSC-03-0059-FOF-TP, issued January 8, 2003, entitled Order Denying Motions for Reconsideration is designated (Reconsideration Order at [Page #]).

The Telecommunication Act of 1996, Pub. L. No. 104-104, is referred to as the "Act." References to the Florida Statutes are the Florida Statutes (2002), unless otherwise noted. References to the United State Code is the United States Code (2002), unless otherwise noted. Incumbent Local Exchange Telecommunications Company is referred to as "ILEC." Alternative Local Exchange Telecommunications Company is referred to as "ALEC."

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts offered by Sprint and Verizon are argumentative. The Commission, therefore, offers its own statement of the case and facts.

On January 21, 2000, the Commission opened an investigation to determine the appropriate method to compensate telecommunications carriers for the exchange of telecommunications traffic subject to section 251 of the Telecommunications Act of 1996 (the "Act"). (R. 1:27) ILECs, including Sprint, Verizon and BellSouth, and ALECs, including AT&T, intervened in the investigation proceeding. (R. 1:28, 38, 40, 43) On March 7 and 8, 2001, the Commission conducted an administrative hearing at which the issue of intercarrier compensation for Internet Service Provider (ISP) bound telecommunications traffic was addressed.

Prior to the Commission rendering a decision on the evidence gathered at that hearing, the Federal Communications Commission ("FCC") released its decision on the subject.[1] In response to the FCC action, the parties to the proceeding presented a stipulation to the Commission requesting that the Commission not

[1] Order on Remand and Report and Order, Implementation of the Local Competitive Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151(2001), remanded, WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1927 (2003).

take action on intercarrier compensation for ISP-bound telecommunications traffic. (R. 8:1492) The Commission approved the stipulation by Order No. PSC-02-0634-AS-TP, issued May 7, 2002, but left the matter open to address issues dealing with non-ISP reciprocal compensation matters. (R. 9:1718, 1720)

Hearings on the non-ISP reciprocal compensation issues were held on July 5 and 6, 2001, and May 8, 2002. By Order No. PSC-02-1248-FOF-TP ("Final Order"), issued September 10, 2002, the Commission rendered its decision on the matters addressed at those hearings. (R. 11:2034) Among other things, the Final Order found that the Commission had the authority to define a local calling area for reciprocal compensation purposes. (R. 11:2075; Final Order at 42)

More specifically, the Commission determined that the local calling area should be determined in the course of negotiations of interconnection agreements. (R. 11:2070-2072; Final Order at 37-39) In the event that the parties could not agree on a definition, however, the Commission provided a default -- the originating carrier's retail local calling area. (R. 11:2087-2088; Final Order at 54-55). The Commission concluded that the originating carrier's retail local calling area was the most competitively neutral alternative of those presented at the hearing. (R. 11:2086; Final Order at 53) The Commission stated

that the default could be incorporated into new and existing interconnection agreements, at the telecommunications carriers' discretion, on a going forward basis. (R. 11:2071; Final Order at 38)

On September 25, 2002, Verizon and Sprint filed separate motions for reconsideration of the Commission's Final Order. (R. 11:2100, 12:2205) Both of the motions requested the Commission to reconsider its decision on choosing the originating carrier's retail local calling area as the default definition for reciprocal compensation purposes. (R. 11:2108, 12:2209) By Order No. PSC-03-0059-FOF-TP ("Reconsideration Order"), issued January 8, 2003, the Commission denied the motions for reconsideration, finding that neither Sprint nor Verizon identified any mistake of fact or law in the Commission's Final Order. (R. 13:2487, 2498-2501; Reconsideration Order at 1, 12-15)

Sprint and Verizon filed Notices of Appeal on February 7, 2003. (R. 14:2553, 2645)

SUMMARY OF THE ARGUMENT

The FCC delegated to the Commission the authority to define a local calling area for reciprocal compensation purposes. The Commission's default definition comports with the FCC's delegation of authority.

The Commission's default definition does not conflict with the statutes pertaining to access rate charges, sections 364.16(3) and 364.163, Florida Statutes. These sections do not prohibit the Commission from establishing the originating carrier's retail local calling area as the default for reciprocal compensation purposes. While the default may result in Sprint and Verizon receiving less revenues from access charges rates, this in no way violates sections 364.16(3) and 364.163. These sections do not guarantee the companies recovery of a certain amount of access charge revenues from their access charge rates.

The Commission is charged with enforcing sections 364.01, 364.16(3), and 364.163. The Commission found that section 364.01 authorizes it 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. The Commission recognized that once the calling area is defined, however, its authority is limited to the

specific statutory provisions applicable to access charge rates, sections 364.16(3) and 364.163.

The Commission's interpretation of sections 364.01, 364.16(3), and 364.163 allows these statutes to be read in harmony. Thus, the Commission's interpretation of these sections cannot be considered clearly erroneous, and the companies have failed to show that the Commission made any departure from the essential requirements of law when interpreting these sections.

Sprint's and Verizon's reliance on the Telenet and MCI Orders as authority for this Court to overturn the Final Order is misplaced. Neither the Telenet Order nor the MCI Order address the matter that was at issue in the proceeding below -- the establishment of a local calling area for reciprocal compensation purposes. Thus, Sprint's and Verizon's assertions that the Commission ignored controlling precedents when making its decision is baseless.

The Final Order is supported by competent, substantial record evidence. The record revealed that a default definition of either the ILEC's retail local calling area or a LATA-wide calling area would unduly favor one group of telecommunications providers over another. The originating carrier's local calling area proved to be more competitively neutral than the other

alternatives in the record. The evidence showed that BellSouth is currently using the originating carrier's local calling area in many of its interconnection agreements. The evidence also showed that the approach could be implemented through the use of billing factors. Sprint's and Verizon's argument characterizing the Commission's action as a "rule" implemented without proper legislative authority should not be entertained by this Court. Section 120.56(4)(a), Florida Statutes, and the cases cited by Sprint and Verizon in support of this argument, clearly show that the Division of Administrative Hearings, not this Court, is the proper forum for addressing agency rule challenges. Nonetheless, even if the rule standard were applied, the Commission's decision would still prevail as the Final Order is neither arbitrary nor capricious and is clearly supported by the record. Therefore, the Commission's Final Order and Reconsideration Order should be affirmed.

STANDARDS OF REVIEW

Orders of the Commission come before the Court clothed with the presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. United Telephone Company of Florida v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986); General Telephone Company of Florida v. Carter, 115

So. 2d 554, 556 (Fla. 1959). The standard of review for Point I is whether the Commission's interpretation of the statutes it is charged with enforcing was clearly erroneous and whether the Commission's action departed from the essential requirements of law. See Section 120.68(7)(d), Florida Statutes; see also Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003). The standard of review for Point II is whether the Commission's exercise of discretion was inconsistent with officially stated prior agency policy or prior Commission practice. See Section 120.68(7)(e). The standard of review for Point III is whether there is competent, substantial evidence in the record supporting the Commission's action. See Section 120.68(7)(b), Florida Statutes; see also Teleco Communications Company v. Clark, 695 So. 2d 304, 308 (Fla. 1997).

ARGUMENT

As discussed above, both Sprint and Verizon appealed the Final Order and Reconsideration Order. While the companies filed separate briefs in support of their appeals, both of the companies' Initial Briefs make the same arguments on the same issue -- whether the Commission has the authority to designate the originating carrier's retail local calling area as the default for reciprocal compensation purposes. This Answer Brief addresses the arguments made by both Sprint and Verizon in their

Initial Briefs. The first sentence of each of the Commission's arguments indicates the point of Sprint's and Verizon's Initial Briefs to which the Commission is responding.

I. THE COMMISSION HAS THE AUTHORITY UNDER FEDERAL AND STATE LAW TO DEFINE A DEFAULT LOCAL CALLING AREA FOR RECIPROCAL COMPENSATION PURPOSES.

In Point I of Verizon's Initial Brief and in Points I and III of Sprint's Initial Brief, the companies argue that the Commission improperly relied on a delegation of authority from the FCC and misinterpreted state law statutes when defining the default local calling area for reciprocal compensation purposes. (Verizon Initial Brief at 24, 34, 37; Sprint Initial Brief at 12, 23) These arguments are without merit.

Pursuant to 47 U.S.C §252(e), the Commission has the authority to implement the rates, terms and conditions of intercarrier compensation mechanisms for intrastate telecommunications traffic subject to the Act, so long as such rates, terms and conditions are not inconsistent with the rules and orders of the FCC governing such intercarrier compensation. (R. 11:2040; Final Order at 7) Furthermore, pursuant to sections 364.161 and 364.162, Florida Statutes, the Commission has the authority to establish the rates, terms and conditions of interconnection agreements. (R. 11:2041; Final Order at 8)

It is important for the Court to keep in mind that the

Commission found that the parties to interconnection agreements should negotiate the local calling area for reciprocal compensation purposes. (R. 11:2070-2072; Final Order at 37-39) Sprint and Verizon are thus free to define a local calling area as they choose pursuant to the Final Order. It is only in those cases where negotiations reach an impasse that the default definition for a local calling area comes into play. (R. 11:2070-2072; Final Order at 37-39) Nevertheless, the Commission has the authority, under federal and state law, to designate the originating carrier's retail local calling area as the default local calling area for reciprocal compensation purposes.

A. The FCC has delegated to the Commission the authority to establish the originating carrier's retail local calling area as the default definition for reciprocal compensation purposes.

Section 47 U.S.C. §251(b)(5) states that each local exchange carrier has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In this regard, the FCC stated in In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, CC Docket No. 96-98, First Report and Order, ¶1035 (1996), (Local Competition Order), that

> ...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 commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside the applicable local area would be subject to interstate and intrastate access charges. We expect the state to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

Sprint and Verizon argue that the language "consistent with the state commissions' historical practice of defining local service areas for wireline LECs" forecloses the Commission from defining the default local calling area as the originating carrier's retail local calling area. (Verizon Initial Brief at 39; Sprint Initial Brief at 24) The language of this paragraph, however, makes no such prohibition.

A more logical interpretation of this phrase is that the FCC has delegated to state commissions the task of defining a local calling area for reciprocal compensation purposes. (R. 11:2074; Final Order at 41) The language referring to the state commissions' historical practice of defining the local service area for wireline local exchange companies just acknowledges that, in the past, the establishment of local calling areas rested with state commissions as opposed to the FCC. See Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248, 251

(Fla. 1993)(finding that the Commission had the authority to determine local calling routes based on the needs of the community pursuant to section 364.01, Florida Statutes).

This interpretation is buttressed by the FCC's statement in the next paragraph of that order. In paragraph 1036 of the Local Competition Order, the FCC defines the local service area for wireless carriers. The FCC states that it has exclusive authority to define the authorized license areas for these carriers. Local Competition Order at ¶1036. It follows that the FCC left the state commissions to act where state commissions previously had authority to act, and took action in the area where the FCC historically had jurisdiction to act. The Commission's establishment of the originating carrier's retail local calling area as the default definition for "local calling area" is not inconsistent with the FCC's Local Competition Order. The Commission's action, thus, comports with the delegation of authority provided to the Commission by the FCC.

B. The Commission's default definition does not lower access rates and thus does not violate sections 364.16(3) and 364.163, Florida Statutes.

The Commission's jurisdiction to specify the rates, terms and conditions governing compensation for transport and delivery or termination of telecommunications traffic is derived from sections 364.161 and 364.162. (R. 11:2039-2041; Final Order at

6-8) More specifically, section 364.162 directs the Commission to establish nondiscriminatory rates, terms, and conditions for interconnection when telecommunications companies are unable to negotiate such aspects of their interconnection agreements. Section 364.161(1) requires that "prices, rates, and terms, and conditions for unbundled local services shall be established by the procedure set forth in s. 364.162."

The Legislature, in section 364.01(4), has also provided general powers to the Commission. Section 364.01(4) states that the Commission must:

> (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.
>
> ***
>
> (g) Ensure all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.
>
> ***
>
> (i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

In Beard, 624 So. 2d at 251, the Court found that the "exclusive jurisdiction in section 364.01 to regulate telecommunications gives the Commission the authority to

determine local routes." In fact, the Court found that section 364.01 alone provided sufficient authority for the Commission to take such action. Id.

The Commission no longer designates the local calling routes that ILECs serve since changes were made to Chapter 364 in 1995, as set forth in section 364.385. The Beard case, however, clearly establishes that the Commission has power derived exclusively from section 364.01 that allows it to act to promote competition in the telecommunications industry and to ensure that telecommunications services are being treated fairly by preventing anti-competitive behavior. In accordance with section 364.01, the Commission chose, in the case at hand, a default from the options available in the record that would best promote competition and ensure fairness to all telecommunications services. (R. 11:2087-2088, 13:2500; Final Order at 54-55; Reconsideration Order at 14)

Sprint's and Verizon's assertion that the Commission's default definition runs counter to sections 364.16(3) and 364.163 is without merit. (Sprint Initial Brief at 16; Verizon Initial Brief at 24) Section 364.16(3)(a) only pertains to access charge rates and states that

> [n]o local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through

> a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Likewise, section 364.163 only addresses access charges rates by setting forth the method for calculating these rates. Noticeably absent from the language of these sections is any prohibition against the Commission defining a local calling area for reciprocal compensation purposes, whether as the originating carrier's retail local calling area, a LATA-wide calling area, or the ILEC's retail local calling area.

Verizon and Sprint argue that the Commission's default definition in effect violates sections 364.16(3)(a) and 364.163 because it allows ALECs to widen their local calling areas and that this will result in ALECs paying reciprocal compensation charges instead of the higher access charge rates to the ILEC. (Sprint Initial Brief at 16; Verizon Initial Brief at 24) While this scenario has the potential of developing, it will in no way violate the statutes pertaining to access charge rates. Although section 364.163 outlines how access charge rates are set, rates which the Commission cannot raise or lower, nowhere does this section, or for that matter section 364.16(3), guarantee to the ILECs a recovery of a certain amount of access charge *revenues* derived from those access charge *rates*.

The Commission's Final Order recognized the difference

between access charge rates and access charge revenues. The Commission explained in the Final Order that

> . . .it appears the ILEC parties are failing to distinguish between access rates and access revenues. It is clear from the plain language of Section 364.163, Florida Statutes, that the Legislature has reserved for itself the authority to determine access charge rates. What is not clear from the ILECs' briefs is how Section 364.163 governs access charge revenues. We do not believe a decision by us to establish LATAs as a default local calling area translates into rate-setting. While the parties appear to agree that using LATAs as default local calling areas would reduce access charge revenues, revenues and rates are distinct entities in intercarrier compensation schemes and under the law.

(R. 11:2074; Final Order at 41)

While the areas defined as "local" for reciprocal compensation purposes may change based on the default definition, ALECs, or ILECs for that matter, who deliver traffic without paying the appropriate charges for terminating access service will still be in violation of section 364.16(3)(a). As the Commission explained in its Reconsideration Order, choosing the originating carriers' retail local calling area as the default "does not render the access/local distinction meaningless because, while the compensation scheme for a particular traffic route may be altered, all carriers will still be required to pay terminating access charges where applicable." (R. 13:2498-2499; Reconsideration Order at 12-13)

C. There is no conflict between sections 364.01,

364.16(3) and 364.163, and the Commission's interpretation of these sections allow the statutes to be read in harmony.

The Commission's interpretation of sections 364.01, 364.16(3) and 364.163 comports with the plain language of the statutes. See Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995)(stating that "[w]hen the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given its effect"). Sprint and Verizon argue that the Court should ignore the authority granted to the Commission by section 364.01 because it is a general statute, not specific, like sections 364.16(3) and 364.163. (Sprint Initial Brief at 14; Verizon Initial Brief at 34) This rule of statutory construction, however, applies when the statutes at issue are in conflict. See, e.g., M.W. v. Davis, 756 So. 2d 90, 106 (Fla. 2000). Sections 364.01, 364.16(3) and 364.163 are not in conflict.

The Commission found that section 346.01 authorizes it 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. (R. 11:2073-2074; Final Order at 40-41) Once the calling area is defined, however, the Commission recognized that its authority

is limited to the specific statutory provisions applicable to access charges rates, sections 364.16(3)(a) and 364.163. (R. 11:2073-2074; Final Order at 40-41) Thus, the Commission's interpretation allows these sections to be read in harmony. See Mann v. Goodyear Tire and Rubber Company, 300 So. 2d 666, 668 (Fla. 1974)(stating that "[i]t is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject and having the same purpose, even though the statutes were not enacted at the same time").

The Commission's interpretation of the statutes that it is charged with enforcing is entitled to great deference and will not be overturned unless the party challenging the order can show a departure from the essential requirements of law. Level 3 Communications, 841 So. 2d at 450. As illustrated above, the Commission properly concluded that the plain language of sections 364.01, 364.16(3), and 364.163, when read in conjunction with the Federal law on the subject and sections 364.161 and 364.162, does not prohibit the Commission from establishing the originating carrier's retail local calling area as the default for reciprocal compensation purposes. Sprint and Verizon have failed to show that the Commission made any departure from the essential requirements of law when

interpreting sections 364.01, 364.16(3), and 364.163.

II. THE COMMISSION DID NOT IGNORE ANY CONTROLLING PRECEDENTS WHEN CHOOSING ITS DEFAULT DEFINITION.

In Point I and II of Sprint's Initial Brief and in Point I.A. of Verizon's Initial Brief, the companies argue that the Commission ignored prior precedents when making its decision, specifically In re: Petition for arbitration of dispute with BellSouth Telecommunications, Inc. regarding call forwarding by Telenet of South Florida, Inc., 97 F.P.S.C. 4:519 (1997)(Telenet Order) and In re: Complaint by MCI Telecommunications Corporation against GTE Florida Incorporated regarding anti-competitive practices related to excessive intrastate switched access pricing, 97 F.P.S.C. 10:681 (1997)(MCI Order). (Sprint Initial Brief at 18, 20; Verizon Initial Brief at 25, 29) This argument is without merit.

A. The Commission did not define a local calling area for reciprocal compensation purposes in the Telenet Order.

The Telenet Order involved a dispute between BellSouth and Telenet over the way Telenet was using BellSouth's call forwarding services. 97 F.P.S.C. 4:519. More specifically, Telenet was using BellSouth's call forwarding services to route calls in such a way that the calls would always be local calls. Id. at 4:521. Telenet conceded that it did not pay any access charges to BellSouth and that if the calls were made through an

interexchange carrier that the calls would be subject to access charges. Id. at 4:520-521.

Telenet's position in the case was that BellSouth's tariff provision that prohibited the company's use of BellSouth's call forwarding in this manner was an anti-competitive restriction. Id. at 4:519. The Commission found that Telenet was knowingly avoiding the payment of applicable access charges in violation of section 364.16(3)(a). Id. at 4:527.

There is no conflict between the Commission's decision in the Telenet Order and the case at hand. In the Telenet Order, the Commission found that ALECs cannot avoid paying terminating access charges where such charges are applicable. Id. at 4:527. Likewise, in the case at hand, the Commission specifically stated that ". . .while the compensation scheme for a particular traffic route may be altered, all carriers will still be required to pay terminating access charges where applicable." (R. 13:2498-2499; Reconsideration Order at 12-13) Although the Final Order defines a default local calling area for reciprocal compensation purposes, the Commission does not authorize companies to cease paying terminating access charges where such charges are applicable under interconnection agreements.

Verizon and Sprint argue that the Commission's decision in the Telenet Order shows that the Commission has previously

established the ILEC's retail local calling area as the definition of "local calling area" for reciprocal compensation purposes. (Sprint Initial Brief at 20; Verizon Initial Brief at 25) This is simply not the case. The Final Order is the first instance where the Commission specifically addressed a default definition for a local calling area for reciprocal compensation purposes. (R. 11:2074, 2086-2087; Final Order at 41, 53-54) The Commission was correct to conclude that the Telenet Order, which was based on a specific fact pattern where a telecommunications company was not paying terminating access charges when such charges were applicable, had little bearing on its decision in the case at hand.

B. The MCI Order does not provide any precedent for defining a local calling area for reciprocal compensation purposes.

The companies' reliance on the MCI Order is an example of the companies confusing access charge rates with access charge revenues. In the MCI Order, MCI petitioned the Commission to reduce GTE Florida's intrastate access charge rates to eliminate anti-competitive effects. 97 F.P.S.C. 10:681. GTE filed a Motion to Dismiss, stating that the Commission did not have the authority to reduce the access charge rates. Id. at 10:682. The Commission granted the Motion to Dismiss, agreeing with GTE that it did not have the authority to reduce the access charge rates.

Id. at 10:685.

There is no conflict between the Commission's decision in the MCI order and in the case at bar. In the Final Order, the Commission only provided a default definition for local calling area for reciprocal compensation purposes. The Commission did not reduce access charge rates. In fact, the Commission acknowledged that once the local calling area was defined, its authority was limited by sections 364.16(3) and 364.163, the access charge rate statutes. (R. 11:2073-2074, 13:2498-2499; Final Order at 40-41; Reconsideration Order at 12-13) Sections 364.16(3) and 364.163 do not guarantee an ILEC the recovery of a set amount of access charge revenues.

The companies' reliance on the MCI Order, just as their reliance on the Telenet Order, is misplaced. The Commission did not deviate from any prior agency policy or practice when rendering its decision. See Section 120.68(7)(e). Sprint and Verizon have failed to show that the Commission abused its discretion. Id.

III. THE COMMISSION'S DECISION TO ESTABLISH THE ORIGINATING CARRIER'S RETAIL LOCAL CALLING AREA AS THE DEFAULT DEFINITION FOR LOCAL CALLING AREA FOR RECIPROCAL COMPENSATION PURPOSES IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

A. The record shows that the originating carrier's local calling area is the most competitively neutral definition of a local calling area for reciprocal compensation purposes.

Sprint argues in Point IV of its Initial Brief and Verizon argues in Point II of its Initial Brief that there was no competent, substantial evidence supporting the Commission's decision to establish the originating carrier's retail local calling area as the default for reciprocal compensation purposes. (Sprint Initial Brief at 25; Verizon Initial Brief at 41) This argument is without merit. In fact, the record showed that this default definition was the most competitively neutral option available to the Commission.

The Commission had before it three options for defining a local calling area: 1) the ILEC's retail local calling area; 2) a LATA-wide local calling area; or 3) the originating carrier's retail local calling area. (R. 11:2076, 2079, 2081; Final Order at 43, 46, 48) The record contained testimony on each of these three options. The ILECs, including Sprint and Verizon, championed the ILEC's local calling area as the default; whereas, the ALECs supported the LATA-wide calling area as the default. (R. 10:1813, 1887, 1912, 11:2076)

The record showed that the ILECs' retail local calling areas were delineated prior to the Act and thus were not premised on the promotion of competition that is the basis of the Act. (TR. 209) Moreover, AT&T witness Cain testified to the shortcomings of using the ILEC's retail local calling area. He stated that

[a]doption of the incumbent local exchange carrier's local calling area suffers from two afflictions. First, it would preserve and perpetuate the complexities plaguing the industry. The ILEC's local calling area is yet another artificial boundary that few outside of this proceeding understand. Second, as a default, it would hold ALECs and consumers hostage to the calling plans of the incumbent local exchange carrier. Although it is true that ALECs are free to define their own retail local calling areas, that freedom is constrained by the costs the ALEC must incur. One of those costs is intercarrier compensation. If the ALEC must pay the ILEC switched access for some calls within the LATA, and reciprocal compensation for others, the ALEC's LATA-wide local calling areas will turn out to be either unprofitable or

uncompetitive, or both.

(TR2. 229)

Witness Cain explained that the unprofitability would result because the rates for switched access generally exceed rates for reciprocal compensation, which means ALECs would have a difficult time competing against the ILECs. (TR2. 229-230) He testified that this would leave an ALEC with only the alternative of duplicating the ILEC's local calling area, which he opined would result in fewer consumer choices and higher rates for customers. (TR2. 230)

The record also showed that there were drawbacks to using the LATA-wide calling area as the default definition. Verizon witness Trimble testified that this approach intrinsically favors ALECs to the disadvantage of ILECs and interexchange carriers ("IXCs"). (TR2. 91-92) He explained that

> [u]nder the LATA-wide approach, all intraLATA calls handled jointly by ALECs and ILECs would be termed "local" and subject to reciprocal compensation. But, an intraLATA call that involves an IXC would still be subject to access compensation rules. The ILECs would, likewise, be subject to access compensation rules when they handle toll calls for their presubscribed customers because Florida law requires them to impute access costs into their intraLATA toll rates. Applying different intercarrier compensation rules to the same type of calls could give the ALECs a significant, artificial competitive advantage in pricing their intraLATA calls (regardless of whether they call them local calls or toll calls) versus pricing based on the cost structures that the IXC and the ILEC (through imputation) face.

(TR2. 91-92)

The defining of a local calling area for reciprocal compensation purposes is a necessary aspect of interconnection agreements. The Commission's purpose in establishing a default was to be as competitively neutral as possible to encourage the negotiation of interconnection agreements. (R. 11:2086; Final Order at 53) The Commission recognized that

> [a] default which is defined in accordance with the ILECs' preference for their existing retail local calling areas or the ALECs' preference for LATA-wide local calling may create a disincentive to negotiate. Adopting either of these two options would seem counterproductive, as it could chill negotiations and lead to one-sided outcomes.

(R. 11:2086; Final Order at 53) Thus, after a review of the evidence, the Commission rejected both the definition favored by the ILECs, which was rooted in monopoly era regulation and effectively precluded an ALEC from offering more expansive calling scopes, and the one favored by the ALECs, which appeared to discriminate against ILECs and IXCs. (R. 11:2086; Final Order at 53)

The third option set forth in the record, the originating carrier's retail local calling area, proved to be a feasible alternative. BellSouth witness Shiroishi testified on this alternative, stating that

> . . .for purposes of determining the applicability of reciprocal compensation, a "local calling area" can be

> defined as mutually agreed to by the parties and pursuant to the terms and conditions contained in the parties' negotiated interconnection agreement, with the originating party's local calling area determining the intercarrier compensation between the parties. BellSouth currently has the arrangement described above in many of its interconnection agreements. . . .

(TR2. 22)

The record showed that the primary concern Verizon and Sprint had in regard to the option of designating the original carrier's retail local calling area as the default definition was that it was administratively complex. (TR2. 97-100, 184-185) In this regard, Verizon witness Trimble testified that the company would need to "build and maintain billing tables to implement each local calling area and associated reciprocal compensation application." (TR2. 100) Sprint witness Ward expressed similar concerns about carriers having "to change their billing systems to maintain the varying local calling areas for each ALEC." (TR2. 185)

There was testimony in the record, however, that extensive changes to billing systems were not necessary. BellSouth witness Shiroishi explained that BellSouth had implemented the originating carrier's local retail calling area though the use of billing factors and that these factors "allow the originating carrier to report to the terminating carrier the percent of usage that is interstate, intrastate, and local." (TR2. 22) The

record, thus, revealed that Sprint's and Verizon's fears regarding the use of the originating carrier's retail local calling area as the default appeared to be exaggerated. (R. 11:2087; Final Order at 54)

As for Sprint's and Verizon's concerns about wholesale compensation varying depending on the direction of the call (TR2. 97-99, 184-185), the Commission found that, policy wise, it would be beneficial to take a wait and see approach to determine whether any directional differences would be sustainable over time and that it was important at this point to encourage experimentation. (R. 11:2087; Final Order at 54) Using its expertise, the Commission reasoned that as carriers experiment with different retail local calling areas, market forces will eventually determine which plans are most viable and more uniformity will emerge as a result. (R. 11:2087; Final Order at 54)

While Sprint and Verizon argue that there is no competent, substantial evidence supporting the Commission's decision, a closer look at the companies' arguments shows that they are actually asking the Court to reevaluate the evidence. This is something the Court is not permitted to do. It is the Commission's job, as fact-finder, to evaluate and weigh the testimony and evidence based upon its observation of the

bearing, demeanor, and credibility of the witnesses appearing at the hearing, and it is not the function of the appellate court to reevaluate the testimony and evidence from the record on appeal below. See Gulf Power Co. v. Public Service Commission, 480 So. 2d 97, 98 (Fla. 1985)(stating that the Court will not reweigh and reevaluate the evidence presented to the Commission).

As illustrated above, there is competent, substantial record evidence supporting the Commission's decision to choose the originating carrier's retail local calling area as the default definition. See Teleco Communications, 695 So. 2d at 308. Nonetheless, it is important that the Court not lose sight of the fact that the default definition the Commission chose for reciprocal compensation purposes is just that -- a default. The Commission found in the Final Order that a local calling area for reciprocal compensation purposes should be defined through the negotiation of interconnection agreements. (R. 11:2070-2072; Final Order at 37-39) Thus, both Sprint and Verizon are in charge of their own destinies, as they are free to negotiate a definition that best suits each interconnection agreement to which they are a party.

B. Sprint's and Verizon's reliance on case law pertaining to rule challenges as authority to overturn the Commission's decision is misplaced.

Verizon and Sprint proceed in their briefs to characterize the Commission establishing a default definition as a "rule" and argue, in essence, that this Court should examine the Commission's actions as if it had implemented a rule without the proper legislative authority to do so. (Verizon Initial Brief at 34; Sprint Initial Brief at 14, footnote 6) Assuming for the sake of argument that the Commission's action was rulemaking, Sprint and Verizon have implemented the wrong procedure to make such a challenge.

Section 120.56, Florida Statutes, sets forth the procedure for challenging an agency statement defined as a rule. Section 120.56(4)(a) is clear that such challenges must be taken to the Division of Administrative Hearings. Section 120.56(4)(a) specifically states that

> [a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

The cases cited by the companies as support for this argument also show that this Court is the wrong forum in which to make a rule challenge. (Sprint Initial Brief at 14; Verizon Initial Brief at 35-36) St. Johns River Water Management

District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998), Southwest Florida Water Management District v. Save the Manatee Club, Inc. 773 So. 2d 594 (Fla. 1st DCA 2000), and Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, 794 So. 2d 696 (Fla. 1st DCA 2001), review denied, 823 So. 2d 123 (Fla. 2002), were all appealed to the First District Court of Appeal from orders of the Division of Administrative Hearings. Thus, the Court should not entertain Verizon's and Sprint's rulemaking arguments.

Nonetheless, even if the rule standard were applied, the Final Order would stand as the Commission's decision was neither arbitrary nor capricious. A decision is arbitrary and capricious when no reasonable man would take the view adopted by the lower court. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). If reasonable men could disagree as to whether the trial court's action was proper, then it cannot be said that the trial court abused its discretion. Id.

The evidence showed that BellSouth currently uses the originating carrier's retail local calling area as the local calling area for reciprocal compensation purposes in many of its interconnection agreements. (TR2. 22) The record also showed that this approach could be implemented by telecommunications companies through the use of billing factors. (TR2. 22) It is

logical that the Commission would choose a default definition that did not unduly favor one particular telecommunications industry group in order to encourage the negotiation of interconnection agreements. (R. 11:2086; Final Order at 53)

The Commission's decision is supported by competent, substantial record evidence and cannot be considered arbitrary nor capricious. See Teleco Communications, 695 So. 2d at 308. Sprint's and Verizon's arguments should be rejected.

CONCLUSION

Sprint and Verizon have failed to meet the heavy burden of overcoming the presumption of correctness that attaches to Commission orders. See General Telephone Company, 115 So. 2d at 556-557; see also United Telephone Company of Florida v. Mayo, 345 So. 2d 648, 651-652 (Fla. 1977). The Commission's Final Order and Reconsideration Order should be affirmed.

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