IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

SPRINT'S INITIAL BRIEF

On Appeal From an Order of the Florida Public Service Commission

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STATEMENT OF JURISDICTION

This is an appeal of an Order of the Florida Public Service Commission relating to telephone rates or services. This Court has appellate jurisdiction of this matter pursuant to Section 364.381, Florida Statutes and Fla.R.App.Proc. 9.030(a)(1)(B)(ii).

STANDARD OF REVIEW

1. The standard of review on Points I and III is de novo, based on the FPSC's lack of statutory authority and a violation of a statutory provision. § 120.68(7)(e)(1) and (4), Fla. Stat. (2002).

2. The standard of review on Point II is abuse of discretion based on the Order's inconsistency with a prior FPSC decision without a reasonable explanation, and a violation of constitutional provisions. § 120.68(7)(e)(3) and (4), Fla. Stat. (2002); *Southern States Utilities v. Florida Public Service Commission*, 714 So. 2d 1046 (Fla. 1st DCA 1998).

3. The standard of review on Point IV is abuse of discretion based on the Order's lack of competent substantial evidence. § 120.68(7), Fla. Stat. (2002), and *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

STATEMENT OF CASE

By Order Number PSC-02-1248-FOF-TP, issued September 10, 2002, (R.11:2034-2097) ("Order") the Florida Public Service Commission ("FPSC") has, *inter alia*, established the originating carrier's retail local calling area as the default for determining intercarrier compensation obligations.

[1] The FPSC rejected Sprint's and other parties' Motions for Reconsideration of this issue in Order Number PSC-03-0059-FOF-TOP, issued January 8, 2003 (R.13:2487-2514) It is only this portion of the Order from which Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership (collectively "Sprint") appeal. Order at 39 to 55 (R.11:2072-2088). The decision to which Sprint takes exception requires a change from existing intercarrier compensation obligations, which are based upon the incumbent local exchange telecommunications company's retail local calling area. This departure from the existing intercarrier compensation requirements is in contravention of Florida law.

The Order appealed from was issued in Docket No. 000075-TP, Phases II and IIA. This docket was a multi-faceted proceeding investigating the appropriate methods to compensate carriers for the exchange of telephone traffic subject to the requirements of Section 251 of the Federal Telecommunications Act of 1996.[2] There were numerous parties to this proceeding, including the incumbent local exchange companies ("ILECs") – such as Sprint-Florida, and the new entrants, known as alternative local exchange companies ("ALECs") – such as AT&T Communications of the Southern States, LLC and TCG South Florida.[3] The issue pertinent to this

[1] The FPSC subsequently issued an Amendatory Order revising provisions of the Order unrelated to the issue that is the subject of this appeal. Order No. PSC-02-1248A-FOF-TP, issued Sept. 12, 2002 (R.11:2098-2099).

[2] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), the Communications Act of 1934, as amended by the 1996 Act and other statutes. See 47 U.S.C. § 151 et seq.

[3] Acronyms are a way of life in the telecommunications industry. It is difficult to write or say anything that does not include one or more acronyms. Even though we have endeavored to limit the number of acronyms and the number of times that they are used in this Brief, we have not been able to eliminate them entirely. For this, we implore the Court's patience and forgiveness. In an effort to make the acronyms more understandable, the following is a listing of the more commonly used acronyms, including their full verbiage and an example.

"ALEC" – Alternative Local Exchange Telecommunications Company

appeal is an issue which would ordinarily be subject to negotiations between interconnecting telecommunications carriers and, potentially, arbitration pursuant to Section 252 of the 1996 Act. Order at 38, 42 (R.11:2071, 2075). The FPSC believes that because the issue of intercarrier compensation and the appropriate local calling area were contentious issues in arbitration proceedings, it would be more appropriate to establish a default local calling area in a generic proceeding to avoid having to litigate this issue over and over in arbitration proceedings. Order at 54-55 (R.11:2087-2088). In the proceeding, the FPSC considered four default options; namely, 1) use of the ILEC's retail local calling areas; 2) use of an originating carrier's retail local calling area; 3) use of the LATA as the local calling area; and 4) use of the LATA, providing that the originating carrier transports its traffic to the serving access tandem and does not charge toll rates for intraLATA calls. Order at 43 (R.11:2076). Although

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- Those entities certificated by the Florida Public Service Commission ("FPSC") after July 1, 1995, to provide local telephone service in competition with the incumbent local exchange telecommunications companies ("ILECs").
- Many ALECs are also interexchange long distance companies, such as AT&T, MCI WorldCom, etc. Other ALECs are also Cable TV companies, such as Time-Warner, Comcast, etc.

"FCC" – The Federal Communications Commission

- The federal agency designated by the Federal Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 151 et seq. to implement the 1996 Act through rules and regulations. The FCC's rules and regulations implementing the 1996 Act are binding on the FPSC.

"FPSC" – The Florida Public Service Commission

"ILEC" – Incumbent Local Exchange Telecommunications Company

- These are the entities, such as Sprint-Florida, that were certificated by the FPSC prior to June 30, 1995, to provide local telephone service in specific local calling areas or exchanges in Florida.

"IXC" – Interexchange Telecommunications Company

- Those entities certificated by the FPSC to provide long distance service between local exchanges/local calling areas of ILECs and ALECs.

Sprint argued for the adoption of the ILEC's retail local calling area as the default local calling area, the FPSC ultimately selected option number 2 as the default local calling area. Order at 55 (R.11:2088). Sprint argued that the FPSC did not have the statutory authority to select options number 2, 3, or 4. (R.10:1888-1897).

In 1983, the FPSC, in preparation for the imminent divestiture of the Bell Operating Companies (such as BellSouth) from AT&T, established an intercarrier compensation mechanism to replace the long-standing division of revenues/settlements process which would be permanently disrupted by the divestiture. *In re: Intrastate telephone access charges for toll use of local exchange service,* 83 F.P.S.C. 100 (1983) ("*Intrastate Access Charge Order*"). The division of revenues/settlements process was a regulatory sanctioned process by which the profits from interexchange long distance toll services were shared by AT&T with all the local exchange companies. The new intercarrier compensation mechanism was named "access charges" and was designed to replicate for the incumbent local exchange companies ("ILECs") the same level of compensation as they had been receiving from long distance toll service for use of the ILECs' local networks – consisting of switches and lines – to originate and terminate intrastate toll calls. Switched network access charges ("access charges"), which were to be collected from <u>all</u> interexchange carriers ("IXCs"), were set at a level that disregarded costs and were to provide levels of contribution to support the ILECs' local service rates and their universal service and carrier of last resort obligations. § 364.025(2), Fla. Stat. (1995); (*In re: Determination of funding for universal service and carrier of last resort responsibilities,* 95 F.P.S.C. 12:375 (1995) ("*USF Order*")). The ILECs' local calling area was used to determine whether access charges were applicable. Any long distance service provided by an

IXC that originated in one local calling area and terminated in a different local calling area was subject to the payment of both originating and terminating access charges.

Sprint-Florida is a local telephone company that is certificated by the FPSC to provide local telephone service within specifically authorized areas. Sprint provides a network of lines and switches which link every Sprint customer within the authorized area ("local calling area") with every other Sprint customer in that same area. July 5, 2001 Hearing Tr., Vol. 3 at 505. Sprint generally is compensated by its customers for this local service on a flat-rate monthly basis. July 5, 2001 Hearing Tr., Vol. 3 at 512. This allows a Sprint customer to call every other Sprint customer within the local calling area without a charge for that call. There are ten local telephone companies ("ILECs") like Sprint in Florida, and each ILEC has multiple local calling areas within its service territory in Florida.

A Sprint customer in one local calling area (e.g., Tallahassee) desiring to communicate with a person in another local calling area (e.g., Pensacola) – whether operated by Sprint or another ILEC – must place a long distance call to that other customer in the other local calling area (e.g., Tallahassee to Pensacola), by using the long distance service of an entity also certificated by the FPSC. July 5, 2001 Hearing Tr., Vol. 3 at 513. These long distance providers are IXCs, and include AT&T, MCI WorldCom, etc., to which Sprint's customer subscribes for his or her long distance service.[4] The IXC must compensate Sprint for the use of Sprint's lines and switches to originate the call in Tallahassee, and must compensate the ILEC, i.e., BellSouth (or an ALEC if the called customer in Pensacola is served by one of BellSouth's

[4] ILECs may also act as the interexchange carrier for calls between local calling areas within their service territory. May 8, 2002 Hearing Tr., Vol. 1 at 94.

competitors) for the use of the ILEC or ALEC's lines and switches in BellSouth's Pensacola local calling area to terminate the calls.

In 1995, the Florida Legislature rewrote Chapter 364, Florida Statutes, to, among other things, terminate the ILECs' local exchange service monopoly (§ 364.337, Fla. Stat. (1995)); require the ILECs to interconnect their local lines and switches with the local lines and switches of the ALECs (§ 364.16(2), Fla. Stat. (1995)); establish a cost-based local intercarrier compensation mechanism by which local exchange companies were to compensate and be compensated for the termination of local calls (§ 364.162(3), Fla. Stat. (1995)); remove the FPSC's authority to adjust switched network access charges (§ 364.163, Fla. Stat. (1995)); and require the FPSC to establish an interim universal service support mechanism (§ 364.025(2), Fla. Stat. (1995)). Because access charges are priced to make a contribution to support universal service and because local interconnection rates are to be set at cost, with no contribution, the Legislature required that:

> No 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.

§ 364.16(3)(a), Fla. Stat. (1995).

The Legislature also created intercarrier compensation mechanisms that differentiate between local traffic and non-local traffic and provide distinct compensation calculations. § 364.163, Fla. Stat. (1995). Whether one mechanism applies instead of the other is dependent upon the ILECs' local calling area and whether the call originates and terminates within the same local calling area (local call) or terminates in a different local calling area (toll call).

Terminating access charges for Sprint are currently about $0.055 per minute, while Sprint's reciprocal local interconnection rate is less than 1/10th of a cent per minute.

[5] May 8, 2002 Hearing Tr., Ex. 11. There are long-standing regulatory-imposed, consumer-welfare reasons for the different intercarrier compensation prices even though the services performed in terminating calls to Sprint's customers, using Sprint's local lines and switches, are essentially the same. Obviously, if Sprint performs the same function in terminating a local call or a long distance call, there is an opportunity for arbitrage. July 5, 2001 Hearing Tr., Vol. 2 at 266; May 8, 2002 Hearing Tr., Vol. 2 at 238. In order to prevent such arbitrage, when competition was introduced in the local market in 1995, the Florida Legislature prohibited any IXC or ALEC from delivering long distance traffic to Sprint in the guise of local traffic originating in the same local calling area in order to gain the lower-priced reciprocal local interconnection rate on that traffic. § 364.16(3), Fla. Stat. (1995).

The Order casts aside the ILECs' local calling area as the determining factor for which intercarrier compensation mechanism applies in favor of the "originating carrier's retail local calling area." Order at 54-55 (R.11:2088-2089). The FPSC bottoms its decision on what it perceives as the authority granted by the Legislature's general legislative intent language, Section 364.01(4), Florida Statutes, that "The commission shall exercise its exclusive jurisdiction in order to:

* * * *

[5] As used herein, "local interconnection rate" is intended to be synonymous with "reciprocal compensation rate" and includes charges for local switching, transport, and tandem switching where applicable. The local interconnection rate is named "reciprocal" because the rate Sprint charges the ALEC for terminating local calls is the same rate the ALEC charges Sprint for terminating local calls originated by Sprint's customer and terminated to an ALEC's customer.

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

§ 364.01(4)(b)(g)(i), Fla. Stat.

Elsewhere in its Order, the FPSC acknowledges that its authority under Section 364.01(4)(b), Florida Statutes, is "not limitless, and that Sections 364.16(3)(a), Florida Statutes, and 364.163, Florida Statutes, restrict our authority in the area of access charges." Order at 40 (R.11:2073). The FPSC, however, gives little weight to those legislative limitations. Instead, the FPSC concludes that "[t]hese provisions only address our authority with regard to access charges once the local calling scope has been defined." *Id*.

The FPSC also asserts that its authority to define the local calling area as "the originating carrier's retail local calling area," is supported by an alleged delegation of authority from the Federal Communications Commission ("FCC") to make determinations as to the geographic parameters of a local calling area. Order at 41 (R.11:2074). The FPSC relies upon only a portion of a sentence within an extensive paragraph as support for this position. When read in its entirety, the alleged delegation of authority from the FCC is illusory.

The net effect of the FPSC's establishment of "the originating carrier's retail local calling area" as the determining factor for the imposition of access charges or

local interconnection compensation is that the restriction found in Section 364.16(3)(a), Florida Statutes, prohibiting delivery of toll traffic as local traffic, has become a nullity. In other words, the same call, depending on what direction it is heading, can result in two different compensation amounts. May 8, 2002 Hearing Tr., Vol. 2 at 185. For example, Sprint's Tallahassee local calling area consists of Tallahassee and the surrounding communities of Crawfordville, Monticello, Panacea, Sopchoppy, etc. An ALEC with an interconnection agreement with Sprint may choose to have a local calling area that includes an area larger than Sprint's local calling area, such as the Florida Panhandle, or even the entire State of Florida.

Under the FPSC's decision, an ALEC's customer located in Monticello calling a Sprint customer in Tallahassee would be making a local call – just like a Sprint customer in Monticello calling a Sprint customer in Tallahassee – and Sprint would charge the ALEC the local interconnection rate for terminating the call in Sprint's local network. Again, under the FPSC's order, if the ALEC has established the Florida Panhandle as its local calling area and has a customer in Pensacola, which is not in Sprint's local calling area, and the ALEC's Pensacola customer calls a Sprint customer in Tallahassee, Sprint could charge the ALEC only the local interconnection rate, even though the call from Pensacola to Tallahassee is really an interexchange call for which Sprint should be able to receive terminating access charges. In fact, if that same Sprint customer in Tallahassee were to call that same ALEC customer in Pensacola, Sprint, or the IXC transporting the call, would have to pay the ALEC terminating access charges, not the local interconnection rate. This result is discriminatory and is contrary to the result contemplated and expressed by the Florida Legislature. The FPSC has recognized this inequity but believes, without any factual

basis, it is a transitory phenomenon because local calling areas will, over time, adjust to market conditions. Order at 54 (R.11:2087).

SUMMARY OF ARGUMENT

The overriding issue to be addressed in this appeal concerns the difference between local and long distance calls, the different amounts of compensation to be paid to local telephone companies for completing such calls, and the different circumstances in which such amounts must be paid to local telephone companies.

The FPSC, in the Order appealed from, has decided that ALECs can now deliver certain telephone calls originating outside of Sprint's local calling area to Sprint as local calls and thereby be charged the lower-priced reciprocal local interconnection rate, even though the calls are actually interexchange calls and would otherwise be charged the higher-priced terminating access rate. The FPSC's decision authorizes the very arbitrage prohibited by the Legislature and is inconsistent with two decades of FPSC decisions. Such arbitrage denies Sprint revenues that Sprint is entitled to as contemplated by the Legislature.

The FPSC misinterprets and misapplies the applicable law in determining that the general legislative directives contained in Section 364.01(4), Florida Statutes, give the FPSC substantive authority to determine local calling areas in contravention to the specific prohibitions of Section 364.16(3)(a), Florida Statutes. The FPSC's holding that the specific proscriptive provisions of Sections 364.163 and 364.16(3)(a), Florida Statutes, should be subordinated to the general provisions of Section 364.01, Florida Statutes (Order at 42, R.11:2075), also is inconsistent with settled law of statutory construction under which the specific provisions govern.

The FPSC's reliance upon an alleged grant of authority from the FCC is also misplaced. The FCC's language in paragraph 1035 of its *Local Competition Order* specifically recognizes the states' pre-existing role in determining the parameters of local calling areas for telecommunications traffic. The FCC's recognition of the role of state commissions does not constitute a "delegation of authority" or supersede or alter the authority granted to or withheld from the FPSC by Florida Statutes.

The FPSC's decision to permit ALECs to transform toll traffic into local traffic to escape the payment of access charges is not only prohibited by Florida Statutes, it is also inconsistent with *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"), in which the PSC held that Section 364.16(3)(a), Florida Statutes, proscribes such behavior. The FPSC's conclusion, in the instant proceeding, that its 1997 decision has no precedential value is without a valid explanation or support.

Not only is the FPSC's decision not supported with statutory authority, it is not supported with record evidence. In fact, the record evidence demonstrates just how conclusory the FPSC's decision to adopt "the originating carrier's retail local calling area" really is.

ARGUMENT

I. The FPSC lacks the authority to establish, and is actually prohibited by statute from establishing, "the originating carrier's local calling scope" as the determining factor for determining which intercarrier compensation amount shall apply.

As a general principle, the FPSC has only those powers granted to it by the Legislature. *United Telephone Company v. Public Service Commission*, 496 So. 2d

116 (Fla. 1986). Generally, orders of the FPSC come to the Court with a presumption that they have been made within the FPSC's jurisdiction and powers. "The party seeking to challenge the PSC's order has the burden of overcoming these presumptions by showing departure from the essential requirements of law." *Level 3 Communications v. Jacobs*, 28 Fla. L. Weekly § 191 (Fla. 2003). However, the Court will not apply such presumption to support the exercise of jurisdiction when the agency has exceeded its authority. "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So. 2d 577, 582 (Fla. 1965).

In this case, the FPSC contends that it has the statutory authority to establish the originating carrier's local calling area as the factor to determine which intercarrier compensation – terminating access charges or local reciprocal compensation – should apply. The FPSC believes that Sections 364.01(4)(b), (g) and (i), Florida Statutes, provide the requisite authority. The FPSC's understanding of its statutory authority is mistaken. Section 364.01(2), Florida Statutes, grants the FPSC exclusive jurisdiction over telecommunications companies in all matters set forth in Chapter 364, Florida Statutes. Section 364.01(4), Florida Statutes, provides only direction as to how the FPSC should "exercise its exclusive jurisdiction" that is, in order to:

* * * *

> (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.
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> * * * *
>
> (g) Ensure that 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.

Nothing specific in that very general pronouncement of legislative intent, which the FPSC distills to the phrase "to define the local calling area where necessary to ensure the widest range of consumer choice and to eliminate the barriers to competition" (Order at 40. R.11:2073), even remotely appears to give the FPSC authority to create a new regulatory regime that is totally inconsistent with two decades of regulatory decisions and with statutory language that specifically prohibits such FPSC action. *See*, § 364.16(3)(a), Fla. Stat. (2002).

It is one thing for the FPSC to rely on the general jurisdiction and legislative intent found in Section 364.01(4), Florida Statutes, when there is also specific authority elsewhere in Chapter 364, Florida Statutes, to support its decision. Such an approach would be consistent with the jurisdiction granted in Section 364.01(2), Florida Statutes. It is quite another thing when the FPSC attempts to rely on such general jurisdiction and legislative intent when there is no specific grant of authority by the Legislature.

[6] It is altogether inappropriate for the FPSC to rely upon this general grant of jurisdiction to support an action that the Legislature specifically has prohibited, which is exactly what the FPSC has done in the instant case.

Although Section 364.01(2), Florida Statutes, arguably gives the FPSC exclusive authority in exercising the regulatory powers over the telecommunications industry conferred in other provisions of Chapter 364, Florida Statutes, that provision, by itself, does nothing to provide the FPSC with the authority to make decisions over matters for which there is no specific authority or, in this case, over matters for which there is a legislative proscription.[7] Well established rules of statutory construction provide that specific provisions take precedence over general provisions when interpreting statutory provisions. *McKendry v. State*, 641 So. 2d 45 (Fla. 1994); *Floyd v. Bentley*, 496 So. 2d 862 (Fla. 2d DCA 1986).

In 1995, the Florida Legislature enacted a far-reaching rewrite of Chapter 364, Florida Statutes, the Florida 1995 Telecommunications Act ("1995 Act"). At the same time that the Legislature announced its legislative intent with regard to how the FPSC

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[6] Section 120.536, Florida Statutes, sets forth the requisite legislative grant of authority necessary to ensure that an agency rule is based on a valid delegation of authority. The statute is instructive in this proceeding in which the FPSC is establishing a generic policy to apply prospectively as carriers enter into interconnection agreements governing their relationship. Section 120.536, Florida Statutes, provides that in addition to a grant of rulemaking authority, a specific law to be implemented is required to validate an agency rule. In addition, the statute specifically denies an agency the authority to implement statutory provisions that merely set forth general legislative intent or policy. Section 364.01, Florida Statutes, which the FPSC cites as its sole authority for its decision on the local calling area issue, is just such a general statement of legislative intent and policy and, therefore, cannot be the basis of the Commission's authority. *See*, *Southwest Florida Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

[7] If Section 364.01, Florida Statutes, gives the FPSC substantive authority independent of the specific provisions of Chapter 364, Florida Statutes, as the FPSC suggests, that grant of power would amount to vesting unbridled discretion in the Commission over the regulation of telecommunications companies and, therefore, would constitute an invalid delegation of legislative authority in violation of the standards set forth in *Askew v. Cross Key Waterways*. 372 So. 2d 913 (Fla. 1978).

was to "exercise its exclusive jurisdiction," the Legislature also eliminated the FPSC's jurisdiction over access charges – Section 364.163, Florida Statutes – and prohibited carriers from labeling traffic "local," instead of "interexchange toll," in order to avoid the payment of access charges – Section 364.16(3)(a), Florida Statutes. Unquestionably, the Legislature knew that the language of Sections 364.163 and 364.16(3), Florida Statutes, relieved the FPSC of authority to mislabel access charges or to permit others to tamper with the traffic to which access charges apply. 14A Fla. Jur. 2d Statutes § 182 and cases cited therein ("it will be presumed that the legislature intended every part thereof for a purpose . . .").

It would be erroneous to then assume that the Legislature would negate the specific proscriptions with non-specific legislative intent. *State ex rel. Florida Industrial Comm'n v. Willis*, 124 So. 2d 48, 51 (Fla. 1st DCA 1960) ("a statute should not be construed to bring about an unreasonable or absurd result and... should be construed to effectuate the intention of the legislature in enacting the statute.") Moreover, there is no clear expression in either Sections 364.01(4) (b), (g) or (i), Florida Statutes, that the FPSC's authority to "[e]ncourage competition through flexible regulatory treatment" or "prevent" anticompetitive behavior and eliminat[e] unnecessary regulatory restraint" or "[c]ontinue its historical role as a surrogate for competition" can be construed to authorize the FPSC to create local calling areas in derogation of the clear legislative language prohibiting such action. Where the statutory provisions proscribe certain actions by the FPSC, the FPSC's attempt to interpret a general grant of authority to circumvent the proscription is in violation of Section 120.68(7)(e)(4), Florida Statutes (2003) (Exercise of discretion is otherwise in violation of specific statutory provisions).

The 1995 Act addresses, *inter alia*, the ground rules for interconnection of competitors and the level of intrastate switched network access charges. *See* §§ 364.16 and 364.163, Fla. Stat. (1995). In particular, Section 364.16(3), Florida Statutes, requires the incumbent local exchange telecommunications companies ("ILECs") to interconnect with and exchange local traffic with alternative local exchange telecommunications companies ("ALECs"). Delivery of local traffic from an ALEC to the ILEC is accomplished in much the same way that long distance – or interexchange – terminating traffic is delivered by an interexchange carrier ("IXC") to the ILEC. Under both state and federal law, the price that the ILEC can charge the ALEC for delivery of local traffic must be set at cost.[8] The price that the IXC must pay the ILEC for delivery of intrastate interexchange traffic – known as access charges – had been established by the FPSC at a level many times cost in order to maintain a regulatory policy of supporting universal service with contributions from toll service. *See, Intrastate Access Charge Order and USF Order*.

The existence of two different prices for essentially the same service creates an opportunity for arbitrage. An IXC, also certificated as an ALEC, could deliver interexchange traffic to an ILEC as if it were local traffic and be charged the much lower local interconnection price. The Legislature foresaw this opportunity for arbitrage, determined that this arbitrage would defeat the purpose of pricing access charges well above cost in order to support universal service goals, and prohibited

[8] Section 252(d) of the 1996 Act requires that the rates for interconnection, and for the transport and termination of traffic, be based on cost. Section 364.162(3), Florida Statutes, requires that, "In setting the local interconnection charge, the Commission shall determine that the charge is sufficient to cover the cost of furnishing interconnection." While the Florida Statutes do not use the terms "transport and termination of traffic" as found in the 1996 Act, the term "interconnection" clearly encompasses the transport and termination of traffic. *See* § 364.16(3)(a), Fla. Stat. (2002).

such arbitrage behavior. Section 364.16(3)(a), Florida Statutes, provides that:

> No 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.

The appealed-from Order, of course, circumvents the limitations the Legislature imposed on the FPSC and the entities regulated by the FPSC to prevent a diminution of access revenues to which the ILEC is entitled. The Legislature's intention that the level of access revenues were of utmost importance and were to be treated in a unique fashion is evident from the fact that the Legislature, in 1995, took the authority to adjust access charges and, thereby, access revenues away from the FPSC. § 364.163(6), Fla. Stat. (1995). This denial of authority has been acknowledged by the FPSC. *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 at 10:689 ("There is, however, reason to conclude that the Legislature in 1995 was fully apprised of the level of access rates in relation to costs and the significance of access rates for the development of competitive markets at the time. Nevertheless, the Legislature did not expressly authorize us to reduce access rates, beyond the statutory mandated reductions, upon a finding of anti-competitive behavior."); § 364.163(6), Fla. Stat. (1998), Ch. 98-277, § 4, Laws of Florida.

By establishing the originating carrier's local calling area as the determining factor for whether access charges or the local interconnection rate applies to terminating traffic, the ALEC is incented to establish a local calling area which is larger

than the ILEC's local calling area. As noted previously, the ALEC, is free to establish whatever size local calling area the ALEC chooses for retail purposes; from the same as the ILEC, to something larger, including the entire state. If the ALEC chooses a different local area from the ILEC then, under the FPSC's decision, all of the traffic originating on the ALEC's network and terminated on the ILEC's network can be charged no more than the local interconnection rate. This is true even though terminating access charges would otherwise apply to the same traffic if it is originated by the ILEC and terminated outside of the ILEC's local calling area.

History, technology and regulatory endorsement, however, control the ILEC's local calling area. The practical effects of the FPSC's decision are that it will jeopardize Sprint's future access charge revenue stream, and it will cause Sprint (or the IXC transporting the call) to pay more to the ALEC than the ALEC will pay to Sprint for delivering the same call. In 1995, the Legislature was concerned enough about Sprint having sufficient contributions from access charges to continue its universal service and carrier of last resort obligations that the Legislature divested the FPSC of authority to adjust access charges and, by implication, the revenues from access charges. Instead, the Legislature mandated only specific, measured access charge reductions by Sprint, the last such reductions in 1998. § 364.163(6), Fla. Stat. (1998); Ch. 98-277, § 4, Laws of Florida. As recognized by the Legislature, critical to the availability of access revenues is the requirement that carriers terminating traditional long distance calls on Sprint's local network pay Sprint access charges. The FPSC's decision, however, subverts the Legislature's clear intent.

The other unfavorable result of the FPSC's decision is that the payment of the higher access charges for a call, rather than the lower reciprocal compensation rate for

a call between the same two parties, depends solely on whose customer makes the call. As demonstrated above, if the ALEC 's local calling area is larger than Sprint's – the Florida Panhandle, for example –and if the ALEC's customer in Pensacola were to call a Sprint customer in Tallahassee, then the ALEC would pay Sprint only the local reciprocal compensation rate under the FPSC's decision. However, if the same Sprint customer in Tallahassee were to call the same ALEC customer in Pensacola, then Sprint (or the IXC transporting the call) would owe the ALEC terminating access charges to complete the call. Such discriminatory treatment is not a result contemplated by the Legislature and is, in fact, in violation of the prohibitory language of Section 364.10(1), Florida Statutes, namely:

> A telecommunications company may not . . . subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The FPSC's decision that the local calling area of the originating customer's telecommunications provider governs for intercarrier compensation purposes unlawfully allows for the very discrimination prohibited by Florida Statute.

II. The FPSC's Order is inconsistent with its previous *Telenet* decision and has offered no valid reason for the inconsistency.

The FPSC ruled in a 1997 decision implementing the 1995 Act that intrastate access charges apply when the ALECs' and ILECs' local calling areas are not the same. *Telenet* at *22. ("While an ALEC may have a different area than an incumbent LEC, *it is required by statute* to pay the applicable access charges." (Emphasis added.) Yet, when confronted in the proceeding below with its previous *Telenet* decision, the FPSC simply brushed it aside by claiming it was an arbitration

proceeding and "we appreciate its conclusions but do not believe that decision has precedential value in the instant proceeding." Order at 41 (R.11:2074).

The FPSC offers no reason why its *Telenet* decision has no precedential value other than the conclusory statement that it was rendered in an arbitration proceeding. Even there, the FPSC's rationale does not support its rejection of its *Telenet* decision. Arbitration proceedings are at the heart of the FPSC's decision in the instant proceeding and are at the heart of the 1996 Act and the FCC orders implementing the 1996 Act. The FPSC notes that it had to establish the default local calling area as "the originating carrier's local calling area" because this had become a "contentious issue" in arbitration proceedings. Order at 54 (R.11:2087).

More importantly, because the FPSC has relied upon the FCC's alleged "unequivocal" delegation of authority to state commissions to determine what geographic areas should be considered "local areas for the purpose of applying reciprocal compensation obligations under Section 251(b)(5) of the Act," (Order at 41, R.11:2074)) it is inconceivable that an arbitration proceeding commenced pursuant to the Act and decided pursuant to FCC rules and regulations implementing the Act could be construed not to have precedential value in the instant case.

Clearly, the FPSC's refusal to follow its earlier, well-reasoned *Telenet* decision without a reasoned explanation for its departure from its prior precedent renders its decision arbitrary. *Couch v. Fla. Dep't of Health and Rehabilitative Services,* 377 So. 2d 32, 34 (Fla. 1st DCA 1979). There is nothing in the factual record in the *Telenet* decision to distinguish it from the issues confronting the FPSC in the instant proceeding. In fact, in that proceeding, Telenet conceded that its local calling area exceeds BellSouth's local calling area and that if the Telenet customer were to use

BellSouth's network or make the same call through AT&T or MCI, it would be either an extended calling service (ECS)

[9] or a toll call. *Telenet* at *19. Based on that factual record, the FPSC concluded:

> We agree that an ALEC has full statewide authority when it receives certification from this Commission, and that it has the authority to designate its local calling area in whatever way it chooses. Section 364.16(3)(a), Florida Statutes, nonetheless, does not allow an ALEC to knowingly deliver traffic where terminating access charges would otherwise apply. Therefore, while an ALEC may have a different local calling area than an incumbent LEC, it is required to pay the applicable access charges.

Telenet at *21-22.

Despite the FPSC's feeble attempts to distance itself from its *Telenet* decision, the *Telenet* decision was, at bottom, an interpretation of Florida law by the agency cloaked with the responsibility to interpret that law for implementation purposes. There is no factual reason, let alone any legal justification, for why the interpretation of law rendered in its *Telenet* decision should be any different in this proceeding or why the FPSC should not be bound by its previous interpretation. *Southern States Utilities v. Florida Public Service* Commission, 714 So. 2d 1046, 1055 (Fla. 1st DCA 1998); *Amos v. Department of Health and Rehabilitative Services*, 444 So. 2d 43 (Fla. 1st DCA 1983); *North Miami General Hospital v. Office of Community Medical Facilities*, 355 So. 2d 1272, 1278 (Fla. 1st DCA 1978) ("inconsistent results based upon similar facts, without a reasonable explanation, violate not only express provisions of the Administrative Procedure Act (Chapter 120, Florida Statutes), but are violative of the equal protection guarantees of both the Florida and the United

[9] Extended calling service (ECS) is a pricing plan under which traffic on long distance toll routes is priced on a per-message or a reduced per-minute basis. *Florida Interexchange Carriers v. Clark*, 678 So. 2d 1268, fn.1 (Fla. 1996).

States Constitutions.")

[10]

III. The FPSC has improperly relied upon an alleged "grant of authority" from the FCC.

The FPSC contends that its authority to establish the originating carriers' local calling area as the factor for determining intercarrier compensation obligations is also bottomed upon a delegation of authority from the FCC. Order at 41 (R.11:2074). This alleged delegation of authority, the FPSC contends, is found in the FCC's *Local Competition Order* at ¶ 1035.

[11] Paragraph 1035 provides, in part, 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) . . .." *Id.* The FPSC's reliance on a self-styled delegation of authority from the FCC is totally misplaced.

The FCC has, in fact, made no such delegation of authority. The FPSC has misread the language of ¶ 1035. A careful, complete reading of ¶ 1035 reveals that the FCC's statement that ". . . . state commissions have the authority to determine what geographic areas should be considered 'local areas' . . ." is nothing more than

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[10] Section 120.68(7)(e)3., Florida Statutes, requires that an agency decision be remanded or set aside if a court finds that the agency's exercise of discretion was inconsistent with officially stated agency policy and the deviation therefrom is not explained by the agency. *See*, *Florida Cities Water Company v. FPSC,* 705 So. 2d 620, 628 (Fla. 1st DCA 1998).

[11] *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499 at ¶ 1035 (1996) ("*Local Competition Order*").

a recognition of preexisting state authority.[12] The FCC's so-called delegation of authority is nothing more than an observation as to what authority the FPSC already has as provided by the governing state statutes.

Additionally, the FCC's observation contains an important limitation ignored by the FPSC. This limitation is the additional language in the same sentence, which states: " . . . consistent with the state commissions' historical practice of defining local service areas for wireline LECs." *Id.* at ¶ 1035. Rather than expanding the FPSC's state authority, this language makes it clear that the FPSC has only that authority to adjust the local calling areas as provided by state law. The FCC had no intention of giving the FPSC – or any state commission – *carte blanche*, "unequivocal" authority to override state law to determine what geographic areas should be considered "local areas" for the purposes of applying reciprocal compensation obligations under Section 251(b)(5) of the Act.[13] Order at 41.

The FCC's observation requires that whatever authority the FPSC has with respect to "local calling areas" must adhere to historical practices in defining the ILECs' local calling area. This, the FPSC did not do. Instead, the FPSC did quite the opposite. The FPSC ignored not only Sections 364.16 and 364.163, Florida Statutes, but also violated Section 364.385(2), Florida Statutes, which in 1995 terminated the FPSC's ability to define the ILECs, including Sprint's, local calling areas. This limitation of its authority over local calling areas has been acknowledged

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[12] Sprint does not concede that the FPSC's "originating carrier's local calling area" default mechanism is consistent with federal law. Sprint reserves its rights to raise such arguments in any action brought in federal court pursuant to 47 U.S.C. § 252(e)(6) resulting from the inclusions of the FPSC's default mechanism in any arbitrated interconnection agreement approved by the FPSC.

[13] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("1996 Act" or "Act").

by the FPSC in numerous orders declining to address applications for extended area service filed after July 1, 1995. *In re: Resolution of Suwannee Board of County Commissioners for extended areas service (EAS) between Dowling Park/Lake City, Florida Sheriff's Boys Ranch/Lake City and Luraville/Lake City*, 97 F.P.S.C. 11:98 (1997); *In re: Resolution by Hamilton County Board of Commissioners requesting extended area service (EAS) from Hamilton County to all exchanges within Suwannee County, Columbia County, and Madison County*, 97 F.P.S.C. 8:323 (1997).

The FCC's observation as to the existing authority of state commissions, by its own terms, does not, and cannot, supersede or alter the authority delegated to the FPSC by state statutes. Based on constitutional principles of federalism, Congress may not create or directly grant powers to a state agency. *New York v. United States*, 505 U.S. 144 (1992). In this case, the FCC's statement at ¶ 1035 (*Local Competition Order*) simply recognizes the state's role, including following state-specific statutory requirements, in determining the parameters of local calling areas for telecommunications traffic.

IV. There is insufficient evidence in the record to support the FPSC'S decision.

Even if the FPSC had the authority to define the local area for reciprocal compensation purposes as something larger than the ILEC's local area, which it does not, the evidence is insufficient to support the FPSC's decision that the originating carrier's retail local calling scope is the appropriate local calling area. The FPSC itself noted that the use of the originating carrier's retail local calling scope was an alternative that received "less attention" from the parties. (Order at 53 (R.11:2086). In fact, the

record evidence in favor of this alternative is scant.

The ALEC parties presented some testimony in the original Phase II of the proceeding that, at least indirectly, appeared to support use of the calling party's local calling area and reciprocal compensation based on different local calling areas for ALECs and ILECs. *See*, July 5, 2001 Hearing Tr., Vol. 4 at 691, 699, 703, and Vol. 5 at 961. However, in the additional evidentiary proceeding ordered by the Commission, in which the originating carrier's local calling scope was identified as a specific alternative, the ALEC parties uniformly supported a LATA-wide local calling scope. (R.10:1758, 1814, 1840). The only direct evidence clearly supporting the merits of the use of the originating carrier's local calling scope is found in the testimony of BellSouth's witness, Elizabeth Shiroishi, in the additional testimony phase. The sum total of that evidence is the following statement by the witness:

> BellSouth's position is 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 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, and is able to implement such arrangement [sic] through the use of billing factors. These factors allow the originating carrier to report to the terminating carrier the percent of usage that is interstate, intrastate, and local. Thus, the originating Party, whose calling area determines the intercarrier compensation due for the call, reports the jurisdiction of the call through the use of factors. With developing technology there are also instances when the terminating Party would have enough information to develop the jurisdiction (and thus the appropriate intercarrier compensation) of the call. (May 8, 2002 Hearing Tr., Vol. 1 at 22.)

Testimony in opposition to this alternative is somewhat more extensive, although still sparse. *See*, July 5, 2001 Hearing Tr. Vol. 2 at 257, 338; May 8, 2002 Hearing Tr., Vol. 1 at 97-98 and Vol. 2 at 184-185, 210.

The FPSC based its adoption of the originating carrier's local calling scope on its finding that it was "more competitively neutral than the others." Order at 53

(R.11:2086). In addition, the FPSC rejected arguments that basing compensation on the originating carrier's local calling scope would be administratively burdensome on the basis of BellSouth's testimony that it implemented this approach through the use of billing factors. *Id*. Finally, the FPSC overruled concerns about the inequity of basing intercarrier compensation on the direction of the call by determining that directional differences would disappear over time through market forces. *Id.* Because there is insufficient evidence in the record to support the FPSC's factual findings that underpin its decision, the decision should be rejected. § 120.68(7)(b), Fla. Stat.; *Duval Utility Company v. FPSC*, 380 So. 2d 1028 (Fla. 1980); *Manasota-88, Inc. v. Gardinier*, Inc. 481 So. 2d 948 (Fla. 1st DCA 1986).

First, the record does not support the FPSC's determination that use of the originating carrier's local calling scope to determine the appropriate intercarrier compensation is the most competitively neutral alternative. While the FPSC attempts to mitigate the lack of evidence supporting its ruling on this point by stating that its determination was limited only to the alternatives offered (Reconsideration Order at 14 (R.13:2500)), the FPSC's rationale is merely semantic sleight-of-hand. The FPSC clearly discussed various local calling scope alternatives, specifically, the ILEC's local calling scope, the LATA, and the originating carrier's retail local calling scope and determined that the latter was the most competitively neutral, despite no evidence in the record to support the determination that using the originating carrier's local calling scope was competitively neutral, either in relation to the alternatives offered or otherwise. Order at 53 (R.11:2086). In fact, the record supports the opposite conclusion, that is, that the use of the originating carrier's retail local calling scope is no more competitively neutral, and could be even less competitively neutral, than the

LATA-wide local calling scope rejected by the FPSC because it was not competitively neutral. May 8, 2002, Hearing Tr., Vol. 1 at 97-98.

In addition, the FPSC found that any competitive concerns caused by the varying local calling scopes of ILECs and ALECs would disappear over time as the ILECs adjusted their calling scopes to reflect the competitive market. Order at 54 (R.11:2087); Reconsideration Order at 14 (R.13:2500). There is no evidence in the record to support this determination. Again, the record evidence regarding this issue supports an opposite conclusion. R.12:2213 and July 5, 2001 Hearing Tr., Vol. 2 at 311, 338 and Vol. 4 at 623.

The record is so inadequate to support the FPSC's determination that its own Staff recognized this deficiency as sufficient grounds for reconsideration of the Order. **(**R.13:2439). At the agenda conference at which the motions for reconsideration were considered, the FPSC recognized the lack of a record to establish the specifics of implementation of its decision. Reconsideration Order at 15 (R.13:2501). However, the FPSC rejected Staff's conclusions that the lack of evidence was a valid basis for reconsideration and upheld its Order on the basis that BellSouth was able to implement the originating carrier's local scope and, implicitly, Sprint and Verizon should similarly be able to address implementation issues. Order at 54 (R.11:2087); Reconsideration Order at 15 (R.13:2500-2501). However, the record is devoid of any evidence concerning the specific terms of any BellSouth agreements containing this definition of local calling area and only cursorily addresses the means by which BellSouth implements such contract provisions, that is, through the use of billing factors. Such bald assertions without further explanation or corroborating support are insufficient evidence to support the FPSC's ruling. *GTC v. Garcia*, 791 So. 2d 452 (Fla. 2000);

cf. *FIPUG v. Jaber*, 833 So. 2d 750, 751 (Fla. 2002) in which the court upheld a decision by the FPSC because "the record revealed that the PSC was presented with detailed competing testimony on which to base its decision."

CONCLUSION

As it has so often done before, the FPSC has attempted in its Order to address and resolve an issue for which it has no specific statutory authority by relying upon the Legislature's general delegation of jurisdiction over telecommunications companies for matters within the scope of Chapter 364, Florida Statutes. This practice is questionable unless there is specific statutory authority elsewhere in Chapter 364, which supports the FPSC's action. But here, the FPSC's Order takes this practice to another level by using the general delegation of jurisdiction to support an action for which not only is there no specific statutory authority elsewhere in Chapter 364 but for which there is statutory language in Chapter 364 which specifically proscribes such an action. Enough is enough. The FPSC's Order should be reversed.

CERTIFICATE OF TYPE SIZE AND STYLE

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

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