IN THE SUPREME COURT OF FLORIDA

CONSOLIDATED CASE NOS. SC04-9, SC04-10, SC04-946

CHARLES J. CRIST, JR., ETC.	**v.**	**LILA A. JABER, ETC., ET AL.**
HAROLD MCLEAN, ETC.	**v.**	**LILA A. JABER, ETC., ET AL.**
AARP	**v.**	**LILA A. JABER, ETC., ET AL.**
Appellants,		**Appellees.**

ON APPEAL FROM FINAL ORDERS OF THE FLORIDA PUBLIC SERVICE COMMISSION

JOINT ANSWER BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC., BELLSOUTH LONG DISTANCE, INC., SPRINT-FLORIDA, INC., SPRINT COMMUNICATIONS LIMITED PARTNERSHIP, and VERIZON FLORIDA, INC.

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REFERENCES AND ABBREVIATIONS

Citations to the record on appeal will be designated as follows:

R. (record) V.x (volume number), xx (page numbers)

Tr. (transcript) V.x (volume number), p. xxx, lines xx-xx

Ex. (hearing exhibit) x (exhibit number), at xx (page numbers)

References to **chapter, section, subsection, and §** are to the 2003 edition of Florida Statutes unless otherwise stated. Other abbreviations:

PSC or Commission: Florida Public Service Commission

BellSouth: BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.

Sprint: Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership

Verizon: Verizon Florida, Inc.

AT&T: AT&T Communications of the Southern States, LLC

MCI: MCI WORLDCOM Communications, Inc.

ILECs: Incumbent local exchange companies. BellSouth, Sprint, and Verizon are collectively referred to as the "ILEC Appellees."

CLECs: Competitive local exchange companies

IXCs: Interexchange telecommunications carriers

OPC: Office of Public Counsel

STATEMENT OF THE CASE AND OF THE FACTS

Appellees BellSouth, Sprint, and Verizon ("ILEC Appellees") adopt the Statement of the Case and of the Facts set forth in the Answer Brief of Appellee Florida Public Service Commission. In order to avoid repetitive explanation of terms, the ILEC Appellees also adopt the Telecommunications Glossary in the PSC Answer Brief.

STANDARD OF REVIEW

The standard of review in this case is limited to whether the PSC's action is supported by competent, substantial evidence. *E.g., Fla. Indus. Power Users Group v. Jaber*, 833 So. 2d 750, 751 (Fla. 2002); *Panda-Kathleen, L.P./Panda Energy Corp. v. Clark*, 701 So. 2d 322, 325-26 (Fla. 1997). In reviewing orders of the PSC, this Court does not reweigh the evidence. *Citizens of the State of Fla. v. Pub. Serv. Comm'n*, 435 So. 2d 784, 787 (Fla. 1983) ("We have spoken time and time again of the task for this Court on judicial review of Commission orders. Our task is not to reweigh the evidence. . . . We must merely determine whether competent, substantial evidence supports a Commission order."). When the record reveals competing evidence with ample testimony supporting different positions, this Court defers to the factfinder – the Commission – in resolving the conflict. *Fla. Power Corp. v. Cresse*, 413 So. 2d 1187, 1190 (Fla. 1982).

Orders of the Commission come to this Court "clothed with the statutory 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." *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 857 (Fla. 2002), *quoting GTC, Inc. v. Garcia*, 691 So. 2d 452, 456 (Fla. 2000). Additionally, "the PSC's interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court if it is not clearly erroneous." *BellSouth*, 834 So. 2d at 857, *quoting Fla. Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267, 1270 (Fla. 1996); *see also Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003) ("This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous'"), *quoting P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988).

A party challenging a Commission order bears the burden of overcoming the presumption of the Order's correctness and must show "a departure from the essential requirements of law." *BellSouth*, 834 So. 2d at 857.

SUMMARY OF THE ARGUMENT

The PSC's orders are supported by competent, substantial evidence and should be affirmed by this Court. Record evidence supports the Commission's findings that it has correctly applied the Legislature's direction, that granting the petitions will result in a more competitive local exchange market for the benefit of residential customers, and that the petitions will induce enhanced market entry. The Commission's determination that approval of the petitions will preserve reasonable and affordable prices for local service also is supported by evidence in the record.

The Appellants have not challenged the fundamental premise underlying the Commission's orders: Local exchange service is priced below its cost and is supported by access charges that the incumbent local exchange companies (ILECs) charge long distance companies. Such support prevents the creation of a more attractive competitive local exchange market. The Commission correctly concluded that rebalancing rates in a revenue neutral manner – i.e., offsetting intrastate access rate reductions with corresponding increases in local rates charged to flat-rate residential and single-line business customers – will result in a more competitive market that will benefit residential customers.

The Commission also correctly concluded that residential customers will benefit from a more competitive local exchange market. Specifically,

residential customers will benefit from a wide choice of service providers and service offerings, including bundled offerings; new product offerings; and increased quality of service. Further, residential customers will benefit from reductions in long distance rates that will "flow through" to them based on a reduction in the access charges the ILECs charge to long distance companies. Neither section 364.164 nor 364.163(2) requires that every customer receive a dollar-for-dollar offset when rates are rebalanced. Had the Commission imposed such a requirement of "bill neutrality," it would have exceeded its statutory authority.

The record also supports the ILECs' allocation of rate increases between residential and business customers. Residential rates are heavily subsidized, while business rates cover their costs. Thus, raising residential rates more than business rates is consistent with the requirement in section 364.164(1)(a) that the Commission determine whether granting the petitions will "remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market . . ." (emphasis supplied).

The Commission correctly found that rebalancing rates as outlined in section 364.164 will enhance market entry. Record evidence demonstrates that a more attractive residential local telecommunications market will prompt a

substantial increase in infrastructure investment by the competitive local exchange carriers (CLECs). The record shows that CLECs and other entrants will serve all residential markets with a variety of new technologies, including voice over internet protocol ("VOIP"), broadband over power lines ("BPL") and fixed wireless services.

The Attorney General's reliance on *U.S. Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, __ U.S. __ (October 12, 2004), is misplaced. The case addresses pricing for unbundled network elements platform (UNE-P). UNE-P rates are paid by CLECS to lease local loops and computer switching facilities from ILECs. Record testimony supports the Commission's conclusion that, regardless of UNE-P rates, the local residential market will be more attractive to competitors once support for local service rates is removed and the price of providing service is closer to its cost.

The Commission's conclusion that approval of the ILECs' petitions will have little, if any, impact on the availability of basic service in Florida and that basic local service will continue to remain affordable for the vast majority of residential customers is supported by evidence in the record. The Commission also correctly found that the amended Lifeline provisions in section 364.10, as well as the ILECs' commitment to go beyond those provisions, will help

protect economically disadvantaged customers from the effect of local rate increases. Competent, substantial evidence supports the Commission's finding that approval of the petitions will preserve reasonable and affordable prices for basic local service.

ARGUMENT

I. THE COMMISSION'S ORDERS ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE THAT THE PETITIONS COMPLY WITH THE CRITERIA OF SECTION 364.164.

The Commission's orders summarize in great detail the evidence relied on to determine that the petitions of BellSouth, Sprint, and Verizon satisfy the criteria of section 364.164(1). R.V.17, 3291-3349. A review of that evidence demonstrates that it constitutes "competent, substantial evidence" as defined by this Court in *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957):

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

(Internal citations omitted).

The Commission appropriately relied on both empirical evidence and expert opinion testimony – discussed below – to find that the petitions satisfied the statutory criteria: whether granting a petition will (a) remove current support for basic local telecommunications services that prevents the creation

of a more attractive competitive local exchange market for the benefit of residential consumers; (b) induce enhanced market entry; (c) require intrastate switched network access rate reductions to parity over a period of not less than two years or more than four years; and (d) be revenue neutral. R.19, 3831; R.V17, 3314-3316, 3328-3329.

Importantly, the Appellants have not challenged the fundamental premise underlying the Commission's orders: The rates the ILECs charge to long distance companies provide support for the local exchange service, and such support prevents the creation of a more attractive competitive local exchange market. R.V.17, 3311, 3314. Thus, the following conclusion of the Commission is conceded by the Appellants:

> Upon consideration, we agree with witness Gordon that the current level of support has allowed residential rates to remain lower than they would be in an undistorted competitive market, and that they are, in fact, lower than in other states in our region. We can find no basis in economics for the underpricing of basic service which is demand-inelastic relative to usage. Except for a limited range of residential customers, it is not economically feasible for a CLEC [competitive local exchange carrier] to price complementary products and packages in a manner that would allow it to make up for lack of profitability in the provision of basic service. As a result, there is little opportunity or ability to bundle products and services for consumers, and a very limited range of customers can truly be served on a profitable basis.

R.V.17, 3314.[1]

The Appellants' only arguments are that the petitions will not benefit residential customers within the meaning of section 364.164(1)(a), that the rate rebalancing petitions do not "induce enhanced market entry" as required by section 364.164(1)(b), and that the petitions violate the statutory requirement that telecommunications service be available at "reasonable and affordable prices." *See* Amended Initial Brief of OPC ("OPC Brief") at 26; Amended Initial Brief of the Attorney General ("AG Brief") at 31, 41, 45; Amended Initial Brief of AARP ("AARP Brief") at 7. Appellants are wrong on all counts.

[1] The Appellants also have not challenged the Commission's finding that the petitions are "revenue neutral." § 364.164(1)(d). As the Commission explained in its Final Order, "revenue neutral" means that "any ILEC that is permitted to reduce its intrastate switched network access rates may offset those reductions through simultaneous increases in the local rates charged to its flat-rate residential and single-line business customers." R.V.17, 3297. Thus, by not challenging this finding, the Appellants have conceded that the ILECs are not making money from rate rebalancing as described in the petitions, and as the statute requires, the petitions are "revenue neutral." Appellants have also failed to challenge the finding that the petitions reduce intrastate switched network access rates to parity with interstate rates over a period of not less than two years or more than four years, R.V.17, 3307; thus, this finding is conceded as well.

A. The PSC Correctly Determined that Granting the Petitions Will Result in a More Competitive Local Exchange Market for the Benefit of Residential Consumers.

The Legislature has found that competition in the provision of local telecommunications services is in the public interest. § 364.01(3), Fla. Stat. ("The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.") (Emphasis supplied). By enacting section 364.164 in 2003, the Legislature directed the PSC to evaluate rate rebalancing petitions by ILECs to determine if, by removing support for basic local telecommunications services that prevents the creation of a more competitive market, the petitions will benefit residential consumers.

In its Final Order, the Commission found that rate rebalancing will benefit residential consumers:

> Upon consideration of the evidence presented, as well as the Legislature's clear policy to enhance competition in Florida's telecommunications market, we find that the ILECs' proposals will ultimately benefit residential consumers as contemplated by Section 364.164, Florida Statutes. . . .
>
> While it is uncontested that some customers will not receive a direct benefit as a result of the implementation of the ILECs'

> proposals, we find that Florida consumers as a whole will reap the benefits of increased competition and, ultimately, competition will serve to regulate the level of prices consumers will pay. Increased competition will lead not only to a wider choice of providers, but also to technological innovation, new service offerings, and increased quality of service to the customer.

R.V.17, 3318-20.

Among the testimony serving as a basis for the Commission's conclusions is that of Dr. Kenneth Gordon, witness for BellSouth, Sprint, and Verizon, who stated:

> Economic activity in Florida will increase as a result of the companies' revised plans because rebalancing generates substantial consumer benefits. Telephone consumers are better off as a result of moving prices more in line with costs, and will likely increase their purchases of those services whose price has come down. Perhaps of even greater significance, competitive telephone service providers will be seeing better price signals for local service, and will be able to invest without having to face the level of subsidized competition they have faced in the past. New investment by these providers should, at the margin, increase.

Tr.V.2, p. 125, lines 18-25.

Similarly, Dr. Aniruddha (Andy) Banerjee, witness for BellSouth, testified that "[t]he BellSouth rebalancing plan will promote greater competition to the benefit of residential customers. Claims to the contrary are flawed as a matter of economic principle and are inconsistent with experience in the industry." Tr.V.5, p. 494, lines 27-29. Dr. Brian K. Staihr, witness for Sprint, testified that "[b]y allowing local rates to approach costs for more and

more customers, a true win-win situation is created in the competitive market: A larger number of basic local service customers become attractive to competitors (which means more customers will be offered choices). And competitive entry will occur when it is efficient and sustainable, not when it is inefficient." Tr.V.9, p. 1039, lines 6-10. Verizon witness Dr. Carl Danner testified that "it is undeniable that telephone service prices are skewed in Florida, as they once were across the country. What is also undeniable is that reforming those prices to make more economic sense will create genuine benefits and stimulate competition. This is the right thing for the Commission to do." Tr.V.8, p. 886, lines 18-22.

1. Residential consumers will benefit from reductions in long distance rates.

The Commission also found that residential consumers will benefit from decreases in long-distance rates, rejecting arguments to the contrary from the Attorney General, OPC, and AARP:

> We acknowledge, as OPC, the Attorney General and AARP have argued, that not every residential customer will get a long distance rate reduction, and those who do receive reductions will not necessarily receive reductions that totally offset the increase in their rate for local service. Such 'bill neutrality' is not required by the statute and, in fact, would be inconsistent with its plain language.
>
> . . . .
>
> [W]hen considered with the economic testimony received through our technical hearing, we find that customers as a whole will benefit as contemplated by the statute.

R.V.17, 3320-21.

The record supports the Commission's findings that customers as a whole will benefit by reductions in long-distance rates. *See* Amended Direct Testimony of Gordon, witness for BellSouth, Sprint, and Verizon, Tr.V.2, p. 126, lines 19-22 ("Importantly, the companies' revised rebalancing plans will lead to lower intrastate toll prices for all consumers. At the end of the day, the mix of services that consumers purchase as a result of the companies' revised plans will make consumers better off overall."); testimony of John A. Ruscilli, witness for BellSouth, Tr.V.3, p. 274, lines 18-21 (concluding that to the extent that customers are using long distance services provided by telecommunications companies that pay BellSouth switched access charges, BellSouth's proposal will result in lower long distance rates for these customers); testimony of Verizon witness Danner, Tr.V.8, p. 818, lines 20-24 ("Because the newly enacted legislation requires long distance providers to flow through access reductions, toll and long distance prices will fall, which in turn [will] stimulate toll and long distance usage. This reaction will increase the size of the market opportunity for competitors, and therefore also promote competition for residential customers.").

Contrary to the arguments of OPC and the Attorney General, neither section 364.164 nor section 364.163(2) requires that the decrease in customers'

long-distance rates offset on a dollar-for-dollar basis the increases in local rates. *See* OPC Brief at 33-34; AG Brief at 41-43. Indeed, imposition of such a requirement by the Commission would have resulted in the Commission exceeding its statutory authority, as the Commission noted in its Final Order. R.V.17, 3308, 3321.

Section 364.164(1) establishes the criteria the Commission must apply in evaluating a petition filed pursuant to that section, and the Commission may not add to those criteria without exceeding its statutory authority. The powers of all administrative agencies are measured and limited by the statutes or acts expressly granting the agencies their powers or by those powers implicitly conferred. *See Dep't of Prof. Reg. v. Marrero,* 536 So. 2d 1094, 1096 (Fla. 1st DCA 1998); *Fla. Dep't of Corrections v. Provin*, 515 So. 2d 302 (Fla. 1st DCA 1987); *Hall v. Career Serv. Comm'n*, 478 So. 2d 1111 (Fla. 1st DCA 1985).

The Appellants also argue that residential customers will not benefit because (1) the majority of the long-distance rate reduction is going to businesses and (2) the majority of the rate increases will be borne by residential customers rather than businesses. AG Brief at 16, 41-42; OPC Brief at 40-41.

The 2003 legislation includes no requirement that residential and business customers receive proportionate benefits from the long-distance rate reductions. Had the Legislature wished to impose such a requirement, it could have revived the 2002 legislation amending chapter 364 that was vetoed by the Governor. *See* 2002 CS/HB 1683 (vetoed by Governor). R.V.14, 2734-2746. The 2002 legislation required the IXCs to ensure that "residential and business customers benefit proportionally from the rate decreases." *Id*. at 2740 (emphasis supplied). Section 364.163(2), as adopted, only requires an IXC to decrease its intrastate long distance revenues "by the amount necessary to return the benefits of such reduction to both its residential and business customers."[2] The long-distance carrier is allowed to determine the specific long-distance rates to be decreased so long as the carrier eliminates any in-state connection fee and both residential and business customers benefit from the rate decreases.[3] § 364.163(2), Fla. Stat. The Commission would have had to exceed its statutory authority to impose a proportional requirement.

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[2] The allocation of reductions in long-distance rates between residential and business customers, based on their respective access minutes of use, is economically rational. R.V. 3345-46. Customers using the service for which a cost has been reduced (access charges) will see the benefit of the cost reduction.

[3] In-state connection fees are flat monthly fees ranging from $1.88 to $1.99 that some long distance carriers charge customers who subscribe to certain calling plans. Tr.V.11, p. 1392, lines 13-25; Tr.V.12, p. 1423, lines 6-13.

2. Residential rates are heavily subsidized; thus, raising residential rates more than business rates is consistent with section 364.164(1)(a).

The record supports the Commission's approval of the ILECs' allocation of rate increases between residential and business customers. *See* Tr.V.3, p. 298, lines 1-11, where BellSouth witness Ruscilli explained that residential service, rather than business service, is heavily subsidized:

> Dr. Cooper is correct that the majority of revenue increases will apply to residential customers, and for good reason. The Statute calls for the removal of the support in basic service and, with the one exception of single-line business rates in Rate Group 2, it is only residence service where the support resides. Historically it has been primarily switched access service and business services that have contributed to the support in basic service rates; therefore, it would be nonsensical to raise business rates in order to eliminate the support in residence service rates.

(Emphasis supplied). *See also* Tr.V.3, p. 277, lines 15-21, where witness Ruscilli explained that BellSouth could not just raise business rates and leave residential rates the same because "[b]usiness rates, in the majority of cases, already cover their underlying costs . . . . Because business rates already cover their costs, there is a significant level of business competition in Florida."

Verizon witnesses Orville Fulp and Danner also explained that Verizon complied with section 364.164 by raising residential rates rather than business rates. *See* Tr.V.6, p. 617, lines 11-18 (Fulp); Tr.V.8, p. 874, lines 15-22, where witness Danner stated:

> [T]he statute refers specifically to removing ". . .current support for basic local telecommunications services that prevents the creation of a more attractive competitive market for the benefit of residential customers." . . . This can only mean raising below-cost basic residential rates. Raising basic business rates will do nothing to help residential customers become a more attractive market to competitors; and basic residential rates are the services that are supported in Florida.

(Emphasis supplied) (internal citations omitted).

Moreover, raising unsupported business rates would not be consistent with section 364.164(1)(a), which requires the PSC to consider whether granting a rebalancing petition would remove current support for basic local telecommunications services. If business rates are not supported, an ILEC cannot propose to raise those rates based on a theory of removing such support without contravening the statute.

3. Exempting BellSouth's and Verizon's bundled services from rate increases is consistent with section 364.164(2).

The Attorney General also argues that BellSouth's and Verizon's petitions do not benefit residential consumers because basic rates are increased, but bundled services are exempt from any increase. AG Brief at 48-49. Such an argument is misplaced given that section 364.164(2) provides that the ILECs shall rebalance "basic local telecommunications service revenues." (emphasis supplied). BellSouth's and Verizon's bundled services have never been classified as basic services. Bundled local service plans are not required to be

treated as basic services, and BellSouth's and Verizon's decisions not to increase bundled service rates are consistent with section 364.02(1), Fla. Stat. (defining "basic telecommunications service" as "voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multifrequency dialing, and access to the following: emergency services such as '911,' all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing."). "Basic" service does not include such "nonbasic" services as call waiting, call forwarding, three-way conferencing, and voice mail, which sometimes are offered in "bundles," along with basic services. *See* § 364.02(9), Fla. Stat. (defining "nonbasic service").

Moreover, the testimony supports the Commission's conclusion that carriers' ability to bundle services will result in a more competitive market for the benefit of residential customers. R.V.19, 3824. *See* testimony of Gordon, witness for BellSouth, Verizon and Sprint, Tr.V.2, p. 159, 18-21, p. 160, lines 1-2:

> [L]ess distorted prices should provide better incentives for competitors to compete for residential consumers. Competition brings with it improved quality, different selection of goods and services bundled together in a way that customers find attractive, and lower prices. These factors provide additional reasons why during the phase-in period, customers will likely place increased

> value on subscribing to the network, thus mitigating the effects of any local rate increase.

(Emphasis supplied); *see also* testimony of Ruscilli, witness for BellSouth, Tr.V.3, p. 297, lines 13-20 ("By increasing the price of basic service to a more market-based level, the bundles that competitors offer will become more attractive. . . . Raising the price of basic service to cover its cost will induce competitors to more aggressively market their services to these customers and a customer that is paying a market rate for basic service is more likely to consider other service options."); testimony of Staihr, witness for Sprint, Tr.V.9, p. 1041, lines 11-13 ("Rate rebalancing will make them relatively more attractive since it will be more profitable for competitors to serve them when their rates cover – or come closer to covering – the costs of providing service.")

4. The legislative floor debate excerpts offered by OPC are not persuasive evidence of legislative intent.

OPC incorrectly argues that the legislative history of section 364.164 demonstrates that the phrase "for the benefit of residential customers" as used in the statute was not followed by the Commission. *See* OPC Brief at 8-12, 31-33.

Although the Commission allowed the introduction of floor debates to assess the proper interpretation of section 364.164,[4] the Commission ultimately

[4] R.V.17, 3306.

concluded that OPC's interpretation of the statutory language is inappropriate. R.V.17, 3320. Instead, the Commission concluded that the "benefit" required by the statute is to be achieved through the creation of "a more attractive competitive telecommunications market for Florida consumers," not through weighing benefits against alleged harms to arrive at some monetary benefit. R.V.17, 3318-3323. This interpretation of record evidence by the Commission is entitled to great deference and must be approved if it is not clearly erroneous. *BellSouth Telecommunications, Inc. v. Jacobs,* 834 So. 2d at 857.

OPC's selective use of floor debate transcripts is misleading. For example, OPC points to excerpts from statements made by Representative Mayfield and underlines language essentially concluding that "residential customers have to benefit." OPC Brief at 8-9. What OPC fails to also highlight are the words that Representative Mayfield used immediately before the underlined language: namely, "Competition has to be created." Thus, if correctly read together, Representative Mayfield's statements reflect the appropriate linkage of "creation of a more attractive competitive market" with "for the benefit of residential consumers."

Similarly, nothing in the statements made by Senator Haridopolos during the Senate floor debates support OPC's argument that the Legislature intended a different meaning than provided by the plain language. In fact, the

statements relied on by OPC support the Commission's interpretation. ("There must be competition, and it must be in the benefit of residential customers.") OPC Brief at 11. (Emphasis supplied by OPC.) Nothing in this underlined language suggests that the "benefit to residential consumers" sought by the Legislature consists of anything other than the benefits that come from having competition in the local residential market.

Arguments, such as those advanced by OPC, can be manufactured; interpretations can be suggested that are contrary to those clear from the actual language in the statutes, and the end result can be a misinterpretation of the law as actually enacted. Courts have specifically warned against relying on legislative floor debates to divine legislative intent. *See Smith v. Crawford*, 645 So. 2d 513, 525 n.8 (Fla. 1st DCA 1994), where the court stated:

> It appears as though the trial court's misreading of the Act grew out of its misplaced reliance on comments made during legislative floor debate. This result shows the inherent difficulties in using such evidence to illuminate legislative intent. Commentators have frequently discussed the unreliability of statements made during floor debate: Courts have generally refused to consider statements made during floor debate as evidence of legislative intent. Various reasons have been advanced for this rule. Some legislators may not have been present during floor debate. Often what is said in debate is for the benefit of constituents only and may be regarded by courts as self serving. Furthermore, supporters of a controversial measure may fear that too much explanation and discussion will cause its defeat, and thus they attempt to minimize debate. ... [L]egislative history ... has the potential to mute (or indeed override) the voice of the statute itself, ...

> and even encourage courts to engage in high fiction in interpreting statutes. In fact, ... it sometimes seems that citing legislative history is still ... akin to looking over a crowd and picking out your friends.

Id. (internal citations and quotes omitted).

The competent, substantial record evidence relied on by the Commission shows that (1) support for basic local telecommunications services prevents the creation of a more attractive local exchange market, a finding that has not been challenged by the Appellants, and that (2) removal of such support will result in a more competitive local exchange market for the benefit of residential customers. Because the PSC's decision is supported by competent, substantial evidence, it should be affirmed by this Court. *Fla. Indus. Power Users Group v. Jaber*, 833 So. 2d at 751-52.

B. The PSC Correctly Determined that the Petitions Will Induce Enhanced Market Entry.

The Attorney General's arguments that the ILEC petitions do not enhance market entry, see AG Brief at 31-41, are contradicted by the evidence summarized in both the original and reconsideration decisions.

The Attorney General makes much in his brief about the effect of *U.S. Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, __ U.S. __ (October 12, 2004). AG Brief at 31-35. This same issue has been raised by AARP in its most recent Motion to

Relinquish Jurisdiction, which is still pending before this Court. The PSC, on reconsideration of its original decision, has already considered the effect of the federal court case and determined that it "does not rise to the level that would necessitate that we reconsider our decision." R.V.19, 3825-26.[5]

1. Regardless of the ultimate pricing structure for UNE-P, the local residential market will be more attractive to competitors once support for local service rates is removed and the price of providing service is closer to its cost.

The Attorney General's reliance on the subject matter of that federal court case – unbundled network element-platform ("UNE-P") rates[6] – is

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[5] The Attorney General argues that the federal court decision served as an independent basis for the PSC to reconsider its ruling. In support of this position, he cites *Reedy Creek Utility Company v. Florida Public Service Commission*, 418 So. 2d 249 (Fla. 1982), *McCaw Communications v. Clark*, 679 So. 2d 1177 (Fla. 1996), and *Sunshine Utilities v. Florida Public Service Commission*, 577 So. 2d 663 (Fla. 1st DCA 1991). These cases are not persuasive. The standard of review in determining whether the PSC should reconsider a previous order is whether there is a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981). The PSC cannot retroactively alter previously entered orders just because hindsight makes a different course of action preferable. *Richter v. Fla. Power Corp.*, 366 So. 2d 798, 800 (Fla. 2d DCA 1979). Instead, reconsideration is justified "…under extraordinary circumstances, as where a substantial change in circumstances, or fraud, surprise, mistake or inadvertence is shown." *Id.*, *citing* 73 A.L.R.2d 939, 951-52 (1960).

[6] UNE-P rates are the rates that competitive local exchange companies (CLECs) pay to ILECs to lease local loops and computer switching facilities.

misplaced. In determining that the case did not provide a basis to reconsider its decision, the PSC stated:

> As for the Supplemental Authority offered by the Attorney General, we conclude that the D.C. Circuit's decision in *United States Telecom Ass'n v. Federal Communications Commission* does not rise to the level that would necessitate that we reconsider our decision. While the decision does muddy the waters as to the future of certain UNEs, it does not, by itself, automatically remove any UNEs from the national list. Furthermore, the D.C. Circuit's decision is currently stayed, and further appeals are possible. While we are concerned about the uncertain state of the FCC's unbundling rates, even if the D.C. Circuit's decision remains in place, and UNEs are removed from the list as a result, that process will likely take place over an extended period of time. Furthermore, even if the D.C. Circuit's decision remains in place, carriers that compete using their own facilities would not be directly affected. For all these reasons, we conclude that the D.C. Circuit's decision does not require a change to our conclusions in this case.

R.V.19, 3825-26.

Although the federal court decision is no longer stayed and the United States Supreme Court has declined to hear the appeal, the FCC in July of 2004 approved a six-month extension of the current UNE-P rates, and the FCC is attempting to draft new permanent rules. *See* AARP Motion for Evidentiary Hearing and Modification of Commission Orders Nos. PSC-03-1469-FOF-TL and PSC-04-0456-FOF-TL on the Basis of Significantly Changed

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The court decision, which was issued in March of this year, changed the way those rates may be established.

Circumstances and Public Need at 27-28 (filed with this Court on September 8, 2004). Thus, any decision about how UNE-P rates are established is not final.

Moreover, UNE-P rates are just one of numerous factors affecting the Florida residential market. The record supports the Commission's conclusion that, regardless of UNE-P rates, the local residential market will be more attractive to competitors once support for local service rates is removed and the price of providing service is closer to its cost. R.V.17, 3307.

For example, the record includes testimony noting that the cost of UNE-P is irrelevant to whether the rate rebalancing petitions should be granted, as well as testimony that it is just one of many factors in competing for local telecommunications services. *See* testimony of Gordon, witness for BellSouth, Sprint, and Verizon ("[R]elying too heavily on UNE-P to enhance market entry is bad public policy if one ever hopes to achieve facilities based competition.") Tr.V.2, p. 183, lines 6-7.

Infrastructure investment is an integral aspect of Florida's 2003 Act. The record confirms that a more attractive competitive market will prompt a substantial increase in infrastructure investment by the competitive local exchange carriers (CLECs). *See* testimony of Gordon, witness for BellSouth, Sprint, and Verizon. Tr.V.2, pp. 125, 127, 146. The record shows that CLECs and other entrants will serve all residential markets – rural, urban, and

suburban – in a variety of ways, including with new technologies, such as voice over internet protocol ("VOIP"), broadband over power lines ("BPL"), and fixed wireless services. *See* Ex. 61 at 27-39. The record demonstrates:

- The cable TV industry is currently conducting voice telephony trials using the VOIP transmission technology over cable TV lines and cable modems. Because of the extensive availability of cable TV networks, especially in residential areas, including rural areas, the cable TV infrastructure is readily available to provide voice telephony using VOIP transmission technologies. Testimony of Staihr, witness for Sprint, Tr.V.9, p. 1040, lines 1-13.

- The electrical power industry, including Florida electric utilities, are currently in trials using broadband power line ("BPL") technology to provide broadband services to consumers using the existing electrical grid. BPL technology is adaptable to also providing voice telephony. Again, because of the ubiquitous presence of the existing electric grid, BPL is a readily available alternative on a widespread basis to the ILECs' networks and could be a significant competitive threat to their residential voice telephony, as well as to data services. Testimony of Staihr, witness for Sprint, Tr.V.9, p. 1040, lines 15-22.

- A number of firms throughout the nation are providing wireless services in less urban areas in competition with the ILECs. Given the proper financial incentives, these wireless firms can and will serve residential local customers in the ILECs' rural areas as an alternative to wireline-based technologies. Testimony of Staihr, witness for Sprint, Tr.V.9, p. 1040, lines 24-25, p. 1041, lines 1-4.[7]

[7] The record demonstrates that pricing reform will have broad policy implications for the state. As Verizon witness Danner made clear: "Pricing reform will also signal investors that the Governor, Legislature and this Commission are serious about promoting competition and removing impediments to its success. For those who might commit new capital to Florida, this signal will be important not just for what it says about current business opportunities, but also for what it says about the Commission's likely future approach to issues that may affect these investments in the future.

The 2003 Act does not require that residential local competition or enhanced market entry come from any specific competitor, or class of competitor, using a particular technology or market entry vehicle. A variety of technologies or market entry vehicles currently are available to competitors. Testimony of Gordon, witness for BellSouth, Verizon, and Sprint, Tr.V.2, pp. 146, lines 21-25, p.147, lines 1-6; Ex. 61 at 27-39. The record also demonstrates that some entrants might use a combination of their own facilities, as well as facilities (UNEs) leased from the ILECs. Ex. 61 at 20-21.

At hearing, AT&T's witness Wayne Fonteix emphasized that reforming access charges, which was at issue in the rate-rebalancing docket, is a significant issue separate from the issue of UNE-P rates. He had the following exchange with Commissioner Davidson:

Commissioner Davidson: Given AT&T's view that UNE rates in Florida are not to the level that AT&T would like them, shouldn't the Commission simply hold off on access charge reform until such time as the UNE rates are to AT&T's liking in the state?

Fonteix: No. The opportunity is long overdue in Florida, as I indicated, to begin to reform the access charge regime, as has been underway for a number of years in other states and at the federal level. . .

Tr.V.11, p. 1304, lines 23-25; p. 1305, lines 1-7.

Reform will thus build confidence in the investment climate for local competition in Florida." R.V.8, p. 821, lines 15-22.

Apart from any relevance of the federal court decision, the record supports the Commission's finding that the ILEC proposals will benefit residential customers through increased competition. OPC's own expert witness, David J. Gabel, testified that rate rebalancing is desirable for competition, stating:

> Well, in the end of my direct testimony I point out I think there should be rebalancing. I do. I'm struck by the access rates here. I do think there should be rebalancing.

Tr.V.13, p. 1653, lines 21-24. *See also* Testimony of Dr. John Mayo, witness for AT&T and MCI, Tr.V.10, p. 1218, lines 24-25; p. 1219, lines 1-6. Mayo stated that the ILEC proposals are in the public interest, consistent with the statute, and consistent with good economics. *Id.* at p. 1218, lines 24-25; p. 1219, line 1. Moreover, he said the proposals are likely to lead to "the emergence of competition in telephony," which will be "a good thing for everybody." *Id.* at p. 1219, lines 4-6; *see also* testimony of BellSouth witness Banerjee, Tr.V.5, p. 497, lines 9-17, who stated:

> Raising basic rates will clearly expand the scope of entry to serve residential customers – especially "low-revenue customers" – who subscribe to BLTS [basic local telecommunications service] but purchase little, if any, of the other services. Competitors estimate likely total revenues and total costs to make *overall entry* decisions; however, they determine which *types of customers* to compete for by comparing likely revenues with costs for every customer category. Thus, allowing ILECs to raise RBLTS rates

> should stimulate competition for a wider spectrum of residential customers and, in particular, the low-revenue customers.

The witness for Knology stated that his company began operating in Panama City, Florida in 1997, based on an expectation that rate rebalancing would occur, which would make Knology's rates more competitive. *See* testimony of Felix L. Boccucci, Tr.V.8, p. 773-779. Specifically, he stated at Tr.V.8, p. 779, lines 16-24:

> But what rate rebalancing would enable us to do is to continue to extend our networks in the – we would look at the possibility of extending our networks through the, through the panhandle of Florida. Specifically some of the territory that Sprint currently serves, with rate rebalancing, it makes the competition for the capital in that particular market arena compete with other markets that we have or other opportunities we have for, for capital since we already have the infrastructure in Panama City that we could leverage off of.

The witnesses for OPC and AARP also acknowledged that consumers are better off if they have competitive alternatives and that competition tends to drive prices toward cost. *See* Deposition of Bion C. Ostrander, witness for OPC, Ex. 36 at 18, lines 9-15; 19, lines, 1-8; Deposition of Dr. Mark N. Cooper, witness for AARP, Ex. 37 at 26, lines 5-13; Deposition of Gabel, witness for OPC, Ex. 35 at 57, lines 14-20.

Neither the Attorney General nor any other Appellant has challenged the Commission's conclusion that local rates are priced below costs, which prevents the creation of a more attractive local exchange market. R.V.17,

3311-16. Given this unchallenged finding, any argument that rate rebalancing will not enhance market entry is hollow. Moreover, the record solidly supports the Commission's findings that local rates have been kept at artificially low levels and below their costs, thereby raising a barrier to entry into the market by efficient competitors. *See* testimony of Gordon, witness for BellSouth, Sprint, and Verizon, Tr.V.2, p. 128, lines 10-11 (rebalancing rates has been demonstrated to have a positive effect on competitive entry into the local exchange market). Gordon also stated that competitors will not rationally try to compete against heavily subsidized prices and that the ILECs' proposals would make for a more attractive market to competitors. Tr.V.2, p. 145, line 19.

The Attorney General dismisses the Commission's finding that rate rebalancing would result in increased competition "as evidenced in other states." R.V.17, 3318; AG Brief at 38. But contrary to the Attorney General's argument, the record provides support for this conclusion. *See, e.g.*, testimony of Gordon, Tr.V.2, p. 163, lines 4-9: ("Massachusetts was one of the first states to open toll and local markets to competitive entry, and the price rebalancing . . . promoted the development of an efficient competitive process."); Tr.V.3, p. 243, lines 10-14 (Gordon testified that competitors came into the market in Maine following rate rebalancing); Tr.V.16, p. 1980, lines 5-25 (discussion at

final hearing concerning other states' experience with rate rebalancing and noting that more CLECs entered the market in those states); Tr.V.9, p. 1101, lines 6-16 (John Felz, witness for Sprint, testified that Sprint's rebalancing efforts in Pennsylvania and Ohio had virtually no negative customer reaction and are expected to increase competition); Tr.V.8, p. 834, lines 9-21 (Verizon witness Danner testified that prior experience with pricing reform in California shows that it can proceed without notable difficulties for customers).

The Commission's Order on Reconsideration summarizes the reasons that rate rebalancing will enhance market entry:

> As demonstrated by the discussion at pages 24-26 and 38-39 of our Order . . .[w]e considered testimony from experts on economic theory, as well as empirical evidence. Based on that evidence, we reached the well-reasoned conclusions that: . . . granting the petitions will remove an obstacle to market entry, providing opportunities for competitors to not only enter new markets, but also to offer new products and services beyond those that they would otherwise be able to offer were the market to remain constrained by the pricing vestiges of the former regulatory regime. . . .

R.V.19, 3831 (emphasis supplied).

2. Evidence on economic theory was appropriately considered by the Commission.

The Commission appropriately relied on both empirical evidence and testimony from experts on economic theory. R.V.19, 3831; R.V.17, 3314-3316, 3328-3329. The Attorney General incorrectly argues in his Amended

Initial Brief that theoretical evidence and testimony concerning general economic principles presented by several of the ILECs' expert witnesses cannot constitute competent, substantial evidence upon which the Commission may rely. AG Brief at 28, 36-37, and 43.

Expert testimony is admissible in Florida under section 90.702, Florida Statutes,[8] if it satisfies the test outlined in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which provides:

> [W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

Castillo v. E.I. Du Pont De Nemours & Co., Inc., 854 So. 2d 1264, 1268 (Fla. 2003) (Emphasis supplied) (For expert testimony to be admissible under the *Frye* test, the scientific principles undergirding such evidence must be found by the trial court to be generally accepted by the relevant members of its particular field.) (emphasis supplied).

[8] "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial." § 90.702, Fla. Stat.

The theoretical evidence that the Attorney General primarily attacks is testimony of Gordon, witness for BellSouth, Sprint, and Verizon, who states that "[i]ncreasing the price of a service . . . will make for a more attractive market for actual and potential competitors." Tr.V.2, p. 145, lines 17-18. Gordon testified that this theory is a widely supported proposition and "not just restricted to regulated utilities;" rather, it is a "general proposition in industry behavior." Tr.V.2, p. 216, lines 3-5 (emphasis supplied). Other ILEC witnesses provided testimony in favor of rate rebalancing using this same economic theory.[9]

This basic tenet of economic theory clearly meets the *Frye* test because it is generally accepted by the relevant members of its particular field. The

[9] *See, e.g.*, testimony of William E. Taylor, adopted by Banerjee for BellSouth, Tr.V.5, p. 478, lines 21-24 ("This section [§ 364.164(1)] recognizes a fundamental precept of market competition, namely, that competitive entry by new service providers depends on, among other things, the rates that incumbent service providers can (or are required to) charge for the service or services for which competition is supposed to occur."); testimony of Danner for Verizon, Tr.V.8, p. 816, lines 2-4 ("[R]eformed prices will make the local exchange market more attractive to competitors and induce enhanced market entry."); testimony of Mayo for AT&T and MCI, Tr.V.10, p. 1168, lines 22-23, p. 1169, lines 1-2 ("[E]conomic theory clearly indicates that the decrease in overpriced access charges together with the corresponding elevation in the retail price of residential service in Florida will positively affect the likelihood of market entry."); testimony of Felz for Sprint, Tr.V.9, p. 1097, lines 16-19 ("[T]he elimination of implicit subsidies in access rates and the establishment of pricing for local services, which are more closely aligned with their costs, will make the residential local market more attractive to competitors . . . .")

Commission, therefore, appropriately relied on testimony from the ILECs' experts concerning economic theory.

Notably, the Attorney General did not object to the relevancy of testimony based on basic economic principles at the hearing; therefore, any relevancy arguments were waived and cannot be raised at this juncture.[10] Similarly, no one challenged the qualifications of any expert offered by the ILECs. No motion to strike opinion testimony was filed; nor did any of the Appellants (Intervenors below) conduct voir dire to ascertain the scope of any ILEC witness' expertise.

The Commission considered economic theory in conjunction with the empirical evidence regarding the experiences in other states that have implemented rate rebalancing to determine the effect rebalancing will have on competition in Florida. Tr.V.3, p. 249, lines 5-7; Tr.V.3, p. 253, lines 10-11 (since rebalancing its rates, Maine has seen an increase in competition and

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[10] *See In Re: Application for transfer of territory served by Tamiami Village Utility, Inc.*, Order No. PSC-95-0576-FOF-SU (May 9, 1995) ("It is well established in the law that errors in admitting evidence are generally waived unless a proper, timely objection was made during the hearing."), *citing* § 90.104(1)(a) and *McMillan v. Reese*, 55 So. 388, 390 (Fla. 1911) ("[o]bjections to the admissibility of evidence must, as a general thing, be made when it is offered, or its admission cannot be assigned as error"). The Attorney General neither objected to nor moved to strike portions of the ILECs' witnesses' testimony based on basic economic principles; therefore, the Attorney General waived his right to object to the relevancy of such testimony on appeal.

maintains the highest level of telephone penetration in the country – 98% of the households in Maine have telephone service); Tr.V.3, p. 248, lines 19-24 (in Massachusetts, CLECs have shown an increased interest in residential customers since rebalancing). The Commission also considered empirical evidence presented by potential ILEC competitors, such as Knology and AT&T. *See e.g.*, R.V.17, p. 3328.

In addition to the testimony provided regarding other states' experiences with rate rebalancing, Gordon discussed a study by Agustin Ros and Karl McDermott ("Ros-McDermott Study") regarding whether low residential basic local rates were having any impact on competition in the states and, specifically, whether low rates were hindering the development of residential competition. Tr.V.2, p. 149, lines 15-18. The study showed a significant, positive association between states that have more balanced tariffs and residential competition: Rebalancing tariffs by 10% leads to approximately a 9% and 13% increase in residential competition. Tr.V.2, p. 150, lines 7-11. Florida is in the same position now as were other states before rates were rebalanced, so it is reasonable to expect that Florida will have similar results.

The Commission appropriately considered both theoretical and empirical evidence, and the competent, substantial evidence in the record supports the Commission's finding that granting the ILECs' petitions will induce enhanced

market entry as required by section 364.164(1)(b). Thus, the decision should be upheld by this Court. *Fla. Indus. Power Users Group v. Jaber*, 833 So. 2d at 751-52.

II. THE COMMISSION'S DETERMINATION THAT APPROVAL OF THE PETITIONS WILL PRESERVE REASONABLE AND AFFORDABLE PRICES FOR BASIC LOCAL SERVICE IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Commission's Final Order and its Reconsideration Order are replete with analysis of evidence concerning how the petitions of BellSouth, Sprint, and Verizon will preserve reasonable and affordable prices for residential telecommunications consumers in Florida, including those who desire only basic local service. Thus, the argument of the Attorney General that the orders do not satisfy the requirements of section 364.01(4)(a) is wrong.

Section 364.01(4)(a) requires the Commission to exercise its jurisdiction to "[p]rotect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices." In its Reconsideration Order, the Commission specifically addressed the Attorney General's argument:

> Upon consideration, we find that the Attorney General has not demonstrated that in acting on the petitions we overlooked or failed to consider our obligations under Section 364.01(4)(a). . . . [T]here is no conflict between Sections 364.164 and 364.01(4)(a). The former section required us to consider, among other things, the impact of proposed rate changes on the creation of a more attractive competitive local exchange market for the benefit of

> residential customers. The Order is replete with discussion of our findings and conclusions on this issue. The latter section required us to consider whether our actions ensure that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices. Although the Order did not make specific reference to Section 364.01(4)(a), the Order demonstrates that we did consider the impact of its action on reasonable and affordable prices for basic telecommunications services.

R.V.19, 3822.

In its original Final Order, the Commission's findings concerning reasonable and affordable rates include the following:

- Experience from other states shows that approval of the ILECs' proposals will have little, if any, impact on the availability of universal service, R.V.17, 3308;

- Basic local service will continue to remain affordable for the vast majority of residential customers, R.V.17, 3308;

- The amended Lifeline provisions in section 364.10 will help protect economically disadvantaged customers from the effect of local rate increases. R.V. 17, 3309.

See also R.V.19, 3823 (Reconsideration Order summarizing these earlier findings).[11]

The record supports these findings. *See, e.g.*, testimony of Gordon, Tr.V.2, p. 138, lines 22-24 ("[T]he companies' revised plans compare

[11] On reconsideration, the Commission also amended the conclusion of its Final Order to specifically reference section 364.01(4)(a), stating: "In granting the Petitions, we have also considered the provisions of Section 364.01(4)(a) and concluded that our action will preserve reasonable and affordable prices for basic local service." R.V.19, 3823.

favorably with other states that have approved rate-rebalancing plans that approved much larger increases than the companies' request. Importantly, those states' price adjustments did not jeopardize universal service."); testimony of Danner, witness for Verizon, Tr.V.8, p. 871, lines 20-25 ("In actuality, the evidence shows that pricing reform has improved universal service, and not caused any notable difficulties for customers."); testimony of Staihr, witness for Sprint, Tr.V.9, p. 1049, lines 4-5 ("Sprint has had experience with rate rebalancing in other states and 'rate shock' has not been a problem."); *see also* Tr.V.9, p. 1047, lines 12-16, where Staihr stated:

> The proposed rate rebalancing will not have a negative effect on universal service. Economists who have studied the demand for basic telephone service know that econometric studies have demonstrated that it is income, rather than price, that plays the largest role in a customer's choice of whether or not to subscribe to basic telephone service.

From an ability to pay perspective, Florida's consumers rank higher in their level of disposable income than the seven other southeastern states, all of which have higher local service rates than Florida and which have actually increased residential subscribership more than Florida's subscribership. (Tr.V. 9, p. 1100, lines 10-16. As confirmed by Dr. Mayo:

> In Florida, the per capita income for the medium – I'm sorry, the medium income for a family of four is about $57,000 a year. That means that if you take typical rates in Florida, that consumers spend less than 4/10ths of one percent of their income on telephone service today. After this petition they will still

> spend less than 4/10ths of one percent of their income on telephone service.

Tr.V. 10, p. 1236, lines 10-16.

The Commission's Order also makes clear that arguments that the petitions would disproportionally hurt senior citizens and those on fixed incomes were considered and rejected. The Commission specifically noted that the ILECs have taken steps to minimize the impact on low-income citizens by expanding the Lifeline program to make those within 135% of the federal poverty level eligible for Lifeline assistance and by protecting program participants from basic service increases for four years, even though such protection is required only until parity is reached. *See* R.V.17, 3309, 3321-22.

The Commission also addressed the impact of the proposals on senior citizens on fixed incomes, finding that (1) rates will still be "within the zone of affordability," R.V.17, 3322; and (2) many seniors on fixed incomes take a number of additional services, such as cellular service, cable service, and Internet service. *Id*.

The record supports these findings. *See* testimony of Ruscilli, witness for BellSouth, Tr.V.3, p. 300, lines 22-25, p. 301, lines 1-5:

> The data is clear; Florida's older citizens not only pay less for residence telephone service than their age group in other states, but they are also more financially capable of paying those rates than their counterparts in other states. Even with the $3.89 monthly increases proposed in three annual increments under

> BellSouth's mirroring methodology, Florida's local residence service rates will be $11.46 in the lowest rate group and $14.93 in the highest rate group. Florida's rates will still be the 4th lowest in the region, and this assumes no increases in rates in the other states.

See also Florida Public Service Commission Report on the Relationship of the Costs and Charges of Various Services Provided by Local Exchange Companies and Conclusions as to the Fair and Reasonable Florida Residential Basic Local Telecommunications Service Rate, February 1999, Vol. II, at 40-41, 47-48 (stating that the percentage of households that would discontinue service or reduce spending based on hypothetical price increases did not vary significantly between seniors and non-seniors and noting that senior citizens subscribe to many optional services);[12] Tr.V.3, p. 263, lines 11-25; p. 264, lines 1-8; testimony of Gordon, witness for BellSouth, Sprint, and Verizon, Tr.V.2, p. 126, lines 11-22 (concluding that companies' revised plans will not jeopardize universal service in Florida).[13]

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[12] The report's findings were acknowledged and accepted during the hearing by Cooper, witness for AARP. Tr.V.14, p. 1856, line 22.

[13] The Attorney General also argues that the Commission gave little regard to citizens who testified at the hearing. Attorney General Brief at 45-46. The Commission's Final Order contradicts this assertion and makes clear the Commission thoroughly considered the citizen testimony. *See, e.g.,* R.V.17, 3321, concluding that "customers as a whole will benefit as contemplated by the statute." *See also* R.V.17, 3316-3323 (discussion of benefits to residential customers.) The summary of the citizen testimony at the Commission's public hearings in these dockets shows there were 45 references to the proposition that the ILECs' proposals promote competition and free enterprise, eight references

In sum, the ILECs who have engaged in rate rebalancing in other states have not seen (1) negative effects of re-balancing rates; (2) large numbers of customers opting to discontinue service; (3) material volumes of complaints filed with state commissions; or (4) any evidence to suggest that any customer's overall quality of life was negatively affected by rate rebalancing. testimony of Staihr for Sprint, Tr.V.9, p. 1053, lines 11-15. As Gordon, testified:

> Maine rebalanced not so long ago. Our penetration rate is 98 percent. I think we're the highest in the nation. And it didn't quiver when we rebalanced rates. I believe the same effect is true in Massachusetts where there was rebalancing. And I don't know about Illinois and Pennsylvania off the top of my head. I would be very surprised to see a significant impact or a measurable impact there. But I think you can begin to generate some comfort by surveying those. And I've mentioned a couple in my testimony.

Tr.V.3, p. 253, lines 10-18.[14]

In approving the petitions of the ILECs, the Commission applied section 364.164, Florida Statutes, which was enacted by the Legislature in 2003, and is

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to the concept that market-based pricing is beneficial, and 11 references to the idea that the proposals bring new technology and innovation. *See* Tr.V.16, p. 1985, lines 14-15 (summary distributed at hearing).

[14] In Pennsylvania, where Sprint was authorized to increase its residential local rates to levels higher than would result in Florida, residential access lines declined less than 1/2 of 1 percent in the six months following the rate increase. Testimony of Felz, witness for Sprint, Tr.V.9, p. 1101, lines 11-13. In fact, this statistically insignificant decline may be the result of competition or other factors and may not be related to the rate increases at all. *Id*., lines 13-20.

the latest expression of legislative intent concerning basic local telecommunications services and the impact of rates on Florida consumers. As such, it is a specific statutory provision that takes precedence over a prior, general expression of legislative intent, such as section 364.01(4)(a). *See, e.g.*, *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms"); *Tribune Co. v. Sch. Bd. of Hillsborough County*, 367 So. 2d 627, 629 (Fla. 1979) ("the later special act, as a more specific expression of the legislative will, will be given effect"); *Barnett Banks, Inc. v. Dep't of Revenue*, 738 So. 2d 502, 505 (Fla. 1st DCA 1999), quoting *McKendry*.

Despite this settled rule of statutory construction, no conflict exists between sections 364.164 and 364.01(4)(a), as noted by the Commission in its Reconsideration Order. R.V.19, 3822 ("[W]hile Sections 364.01(4) and 364.164 must be read together, Section 364.164 is the controlling provision to the extent there is any conflict between the two. . . . In this case, however, there is no conflict between Sections 364.164 and 364.01(4)(a)"). The Commission's construction of these statutes, which the PSC is charged with enforcing, is entitled to great deference by this Court. *BellSouth Telecommunications, Inc. v. Jacobs.* 834 So. 2d at 857. Because the

Commission's statutory interpretations are not "clearly erroneous," they should be approved. *Id*.

CONCLUSION

For the reasons expressed, the Final Order and the Reconsideration Order entered by the Commission are supported by competent, substantial evidence. Therefore, the ILEC Appellees respectfully request that this Court affirm both orders.

Respectfully submitted this 3d day of November, 2004.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Donna E. Blanton

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served by U.S. Mail this 3d day of November 2004, on the following:

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