IN THE SUPREME COURT OF FLORIDA

CHARLES J. CRIST, JR., Attorney General, State of Florida, **HAROLD McLEAN**, Public Counsel, Counsel, State of Florida, and **AARP**,	)	
Appellants,	)	**Consolidated Case Nos**. SC04-9, SC04-10, SC04-946
vs.	)	
LILA A. JABER, Chairman, et al., constituting the FLORIDA PUBLIC SERVICE COMMISSION, an agency of the State of Florida, **BELLSOUTH TELECOMMUNICATIONS, INC.**, **VERIZON FLORIDA, INC.** and **SPRINT-FLORIDA, INC.**, et al.,	)	
Appellees.	)	

On Appeal from the Florida Public Service Commission

ANSWER BRIEF OF FLORIDA PUBLIC SERVICE COMMISSION

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TELECOMMUNICATIONS GLOSSARY

The following is a brief glossary in narrative form of the key telecommunications terms involved in this case. Each acronym is defined again when it first appears in the body of the brief.

* * * * *

A residential consumer in Florida typically purchases **basic local telecommunications service** (local service) for a flat monthly rate. Local service allows the customer to make unlimited local telephone calls and to dial 1+ to reach his or her long distance company to make long distance calls.

A consumer can purchase local service from an **incumbent local exchange company or ILEC** (*e.g.* BellSouth, Sprint, or Verizon) or, in areas where competition is present, from a **competitive local exchange company or CLEC** (*e.g.* AT&T, Knology, or MCI). A CLEC may provide local service by using its own facilities (*i.e.* as a **facilities-based carrier**), by purchasing piece-parts of the incumbent's network (*i.e.* **unbundled network elements or UNEs**) at cost-based rates, by using some combination of its own facilities and UNEs, or by reselling services purchased from the incumbent at a wholesale discount.

When a consumer dials 1+ to place a long distance call, that call uses the local company's network to reach the long distance carrier. The call then travels over the long distance carrier's network to the distant calling area. At that point, the

call is handed off to another local company, whose network is used to complete the call. The **long distance company (interexchange carrier or IXC)** typically charges the customer a per-minute **toll rate** for making the long distance call.[1] In turn, the long distance company pays a per-minute **access charge** to the local companies that originate and terminate the call as compensation for the use of their networks. If the long distance call is within Florida, the IXC pays the **intrastate access charge rate**; if the call is between Florida and another state, the IXC pays the **interstate access charge rate**.

This case involves the Commission's implementation of sections 364.163 and 364.164, Florida Statutes (2003), as amended by the **Tele-Competition Innovation and Infrastructure Enhancement Act (Act)**, Chapter 2003-32, Laws of Florida. Under the Act, the incumbent local companies can petition the Commission to reduce their intrastate access charge rates to **parity** with their interstate access charge rates over a period of two to four years, and to increase rates for basic local service by an offsetting amount designed to make the change **revenue neutral** to the incumbents. This type of revenue neutral change in a local company's rates is generally referred to as **rate rebalancing**. The Legislature listed

[1] Some consumers purchase a flat-rate **bundle** of services that includes both basic local service, some features such as call-waiting or call-forwarding, and unlimited long distance calling. Other customers subscribe to a long distance calling plan that includes a flat monthly **in-state connection fee** in addition to per-minute charges for long distance calling.

four specific factors that the Commission was required to consider in determining whether to grant the petitions.

If the petitions are granted, the long distance companies (IXCs) are required to eliminate any in-state connection fees and to reduce their per minute long distance rates so as to **flow through** to residential and business customers the financial benefit the companies receive from paying reduced intrastate access charges.

Any incumbent local company whose rebalancing petition is granted is required to expand the pool of customers eligible to subscribe to the company's **Lifeline** service, a subsidized service for low income consumers. The Act also protects Lifeline customers (until parity is reached) from any local rate increase that results from rebalancing. These additional Lifeline provisions advance the goal of **universal service** – the widespread availability of telephone service at reasonable and affordable rates.

STATEMENT OF THE CASE AND OF THE FACTS

This is the latest in a series of cases involving the Florida Public Service Commission's (Commission's) implementation of pro-competitive legislation enacted by the Florida Legislature. It involves the Commission's final order and order on reconsideration approving amended petitions filed by Verizon, Sprint and BellSouth – the "incumbent local exchange companies" or "ILECs" – under the competitive market enhancement provisions of section 364.164, Florida Statutes (2003).[2] (R17:3291-3349; R19:3818-35).[3]

The ILECs' amended petitions sought to decrease *intra*state access charge rates – the rates that ILECs charge long distance carriers for using ILEC facilities to originate and terminate intrastate long distance calls – to parity with the *inter*state access charge rates for providing comparable service with respect to interstate long distance calls. (R2:349-56, 359-77, 378-401). These reductions total

[2] Subsequent citations to the Florida Statutes are to the 2003 edition unless otherwise noted.

[3] Citations to the record on appeal are designated as follows:

Example	Explanation
R1:32	Record volume # : clerk's page #
T1:15	Hearing transcript volume # : court reporter's page #
Ex. 79	Hearing exhibit #
Confid. 502	Confidential documents on index with clerk's page #
Corres. 722	Correspondence with clerk's page #

$343.5 million over two years.[4] The long distance carriers – also known as "interexchange carriers" or "IXCs" – who pay these access charges to the ILECs are required to flow through to Florida consumers 100% of any reductions they receive by lowering their intrastate long distance rates and eliminating any in-state connection fees. § 364.163(2), Fla. Stat.

To compensate for the ILECs' reduced revenues from intrastate access charges (*i.e.* to make the change revenue neutral), the ILECs are permitted to increase the rates charged to residential customers and single-line business customers for basic local telephone service by the same $343.5 million. § 364.164(2), (7), Fla. Stat.

Background [5]

Until the early 1980s, both local and long distance service were provided on a highly regulated, monopoly basis. In 1982, the Florida Legislature began the introduction of competition into the intrastate long distance market by enacting Chapter 82-51, Laws of Florida. This Court recognized in *Microtel, Inc. v. Florida Public Service Commission*, 464 So. 2d 1189, 1191 (Fla. 1985), that the 1982

[4] The total consists of $125.2 million for BellSouth, $142.1 million for Sprint, and $76.2 million for Verizon. (R2:354, 372, 383; T3:273; T6:616; Ex. 69 at JMF-12).

[5] The Commission provided a more detailed historical background at pages 3-8 of its final order. (R17:3293-7).

Legislature made "the 'fundamental and primary policy decision' that there be competition in long distance telephone service" in Florida.

In 1995, the Legislature began the introduction of competition into the local exchange market by eliminating the ILECs' statutory monopoly for local service. Ch. 95-403, Laws of Fla. The Legislature found 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." § 364.01(3), Fla. Stat. added by Ch. 95-403, §5, Laws of Fla. The 1995 law also directed the Commission to submit an annual report to the Legislature on the status of competition in the telecommunications industry. § 364.386, Fla. Stat. added by Ch. 95-403, §29, Laws of Fla.

The Commission's 2002 Annual Report on Competition showed that as of June 30, 2002, the competitive local exchange companies – formerly known as ALECs,[6] now known as CLECs – had obtained a 13% share of the local exchange market, up from 8% in 2001. (Ex. 61, p. 3). This market share was heavily weighted in the business sector. CLECs served 26% of the business lines in the state, but only 7% of the residential lines. *Id.* The Commission's 2003 Annual

[6] Alternative local exchange companies.

Report on Competition showed that the CLECs had increased their overall market share during the year from 13% to 16%. (Ex. 15, p. 7). Again, the CLECs' market share was heavily weighted in the business sector. The CLECs' 9% share of the residential market continued to lag behind their share of the business market, which had grown to 29%. (Ex. 15, p. 7).

The differing level of competition in the residential and business markets eight years after the Legislature authorized competition for local service is due in part to the fact that in Florida the ILECs' rates for residential local service, against which the CLECs must compete, are currently priced below cost. (T3:277; T6:625; T9:1081; Ex. 69 at JMF-3; compare Ex. 53 [rate] with Conf. 475 [cost]). In fact, Florida residential rates are lower than the national average and are the lowest of any state in the Southeast. (T2:132; T9:1082; T11:1306; Ex. 69 at JMF-6). Florida's below-cost residential rates are supported by intrastate access charges that are generally the highest of any state in the Southeast. (T10:1253-4; Ex. 72). Intrastate access charge rates in Florida are substantially higher than interstate access charges and even further above the cost of providing access. (Ex. 72; Confid. 1466). The high intrastate access charge rates paid by IXCs have led to intrastate long distance rates in Florida that are among the highest in the country. (T9:962-3).

The continued existence of above-cost access charges, coupled with below-cost rates for residential basic local service, is an artifact of rate design policies that prevailed when all telecommunications services were provided by regulated monopolies. Under the pre-competition regulatory scheme, regulators set local prices as low as possible to promote the social policy goal of universal service. Prior to the divestiture of AT&T in 1984, long distance rates provided much of the support for low local rates. After divestiture, interstate and intrastate access charges were substituted as a means of supporting basic local service. (T2:140-2; T10:1164-7). This approach has resulted in prices for both local and long distance service that are economically inefficient. In today's emerging competitive market, these prices provide inappropriate signals to actual and potential competitors. (See T2:145-6; T10:1166-7).

The Act

In an effort to promote additional competition for residential customers, the 2003 Legislature enacted the Tele-Competition Innovation and Infrastructure Enhancement Act ("Act"), which took effect on May 23, 2003. Ch. 2003-32, Laws of Fla. A key provision of the Act allows the ILECs to petition the Commission to reduce intrastate access charge rates to parity with interstate rates. The impact of the resulting revenue decrease must be offset with revenue neutral increases in

basic local service rates. § 364.164, Fla. Stat. The Commission is charged under section 364.164(1) with considering whether granting such petitions 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 2 years or more than 4 years.
>
> > ["Parity" occurs, according to subsection (5), when an ILEC's intrastate access rate is equal to its interstate access rate in effect on January 1, 2003.]
>
> (d) Be revenue neutral as defined in [subsections (2) and (7)].
>
> > [These subsections require that the ILEC's combined revenues from basic local service charges and intrastate access charges remain the same before and after the rate adjustments permitted by this section. Under section 364.02(1), basic local service is defined to mean flat-rate residential and flat-rate single-line business service.]

The Act provides that any long distance carrier who benefits from an approved access charge reduction must "decrease its intrastate long distance revenues by the amount necessary to return the benefits of such reduction to both its residential and business customers." § 364.163(2), Fla. Stat. This so-called "flow-through" provision allows the long distance carrier to determine the specific long distance rates to be decreased, provided that it eliminates any in-state

connection fee and provided that both residential and business customers benefit from the rate decreases.[7] *Id.*

The Proceedings Below

On August 27, 2003, BellSouth, Verizon and Sprint each filed petitions under the Act seeking to reduce their intrastate access charges to parity and to make revenue neutral increases in local rates. (R1:54-76, 77-94, 95-100). The proceedings involving the three petitions were consolidated. (R1:194). The Office of Public Counsel, AARP, and the Attorney General intervened. (R1:158-9, 160-1, 162-3; R2:268-70; R14:2849-50).

The Commission dismissed the initial petitions on the grounds that they proposed to implement the rate adjustments over a one-year period rather than the minimum two-year period permitted by the Act. (R5:871-89). The ILECs were allowed to file amended petitions complying with the Act's timing requirements, and they did so. (R5:887; R2:352-6, 359-77, 378-401).

The Commission opened a separate docket to address issues regarding the flow-through reductions to long distance customers. This docket was consolidated with the case involving the ILECs' petitions. (R8:1453-6; R10:1923-4). Several companies that provide long distance or competitive local exchange service

[7] In-state connection fee refers to a flat monthly fee, typically in the $1.88 to $1.99 range, that many long distance carriers charge customers who subscribe to certain calling plans. (T9:1098; T11:1355, 1391-2; T12:1423).

intervened, including MCI WorldCom Communications, Inc. (MCI), AT&T Communications of the Southern States, Inc. (AT&T), BellSouth Long Distance, Inc. (BSLD), Sprint Communications Company Limited Partnership (Sprint-LD) and Knology of Florida, Inc. (Knology). (R12:2383-91; R14:2849-50).

The Commission conducted a formal administrative hearing on the petitions on December 10-12 and 16, 2003. The Commission heard the testimony of 26 witnesses on behalf of the ILECs, CLECs, IXCs, consumer advocates and the Commission staff, and received 86 exhibits into evidence. (R17:3299). The Commission also received testimony from customers at 14 service hearings held throughout the state, as well as written customer comments. (R17:3299; R19:3811; Corres. 1-1851). This evidence is summarized and analyzed at length in the Commission's 59-page final order. The competent, substantial evidence supporting the three major findings challenged by appellants is discussed in the Argument section of this brief.

The Decision

The Commission's decision addressed each of the four factors required by section 364.164(1), Florida Statutes. The Commission considered the requirements of section 364.164(1)(a) in three stages. The Commission first found that the ILECs' estimate that above-parity access charges provide approximately $343.5 million of support to basic local service was reasonable. (R17:3309-12). Next, the

Commission found that the current support provided by access charges impedes competition in the residential local exchange market. (R17:3313-6). Finally, the Commission found that rebalancing will benefit residential consumers. Rebalancing will give consumers a wider choice of service providers, encourage technological innovation, lead to new product and service offerings, increase quality of service, stimulate long distance usage, and increase the availability of bundled offerings that will diminish the distinction between local and long distance service for wireline customers.[8] (R17:3316-23; R19:3832-3).

The Commission addressed section 364.164(1)(b), finding that rebalancing will result in more attractive pricing for basic local telephone service and thereby provide "market entry opportunities for competitors that have been constrained by inefficient pricing in the past." (R17:3329, 3323-9).

The Commission next determined that each ILEC proposal complied with section 364.164(1)(c) by reducing intrastate access charges to parity over not less than two or more than four years. (R17:3332). This determination resolved disputed issues regarding the details of Verizon's calculations, the appropriate time period over which to spread Sprint's reductions, and the particular methodology to be used in the calculation for BellSouth. (R17:3329-33). The Commission also

[8] "Wireline" service refers to telephone service provided over a traditional pair of wires running to the customer's premises. It is contrasted with wireless (cellular) service.

addressed the revenue neutrality requirement in section 364.164(1)(d) and concluded that each of the petitions met this requirement. (R17:3337, 3334-7).

Finally, the Commission addressed and resolved a number of issues regarding the IXCs' plans to flow through to their long distance customers the benefits of the intrastate access charge reductions. (R17:3338-46). The Commission noted that each of the IXCs agreed that the allocation of rate reductions between the residential and business customer classes should be in proportion to their respective access minutes of use. (R17:3345). The Commission acknowledged that this allocation was reasonable. It rejected the argument that residential customers should receive long distance rate reductions in the same proportion as they bear local rate increases, saying:

> While we have considered the argument that the reductions should be allocated in accordance with the increases on the local exchange side, we are not persuaded that this is feasible, economically appropriate, or even contemplated by the statute.
>
> (R17:3345-6).

Based on the determinations that each of the statutory criteria had been met, the Commission granted the ILECs' petitions, saying: "granting the Petitions furthers the Legislature's stated policy of furthering competition in the local exchange market and promoting new offerings and innovations in the telecommunications market for Florida consumers." (R17:3346).

Post-Decision Proceedings

The Attorney General and OPC appealed the Commission's final order on January 7, 2004. (R17:3350-1, 3411-2). On the following day, the Attorney General and AARP petitioned the Commission to reconsider the final order. (R18:3475-3509, 3514-27). The Court relinquished jurisdiction to the Commission for the purpose of disposing of the reconsideration petitions. After considering the petitions and responses, and hearing oral argument from the parties, the Commission issued its order on reconsideration. (R19:3818-35, 3836-89). That order did not change the Commission's ultimate decision to grant the ILECs' amended petitions, but it did clarify several aspects of the final order. Of relevance to this appeal, the Commission clarified that:

(i) it did consider section 364.01(4)(a), which directs the Commission to "protect 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," and it concluded that granting the petitions would preserve such prices; (R19:3823, 3821-3) and

(ii) it appropriately considered both qualitative and quantitative benefits to residential consumers in granting the petitions. (R19:3832-3).

The Commission also addressed additional points raised by the Attorney General and AARP in their reconsideration petitions, including the effect of the

intervening decision of the United States Circuit Court of Appeal for the District of Columbia Circuit in *United States Telecom Ass'n v. Fed. Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II") cert. den*. __ U.S. __, 2004 U.S. LEXIS 6710-12, Case Nos. 04-12, 04-15, 04-18 (October 12, 2004). (R19:3825-6). The Attorney General and AARP argued that by affecting the availability and pricing of UNEs, *USTA II* reduced the likelihood of enhanced local competition. The Commission noted that while *USTA II* "does muddy the waters as to the future of certain UNEs, it does not, by itself, remove any UNEs from the national list" and "does not rise to the level that would necessitate that we reconsider our decision." (R19:3825).

The Attorney General and OPC amended their notices of appeal to include the Commission's order on reconsideration and AARP filed a notice of appeal. (R20:3892-3, 3973-4, 3978-9). By order dated June 28, 2004, the Court consolidated the appeals by the Attorney General, OPC, and AARP for all appellate purposes.

SUMMARY OF ARGUMENT

The appellants challenge three fundamental aspects of the Commission's order. Appellants claim that there is not competent, substantial evidence to support the Commission's findings that:

- Granting the petitions will create a more attractive local residential market and will enhance market entry.
- Additional entry will benefit residential consumers.
- Residential local telephone rates will remain reasonable and affordable for Florida consumers.

Each of these findings is supported by competent, substantial evidence. The record shows that as a result of historical pricing policies under monopoly regulation, the ILECs' rates for basic local service are set below cost, and receive over $343.5 million a year in support from over-priced intrastate access charges. The record shows that it is difficult for new entrants to compete against such heavily subsidized rates. The record shows that reducing these rates closer to cost will create increased opportunities for profitable market entry. This will encourage competitors to enter the residential market or to expand their services to previously unprofitable segments of that market.

The record also shows that additional entry will provide exactly the type of consumer benefits that the Legislature intended when it opened the local telephone

market to competition. These include freedom of choice, new telecommunications services, technological innovation, increased investment in infrastructure, improved service quality, the offering of a more valuable mix of services, and price competition.

In an effort to downplay these benefits, the appellants argue that the Commission should have conducted a quantitative cost-benefit analysis that assigns values to each of these qualitative benefits and nets them against the increase in residential local rates. The Act does not contemplate such a mechanical balancing test. The Commission's determination that the mix of qualitative and quantitative benefits it identified constitute a sufficient basis to approve the rebalancing petitions is a reasonable construction of the statute, and one that is entitled to deference by this Court.

Appellants also argue that the petitions should have been denied because the qualitative benefits of future competition are speculative, while the increase in local rates is not. Under this chicken-and-egg analysis, the Commission could never implement steps to promote competition. The full benefits of a competitive market simply cannot be realized until after proper price signals are in place to support competitive entry.

The record shows that local rates will remain at reasonable and affordable levels following rebalancing. Experience in other states that have undertaken rate

rebalancing, or have higher local rates, shows that the rates resulting from this proceeding will not impair the availability of universal service. Importantly, the Legislature tied implementation of any local rate increases to expanded Lifeline protection for low income consumers. In addition, the ILECs committed to extend Lifeline protection to more customers, and for a longer period of time, than the Legislature mandated. Although the record suggests that the financial impact on senior citizens may be greater than on other age groups, the record also shows that the differential is small in absolute dollars (see Confidential Appendix) and does not result in unaffordable rates.

The Commission properly concluded on reconsideration that the potential impact of the subsequent decision by the D.C. Circuit Court of Appeals in *USTA II* does not warrant reopening the evidentiary record in this case. The competitive landscape in the telecommunications industry is in a constant state of flux as a result of FCC decisions and rulemakings, state commission decisions and rulemakings, and appeals of both. If regulatory certainty were required as a prerequisite to action, the Commission could never move forward to implement the Legislature's pro-competitive policies.

The Commission's decision is based on competent, substantial evidence and on a reasonable construction of the Act. It must be affirmed.

STANDARD OF REVIEW

There are two applicable standards of review in this case – one for factual issues and one for issues of statutory construction.

The Commission agrees with the Attorney General and OPC that the standard of review for factual matters is whether the Commission's order is supported by competent, substantial evidence and complies with the essential requirements of law. *Gulf Coast Elec. Coop., Inc. v. Clark*, 674 So. 2d 120, 122 (Fla. 1996); *Fort Pierce Utils. Auth. v. Beard*, 626 So. 2d 1356, 1357 (Fla. 1993). The Court "will not reweigh or re-evaluate the evidence presented to the commission, but should only examine the record to determine whether the order complained of complies with the essential requirements of law and whether the agency had available competent, substantial evidence to support its findings." *Polk County v. Florida Public Service Comm'n*, 460 So. 2d 370, 373 (Fla. 1984).

The appellants treat each of their points on appeal as raising only factual matters, and do not identify the standard of review applicable to the Commission's construction of section 364.164(1). However, they implicitly raise the issue of what constitutes "the creation of a more attractive local exchange market *for the benefit of residential consumers*." (emphasis added). As the administrative body responsible for the administration of chapter 364, the Commission's construction of this statute is entitled to great deference, and should be approved by the Court

unless it is clearly erroneous. *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 857 (Fla. 2002) *citing Florida Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267, 1270 (Fla. 1996). So long as the agency's construction is reasonably defensible, this principle applies even if the courts might prefer another view of the statute. *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994) *citing Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979).

ARGUMENT

I. THE COMMISSION PROPERLY CONSTRUED SECTION 364.164 AND THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS THAT THE PROPOSED REBALANCING SATISFIES THE STATUTORY REQUIREMENTS.

The Commission's final order addressed each of the required considerations in section 364.164, Florida Statutes The appellants challenge the Commission's determinations that the proposed rebalancing will:

- create a more attractive competitive local market for the benefit of residential consumers within the meaning of section 364.164(1)(a);
- induce enhanced market entry within the meaning of section 364.164(1)(b); and
- preserve the availability of reasonable and affordable service for all Florida consumers within the meaning of section 364.01(4)(a).

Importantly, the appellants do not dispute the Commission's findings that:

- intrastate access charges provide at least $343.5 million of support for basic local telecommunications service within the meaning of section 364.164(1)(a);
- the petitions reduce access charges to parity over a period of 2 to 4 years within the meaning of section 364.164(1)(c); and

- the petitions are revenue neutral within the meaning of sections 364.164(1)(d), (2), and (7).

The appellants also do not challenge the Commission's determination that the long distance companies' plans for flowing through access charge reductions to residential and business customers in proportion to their access minutes of use complies with the requirements of section 364.163(2).

A. Rebalancing will create a more attractive competitive local exchange telephone market and will enhance market entry.

The Commission found that the existence of $343.5 million of support for basic local telecommunications service "prevents the creation of a more attractive competitive local exchange market by keeping local rates at artificially low levels, thereby raising an artificial barrier to entry into the market by efficient competitors." (R17:3307, 3314-6). The appellants contest the Commission's finding that "the elimination of such support will induce enhanced market entry into the local exchange market." (R17:3308, 3328-9). (AG Br. 31). [9]

The Commission's discussion and analysis of these issues at pages 23-26 and 33-39 of its final order shows that there is ample record support for its determinations. (R17:3313-6, 3323-9). The underlying economic principle is simple. Even an efficient competitor will be deterred from serving residential

[9] Reference to the appellants' briefs are to their Amended Initial Briefs.

customers if it must compete against an ILEC's price that is below cost and supported by other sources, in this case intrastate access charges.

The Commission relied, *inter alia*, on the testimony of Dr. Gordon, Dr. Mayo, and Mr. Boccucci to support its findings. Dr. Gordon presented theoretical and empirical evidence that "low residential basic local prices have hindered the development of residential competition," and that better aligning prices with cost will give competitors "increased incentives to target a broader mix of residential customers." (T2:125, 128). Dr. Gordon testified that competitors will not rationally try to compete against heavily subsidized prices. (T2:145). Raising the price of a service that is below cost (such as residential basic local service) will create a more attractive market for actual and potential competitors. It will increase the revenues that a competitor can realize from entering the market by increasing the range of residential customers that can be profitably served. (T2:145-6; *see* T5:497). This more attractive market in turn will enhance market entry. (T2:151-2).

This economic theory is supported by empirical evidence in the record that there is less competitive entry in states where residential rates are lower. One study shows that rebalancing tariffs by 10% leads to a 9% to 13% increase in residential competition. (T2:149-50). The Commission's 2002 and 2003 Competition Reports show that in Florida there is substantially more entry in the business market –

where local service rates generally exceed cost – than in the highly supported residential market. (Ex. 15, p. 7; Ex. 61, p. 3; T3:277, 297-8; T6:617; T8:874).

Dr. Mayo also testified that "economic 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." (T10:1168-9, 1207). Prices serve an important role in signaling prospective entrants regarding the desirability of entry. (T10:1169). Current residential local exchange prices in Florida, which are a holdover from the days of monopoly regulation, are relatively unattractive for market entry. *Id.* Market entry will be enhanced by moving toward a set of prices that better reflect the cost of providing local exchange service. *Id*. Dr. Mayo also explained that as the telecommunications market moves toward a structure in which customers pay a flat monthly rate for all telephone usage – local and long distance – the proposed reduction in access charges will enable competitors to compete on a more equal footing with the ILECs, and will afford new entrants an improved opportunity to enter the market for bundled services. This occurs because the competitors' cost for providing long distance service moves closer to the ILECs' cost for providing the same service as access charges are reduced. (T10:1170-1, 1210-2; Ex. 71 at JWM-3).

Mr. Boccucci, the vice president of business development for Knology, a CLEC, testified that his company provides competitive voice (telecommunications), video (cable TV) and data services in nine markets in Florida, Georgia, Alabama, South Carolina and Tennessee. (T8:748, 750-1). Under the current rates for local service in Florida, Knology has not been able to generate rates of return sufficient to attract the capital necessary to expand its operations in the state. Without rebalancing, Knology will invest its capital in other states that have significantly higher average residential service prices. (T8:758-60).

B. Increasing competition in the local exchange telephone market will benefit Florida's residential consumers.

The Commission properly found that the qualitative and quantitative benefits to residential consumers of implementing the proposed rebalancing will outweigh the increase in local rates. (R17:3320 as clarified at R19:3833). The record support for this finding is discussed in detail at pages 26 to 33 of the final order. (R17:3316-23).

1. Increased local competition provides numerous *qualitative* benefits.

When the Legislature in 1995 first opened Florida's local exchange market to competition, it did so based on a finding that:

> the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will [a] provide customers with freedom of choice, [b] encourage the introduction of new telecommuni-

> cations service, [c] encourage technological innovation, and [d] encourage investment in telecommunications infrastructure.

§ 364.01(3), Fla. Stat. The record in this case contains competent, substantial evidence to show that implementation of the rebalancing proposals will in fact bring Florida consumers each of the four benefits the Legislature hoped to achieve. In addition, the record shows that the rebalanced rates will bring other tangible and intangible benefits to those consumers.

a. Freedom of Choice. Enhanced market entry can take one of two forms. First, companies that do not currently serve the Florida market may be induced to enter. Second, current competitors who serve only a portion of the market (*i.e.* just the business segment, just in certain geographic areas, or just certain profitable residential customers) will have "increased incentives to target a broader mix of residential consumers." (T2:125, 151, 192; T5:497; T8:818). This will provide residential customers with more choices of both providers and services. (T8:757; T10:1226-7).

b. New Telecommunications Services. Increased competition will lead to the introduction of new telecommunications services and new bundles of services. (T10:1175). One prime example of such innovation is the introduction of different selections of services bundled together in a way that customers find attractive. (T2:159; T3:249). For example, Knology, a competitive provider that

makes use of cable technology, offers bundles of local and long distance service, analog and digital cable TV services, and high speed Internet access. (T8:763-4).

c. Technological Innovation. Increased competition will lead to technological innovation, as competitors seek new ways to increase quality or provide service more efficiently. (T10:1269). Competition in the long distance market led to the widespread deployment of fiber optic technology in long distance networks, as AT&T was forced to keep up with its new competitors. (T10:1269). A similar phenomenon can be expected in the local market. Increased competition may lead, for example, to the deployment of packet-switched IP [internet protocol] technology in that market. (T10:1270). While it is not possible to predict precisely what technological innovations will develop, a competitive market with prices that send proper signals will do much better than a monopoly market in discovering which technologies – or mix of technologies – can succeed in the long run. (T2:146-7).

d. Investment in Infrastructure. The current level of residential rates in Florida makes competitive entry unattractive, and available capital goes to other states with more favorable residential markets. (T8:758-9). Rate rebalancing will substantially increase the likelihood that competitors will increase their investment in Florida infrastructure. (T2:125, 154; T8:755, 783).

e. Improved Quality of Service. As more companies begin to compete for residential customers, pressure will mount for all providers – including ILECs – to improve their quality of service. (T2:131, 159). Knology's experience shows that incumbents increase their level of customer service and marketing in order to compete with Knology. (T8:753). For example, when Knology enters a market and its customer service representatives answer the phone in 30 seconds, competitors are forced to meet this improved service standard. (T8:783-4).

f. More Valuable Mix of Services. The reduction in access charges will result in reduced intrastate long distance rates, removing what is today an artificial discrepancy between intrastate and interstate rates. (T5:479). Customers will respond to lower toll rates by increasing their use of intrastate long distance service. (T8:820; T9:945-6). This increased use of long distance service is a benefit to consumers, who will receive a mix of telecommunications services that provides more value than they are currently receiving. (T2:134-135; T8:820).

g. Price Competition. The entry of additional competitors will increase price competition, including lower prices for bundles or packages of services. (T2:159; T8:768; T10:1270). For example, today many companies charge an installation fee for new customers. It will be difficult to sustain a high installation charge, however, when there is active competition for new customers. (T8:783-4). Knology's experience shows that a competitor's success in winning

market share can force the incumbent to offer win-back promotions that provide great value to consumers. (T8:784). Because local service currently receives substantial support that will be eliminated by implementing rate rebalancing, competition is not likely to return local service rates to their current levels. (T12:1513-4). However, competition will force all players in the market to operate efficiently, and will put downward pressure on cost and prices. (T10:1227).

In summary, the Commission's finding that competition will bring a number of qualitative benefits to residential consumers is amply supported by competent, substantial evidence. The Court should reject the appellants' invitation to reweigh that evidence. *Polk County*, 460 So. 2d at 373 (court will not reweigh or re-evaluate the evidence presented to the commission, but should only examine the record to determine whether the order complained of complies with essential requirements of law and whether the agency had available competent, substantial evidence to support its findings).

2. The Commission's decision to consider future benefits from competition is fully consistent with the Act.

The record contains ample theoretical and empirical evidence that increased competition will bring numerous qualitative benefits to Florida consumers. OPC argues, however, that these benefits are forward-looking and speculative, and do not provide a valid basis for approving the rebalancing proposals. (OPC Br. 33, 36). Basically, OPC argues that the steps needed to bring the benefits of

competition to Florida consumers cannot be taken until after competition has arrived. That would be an impossible standard to meet, and cannot be what the Act intends. *See, Jordan v. Food Lion, Inc.*, 670 So. 2d 138, 140 (Fla. 1st DCA 1996) (it is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result).

As a practical matter, the effects of rebalancing will be felt over time, as rates are changed and competitors adjust their business plans. If the statute were construed to require that the benefits of competition be realized before the appropriate price signals are in place to support market entry, then steps to promote competition could never be implemented. Moreover, the language of the Act itself contemplates that change will occur over time by requiring the Commission to consider whether granting the petitions will remove support that prevents the *creation* of a more attractive competitive market and will *induce* enhanced market entry. § 364.164(1)(a), (b), Fla. Stat. These terms contemplate effects that will take place in the future; not events that have occurred in the past. Thus, the Commission's consideration of the future benefits of increased competition is entirely consistent with the Act.

3. The Act does not require that residential consumers receive a *quantifiable* net benefit as a precondition to approval of the petitions.

The appellants argue that the Commission erred in granting the petitions because: (1) the local rate increases paid by residential customers will not be completely offset by long distance rate reductions received by residential customers, and (2) the Commission did not perform a mechanical cost-benefit analysis to show that the qualitative benefits of increased competition will outweigh this financial cost. (AG Br. 41-44; OPC Br. 26, 33-34). This claim is based on an erroneous construction of the Act.

The Act does not require a net financial benefit to residential consumers. It simply requires that the Commission consider whether reducing access charges will remove current support for basic local service[10] and thereby create "a more attractive competitive local exchange market for the benefit of residential consumers." §364.164(1)(a), Fla. Stat. As discussed above, the evidence shows that the approved rate rebalancing will enhance market entry and that enhanced competition will bring numerous benefits to residential consumers.

In arguing that the record does not support a benefit to residential customers, the appellants point to the fact that residential customers as a whole will pay

[10] As noted above, no party disputes the Commission's finding that the approved access charge reductions will remove an equivalent amount of current support for basic local service. (R17:3307, 3311-2).

approximately $303 million, or 88%, of the total increase in local rates. (AG Br. 41; OPC Br. 23). Appellants contrast this with the residential customers' expected share of long distance rate reductions, which the Attorney General expresses as a percentage range of **(CONFID. APP. ITEM 1)** and OPC expresses as a dollar amount of approximately **(CONFID. APP. ITEM 1)**. (AG Br. 41-2; OPC Br. 41).

Appellants ignore the fact that the existence of such a differential is consistent with the statutory scheme established by the Legislature. The Act requires the ILECs to "implement a revenue category mechanism consisting of *basic local telecommunications service revenues* and intrastate switched network access revenues to achieve revenue neutrality" and all rate increases and decreases must occur within this revenue category. § 364.164(2), Fla. Stat. (emphasis added). Basic local telecommunications service in turn is defined in section 364.02(1), Florida Statutes, to mean flat-rate residential and flat-rate single-line business local exchange service. Thus, by statute, the ILECs must offset their access charge reductions with increases in basic local rates paid by residential and single-line business customers. Statutorily, they cannot offset those reductions with increases in the local rates paid by multi-line businesses. (See R17:3321).

The Act's provisions regarding the long distance companies' flow through of the access charge reductions contain no similar limitation. Instead, the statute allows each long distance company to "determine the specific intrastate rates to be

decreased, provided that residential and business customers benefit from the rate decreases" and provided that the company eliminates any in-state connection fee as part of its plan. § 364.163(2), Fla. Stat. In contrast to the revenue neutrality provisions applicable to the ILECs, the flow-through provisions applicable to the IXCs do not distinguish between single-line and multi-line business customers.

Each of the long distance companies that participated in this docket proposed to reduce long distance charges to its residential and business customer classes in proportion to their relative access minutes of use. (T11:1322, 1383; T12:1421, 1434, 1446-7, 1476). The long distance companies justified this approach on the grounds that it allows long distance prices to follow access charge costs. (T11:1331-2). If, for example, BellSouth's charge to AT&T is reduced from $0.0459845 to $0.0098420 per minute of use, AT&T receives a $0.0361425 reduction in cost for every minute of intrastate long distance calling that utilizes its system. (See Ex. 57 at JH-2, p.3). Hypothetically, if its business customers represent 50% of its access minutes of use and residential customers represent the remaining 50%, AT&T would allocate half of the long distance rate reduction to the residential class. An allocation that instead tracked the increase in local rates – *e.g.* 88% to residential customers – would result in business customers paying more, and residential customers paying less, than their share of the costs their long

distance calling imposes on AT&T. Such a pricing approach is not economically efficient, and would create price distortions in the long distance market.

Because each long distance company has a unique mix of residential and business customers and usage, the IXCs' approach results in varying percentages of the toll rate reductions flowing to the residential customer class. (See Tabs 10 and 11 in the Attorney General's Confidential Appendix). The Commission found that this pro-rata allocation is reasonable. (R19:3346) In doing so, it considered and rejected the argument that the reductions should be allocated in accordance with the increases in local rates, saying "we are not persuaded that this is feasible, economically appropriate, or even contemplated by the statute." *Id*.

While the Attorney General's and OPC's arguments are framed in terms of lack of competent, substantial evidence, in fact they each seek to turn the analysis into a mechanical weighing of net benefit. OPC, for example, argues that:

> … to ensure that residential customers benefit, benefits must exceed costs. To determine whether this is the case, there must be a weighing of benefits versus costs, and to accomplish that, there must be a weight assigned to each.

(OPC Br. at 33). In a similar vein, the Attorney General argues that:

> … there is no competent substantial evidence that the so-called qualitative benefits will occur at all, much less that their value to residential consumers is greater than their financial cost.
>
> * * *
>
> Without evidence of the value that residential customers would place on any potential qualitative effects of the petitions, there

> was no evidentiary basis for the PSC's conclusion that these benefits would "outweigh" the financial costs of the petitions to residential consumers.

(AG Br. at 43, 44).

The Act does not require such a mechanical weighing process. In fact, there was a major dispute between the ILECs and AARP as to whether section 364.164 (governing review of the rebalancing petitions) required consideration of the impact on residential consumers of the long distance rate decreases under section 364.163 so as to make IXCs indispensable parties to the case. (R5:900; R7:1219-26, 1227-36, 1247-57). In rejecting the argument that the IXCs were indispensable parties,[11] the Commission ruled that section 364.164 does not mandate that the Commission consider how the petitions will affect the toll market for residential consumers. (R13:2454-67; R17:3301-3). At the same time, the Commission held that section 364.164 did not preclude its consideration of the long distance rate reductions. *Id.*

The Commission rejected the argument that the Act requires it to quantify the beneficial impacts of competition. Instead the Commission found that the preponderance of evidence shows that the qualitative and quantitative benefits to residential customers as a whole – including decreases in long distance rates,

[11] Ultimately, the IXC flow-through docket was consolidated for hearing with the ILECs' petitions, so evidence on the long distance rate impacts was available to, and considered by, the Commission.

elimination of the in-state connection fee, increased availability of bundled offerings, more competitive options for service, and stimulated long distance usage – will outweigh the increase in local rates. (R17:3320 as clarified at R19:3833; R17:3308).

The Commission recognized 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 local rates. The Commission explained that such bill neutrality is not required by the Act and would, in fact, be inconsistent with its plain language. (R17:3308, 3320-1). While no party contends on appeal that bill neutrality is required, the argument that every benefit must be quantified and subjected to a netting process amounts to substantially the same thing. In either incarnation, it is a plain misreading of the statutory requirements.

OPC's brief places great reliance on what it characterizes as expressions of legislative intent gleaned from floor debates when the Act was under consideration by the Legislature. In OPC's view, these materials suggest that the Commission cannot approve the rebalancing petitions unless there is a net financial benefit to residential consumers and unless only immediate benefits are weighed in the balance.

As previously discussed, the Commission took official notice of these legislative materials and concluded that it was permitted (but not required) to consider the impact of toll rate reductions, in addition to the four mandatory criteria of section 364.164(1), in evaluating the petitions. (R17:3301-3, 3308, 3320). However, the Commission concluded that the Act did not impose a bill neutrality provision or require that residential customers as a class be held financially harmless from the impact of rate rebalancing. (R17:3308, 3320-1, 3345-6). This is a reasonable construction of the statute. It is fully consistent with both the plain language of the Act and the legislative history as a whole. As the agency charged with implementation of chapter 364, the Commission's construction of the benefit requirement in section 364.164(1)(a) is entitled to great deference by this Court and should be approved unless it is clearly erroneous. *BellSouth*, 834 So. 2d at 857. OPC's selective quotation of legislative floor debates does nothing to show that the Commission's construction is "clearly erroneous."

C. The Commission's decision will preserve reasonable and affordable basic local telephone service for all Florida consumers.

There is ample evidence to support the Commission's conclusion that approval of the rebalancing petitions will preserve reasonable and affordable prices for basic local service. (R19:3823; see R17:3308).

The Commission heard testimony from several witnesses who were familiar with similar rate rebalancing actions in other states, including California, Illinois,

Maine, Massachusetts, Ohio and Pennsylvania. These other states have approved larger increases than have been approved in Florida without jeopardizing universal service. (T2:138).

In Massachusetts, for example, residential customers saw an average local rate increase of $2.18 a year over four years with virtually no impact on the percentage of residential customers taking telephone service. (T2:161-164). In Maine, residential phone rates were raised by $5.28 over three years, with no noticeable impact on telephone subscribership levels. (T2:164). In California, GTE California customers saw a $7.50 per month basic rate increase with no widespread expressions of concern from consumers and no apparent impact on universal service. (T8:834-5; T9:960-2). In Ohio, Sprint customers saw a one-time $4.10/ month increase in 2001 that was offset by intrastate access charge reductions. (T9:1083-4). In Pennsylvania, Sprint has increased its local rates by approximately $4.41/month, offset by intrastate access charge reductions, and has obtained approval for another $2.00/month increase. (T10:1084-6).

In addition to these state rebalancing plans, the Federal Communications Commission (FCC) has implemented pricing reform at the federal level. Reductions in interstate access charges have been offset by a flat monthly fee, called a subscriber line charge (SLC), that appears on customers' bills for local service. Contrary to dire predictions that implementation of the SLC, which now

stands at $6.50 per line/month, would drive consumers off the telephone network, the number of subscribers nationwide has actually increased. (T8:835; T9:1101-2). This is due in part to the reform's beneficial impacts on universal service, offsetting reductions in long distance rates, and increases in consumer income. *Id.*

In sum, experience with rate rebalancing in other states and with pricing reform at the federal level shows no problem with rate shock, no large scale discontinuance of service, and no material volume of complaints filed with commissions. (T9:1049, 1053). Based on this experience, there is no reason to believe that local rate increases ranging from $3.50 (BellSouth) to $6.86 (Sprint) per month will result in unreasonable or unaffordable prices for Florida's residential consumers. (See T9:1102).

To the contrary, there is competent, substantial evidence to support the conclusion that local rates will remain affordable. Florida residential telephone rates today are well below the national average of $14.55. (T2:132). Even with the approved increases, Florida's residential rates will be the fourth lowest in the nine-state southeast region and will be below the level of rebalanced rates in Ohio and Pennsylvania. (T2:132; T3:301; T9:1100-1101). At the same time, Florida per capita income is on a par with the national average and higher than in the other Southeastern states. (T2:134; T9:1100; Ex. 69 at JMF-16, -17). Thus, there is room to raise prices without making services unaffordable to residential consumers.

(T2:134). For example, based on median family incomes, Florida consumers spend less than 4/10 of one percent of their income on basic local telephone service today, and will continue to spend less than 4/10 of one percent after the increases approved in this case. (T10:1236).

Higher local rates obviously have the potential to affect some low income consumers. The Legislature took this potential effect into account by modifying the state's Lifeline service program. Under Lifeline, residential consumers who participate in one of a number of low-income assistance programs are eligible for up to a $13.50 per month credit against their telephone bill for basic local service. (T6:633). Once an ILEC has a rebalancing plan approved, it must also offer Lifeline to any consumer whose income is at or below 125% of the federal poverty income guidelines, regardless of whether the consumer participates in a qualifying low-income assistance program. § 364.10(3)(a), Fla. Stat. (T9:1099). This expanded eligibility means that more low-income consumers will qualify for Lifeline assistance. At the same time, the Legislature provided that any customer receiving Lifeline benefits "shall not be subject to any residential basic service local telecommunications services rate increases authorized by s. 364.164" until the ILEC's access rates reach parity. §364.10(3)(c), Fla. Stat. Thus, the consumers most in need of protection will not immediately feel the effect of any local rate

increases, despite the fact that they will share in the opportunity to take advantage of lower long distance rates. (T9:1102; T10:1174; see T2:135).

During the proceedings below, each of the ILECs committed to expand its Lifeline eligibility criteria further than the Act requires by allowing customers with incomes at or below 135% of the federal poverty guidelines to participate in the program. (T9:1111; T12:1497; T15:1883). They also committed not to increase rates to Lifeline customers before September 1, 2007, even if parity is reached prior to that date. (T3:275, T6:647, T9:1110-1). The commitment to increase the eligibility criterion from 125% to 135% of the federal poverty level makes approximately 119,000 additional Floridians eligible for both the monthly Lifeline credit and the protection from the immediate effect of the approved local rate increases. (R17:3309; T16:1999).

In making their affordability argument, the Attorney General and OPC refer to an analysis by Verizon which calculates that the average net impact on senior citizens – *i.e.* the total local rate increase offset by expected long distance rate decreases – is several times greater than the average impact on younger consumers. (AG Br. 48, 49; OPC Br. 41).

In highlighting the differential, the Attorney General and OPC ignore the absolute magnitude of the net financial impact on the two groups of customers. That net impact ranges from (**CONFID. APP. ITEM 2)** per month for senior

citizens over age 76 to (**CONFID. APP. ITEM 2)** per month for consumers aged 26-35, or a difference of (**CONFID. APP. ITEM 2)** per month.[12] (See T8:912-9; Confid. 662-3). While this is a seemingly large differential when expressed on a percentage basis, it is small when expressed in absolute dollars. The Commission found no compelling evidence to suggest that increases of this magnitude will have an adverse impact on senior citizens or other consumers whose incomes are above the level eligible for Lifeline. To the contrary, the previously cited experience in other states and at the federal level demonstrates that even greater increases will have no significant adverse impact on universal service. Moreover, while Florida has the largest percentage of persons aged 65 and older of any BellSouth state, a lower percentage of those citizens are below the poverty level. (T3:300).

Other evidence shows that senior citizens will share in the benefit of long distance rate reductions. They are more likely than younger consumers to use at least some wireline long distance service. Those who do use it spend an average of approximately $14/month on such service and will share in savings on intrastate calls. (T10:1257, 1276). The record also shows that many senior citizens on fixed incomes purchase a number of additional services – such as cellular, cable TV, and Internet – which suggests that the increases proposed are within the zone of

[12] The Attorney General's brief mischaracterizes the evidence when it suggests that the basic telephone rate increase for senior citizens is five times that for younger citizens. (AG Br. 49). The rate increase is the same; only the expected toll rate offset is different.

affordability for this segment of consumers. (Ex. 85) It also indicates that senior citizens will receive added benefits from the increased availability of competitively priced bundles of the services they use. (T7:761, 766-7, 768; R17:3322).

II. THE COMMISSION PROPERLY DETERMINED THAT THE FEDERAL COURT DECISION IN *USTA II* DID NOT WARRANT RECONSIDERATION OF ITS REBALANCING ORDER.

The Attorney General argues that the Commission erred by failing to reopen the hearing to allow additional evidence to address the impact on its final order of the decision issued on March 2, 2004 in *USTA II*.[13] The Attorney General asks that the Commission's order therefore be reversed or, at a minimum, remanded for further evidentiary proceedings. (AG Br. 31-35, 50). In a more extreme vein, AARP's entire brief does little more than argue that its Motion to Relinquish Jurisdiction should be granted so that the Commission can further consider the effect of *USTA II* before this Court reaches the merits of the case. (AARP Br. 4-6).

The underlying basis of these arguments is that by vacating some of the FCC's rules regarding the ILECs' obligation to offer unbundled network elements (UNEs) to their competitors at cost-based rates, the *USTA II* decision will increase the CLECs' cost of providing service and thus decrease the likelihood that they will

[13] The *USTA II* decision was offered below as supplemental authority in support of the Attorney General's motion for reconsideration. (R19:3762-90). The effect of the decision was addressed during oral argument on the motions for reconsideration. (*See, e.g.,* R19:3836, 3846-9, 3867-9).

choose to enter the residential local service market. The appellants argue that Florida customers therefore will not experience the benefits promised by increased residential competition. Alternatively, they argue that the record below should be reopened to further consider the likelihood that such benefits will be realized.

Contrary to these positions, the Commission correctly determined that while the *USTA II* decision "does muddy the waters as to the future of certain UNEs," it ultimately "does not rise to the level that would necessitate that we reconsider our decision." (R19:3825). Some historical perspective is helpful to put this conclusion in context.

The landscape of the telecommunications industry, and in particular the availability and pricing of UNEs, has been in a state of almost constant flux since the enactment of the federal Telecommunications Act of 1996.[14] Pursuant to 47 U.S.C. Section 251(d), the FCC adopted its first set of unbundling rules in October 1996. A portion of those first rules was ultimately invalidated by the Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999). The FCC's second effort to adopt a set of unbundling rules was also appealed, and much of that effort was invalidated in *United States Telecom Ass'n v. Fed. Communications Comm'n*, 290 F. 3d 415 (D.C. Cir. 2002) ("*USTA I*"). The FCC subsequently consolidated the D.C. Circuit's remand in *USTA I* with its triennial

[14] Pub. Law No. 104-104, 110 Stat. 56, 47 U.S.C. §151 *et seq.*

review of the scope of obligatory unbundling and issued a third set of unbundling rules in August 2003. A large portion of this third effort to adopt unbundling rules was held unlawful in *USTA II*.

On August 20, 2004, in response to the D.C. Circuit's *USTA II* decision, the FCC released an interim set of unbundling requirements generally designed to maintain the *status quo*, and announced its intention to adopt final rules by year-end. *In the Matter of Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313 (rel. August 20, 2004). Some ILECs challenged the interim requirements as an improper attempt to reinstate the vacated rules. On October 6, 2004, the D.C. Circuit issued an order holding their mandamus proceeding in abeyance until January 4, 2005, to give the FCC the opportunity to conclude its fourth attempt at rulemaking. *United States Telecom Ass'n v. Fed. Communications Comm'n*, Order on Mandamus Petition, 2004 U.S. App. LEXIS 20967 (October 6, 2004). A few days later, on October 12, 2004, the United States Supreme Court denied three certiorari petitions that had sought review of the *USTA II* decision. 2004 U.S. LEXIS 6710-12, Case Nos. 04-12, 04-15, 04-18.

Given this litigation history, it is reasonable to assume that whatever rules result from the FCC's current rulemaking proceeding will themselves be challenged in the D.C. Circuit Court of Appeals. In any event, as the Commission

observed in its order on reconsideration:

> … if UNEs are removed from the list as a result [of *USTA II]* 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.
>
> (R19:3825).

While this continued litigation does muddy the waters, it is typical of the situation that has existed throughout the telecommunications industry since 1996. Almost every Commission decision setting UNE rates, or deciding issues relating to the availability of UNEs under then-current versions of the FCC's rules, has been challenged either in this Court or in federal district court.[15] With every decision by the Commission or the courts, the competitive balance between ILECs and competitors can shift, and business plans can change. If certainty about the future were required before Commission orders could become final, the agency would be paralyzed by inaction and could never take steps to further the goal of competition. That would be inconsistent with the Legislature's desire that rebalancing issues be considered and resolved in a timely fashion – a desire

[15] *See, e.g., Verizon Florida, Inc. v. Jaber*, SC02-2647, 29 Fla.L.Weekly S 459 (September 2, 2004); *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 122 F. Supp. 2d 1305 (N.D. Fla. 2000) *reversed* 268 F. 3d 1294 (11th Cir. 2001); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000) *aff'd* 298 F. 3d 1269 (11th Cir. 2002).

underscored by the requirement that rebalancing petitions be disposed of within 90 days after filing. § 364.164(1), Fla. Stat.

The full effect of the *USTA II* decision cannot be known until after the FCC concludes its current rulemaking process and its decision is tested on appeal. Under any scenario, however, the Florida local residential market is *more* attractive to *any* competitor to the extent that artificial support has been removed from the ILEC's local service rates and the price against which it competes is closer to covering the true cost of providing the service. (See T2:132-3). Put simply, under any assumption about the future impact of *USTA II*, there will be more opportunity for residential competition with rate rebalancing than without.

CONCLUSION

The Commission's detailed final order and order on reconsideration contain a full discussion and analysis of the evidence that supports its decision to grant the rate rebalancing petitions. The Commission properly construed the phrase "for the benefit of residential consumers" in section 364.164(1)(a) to encompass consideration of both quantitative and qualitative factors. The appellants' efforts to have this Court reweigh the evidence, overturn the Commission's construction of the benefit requirement in section 364.164(1)(a), or reopen the record for further proceedings must be rejected. The Commission's final order and order on reconsideration should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of November, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief of Florida Public Service Commission is submitted in Times New Roman 14-point font and complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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