IN THE SUPREME COURT OF FLORIDA

CHARLES J. CRIST, JR.,
Attorney General, State of Florida,
HAROLD McLEAN,
Public Counsel, State of Florida,
and **AARP**,

Appellants,

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.
_____/

Consolidated Case Nos.
SC04-9, SC04-10, SC04-946

On Appeal From the Florida Public Service Commission

AMENDED INITIAL BRIEF OF THE CITIZENS
On Behalf of the Citizens of the State of Florida

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PRELIMINARY STATEMENT AND GLOSSARY

This is the Initial brief of the Citizens of the State of Florida, by and through Harold McLean, Public Counsel ("Citizens" or "Public Counsel"). The Citizens were intervenors before the Florida Public Service Commission below, opposing the petitions of the incumbent local telephone companies in that proceeding. The Citizens appear in this Court as appellants to the Commission's final order and order on reconsideration.

In this brief, the Citizens use the following terms to designate the primary parties: "Attorney General" refers to Charles J. Crist, Jr., Attorney General, State of Florida, the other appellant, along with AARP. For the primary appellees, "Verizon" refers to Verizon Florida, Inc., "Sprint" is Sprint-Florida, Incorporated, and "BellSouth" is BellSouth Telecommunications, Inc. (together: "local telephone companies" or "ILECs"); "AT&T" is AT&T Communications of the Southern States, LLC, "MCI" is MCI WorldCom Communications, Inc., "Sprint LP" is Sprint Communications Company L.P. (together: "long distance telephone companies" or "IXCs"); "Commission" or "PSC" refers to the Florida Public Service Commission, the administrative agency which considered the ILECs' petitions.

The Citizens will use the following cites:

to the record on appeal as (R[vol. #] : [page #]);

to the transcript of the hearing as (T[vol. #] : [page #]);

to the confidential transcript of the hearing as (Conf. [page #]);

to hearing exhibits as (Ex. [#] at [witness initials - #]);

to confidential hearing exhibits as (Conf. Ex. [#] at [witness initials - #]);

and to Appendix Notes as [See A.N. #].

STATEMENT OF THE CASE AND OF THE FACTS

This appeal is from a final order of the Florida Public Service Commission (hereinafter "Commission" or "PSC"), order no. PSC-03-1469-FOF-TL ("Final order"), issued December 24, 2003 (R17:3291-349), and order on reconsideration no. PSC-04-0456-FOF-TP ("order on reconsideration"), issued May 4, 2004. (R17:3818-3835). The final order granted amended petitions filed on October 2, October 1, and September 30, 2003, respectively, by Verizon Florida, Inc. ("Verizon"), Sprint-Florida, Incorporated ("Sprint"), and BellSouth Telecommunications, Inc. ("BellSouth") (together: "local telephone companies" or "ILECs"). (R17:3347). Through their respective petitions, the local telephone companies sought to increase their residential and single-line business local telephone rates by an amount that would exactly offset their proposed reductions to access charges the ILECs charge interexchange carriers ("long distance telephone companies" or "IXCs") to complete long distance calls. (R1:54-76, 77-94, 95-100). The Citizens of the State of Florida, by and through Harold McLean, Public Counsel, timely appealed the final order on January 7, 2004. (R17:3411-14). The order on reconsideration denied motions for reconsideration filed by the Attorney General and AARP. (R19:3818-35).

Background

Prior to 1996, the statutes governing the regulation of monopoly local telephone companies by the Commission were much the same as the statutes which exist today governing the regulation of electric, water, and wastewater companies. See Chapters 366 and 367, Fla. Stat., (2003). (hereafter, all statutory cites are to the 2003 Florida Statutes, unless noted otherwise). Before 1996, BellSouth, Verizon, and Sprint operated under rate-of-return regulation. Under this regulatory paradigm, the Commission set the companies' rates at a specific level, which allowed the companies the opportunity to recover all of their prudently incurred expenses plus a reasonable profit on their investment. See §§364.03 and 364.035. The Commission typically set a midpoint for an authorized return on equity and allowed the company to earn 100 basis points above or below the midpoint without the prospect of taking any action against the company. See §§364.03, 364.035, and 364.04. If a company earned below the authorized range, it could request a rate increase. See §§364.03, 364.035, and 364.04. If the company earned above the authorized range, the Commission or a substantially affected person could bring an action against the company to reduce its rates. See §§364.035 and 364.05.

The landscape in the Florida telecommunications industry changed with the elimination of the statutory monopoly for local exchange service. (R17:3294). In

1995, the Florida Legislature amended Chapter 364, to allow for competition in the provision of local telephone service. §364.01, Fla. Stat. (1995). The Legislature found that "the competitive provision of telecommunications services, including local exchange service, is in the public interest and will provide customers with freedom of choice, encourage technological innovation, and encourage investment in telecommunications infrastructure." §364.01(3), Fla. Stat. (1995). In conjunction with the opening of the local exchange market to competition, the incumbent local exchange companies were permitted to substitute price regulation for the former rate base, rate-of-return regulation. §364.051, Fla. Stat. (1995).

Under the price-cap regulatory paradigm that became applicable to BellSouth, Verizon, and Sprint in 1996, the direct link between rates and cost recovery was broken. Rather than setting rates to recover costs and to target an authorized midpoint return on equity, price-cap regulation sets prices independently of costs. Under price-cap regulation, a company can reap the benefits of the cost reductions for its stockholders if it can successfully reduce its overall costs or hold costs steady while its revenues increase. See §364.051, Fla. Stat. (1995).

The price-cap system put into effect during 1996, generally froze rates at levels in existence as of July 1, 1995, and allowed the companies to later gradually raise

rates by certain percentages unrelated to the costs incurred by the companies. §364.051(2)(a), Fla. Stat. (1995). That section provided that:

> effective January 1, 1996, the rates for basic local telecommunications service of each company subject to this section shall be capped at the rates in effect on July 1, 1995, and such rates shall not be increased prior to January 1, 1999.[1] However, the basic local telecommunications service rates of a local exchange telecommunications company with more than 3 million basic local telecommunications service access lines in service on July 1, 1995, shall not be increased prior to January 1, 2001.

Section 364.051(4), Fla. Stat. (1995),[2] allowed annual increases of up to one percentage point less than the rate of inflation.

Under the 1995 statute, the companies could increase the rates for nonbasic services significantly more than basic local rates. §364.051, Fla. Stat. (1995). Nonbasic services, defined in section 364.02(8), Fla. Stat. (1995),[3] included ancillary services such as call waiting, caller I.D., three-way calling, and a host of other

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[1] Several changes have occurred in chapter 364, Florida Statutes (1995), since 1995. Chapter 1998-277, §8, at 2345, Laws of Fla., extended the cap on rates of each company subject to section 364.051(2)(a), from January 1, 1999, to January 1, 2000.

[2] Section 364.051(4) was renumbered section 364.051(3), by Ch. 2000-334, §3, at 3593, Laws of Fla.

[3] Section 364.02(8), was renumbered section 364.02(9), by Ch. 2003-32, §3, at 217, Laws of Fla.

services. Since 1995, pricing of these services has been governed by Section 364.051(6),[4] which provides in part:

> (5) NONBASIC SERVICES.--Price regulation of nonbasic services shall consist of the following:
> (a) Each company subject to this section shall maintain tariffs with the commission containing the terms, conditions, and rates for each of its nonbasic services, and may set or change, on 15 days' notice, the rate for each of its nonbasic services, except that a price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period until there is another provider providing local telecommunications service in an exchange area at which time the price for any nonbasic service category may be increased in an amount not to exceed 20 percent within a 12-month period, and the rate shall be presumptively valid.

In the 2003 legislative session, the House and the Senate considered and debated bills proposing amendments to chapter 364, that would direct the Public Service Commission to determine whether allowing the ILECs to reduce their intrastate access charges to interstate levels, and to make offsetting increases in local service rates, would further the Legislature's goal of increasing competition in the local telephone market. (R15:2866-84, 2885-929, 2930-76). In the floor debates, legislators expressed their intent that the bill providing for the changes to Chapter 364 would specifically benefit residential customers. (R15:2866-976). The bills' sponsors allayed these concerns, reassuring both Houses that the bills directed the PSC to withhold its grant of approval unless the Commission is "completely satisfied that two

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[4] Section 364.051(6) was renumbered 364.051(5), by Ch. 2000-334, §3, at 3593, Laws of Fla.

conditions are met: competition has to be created and residential customers have to benefit." (R15:2870-71).

The following excerpts from the floor debates in the House and Senate reflect some of the concerns expressed by legislators about residential customers benefiting from passage of the bill:

> REPRESENTATIVE MAYFIELD**:** With the implementation of this bill, the Public Service Commission will have sweeping authority to trigger a three-phased transition to take us to a market-driven telecommunications environment. At each step of the way, at each step of the process, the PSC will have full authority to protect consumers while sparking competition. (R15:2869).

> REPRESENTATIVE MAYFIELD**:** Now, members, let me tell you what the bill does not do, does not do. It does not raise rates. It does not contain any mandatory language that requires rate increases. It does not require the PSC to grant any petition from any company unless the Commission is completely satisfied that two conditions are met: Competition has to be created, and residential customers have to benefit. The PSC is going to be responsible for sitting in judgment and making sure that those two things take place before it will grant any petition. (emphasis added) (R15:2870-71).

> REPRESENTATIVE RITTER: If I thought that this bill would raise my parents' local rates, I wouldn't be supporting it. (T15:2874).

> REPRESENTATIVE MAYFIELD**:** The Public Service Commission is going to have to sit in judgment and review and evaluate the petition and determine that the customers are benefiting and that both

the competitive environment is being created before that petition can move forward. (emphasis added) (R15:2875).

On May 1, 2003, the House adopted CSSB 654 as a substitute for HB 1903, and debated CSSB 654. (R15:2930-76).

REPRESENTATIVE MAYFIELD**:** It sets forth provisions which will require the Public Service Commission to sit in judgment and to determine two factors: One, will the petition to change rates created competition in the local marketplace; and two, will it be beneficial to residential customers. Before any changes can take place, that has to be determined by the PSC. (emphasis added) (R15:2934).

REPRESENTATIVE RITTER: There are only two guarantees in this life, as we all know, death and taxes. If our Speaker had his way, there would only be one guarantee, and that would be death. But there are only two guarantees in life, death and taxes. So I choose to take this leap of faith that my constituents will actually see a reduction in their phone bill. (emphasis added) (R15:2950).

REPRESENTATIVE RITTER: In closing, let me say this. And I said it yesterday, but I believe it bears repeating. My parents live in my district. They are my most vocal constituents. For those of you from my county who know my dad, you know he doesn't hesitate to pick up the telephone or come to my house and speak to me whenever he needs to on a piece of legislation. They are residential consumers, basic service, single line. If I thought that this bill would raise my parents' phone bill, I would not support this piece of legislation. I do not believe that my parents will see an increase in their bill as a result of this piece of legislation, and I am supporting it, and I would hope the members of this body would do the same. (emphasis added) (R15:2952).

SENATOR HARIDOPOLOS: They have this very strict language in Section 15 of the bill which says that the -- the language as outlined making sure that it must be in the best interests of residential customers and bring local competition to the market before they would look at the rates. (R15:2887).

SENATOR SIPLIN: Thank you. Senator from the 26th, will your bill impose an automatic increase on our customers, on our citizens in the State of Florida?

SENATOR HARIDOPOLOS: That's a very good question. Absolutely not. As I think -- I know you worked on the bill with me. This is very clear that the Public Service Commission has absolute control over costs and prices. And again, to make it clear to the members, the only way that a rate increase could take place is only if the mandates or conditions are met, and that is that it must be in the best interests of residential customers and must bring local competition before they can look at rates. (emphasis added) (R15:2892-93).

SENATOR HARIDOPOLOS: Senator Cowin, I think you bring up a very legitimate issue and an issue of concern to a lot of persons. I think what gives me comfort as I read through the bill, especially in Section 15, it clearly delineates, it clearly mandates that -- it says to the areas we're hoping to open up to competition that there must be a benefit to residential customers and there must be competition in the market before they can adjust these rates. That's the comfort level that I have in the bill. If there is no competition, if it's not in the best interests of the customer, their rates cannot be increased.
And again, we're giving that discretion to the Public Service Commission, and we're going to have persons from the background of Jack Shreve[5] and others defend before the Public Service Commission saying that this is not the right thing to do, raise rates in this area.

[5] Jack Shreve is the former Public Counsel who served in that capacity during the 2003 Legislative session.

Also, you have a provision which was not in the previous bill of having the carrier of last resort. That's expanded all the way now to 2009, and I think that will also benefit the rural areas which have legitimate concerns about this bill.
But I think those two key points, saying there must be competition and it must benefit the local customer, is really the key provision. And I think you might see -- it might take longer for competition, but that also means that the rates will not go up in these noncompetitive areas. (emphasis added) (R15:2902-03).

SENATOR COWIN: A follow-up and then another question. So I guess I'm hearing you say that in a rural community, that if the telephone rates don't have competition or the rates don't go -- and the rates won't go up if there isn't competition for those people that don't have any long distance, or are you looking at it as a total picture and saying overall, there will be parity, because overall the long distance rates -- where is the geographic region for competition for rural communities? Is that a separate entity?

SENATOR HARIDOPOLOS: I believe, Senator Cowin, as the bill clearly states, that what you're going to have here is simply, as the PSC looks at each -- as the company asks in a particular jurisdiction to raise rates, they're going to look at the parameters of the area they're looking at specifically, and they're going to ask those two basic questions, will it benefit customers, and is there true competition. And I think that's what we want to hand to the professionals at the PSC, this very type of question. (emphasis added) (R15:2903-04).

SENATOR SEBESTA: Thank you, sir. So as you said a minute ago, rates will not be allowed to go up unless there is new competition in the area?

SENATOR HARIDOPOLOS: That is correct. There must be competition, and it must be in the benefit of residential customers. (emphasis added) (R15:2908).

Committee Substitute for Senate Bill 654 passed both Houses and was signed into law by Governor Bush, effective May 23, 2003, as the Telecommunication Innovation and Infrastructure Enforcement Act ("TIIE Act"). Ch. 2003-32, §§1-27, Laws of Fla. Included in the TIIE Act was newly-enacted section 364.164, which allows any incumbent local exchange company to petition the Commission to reduce intrastate switched network access rates that it charges long distance companies and to offset those revenue reductions with increases to their basic local telecommunications rates for residential and single-line business customers. §364.164(1). Section 364.02(1) contains the following definition:

> "Basic local telecommunications service" means 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. For a local exchange telecommunications company, such term shall include any extended area service routes, and extended calling service in existence or ordered by the commission on or before July 1, 1995.

Section 364.164 provides:

> (1) Each local exchange telecommunications company may, after July 1, 2003, petition the commission to reduce its intrastate switched network access rate in a revenue-neutral manner. The commission shall issue its final order granting or denying any petition filed pursuant to this section within 90 days. In reaching its decision, the commission shall consider whether granting the petition will:

> (a) Remove current support for basic local telecommunications service 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.
> (d) Be revenue neutral as defined in subsection (7) within the revenue category defined in subsection (2).

Further, section 364.163(2), provides a mechanism by which any long distance company that receives the benefits of intrastate access rate reductions will return the benefits of such reductions to both its residential and business customers:

> Any intrastate interexchange telecommunications company whose intrastate switched network access rate is reduced as a result of the rate adjustments made by a local exchange telecommunications company in accordance with s. 364.164 shall decrease its intrastate long distance revenues by the amount necessary to return the benefits of such reduction to both its residential and business customers. The intrastate interexchange telecommunications company may determine the specific intrastate rates to be decreased, provided that residential and business customers benefit from the rate decreases. Any in-state connection fee or similarly named fee shall be eliminated by July 1, 2006, provided that the timetable determined pursuant to s. 364.164(1) reduces intrastate switched network access rates in an amount that results in the elimination of such fee in a revenue-neutral manner. The tariff changes, if any, made by the intrastate interexchange telecommunications company to carry out the requirements of this subsection shall be presumed valid and shall become effective on 1 day's notice.

On August 27, 2003, Verizon, Sprint, and BellSouth each filed petitions pursuant to section 364.164(1). (R1:54-76, 77-94, 95-100). The petitions sought to increase their residential and single-line business local telephone rates by an amount

that would exactly offset their proposed reductions to access charges the ILECs charge IXCs to complete long distance calls. (R1:54-76, 77-94, 95-100).

On September 3, 2003, the Public Counsel filed motions to dismiss the petitions, based on the timing of the ILECs' proposed rate changes. (R1:164-84). Public Counsel urged the Commission to dismiss the petitions because section 364.164(1)(c) requires the rate changes to take place "over a period of not less than 2 years or more than 4 years and the rate changes, as proposed by [the ILECS], would take place over a one-year period, or twelve months." (R1:167, 174, 180). On October 20, 2003, the Commission dismissed the ILECs' petitions, with leave to amend. (R5:871-89). The Commission found that the ILECs had failed to comply with the requirement of section 364.164(1)(c), that the rate changes take place over a period of not less than 2 years. (R5:885).

All three petitions and testimony were quickly amended and refiled on September 30, October 1, and October 2, 2003, respectively. (R2:349-56, 359-77, 378-401). The local telephone companies now asserted that they would reach parity with their access rate reductions and simultaneous increases in their respective basic local telephone service rates over a period of two years, in three steps. Otherwise, the amended petitions sought the same relief as the original petitions.

On November 4, 2003, the Commission consolidated the newly-opened IXC Docket with the local ILECs' proceeding, integrating consideration of the IXCs' flow-through of the benefits of access rate reductions to the IXCs' own customers, with the issues of the ILECs' dockets. (R8:1453-56). On November 10, 2003, the Commission directed the parties to submit testimony on additional issues specifically addressing the flow-through of access rate reductions. (R9:1778-84).

On October 8, 2003, the commission issued Order No. PSC-03-1125-PCO-TL, granting in part and denying in part, Citizens' motion to hold expedited public hearings, to take sworn testimony from the ILECs' customers. (R3:407-16). The last of these public hearings was held immediately prior to the opening of the final hearing, on December 10, 2003, in Tallahassee. (R16:3132-99).

The final hearing before the Commission was held on December 10–12, 2003. (T1:1-16:1948). BellSouth initially proposed local rate increases of $125.2 million per year. (R2:351, T3:273). Of that, it proposed that $107.77 million per year come from monthly increases to residential lines, $1.16 million per year from monthly increases to business lines, and $16.29 million per year from increases to nonrecurring charges applicable to both residential and business customers. (T3:273). The Commission accepted a proposal by BellSouth during the hearings to shift a small

portion of the residential monthly increases to additional increases in non-recurring charges. (R17:3346).

Verizon initially proposed local rate increases of $76.2 million per year. (R2:383, T6:616). Of that, it proposed that $70.9 million per year come from recurring and nonrecurring rates for residential lines and $5.3 million come from recurring and nonrecurring rates for business lines. (T6:616). The Commission accepted a proposal from Verizon during the hearings to shift $1.2 million from recurring to nonrecurring rates, but this had little or no effect on the relative proportion of the rate increases coming from residential and business customers. (R17:3346).

Sprint initially proposed residential rate increases totaling $122.9 million per year and business rate increases totaling $19.2 million per year. (Ex.68 at JMF-12). In its closing argument, Sprint proposed to recover these increases over four, rather that the original three, increments proposed in its case, and the Commission approved these changes. (R17:3331, 3347). However, these changes did not affect the relative proportion of the increases that will come from residential and business customers.

Overall, under the petitions filed by the ILECs, basic local rates would be raised by $343.5 million per year (T3:273 6:616; Ex. 68 at JMF-12; 9:1779; Conf. Ex. 80 at BCO-1). Approximately 90 percent of the rate increases (approximately $300 million per year) fall on residential customers. (T3:273; 6:616; Ex. 68 at JMF-12; 9:1779,

1793; Conf. 1028; Conf. Ex. 80 at BCO-1). This high proportion of the burden falling on local residential customers stands in contrast to the relatively small benefit residential customers would receive from long distance rate reductions. (T11:1323, 13-53-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19; Conf. 702; T12:1476-77, 1490, 1493; Conf. 664; T14:1702; Ex. 79 at BCO-2).

In the final order, the Commission found as reasonable that the IXCs would allocate long distance rate reductions "on a pro-rata basis according to access minutes of use." (R17:3346). AT&T estimated that it would enjoy access charge reductions of [See A.N. 1] in the first year of the access charge reductions. (T11:1323; Conf. 714).[6] Of that, it planned to reduce residential rates by [See A.N. 2] , and it planned to pass the remainder of the reduction [See A.N. 3] to its business customers. (T11:1323; Conf. 714). AT&T thus planned to provide its residential customers only [See A.N 4] of the access charge reduction, while the remainder went to its business customers. (T11:1323; Conf. 714).

[6] AT&T's estimate of access charge reductions is apparently based on BellSouth's "mirroring" methodology, which produced approximately $136.4 million of revenue reductions. (R1:96). The PSC selected BellSouth's proposed "composite" methodology, which results in approximately $125.2 million of revenue reductions. (R1:97).

MCI estimated its access charge reduction in the first year at [See A.N. 5]. (T12:1419; Conf. 702). MCI planned to apportion approximately [See A.N. 6] of this reduction to its residential customers, while business customers would receive the remaining [See A.N. 7]. (T12:1418-19; Conf. 702).

Similarly, Sprint Communication Company L.P. (the long distance company) estimated its access charge reduction in the first year a [See A.N. 8]. (T11:1382; Conf. 693). Sprint Communication estimated that it would provide only [See A.N. 9] of its access charge reduction to its residential customers. (T11:1387; Conf. 694).

Verizon Long Distance differs from the other carriers by its intention to pass on [See A.N. 10] of its access charge reduction to its residential customers. (T12:1476-7; Conf. 664). Verizon Long Distance, however, serves very few business customers - - only 1 or 2 percent of its business comes from big businesses. (T12:1492). Also, unlike carriers such as AT&T, MCI and Sprint, Verizon Long Distance concentrates only on serving the market of its local company affiliate Verizon and does not have the same spread across the state as do the other carriers. (T12:1493).

In broad terms, the petitions filed by the local exchange companies raise residential local rates by approximately $300 million per year, while the rate reductions to residential customers passed along by the long distance companies

amount to approximately [See A.N. 11] per year,[7] resulting in a net rate increase to residential customers of approximately [See A.N. 12] per year. (emphasis added) (T3:273; 6:616; Ex. 68 at JMF-12; T14:1779, 1793; Conf. 1028; Conf. Ex. 80 at BCO-1; T11:1323, 1353-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19; Conf. 702; T12:1476-77, 1490, 1493; Conf. 664; T14:1702; Ex. 79 at BCO-2).

Evidence from Verizon also addressed the relatively greater impact resulting from their proposal on the total telephone bills paid by the elderly. (T8:904-19). According to one study, the impact on the age group 76 years and older was about 3 times the impact on the age group 26 to 35 years (T8:915). According to another analysis, which the company witness believed was "more accurate," the ratio of the

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[7] The figure of [See A.N. 13] is a rough, ballpark estimate based on record evidence provided by AT&T, MCI, and Sprint Communications Company L.P. showing the percentage of the access charge reductions the companies intended to pass along to their residential customers. Unlike Verizon Long Distance, these three companies broadly serve residential and business markets throughout Florida. In particular, the [See A.N. 14] figure assumes that the evidence provided by these three large interexchange carriers is indicative of the proportions of the long distance market serving residences and businesses and that other interexchange carriers, in the aggregate, will flow through access charge reductions in a similar manner. Using these assumptions, the amount by which residential customers would benefit from access charge reductions is roughly [See A.N. 15] of $343.5 million, or about [See A.N. 16]. Citizens believe this to be a reasonable estimate based on the record. The Commission did not make this or any similar evaluation.

impact was about 5½ to 1, although the witness also testified that the actual dollar differences were relatively small. (T8:919).

Witnesses for the companies testified that in their opinion, residential customers would benefit from the ILECs' proposals, citing items such as increased offers to customers of bundled telephone services and other services such as cable and internet (T2:159; 8:751, 763-65, 768; 12:1506), new services (T2:127; 3:249; 8:756; 11:1318), more options and choices (T2:131; 8:757), greater efficiency, investment, and innovation (T2:97,127,192), more attention to quality (T2:131, 159; 10:1152; 11:1388), and claimed lower prices (T2:159; 8:759; 10:1227, 1271), although at best, the evidence only suggests that it is "possible" that competition might create a downward pressure on basic local rates. (T10:1271). Otherwise, the evidence demonstrates that even assuming an increase in competition, local rates will not return to their current levels. (T5:568; 12:1513-14).

The ILECs' own witness, Gordon, confirmed that "I can't tell you what the benefits of tomorrow's innovation are going to be. It will be a surprise to all of us." (T3:248). Verizon witness Danner testified that "[a]lthough these effects are difficult to quantify, they more than offset any small initial bill increases that residential consumers may experience." (T8:877). The Commission's witness, Greg Shafer, described the consideration of bundled services as a "benefit" for residential

customers, many of whom may have difficulty paying their current telephone bills. (T12:1517). He testified that a customer may receive value or versatility by switching her subscription from basic service to a more expensive bundle that includes, along with basic service, additional vertical services, but that customer may not consider this more expensive extra versatility as a "benefit" to her. (T12:1517). Mr. Shafer stated that:

> when you're talking about value, it's hard to put a dollar amount on that. But I think you have to assume that a customer who's taking a particular service now that gets bumped to a higher price service probably is not getting a benefit unless they weren't aware of how much fun it was to have a bundled package as opposed to basic service . . . . But in terms of the dollar amount in your budget that you spend every day, if that's the measuring stick that you're using, then it's hard to imagine that as a benefit if you have to pay more. (T12:1519).

Public Counsel's witness Ostrander pointed out that the telephone companies' witnesses "rely on arguments consisting of speculative information or vague assertions." (T14:1684). Ostrander agreed that commonly associated benefits of competition are increased or innovative services, lower prices, and others. (T14:1718). He testified, however, that there was no showing that the increase in basic local rates resulting from the local telephone companies' petitions would provide more benefits than otherwise would exist. (T14:1684-85).

During closing arguments, Public Counsel argued that the petitions, if granted, would cause a massive transfer of wealth from residential to business customers.

(T15:1909-16). Public Counsel also argued that the Commission had to determine whether the overall net impact of the petition would benefit residential customers and that the companies had no analyses or other evidence showing that the claimed intangible benefits of the petitions would offset the increases to customers' bills. (T15:1913-14, 1916).

During the Commission's deliberations on the petitions at agenda on December 16, 2003, Chairman Jaber inquired about staff's earlier statement to the Commission that it was not indicative of the effect on overall consumer welfare that certain categories of residential customers would not benefit. (T16:1983). Staff analyst Simmons, a nontestifying staff advisor, responded that benefit is not strictly a "dollars and sense" concept, for when one also considers what a consumer's propensity to pay for usage, then there exists "a situation where you have a basic rate increase together with a lower long distance price when netted together should result in more economic benefit to the customer." (T16:1983).

However, neither staff nor the Commission quantified these two factors, and if they had been quantified, "netting" them produces a [See A.N. 17] cost to residential customers - - not more economic benefit. (T3:273; 6:16; Ex. 68 at JMF-12; T14:1779, 1793; Conf. 1028; Conf. Ex. 80 at BCO-1; T11:1323, 1353-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19, Conf. 702; T12:1476-77, 1490, 1493;

Conf. 664; T14:1702; Ex. 79 at BCO-2). Of the total rate increase by the three local telephone companies of $343.5 million per year, the ILECs will recover from residential customers approximately $300 million per year. (T3:273; 6:616; Ex. 68 at JMF-12; T14:1779, 1793). The IXCs testified that they intend to return to residential customers, through lower long distance rates approximately [See A.N. 18] per year. (Conf. 1028; Conf. Ex. 80 at BCO-1; T11:1323, 1353-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19, Conf. 702; T12:1476-77, 1490, 1493; Conf. 664; T14:1702; Ex. 79 at BCO-2).

The final order approved the petitions filed by BellSouth, Verizon, and Sprint. (R17:3347). The Commission found that the companies' rate rebalancing would ultimately benefit residential customers as contemplated by section 364.164, and cited factors such as increased choice for customers, increased profit margins for competitors, technological innovation, new service offerings, and increased quality of service. (R17:3316-18). It also found that "the benefits to residential customers as a whole generated by the resulting decreases in long distance rates and elimination of the in-state connection fee will outweigh the increase in local rates." (R17:3318).

Public Counsel timely appealed the Commission's final order to the Supreme Court on January 7, 2004. (R17:3411-14). The Attorney General also filed a Notice of Appeal on that date. (R17:3350-53).

On January 8, 2004, the Attorney General and AARP filed with the Commission separate motions for reconsideration of the final order (R18:3475-509, 3514-27). That same date both the Attorney General and AARP filed in this Court motions to relinquish jurisdiction to the Commission for the limited purpose of obtaining rulings on their motions for reconsideration. On March 3, 2004, the Court relinquished jurisdiction to the Commission, with jurisdiction to rule on the motions for reconsideration on or before May 3, 2004. On March 3, the Court also issued its Order staying proceedings in the Court in case number SC04-10, until May 3, 2004.

On May 3, 2004, the Commission heard oral argument on the motions for reconsideration and voted to deny the motions. (R19:3836-89). On May 4, 2004, the Commission denied the motions, but added “clarification” and “explanation” of the Commission’s final order. (R19:3818-35). The Commission clarified the sentence in its final order that found "the benefits to residential customers as a whole generated by the resulting decreases in long distance rates and elimination of the in-state connection fee will outweigh the increases in local rates." (R17:3320). The Commission stated that the referenced sentence was not intended to indicate that the Commission found that the long distance rate reductions would result in a "dollar for dollar" offset of the local rate increases for residential customers. (R19:3833). Rather, the Commission stated, it found that many customers would receive the benefit of

reduced long distance rates, as well as the elimination of the in-state connection fee, and that those who did not receive a rate reduction would receive a qualitative benefit from increased availability of bundled offerings, more competitive options for service and stimulated long distance usage. (R19:3833). The Commission changed its original order to read:

> that the preponderance of evidence in the proceeding shows that the qualitative and quantitative benefits to residential customers as a whole generated by the resulting decreases in long distance rates, and 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. (emphasis in original) (R19:3833).

SUMMARY OF ARGUMENT

The Florida Public Service Commission failed to comply with the essential requirements of law by ignoring competent substantial evidence of the net financial harm the ILECs' petitions will cause residential customers. The Commission's determination that those customers will benefit, as required by section 364.164(1)(a), was in error and not supported by the competent substantial evidence that was the ILECs' burden to bring forth. The Commission could not rationally conclude that residential customers will benefit, when it omitted the essential step of balancing the concrete, immediate and adverse financial impact on residential customers against the testimony of less tangible, qualitative benefits the Commission chose to accept.

The Commission's determination in its final order, and again in its order on reconsideration, was thus arbitrary, and unsupported by competent substantial evidence and failed to comport with the essential requirements of law.

ARGUMENT

THE FLORIDA PUBLIC SERVICE COMMISSION ERRED IN FINDING THAT THE ILEC PETITIONS MET THE REQUIREMENTS OF SECTION 364.164(1), BECAUSE THE PETITIONS DO NOT BENEFIT RESIDENTIAL CUSTOMERS, AS REQUIRED BY SECTION 364.164(1)(a).

The Florida Public Service Commission failed to comply with the essential requirements of law when it ignored evidence of the net financial harm that will be visited on residential customers because it erroneously determined in its Final Order that those same customers will benefit from the ILEC petitions, and reconfirmed that determination in the Order Denying Reconsideration. In finding that residential customers would benefit from the petitions, the Commission failed to consider the net financial burden of approximately [See A.N. 19] per year that will fall on residential customers as a result of the petitions. The Commission could not logically conclude that residential customers would benefit from the petitions unless it at least balanced the immediate adverse financial impact on residential customers against other, less tangible, benefits. Instead of balancing the harm against the good, the Commission simply ignored the harm to residential customers in concluding that they would benefit from the petitions.

The Commission's action is arbitrary and is not supported by competent substantial evidence. For these reasons, the Court should reverse the final order with directions to deny the petitions. Alternatively, the Court should remand the final order for further proceedings consistent with the essential requirements of law. The Commission's order on reconsideration elaborated on several items contained in the final order. Those items included the conclusory finding that benefits as a whole will outweigh the increase in local rates. (R19:3833). The Commission, however, remained steadfast in its resolve to ignore evidence of the net financial harm that will befall residential customers, leaving nothing of substance changed regarding the issues on appeal. The Court should quash the order on reconsideration.

Standard of Review

This Court has noted its narrow scope of review for orders of the Florida Public Service Commission. In Pan American World Airways, Inc. v. Florida Public Service Comm'n, 427 So. 2d 716, 717 (Fla. 1983), this Court noted:

> We begin by noting the narrow scope of this Court's review of orders of the Florida Public Service Commission. We have only to determine whether the PSC's action comports with the essential requirements of law and is supported by substantial competent evidence. Florida Telephone Corp. v. Mayo, 350 So. 2d 775 (Fla. 1977). The burden is on appellants to overcome the presumption of correctness attached to orders of the Public Service Commission. Surf Coast Tours, Inc. v. Florida Public Serv. Comm'n, 385 So. 2d 1353 (Fla. 1980); Fargo Van & Storage v. Bevis, 314 So. 2d 129 (Fla. 1975).

This presumption of correctness does not mean, however, that the Commission has unbridled discretion to rule in any manner it wishes. The Commission must rely on competent substantial evidence to support its order. As the Court stated in Citizens of the State of Florida v. Public Serv. Comm'n, 425 So. 2d 534, 538 (Fla. 1982):

> The standard on review is whether competent, substantial evidence supports a Commission order. Citizens of the State of Florida v. Hawkins, 356 So. 2d 254, 259 (Fla. 1978); DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957). Orders of the Commission come before this Court clothed with the presumption of validity. On review this presumption of validity can only be overcome where the Commission's error either appears plainly on the face of the order or is shown by clear and satisfactory evidence. General Telephone Co. v. Carter, 115 So. 2d 554, 556-57 (Fla. 1959).

As this Court stated in Shevin:

> [W]e will not overturn an order of the Commission because we would have arrived at a different result had we made the initial decision: something more is needed. However, we will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right. Shevin v. Yarborough, 274 So. 2d 505, 509 (Fla. 1973).

This Court has previously reversed when the Commission findings were unsupported by the record. The Court addressed this in Florida Power Corp. v. Public Serv. Comm'n, 487 So. 2d 1061, 1063 (Fla. 1986):

> [1] Although we will not reweigh or reevaluate the evidence presented to the Commission, we may examine the record to determine whether the order complained of meets the essential requirements of law. Citizens v. Public Serv. Comm'n, 464 So. 2d 1194 (Fla. 1985).

> [2] The fundamental premise supporting the Commission's order is that FPC received no consideration when it assigned its interest in COM technology to EFC. This finding is wholly unsupported by the record and fails to comport with the essential requirements of law. Accordingly, we reverse the order of the PSC.

Agencies have been reversed when they ignore facts, act arbitrarily or abuse their discretion by placing too much emphasis on some criteria and failing to consider others in applying their statutes and rules. In Balsam v. Dept. of Health & Rehab. Serv., 486 So. 2d 1341, 1346 (Fla. 1st DCA 1986), the court stated that:

> [The agency] has, in determining the existing bed inventory, erroneously ignored "facts within its knowledge associated with other CONs deemed relevant to a pending CON request." University Community Hosp. v. Dep't of Health & Rehab. Serv., 472 So. 2d 756, 758 (Fla. 2nd DCA 1985).
>
> . . .
>
> [The agency] was not free to ignore facts, proved by substantial competent evidence, showing that the actual number of short-term psychiatric and substance abuse beds was considerably different from that reflected in the HRS records.

The court also stated that:

> [The agency] did not exercise its discretion in compliance with the applicable statutes when it declined to consider these differences in comparing the proposed project with existing facilities. Second, HRS acted arbitrarily and abused its discretion by placing too much emphasis upon the controlling nature of the bed-need formula and failing to consider the other criteria under the statutes and rules.

Id. at 1349.

The standard of review places the burden on appellants to overcome the presumption of correctness of the Commission order and show that the legal conclusion does not comport with the essential requirements of law or that the factual conclusion is unsupported by competent substantial evidence. Because the order fails both tests, the final order should be reversed and the order on reconsideration should be quashed.

The Commission erred in its order because it ignored facts that are crucial to any weighing of costs versus benefits. An agency cannot simply ignore the facts that it finds troublesome. Id. at 1346. Without considering such facts that are essential to its determination, the Commission cannot rationally conclude that the ILECs' petitions will indeed benefit residential customers, in compliance with section 364.164(1)(a). Consequently, the Commission's ultimate finding that residential customers will benefit from the ILECs' petitions is arbitrary and unsupported by competent substantial evidence. See Shevin, 274 So. 2d at 509. See also Citizens, 425 So. 2d at 538; Balsam, 486 So. 2d at 1348-49.

The ILECs filed their petitions pursuant to the authority of section 364.164(1). To grant their petitions, the Commission must find that the ILECs have complied with each and every requirement of section 364.164(1)(a)-(d), all of which are mandatory. (R17:3296, 3299, 3300, 3306). Section 364.164(1)(a) states that the Commission

shall consider whether an ILEC petition will "[r]emove current support for basic local telecommunications service that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers." The Commission reviewed the Legislative history of section 364.164(1)(a) and found that it allowed discretion to "consider the degree of benefit to residential customers from long distance rate reductions," in addition to those benefits that might occur in the local markets, in the Commission's analysis of whether the ILEC petitions would benefit residential customers. (emphasis added) (R17:3320).

Importantly, the Legislature's floor debates demonstrate that while increasing competition in the local telephone market continues to be of major importance to the Legislature, as it has been since 1995, the 2003 Legislature expressed an overriding concern for protecting residential consumers in passing CSSB 654. Even though the intention is that competition in the local exchange market will be increased through this bill, the Legislature emphatically asserted that the telephone companies' residential customers must be protected - - that is, residential customers must benefit from the ILEC petitions through this bill.

In the House debate, co-sponsor, Representative Mayfield, stated that the bill would give sweeping authority to the Commission to spark competition but also authority, at each step of the way, to protect consumers. (R15:2869). On the other

hand, Representative Mayfield advised his colleagues, the bill "does not raise rates;" it does not require the Commission to grant any petition unless the Commission is completely satisfied that competition is created, and "the residential customers have to benefit." (R15:2870-71). Representative Ritter categorically stated that if he "thought that this bill would raise my parents' local rates, I wouldn't be supporting it." (R15:2874). Representative Mayfield insisted that "[t]he Public Service Commission is going to have to . . . determine that the customers are benefiting and that both the competitive environment is being created before that petition can move forward." (R15:2875). Representative Mayfield told the House that the Commission would be required to determine two factors: whether the petition creates competition; and whether it will benefit residential customers. Further, Representative Mayfield stated that the Commission would be required to determine whether those two factors would be satisfied by the petition before any changes could take place. (R15:2933-34).

In the Senate debate the bill's sponsor, Senator Haridopolos asserted that the bill would make sure that a petition "must be in the best interests of residential customers" (R15:2887) and that the bill did not impose an automatic increase on customers, but rather, "only if the mandates, or conditions are met, and that is, that it must be in the best interests of residential customers and must bring local competition before" the Commission may look at rates. (R15:2892-93). Senator Cowin expressed

reservation about the impact of ILEC petitions on rural customers, to which Senator Haridopolos responded with a clear declaration that any petition must benefit residential customers and there must be competition before any rate adjustment may take place. (R15:2902-04). Senator Haridopolos stated confidently that rates would not be increased unless there is competition "and it must be in the benefit of residential customers." (R15:2908).

As the cites to the Legislative debates amply demonstrate, the Legislature made it clear that section 364.164(1)(a), charges the Commission with exercising its judgment to ensure that, among other things, residential customers must benefit before the Commission grants an ILEC petition. This cannot reasonably mean simply that some nebulous benefits may reach some of these customers. (R15:2887, 2892-93). The Commission must account for the very real, undisputed cost to residential customers that is associated with the ILEC petitions. That is, 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. The Commission claimed to acknowledge and accept this concept, because its conclusion was that "the benefits to residential customers as a whole generated by the resulting decreases in long distance rates and elimination of the in-state connection fee will outweigh the increase in local rates." (R17:3320). To

conclude that benefits "outweigh" local rate increases, there must be a surplus of benefits over the costs of rate increases. The Commission, however, never estimated or considered the overall financial burden the petitions placed on residential customers. It was thus impossible for the Commission to rationally conclude that the petitions would provide an overall benefit to residential customers. Had the Commissioners shared the concerns of the Legislature, they could not have ignored, as they did, the monetary impact on residential customers.

The Commission is familiar with the need for a well-reasoned analysis when judgment is necessary, and particularly with the use of cost/benefit analysis when the judgment called for is to decide which is the weightier of two factors: costs or benefits. See In re: Application for Increase in Water Rates for Seven Springs System in Pasco County by Aloha Utilities, Inc., 217 PUR 4th 1, 2002 WL 985002 (Fla. P.S.C. 2002). The Commission stated that in relation to its rate-making function, "[w]e believe that a rate increase should be granted only if the reasons for it are clear and well justified." Id. at 31. The Commission ordered Aloha to perform a cost/benefit analysis of alternative means of obtaining water above its permitted levels in order to determine the most cost-effective alternative for Aloha's customers. Id.

Notwithstanding its familiarity with analyzing costs versus benefits, in this case the Commission ignored the fundamental steps of a well-reasoned analysis, which

made it impossible to reach a valid conclusion that benefits will outweigh local rate increases. The Commission ignored the numerical cost of the overall residential rate increases and the numerical degree of benefit of long distance rate reductions that might flow through to residential customers. Because the Commission did not quantify them in order to compare benefits and costs, the Commission cannot validly conclude that either "outweighed" the other.

The ILEC petitions originally proposed total rate increases of approximately $343.5 million per year.[8] It is undisputed that the ILECs' residential customers are to be overwhelmed with 90 percent of that amount – a burden of approximately $300 million per year.[9] The Commission found as reasonable that the IXCs would allocate long distance rate reductions "on a pro-rata basis according to access minutes of use." (R17:3346) What the Commission ignored was that of the corresponding $343.5 million per year in access rate reductions to be granted to the IXCs, approximately [See A.N. 20] are intended to be returned to residential consumers through lower long distance rates, which results in a net increase in rates for residential customers of

[8] This total comprised BellSouth's $125.2 million per year, Sprint's $142.1 million per year, and Verizon's $76.2 million per year. (T3:273; 6:616; Ex. 68 at JMF-12; T14:1779, 1793).

[9] This total comprised BellSouth's $107.77 million per year, Sprint's $122.9 million per year, and Verizon's $70.9 million per year. (T3:273; 6:616; Ex. 68 at JMF-12; 14:1779, 1793).

approximately [See A.N. 21] per year. (T3:273; 6:616; Ex. 68 at JMF-12; T14:1779, 1793; Conf. 1028; Conf. Ex. 80 at BCO-1; T11:1323, 1353-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19; Conf. 702; T12:1476-77, 1490, 1493; Conf. 664; T14:1702; Ex. 79 at BCO-2).

The companies' witnesses proffered a number of qualitative, speculative benefits, which have generally accompanied competition in the marketplace. Public Counsel's witness, Bion Ostrander, stated at hearing that the companies' witnesses "rely on arguments consisting of speculative information or vague assertions." (T14:1685). He testified that the ILECs had not met their burden of presenting competent evidence to show that benefits, which company witnesses claimed are "expected" or that "should" occur, would materialize. Indeed, as Gordon, witness for all three ILECs, confirmed, "I can't tell you what the benefits of tomorrow's innovation are going to be. It will be a surprise to all of us." (T3:248). Notwithstanding the speculative nature of the benefits he proffered, Verizon witness Danner reassured the Commission that "[a]lthough these effects are difficult to quantify, they more than offset any small initial bill increases that residential consumers may experience." (T8:877).

The Commission wrongly rejected Mr. Ostrander's testimony that the ILECs were unable to demonstrate with competent evidence the benefits to customers.

Instead, the Commission found as fact, several qualitative benefits that were proffered by the companies: "As evidenced by the results in other states that have engaged in rate rebalancing, the ILECs' proposals **. . .** should lead to an increase in choice of providers;" also, "[i]ncreased competition will lead not only to a wider choice of providers, but also to technological innovation, new service offerings, and increased quality of service;" as well as, "over the long run, reductions in prices for local service;" and "we anticipate that the reduction in access fees will result in an increase in bundled offerings . . . " (R17:3307, 3318, 3319, 3320).

This last finding of anticipated increased bundled offerings was a highly touted benefit of the ILEC petitions. (T2:159; 8:751, 763, 768; 12:1506). "[B]undles of local and long distance service, and bundles that may include cable TV service and high speed internet access service" were mentioned. (R17:3307). None of these "anticipated" benefits was quantified though, or even assured of occurring. Notwithstanding their speculative nature, however, the Commission found that they constituted "benefits" for residential customers.

The Commission's own witness, Greg Shafer, described the irony of considering bundled services a "benefit" for residential customers, many of whom may have difficulty paying their current telephone bills. He offered an example: If a customer is currently paying $10 per month for basic local service and that price is

raised to $16 per month, the customer may receive value/versatility by switching her subscription to a bundle that includes, along with basic service, additional vertical services. But now the price for her service is $16 or $18 per month. That customer may not consider this extra versatility as a "benefit" to her. (T12:1517). Mr. Shafer continued,

> . . . when you're talking about value, it's hard to put a dollar amount on that. But I think you have to assume that a customer who's taking a particular service now that gets bumped to a higher price service probably is not getting a benefit unless they weren't aware of how much fun it was to have a bundled package as opposed to basic service . . . . But in terms of the dollar amount in your budget that you spend every day, if that's the measuring stick that you're using, then it's hard to imagine that as a benefit if you have to pay more. (T12:1519).

Unfortunately, for many consumers, an awareness of "how much fun," i.e. how convenient or versatile a bundled package may be is not necessarily accompanied by the capability, or even the desire, to pay an increased cost for the extra services. Access to bundles does not automatically translate into a "benefit."

Nevertheless, the Commission found that the increased availability of bundles is a prime benefit for all consumers. (R17:3307,3320). Commission staff analyst Simmons confirmed that according to discovery responses from the ILECs, BellSouth's customers who subscribe to bundles would not receive an increase in the price of the basic local service component of those bundles. So all those customers would only stand to gain from the ILECs' petitions. (T16:1982). Although neither

BellSouth nor Verizon intended to increase the local service component of their residential bundled local service plans, however, Sprint did intend to do so. (T16:1982). Chairman Jaber was apparently concerned that this situation might negatively impact the Commission's consideration of bundles as benefits for residential consumers for, as she explained, her inquiries to staff were due to her understanding of "benefit" as perhaps "an encouragement or an incentive for residential customers to look at bundled offerings . . . ." (T16:1982). In other words, by increasing the price of basic local service, the ILECs raise basic rates closer to the price of bundles that comprise basic plus additional services. The intent is that the closer basic prices are raised to bundle prices, the more likely a residential customer will be pressured to make the jump to a more costly, bundled service. Of course, considering this a "benefit" ignores the distinct possibility that the customer either currently cannot afford to, or perhaps does not wish to, pay for bundled service.

Chairman Jaber further inquired about staff's earlier statement to the Commission that just because certain categories of residential customers would not benefit, was not indicative of the effect on overall consumer welfare. Analyst Simmons, a nontestifying staff advisor, responded that "benefit" is not strictly a "dollars and sense" concept, for when one also considers what a consumer is willing to pay for basic local service, compared to that consumer's propensity to pay for

usage, there exists "a situation where you have a basic rate increase together with a lower long distance price when netted together should result in more economic benefit to the customer." (T16:1983).

Analyst Simmons' nontestifying advice to the Commission is in error. First, the Commission cannot "net" together these two factors unless they are quantified, and neither staff nor the Commission quantified either of these impacts on residential consumers. Second, if these two factors are quantified, as they must be to determine whether the petitions benefit residential customers, "netting" them produces a [See A.N. 22] harm to residential customers, not more economic benefit. (T3:273; 6:616; Ex. 68 at JMF-12; T14:1779, 1793; Conf. 1028; Conf. Ex. 80 at BCO-1; T11:1323, 1353-54; Conf. 714, 1503; T11:1382, 1387; Conf. 693-94; T12:1418-19; Conf. 702; T12:1476-77, 1490, 1493; Conf. 664; T14:1702; Ex. 79 at BCO-2). There is no competent substantial evidence in the record to support staff advisor Simmons' advice to the Commission. Armed with this erroneous information from staff advisor Simmons, however, the Commission found that "benefits to residential customers as a whole generated by the resulting decreases in long distance rates and elimination of the in-state connection fee, will outweigh the increase in local rates." (R17:3320).

In its decision-making process, the Commission accounted for the qualitative, speculative benefits, including bundles, on the benefit side of the equation. It even

accounted for the long distance rate reductions on the benefit side, but only as a speculative concept, ignoring their quantified, numerical value. The Commission did this notwithstanding its determination that it could, and purportedly did, consider the "degree of benefit" of these decreases. (R17:3320, 3346). As noted above, the IXCs testified that they intend to flow through to residential customers approximately [See A.N. 23] of the $343.5 million in reduced access charges they will enjoy.

On the cost side of the equation, the Commission ignored quantifying the overall residential rate increases. As noted above, the ILECs will overwhelm their residential customers with $300 million in rate increases, which would be reduced by the intended [See A.N. 24] decrease in long distance rates. The Commission also ignored another important aspect of this cost to residential customers: that is, the age category with the greatest increase in its total bill is that of residential customers 76 years old and older. The increase for this age group is five and one-half times the increase imposed upon the 26 to 35 year-old group.

CONCLUSION

The Commission avoided weighing substantive benefits against substantive costs. It ignored the essential step of estimating or considering the overall financial burden that will fall on residential customers. The Commission ignored the harm to residential customers. Consequently, it was impossible for the Commission to validly conclude that benefits as a whole will outweigh overall residential rate increases.

Accordingly, the Commission's final order does not comport with the essential requirements of law. Its fundamental finding that the ILEC petitions benefit residential customers, is arbitrary and unsupported by competent substantial evidence, because that finding ignores essential facts in the record. The order relies on that finding to grant the ILECs' petitions, which do not satisfy section 364.164(1)(a).

The order on reconsideration made no material change to the effect of the final order. The Commission still failed to consider that residential local rate increases heavily exceed long distance rate reductions. This ignores the clear Legislative intent to protect the residential customers, as amply demonstrated by the debates.

The Court need only examine the record to determine that the Commission's finding is wholly unsupported and fails to comport with the essential requirements of law. This Court should reverse the Commission's Final Order with instructions to deny the petitions, and quash the Order on Reconsideration.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amended Initial Brief is submitted in Times New Roman 14-point font and complies with Rule 9.100(1) of the Florida Rules of Appellate Procedure.

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H F. MANN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of an AMENDED REDACTED Initial Brief, without Appendix, of the Citizens of the State of Florida has been furnished by U.S. Mail to the following, this 10th day of September, 2004:

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