THE SUPREME COURT OF FLORIDA

CHARLES J. CRIST, JR., ATTORNEY GENERAL, STATE OF FLORIDA, Appellant,	Case No.: SC04-9
HAROLD MCLEAN, PUBLIC COUNSEL, STATE OF FLORIDA, Appellant,	Case No.: SC04-10
AARP, Appellant,	Case No.: SC04-946

v.

LILA A. JABER, etc., et al., Appellees.

REPLY BRIEF OF APPELLANT AARP

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STANDARD OF REVIEW

AARP does not take issue with the bulk of the Appellees BellSouth, Sprint and Verizon's ("ILEC Appellees") statement of this Court's standard of review in this case. However, AARP would urge the Court to reexamine its policy of giving "great deference" to the Public Service Commission's (PSC) interpretation of statutes it is charged with enforcing. BellSouth Telecommunications, Inc. v. Jacobs, 834 So. 2d 452, 456 (Fla. 2002). AARP is unaware of any cases in which this Court has given such deference to either the trial courts or lower appellate courts of this state and questions the necessity for granting such deference to the PSC. See Sections 350.031(4) and 350.04, F.S. Although the commissioners' terms are staggered, there is no basis for assuming that the collective institutional memory of the PSC puts that agency in a better position than this Court to ascertain the legislature's statutory intent. For these reasons, AARP would urge this Court to interpret the statutes at issue in this case as it would in any other proceeding.

SUMMARY OF ARGUMENT

AARP also finds several of the Appellees' arguments, particularly those of the ILEC Appellees, counterintuitive. For example, Appellees contend that higher rates are better for consumers than lower rates. To support this argument, they state: "Telephone consumers are better off as a result of moving prices more in line with costs [meaning higher rates] . . . . (Local Incumbents' ("LI") Brief at 12).

However, Appellees present no factual evidence of record to support the conclusion of industry experts that higher residential rates will result in enhanced competition. Moreover, these conclusions are not supported by the legislative intent found in the relevant floor debates, which may be relied upon where, as in this case, the PSC found Section 364.164(1), F.S. ambiguous. Those floor debates made clear that the legislation's sponsors in both chambers expected both actual competition to result and net financial benefits to the residential customer class in exchange for their increased rates.

AARP also believes the PSC incorrectly evaluated the critical role played by UNE-Ps in achieving the current limited local service competition attained in Florida, as well as the role UNE-Ps should play in realizing future local service enhanced competition. Necessarily, AARP believes the PSC erred when it failed to reconsider its initial order in light of the decision in United States Telecom Ass'n v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004), cert. denied, Case Nos. 04-12, 04-15, 04-18 (Oct. 12, 2004) ("USTA II"). Thus, AARP supports the Attorney General's request for the Court to remand the case for reconsideration of the PSC's orders in light of the USTA II decision and the failure of the United States Supreme Court to review it.

ARGUMENT

THE PSC'S ORDERS ARE NOT SUPPORTED BY COMPENTENT, SUBSTANTIAL EVIDENCE THAT THE PETITIONS COMPLY WITH THE CRITERIA OF SECTION 364.164.

The ILEC Appellees offered, and the PSC accepted, expert testimony stating that raising prices for a good or service would necessarily result in more competitors offering the good or service. Aside from antecedent and largely conclusory evidence from other states, no industry testimony was provided to support the notion that higher rates for basic local service would necessarily bring competitors to Florida, which, in turn, would benefit residential customers notwithstanding the conceded greater cost to them. In short, the ILEC Appellees' experts failed to identify record facts to support their conclusory and theoretical opinions of what would result in Florida. Expert opinion does not dispense with the necessity for proving facts necessary to support the opinions, and such opinions lacking documentary or factual evidence will not support a PSC order. Harris v. Josephs of Greater Miami, Inc., 122 So. 2d 561, 562 (Fla. 1960); GTC, Inc. v. Garcia, 791 So. 2d 452, 461 (Fla. 2000).

Moreover, the testimony presented by Appellees' witnesses ignores the near monopoly status of the ILEC Appellees, the PSC's previously stated recognition of the central role of UNE-Ps in fostering the limited competition attained in Florida to date, and the near certainty that the availability of UNE-Ps, at

favorable pricing, is at an end because of the intervening federal decisions. Thus, there is no competent, substantial evidence of record to support that conclusion that raising basic local rates will benefit residential customers at all, let alone that they will be net economic beneficiaries.

During their deliberations the PSC found that Section 364.164(1) was ambiguous and that, therefore, reference to the legislative floor debate was appropriate to ascertain the legislative intent. After reviewing the transcripts from the floor debates, AARP believes, along with the Public Counsel and Attorney General, that the clear intent of the legislation's sponsors, as related to their colleagues, was that actual, not mere theoretical, enhanced competition had to result and, further, that residential customers had to be net economic beneficiaries, at least as a customer class. The ILEC Appellees may wish to suggest that the legislators' statements relied upon by the Appellants were self-serving and disingenuous (IL Brief at 22), but the legislature's stated desire to benefit residential customers appears clear. Importantly, the ILEC Appellees have not been totally forthright with the Court in quoting to Smith v. Crawford, 645 So. 2d 513 (Fla 1st DCA 1994) to support their claim that "courts have specifically warned against relying on legislative floor debates to divine legislative intent" because "often what is said in debate is for the benefit of constituents only and may be regarded by courts as self-serving." While the quote is correct as far as it is

presented, that court went on to note that the statute was not ambiguous and, therefore, reliance on the floor debates in that case was inappropriate. The court further noted, however, the appropriateness and necessity of intrinsic aids to statutory construction like "transcripts of floor debates" where a statute is susceptible to more than one interpretation.

As stated above, the PSC found Section 364.164(1) to be ambiguous, which led it to conclude that reference to the legislative floor debates was appropriate in ascertaining the legislative intent. In reaching this conclusion, the Commission states:

> We note the lack of clarifying language or punctuation in the provisions at issue contributes to the differing interpretations. As such, having considered the arguments and the language of the statute itself, we find that the language of Section 364.164, Florida Statutes, is not clear on its face and, thus, is subject to statutory interpretation.

Final Order at 16. (Emphasis added.) ILEC Appellees do not dispute this PSC finding.

AARP would submit to the Court that a mere reading of the statute gives obvious support for the PSC's finding of ambiguity. Subsections (1)(b),(c) and (d) are not troubling, but subsection (1)(a) is extremely convoluted, especially as to what type, or level of, "benefit" residential consumers are to receive if their rates are to be increased so dramatically. Note, too, that the four provisions are cumulative, so that Appellees' suggestions that the Appellants do not deny the

correctness of (c) and (d) are meaningless. If any of the four elements is not met, then the increases must fail. Section 364.164(1) states:

> **364.164 Competitive market enhancement.--**
>
> (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 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.
>
> (d) Be revenue neutral as defined in subsection (7) within the revenue category defined in subsection (2).

AARP, along with the Attorney General and Public Counsel, believes the floor debate, especially of the legislation's House and Senate sponsors, reveals their intention (1) that actual, not just theoretical, local service competition must result if residential rates are to be increased and (2) that residential customers, even if only as a class, must be net financial beneficiaries. Pages 8-11 of Public Counsel's Amended Initial Brief include extensive testimony by the legislation's sponsors to their respective chambers in floor debate, while the import of the remarks are argued at Pages 31-33 of the same brief.

While increased or enhanced local service competition was a dubious proposition prior to USTA II, it now appears largely impossible. As to residential customers being economic net beneficiaries, even as a class, the meager percent of intrastate access reductions to be flowed to them as compared to the 90 percent or more they will pay in local service rate increases belies that possibility. The actual confidential numbers for the total intrastate access reductions are reflected in the confidential briefs of both the Public Counsel and the Attorney General.

All the Appellees dismiss the importance of the USTA II decision, which effectively precludes the continued leasing by competitive telecommunications companies of the incumbent telephone companies' computer switching and local loop facilities at Federal Communications Commission ("FCC") ordered, low-cost wholesale rates. While the PSC on reconsideration considered that USTA II only "mudd[ied] the waters," in part, because the "decision is currently stayed, and further appeals are possible," that situation is markedly changed now, since, as acknowledged by the ILEC Appellees, "the federal court decision is no longer stayed and the United States Supreme Court has declined to hear the appeal." (IL Brief at 25).

While AARP believes the PSC's initial final order was not supported by competent, substantial evidence on the issue of residential customer benefit, it believes the lack of residential benefit is more clear cut now. AARP also believes

that the PSC erred in not reconsidering its order in light of the USTA II decision's adverse impact on the critically important issue of ongoing UNE-P availability.

The PSC's 2003 Report on Competition (Ex. 15) stated the 1996 Act established three methods by which CLECs could enter the local exchange market: (1) resale, (2) leasing of unbundled network elements (UNEs), and (3) investing in their own facilities. Because it found the ILECs dominate the last mile of the local network, the 2003 Report concluded the CLECs must either use the ILEC's local loops or build their own facilities. The 2003 Report also discussed the importance of the TELRIC-based UNE-P rates to both of these strategies, saying, in part:

> *Unbundled Network Elements (UNEs)*
>
> UNEs are the building blocks of ILEC networks used to provide telecommunications services. This method of entry requires ILECs to unbundle their networks and lease the piece parts or elements to CLECs at rates based on a total element long-run incremental cost (TELRIC) methodology.

(Ex. 15 at 5).

The clear thrust of the 2003 Report, as well as the testimony of the CLECs in this case, is that expanded residential competition in most of Florida depends almost entirely on the continued availability of UNE-Ps to the CLECs from the ILECs and at the relatively lower rates based on the FCC-mandated TELRIC methodology.

According to the 2003 Report, of the top 10 telephone exchanges with the most CLEC providers, all were in BellSouth's territory and their existence largely resulted from the availability of low-cost UNE-P rates. The Report says, in part:

> CLECs concentrate on larger metropolitan areas for a number of reasons including higher population densities, which improve economics of scale and scope. Lower UNE rates in these higher density zones also attract competitors. Notably, each exchange shown in Table 4 is in BellSouth's territory. One explanation of the greater CLEC presence in these exchanges is that BellSouth has the lowest UNE-P rates among all the ILECs (See Section B for further discussion).

(Ex. 15 at 11. Emphasis supplied.) The 2003 Report continues with respect to the importance of UNE-P availability and price in promoting local service competition. The report continues, saying:

> **3. UNE-P Availability and Price**
>
> An additional factor attracting competitors to BellSouth's territory appears to be the availability of UNE-P at the lowest prices in the state.
>
> * * *
>
> As stated earlier, the availability and price of UNEs, especially UNE-P, are key determinants of CLEC market entry. UNE-P appears to be the entry strategy of choice for many CLECs serving the mass market (i.e., residential and small business customers).

(Ex. 15 at 12, 13. Emphasis supplied.)

The 2003 Report also discusses whether CLECs can effectively compete for residential customers without access to UNE-Ps, saying:

> There is an ongoing debate about the appropriate level of UNE-P rates and about whether CLECs are impaired in the market without access

> to UNE-P. Whatever the outcome of these debates, UNE-P appears to be a significant element in the current business plans of CLECs serving mass market customers. In Florida, 73% of CLEC residential lines are served via UNE-P. The remainder are served in almost equal amounts via resale and subscriber loops that are tied to CLEC switches.
>
> Where UNE-P has become a prevalent method of market entry, proponents of UNE-P argue that UNE-P is critical to ensuring competition in the local telecommunications market and that it must be preserved. The argument on the other side of the debate is that UNE-P is not viable as a long-term competitive strategy. Critics of UNE-P maintain that this strategy is not economically rational and that it serves to drain capital from an industry in dire need of investment. Instead, they argue that regulatory policies should promote facilities-based competitive models – and not business models reliant on market participants leasing the facilities of their competitors.

Ibid. (Emphasis supplied.) USTA II effectively eliminated the market entry method the PSC found critically responsible for the nascent local service competition now in Florida. With the loss of the low-cost UNE-P method, there is no record evidence that existing competition can be maintained, let alone be enhanced as mandated by the statute.

CONCLUSION

There is not competent, substantial evidence of record to support the industry's theoretical testimony, and the PSC's finding, that raising residential local service rates would actually result in enhanced local service competition for residential customers. The PSC order does not require the competition. Additionally, legislative intent makes clear that the legislature intended that both

actual competition must result and residential customers, at least as a class, must be net economic beneficiaries if the rate increases are to stand. Furthermore, in light of the USTA II decision and the likely unavailability of UNE-Ps at low-cost FCC rates going forward, it appears impossible for local service competition to be maintained at current levels, let alone enhanced. To the extent the Court cannot ascertain the impact of the USTA II decision on increased competition here, it should remand the case to the PSC for an evidentiary hearing as requested by the Attorney General.

DATED this _____ day of December, 2004.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing AARP's Amended Initial Brief has been prepared using Times New Roman 14-point font.

_____
Michael B. Twomey

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following on this ___ day of December, 2004:

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