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.	)	

ANSWER BRIEF OF AT&T OF THE SOUTHERN STATES, LLC, KNOLOGY OF FLORIDA, INC., AND MCI WORLDCOM COMMUNICATIONS, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FLORIDA STATUTES

RULES

LAWS OF FLORIDA

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellees, AT&T of the Southern States, LLC ("AT&T), Knology of Florida, Inc. (“Knology”), and MCI WORLDCOM Communications, Inc. (“MCI”) accept and adopt the Statement of the Case and Facts in the Answer Brief of the Florida Public Service Commission (“Commission”).

In accepting and adopting the Commission’s statement, Appellees do not accept the “Statement of the Case,” such as it is, submitted on behalf of Appellant Charles J. Crist, Jr. There is no statement contained in the Amended Initial Brief that concisely describes the procedural posture of this case as required by Rule 9.210(b)(3), Fla.R.App.P. Rather, the section entitled “Statement of the Case and Facts” contains nothing more than argument and a one-sided view of the “facts.” The use of the statement of the case and facts as an extension of a party’s argument of the merits of the case is improper. *See, e.g.*, *Sabawi v. Carpentier*, 767 So.2d 585, 586 (Fla. 5th DCA 2000); *Williams v. Winn-Dixie Stores, Inc.*, 548 So.2d 829, 830 (Fla. 1st DCA 1989).

Further, Appellees do not agree with the “Statement of the Facts” as presented in the Amended Initial Briefs of either Charles J. Crist, Jr., the Public Counsel or, by reference, the AARP. The voluminous pages of “facts” presented by the Appellants contain an entirely one-sided view of the record, are interspersed

with argument such as "the telephone companies . . . have not submitted evidence a reasonable mind would accept as proof . . ." (Amended Initial Brief of Crist at 1), comment extensively on the quality and competence of the "pertinent evidence" as summarized by Attorney General Crist, and even presented the closing argument of Public Counsel as "facts." (Amended Initial Brief of the Citizens, at 21-22).

The courts have recognized that the purpose of a statement of the facts is to provide the court with a basic understanding of the nature of the controversy. Accordingly, "[t]he purpose of providing a statement of the case and of the facts is not to color the facts in one's favor . . . but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." *Sabawi,* 767 So.2d at 586.

The lack of objectivity and the complete one-sidedness of the Appellants' presentation of the "facts" of this case prevent AT&T, Knology, and MCI from presenting a limited statement as to the "extent of the disagreement" as contemplated by Rule 9.210(c), Fla. R. App. P., and the Committee Notes accompanying the Rule. Therefore, Appellees AT&T, Knology, and MCI ask that the Court substitute the Commission's Statement of the Case and Facts for purposes of this appeal.

SUMMARY OF THE ARGUMENT

The Commission was charged with the responsibility of rebalancing telephone rates to implement the Florida Legislature's instruction set forth in Section 364.164, Florida Statutes. In performing its legislative ratemaking function, the Commission heard and considered a large amount of testimonial and documentary evidence, applied the facts derived from the evidence as part of its fact-finding function, and applied the law to those facts.

The Appellants have fixed their analysis of the rate making process on whether individual residential customers may have to bear increases in their flat-rate local service rates, at least in the short-term, to the exclusion of all other relevant factors. The legislature's directive that rate rebalancing "remove current support for basic local telecommunications services" expressly contemplates that the previously subsidized rates will, of necessity, rise. Thus, the issue to be resolved in this case is not whether local service rates will rise - they will - but whether issues of increased competition and enhanced service offerings will, in the long run, better serve the public interest.

The Commission in this case carefully balanced the relevant statutory and factual criteria and properly fulfilled its statutory function. There was no error in either the procedural or substantive actions of the Commission, and the

Commission's final Order on Access Charge Reduction Petitions ("Petition Order") and the Order on Motions for Reconsideration ("Reconsideration Order") (hereinafter, collectively the "Orders") should be affirmed.

STANDARD OF REVIEW

The standard of review in a Public Service Commission rate-making case has been succinctly, and recently, described by this Court as follows:

> We note preliminarily that "orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *General Telephone Co. v. Carter,* 115 So.2d 554, 556 (Fla.1959). . . . Additionally, this 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." *Polk County v. Florida Public Service Commission,* 460 So.2d 370, 373 (Fla.1984). Where the findings and conclusions comport with the essential requirements of law and are based on competent, substantial evidence, this Court will approve them. *Fort Pierce Utils. Auth. v. Beard,* 626 So.2d 1356 (Fla.1993).

Sprint-Florida, Inc. v. Jaber, ___ So.2d ___, 29 Fla. L. Weekly S487 (Fla. 2004).

This Court has provided additional analysis of the standard of review as follows:

> We begin our analysis by noting the applicable standard of review: "[O]rders of the Commission come before this

> Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *GTC, Inc. v. Garcia,* 791 So.2d 452, 456 (Fla.2000) (quoting *United Tel. Co. v. Public Serv. Comm'n,* 496 So.2d 116, 118 (Fla.1986)). "The party challenging an order of the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law. We will approve the Commission's findings and conclusions if they are based on competent substantial evidence, and if they are not clearly erroneous." *Gulf Coast Elec. Co-op., Inc. v. Johnson,* 727 So.2d 259, 262 (Fla.1999) (footnote omitted).

Verizon Florida, Inc. v. Jaber, ___ So.2d ___, 29 Fla. L. Weekly S459, (Fla. 2004); *see also Florida Interexchange Carriers Association v. Clark,* 678 So.2d 1267, 1270 (Fla. 1996); *Legal Environmental Assistance Foundation, Inc. v. Clark,* 668 So.2d 982, 987 (Fla. 1996); *Florida Cable Television Association v. Deason*, 635 So.2d 14, 16 (Fla. 1994).

ARGUMENT

I. The Commission Did Not Err in Concluding that the ILEC Petitions "Benefit Residential Consumers" Within the Meaning of Section 364.164(1)(a), Florida Statutes

The entirety of the Public Counsel's Amended Initial Brief, and Argument II of the Attorney General's Amended Initial Brief, focus directly and exclusively on the Commission's construction of Section 364.164(1)(a), Florida Statutes. The

Public Counsel argues that the Commission erred in taking a broad view of the term "benefit residential consumers" as used in the statute.

This Court has recognized that the setting of rates is a legislative function. *Chiles v. Public Service Commission Nominating Council*, 573 So.2d 829, 832 (Fla. 1991). In applying the statutory review standards for ratemaking to the findings of fact the Commission was performing its proper legislative function. This case involves nothing more than a rate-setting Commission exercising its legislative authority by applying the relevant and appropriate law to the findings of fact, and balancing those factors necessary for consideration in determining a fair, just and reasonable rate for services. This case does not involve a broad effort to enrich the telephone companies at the expense of the public. Rather, as expressed by the Commission in its thorough and thoughtful Orders, the petitions were granted in an effort to fulfill the legislative directive to encourage the development of competition and promote the creation of the highest caliber of telephone services and service options for the people of the state of Florida.

A. Statutory Construction

Review of the Commission's Orders must necessarily commence with an analysis of the Commission's legislative charge. Section 364.164(1), Florida Statutes, provides that:

> 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).

The Appellants seek to place a construction on the statute that is not apparent from its face by use of selected snippets of the floor debate as being determinative of the intent of the Legislature and as the only means of interpreting the statute. The Commission's - and the Court's - consideration of such evidence is appropriate only in limited instances when the statute at issue suffers from some intrinsic ambiguity. Section 364.164, Florida Statutes, which establishes the exclusive criteria by which the Commission is to approve or deny rate rebalancing petitions, is not ambiguous.

It is well established that "[o]nly when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature." *Capers v. State*, 678 So.2d 330, 332 (Fla. 1996), citing *Florida State Racing Commission v. McLaughlin*, 102 So.2d 574, 576 (Fla. 1958); *see also, Verizon Florida, Inc. v. Jacobs*, 810 So.2d 906 (Fla. 2002) (holding the term "gross operating revenues" to be unambiguous in the context of calculating telecommunications regulatory assessment fees, thus disallowing consideration of extrinsic aids to construction); *Closet Maid v. Sykes*, 763 So.2d 377, 381 (Fla. 1st DCA 2000) (holding that the phrase "major contributing cause" as applied to injuries covered by workers' compensation was amenable to construction without resort to extrinsic aides); *Rhodes v. State*, 704 So.2d 1080, 1083 (Fla. 1st DCA 1998) (holding that the term "prior to the current offense" was unambiguous as applied to habitual offender sentencing, thus disallowing consideration of extrinsic aids to construction).

As applied specifically to the consideration of legislative history as an extrinsic aid, this Court and lower courts have uniformly held that consideration of the legislative history of an act, including excerpted floor debate, as an extrinsic aid to construction is improper in construing an unambiguous statute. *Coleman v. Coleman*, 629 So.2d 103, 104 (Fla. 1994) (holding the term "alimony obligation"

to be unambiguous, thus disallowing consideration of legislative history); *Silva v. Southwest Florida Blood Bank, Inc.*, 601 So.2d 1184, 1186-1187, 1188 (Fla. 1992) (holding the terms "diagnosis" and "treatment" to be susceptible to construction by their plain meaning); *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594, 599 (Fla. 1st DCA 2000) (holding that terms used in the 1999 amendments to Section 120.52(8), Florida Statutes, were clear and capable of construction using the dictionary, thus providing "no reason to add our own view of the legislative intent."); *Mayo Clinic Jacksonville v. Department of Professional Regulation, Board of Medicine,* 625 So.2d 918, 919 (Fla. 1st DCA 1993) (finding no ambiguity in a facility-based physician licensure statute, and thus no need to resort to legislative history or other rules of construction). Furthermore, jurisprudential restriction on the use of legislative history as an aide to statutory construction is so embedded that this Court has held that:

> Where, as here, the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction. As we have repeatedly noted,
>
> > "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." (citations omitted)

Lamont v. State, 610 So.2d 435, 437 (Fla. 1992).

Section 364.164(1)(a), Florida Statutes, is clear on its face that the "benefit" to residential consumers from rate rebalancing is that arising from the creation of a competitive marketplace for telecommunications services. Section 364.164(1)(a), Florida Statutes, does not state, or even imply, that the "benefit to residential consumers" must be a direct, financial benefit to each subscriber as suggested by the Appellants. Notwithstanding the breadth of the benefits allowed by the statutory standards, residential long-distance customers will see a direct benefit through lower long-distance rates and the elimination of in-state connection fees. *See*, Section 364.163(2), Florida Statutes; Petition Order at 57, R17:3365.

As set forth in the Orders, the benefit to residential consumers can be manifested in a number of different ways. The statute is not so ambiguous as to require or justify the consideration of extrinsic means of construction to decipher its meaning. Thus, the excerpts from legislative floor debates as to the meaning of the statute cannot be considered in light of the plain meaning of the statute.

To the extent this Court finds the statute to be ambiguous, as the Commission did, consideration of the extrinsic evidence does not alter the findings and conclusions set forth in the Orders. The courts have recognized that an interpretation of a statute by the agency charged with its implementation is among

the most reliable, accurate, and persuasive indicators of the proper construction of the statute. An agency's decision on mixed questions of law and fact "is entitled to 'increased weight when it is infused by policy considerations for which the agency has special responsibility." *Harloff v. City of Sarasota*, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991) (citations omitted). Such deference to an agency's construction of its enabling and implementing statutes has been uniformly applied by this Court to the interpretation of telecommunications statutes by the Commission. Thus, this Court has held that the Commission's interpretation of a statute it is charged with implementing is "entitled to great deference and will be approved by this court if it is not clearly erroneous." *Florida Interexchange Carriers v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996). The Court further held that "the party challenging the Commission's order bears the burden of overcoming those presumptions by showing a departure from the essential elements of law." *Id.* at 1270. In addition, it is well established that courts "will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous.' " *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447, 450 (Fla. 2003). Therefore, "unless this Court finds that the PSC acted outside the scope of its powers and jurisdiction . . . or its decision was 'clearly unauthorized or erroneous,' the PSC's decision will be

afforded deference." *Id*.; *see also BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla. 1998); *AmeriSteel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997).

With respect to the specific extrinsic evidence offered by Appellants, the Commission considered such evidence below and rejected its usefulness. This court should do likewise. The evidence recounted in the Appellants' briefs, especially that of Public Counsel, pertains to excerpts from the floor debate on the 2003 bill that became Section 364.164, Florida Statutes. Transcripts of floor debates are one of numerous items of extrinsic evidence that **may** be used by courts to determine the meaning of ambiguities in legislative enactments. However, as explained in a lengthy and well-reasoned analysis by the First DCA, excerpts from floor debate may be the most **unreliable** form of extrinsic evidence. In that regard, the First District stated that:

> It appears as though the trial court's misreading of the Act grew out of its misplaced reliance on comments made during legislative floor debate. This result shows the inherent difficulties in using such evidence to illuminate legislative intent. Commentators have frequently discussed the unreliability of statements made during floor debate:
>
> > Courts have generally refused to consider statements made during floor debate as evidence of legislative intent. Various reasons have been advanced for this rule.

> Some legislators may not have been present during floor debate. Often what is said in debate is for the benefit of constituents only and may be regarded by courts as self serving. Furthermore, supporters of a controversial measure may fear that too much explanation and discussion will cause its defeat, and thus they attempt to minimize debate.
>
> Robert M. Rhodes, John Wesley White & Robert S. Goldman, *The Search for Intent: Aids to Statutory Construction in Florida*, 6 *Fla.St.U.L.Rev.* 383, 396-397 (1978). (Footnote omitted.) As Federal Circuit Judge Kenneth Starr stated "[l]egislative history . . . has the potential to mute (or indeed override) the voice of the statute itself," Kenneth W. Starr, *Observations on the Use of Legislative History*, 1987 *Duke L.J.* 371, 375, and even encourage courts to engage in "high fiction in interpreting statutes." *Id.* at 378. In fact, as Federal Circuit Judge Patricia Wald has observed, it "sometimes seems that citing legislative history is still . . . akin to 'looking over a crowd and picking out your friends.' " Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L.Rev.* 195, 214 (1983).

Smith v. Crawford, 645 So.2d 513, 525, fn.8 (Fla. 1st DCA 1994).

In focusing on selective platitudes offered on the Senate floor, the Appellants ask this Court to limit its attention to the flat rate local service rates, as reflected in individual customer bills, that must inevitably rise when subsidizing support is withdrawn. However, as stated by the Commission in its Order, "[s]uch 'bill neutrality' is not required by the statute [Section 364.164, Florida Statutes]

and, in fact, would be inconsistent with its plain language." (Petition Order at 18, 31; R17:3308,3321) Furthermore, "bill neutrality" is impossible if subsidizing support for flat rate local service is withdrawn as required. (See Petition Order, at 17-18; R17: 3307-3308) Rather, the Commission directed its attention, as required by the statute, to **revenue** neutrality, i.e. that the telephone companies derive no greater revenue after rebalancing than they did prior to rebalancing. In this light, the selective legislative floor statements are completely irrelevant to the interpretation of Section 364.164, Florida Statutes.

In the present circumstances, the floor speeches extracted by the Appellants certainly demonstrate their unreliability as evidence of legislative intent. The very personal statements offered on the floor demonstrate individual motivations, opinions, or argument clearly proffered for the purpose of justifying one's vote and swaying public opinion on a complex piece of economic rate legislation. In context, this is political commentary not factual evidence of legislative intent. Accordingly, the Court should refuse to consider such unreliable evidence in any interpretation of this statute that may be required.

B. Evidentiary Support

In this case, the Commission analyzed the facts, weighed the relevant statutory factors, and determined that the petitions filed by Verizon, Sprint, and

BellSouth met the legislatively-created standards. The Commission devoted considerable effort to explaining the full evidentiary basis for its construction of the "benefit of residential consumers" provision in Section 364.164(1)(a), Florida Statutes. Commencing on page 15 of the Petition Order, and going through page 33 (R17:3305-3323), the Commission performed a clause-by-clause analysis of the 26-word paragraph. Its analysis completely and exhaustively considered and discussed the factual and statutory bases for its construction of the statute and its application to the Commission's decision, and by so doing completely refuted the central premise of the Public Counsel's argument, i.e. that "the Commission simply ignored the harm to residential customers in concluding that they would benefit from the petitions." (Amended Initial Brief of the Citizens, at 26).

Some of the most compelling, real-world evidence of record relied upon by the Commission in making its decision was offered by Knology's witness, Mr. Felix Boccucci. As is reflected in the record below, Knology is a competitive local and long distance telephone company. (T8:745) Knology presently operates in eight metropolitan markets in five states in the Southeastern United States, including Florida. (T8:750)

Knology specializes in the offering of a "bundle" of voice, video, and data services, all included in a single bill to the customer. More specifically, Knology

has a product offering that includes local and long distance telephone service, cable television, and data service that offers high-speed bandwidth access to the Internet. (T8:751-756)

In the mid-1990s, in response to the 1996 passage of the Federal Telecommunications Act, Georgia and Alabama moved to rebalance rates to enhance competition. Knology responded by expanding its operations in those states. (T8:774-775) In 1997 Knology expanded to Panama City, Florida, taking the calculated risk that Florida would modernize its local telephone rate structure as George and Alabama had done. But the anticipated rebalancing of rates in Florida has not yet become reality, which has prevented the company from attracting the necessary capital to enhance its services and expand its markets in Florida. (T8:758-763; T8:778-779) For example, before the passage of the Florida rebalancing statute in 2003, Knology elected to expand into Knoxville, Tennessee rather than Tallahassee due to the inability to charge a more competitive and realistic price for local telephone service in Florida. (T8:779) However, on the basis of the 2003 Florida rebalancing statute, Knology purchased Verizon's media ventures fiber network in Pinellas County and has begun other expansion plans for Florida. (T8:748-752, 774)

The benefits to consumers of real competitive choice were well documented in the record below. When Knology first entered the Panama City area, the incumbent telephone company lowered prices, improved services, and provided an overall greater benefit to the consumer. When faced with such competition, incumbent telephone companies often waive connection charges (which can cost $30.00) and other ancillary charges. Customers are also afforded greater respect and a more prompt response. (T8:758-768)

In terms of the net financial benefit from increased competition, Mr. Boccucci testified that in Florida markets without competition, cable TV charges average $45.00 per month. When Knology enters the market, that rate often decreases to $30.00. If rate rebalancing occurred for local telephone service and local rates were increased from $9.00 to $15.00, consumers in that competitive environment could pay less for the overall bundle of services due to lower cable charges ($30.00 for cable plus $15.00 for local service equals $45.00 per month). If, to the contrary, the local subsidies are not removed from the current local telephone rates and competitors are without an economic incentive to enter or expand in Florida, consumers will end up paying more per month for those same services ($45.00 for cable plus $9.00 for local equals $54.00 per month). (T8:761-766)

The record reflects that the competitive choices offered by companies like Knology will extend to Florida's elderly population and others on reduced or fixed incomes. Again, Knology's actual experience in Florida shows that approximately 83% of its customers have both local telephone and cable TV services. Notably, approximately 65% of Florida's present Lifeline customers purchased both local and other ancillary services like cable TV. (Ex. 84.) These facts, combined with the economic and analytical testimony offered by Dr. Mayo, provided the considerable record support for the Commission's findings that Florida consumers will receive a net economic benefit as a result of the implementation of the rebalancing Orders. (T8:765-772)

A review of the Orders as a whole reveals that the Commission, using the factual record developed at the hearing, thoughtfully and carefully considered each of the statutory review criteria, provided a full analysis of **all** of the evidence submitted by each party, stated the reasons why the evidence was weighed as it was, and ultimately drew conclusions and recommendations based on the evidence. Rather than focusing on a single, non-statutory reason for its action, it is the Commission's legislative responsibility to consider all factors, merge and reconcile facts pertinent to the statutory factors, apply the relevant law and make a judgment as to a reasonable rate. That is the duty of a finder-of-fact, a duty that in this case

was performed in the open, was fully and completely explained, and should be upheld by this Court. In viewing the ratemaking criteria as a whole, the Commission has appropriately performed its legislative ratemaking responsibility in this case in a thorough and thoughtful manner, and concluded that the ILEC Petitions benefited customers, including residential consumers. Thus, the Commission's Orders should be affirmed by this Court.

II. The Commission Did Not Err in Concluding that the ILEC Petitions "Induce Enhanced Market Entry" within the meaning of Section 364.164(1)(b), Florida Statutes

The Attorney General argues that the Federal Circuit Court's decision in *U.S. Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004), requires reversal of the Commission's Orders and, alternatively, that the Orders are unsupported by competent, substantial evidence. The Attorney General's argument is flawed as to both issues.

A. The Commission Adequately Addressed *U.S. Telecom*

The Attorney General, in Issue I.A. of his Amended Initial Brief, argues that the Commission failed to adequately consider the speculative effect on rate rebalancing of the D.C. Circuit's March 2, 2004, opinion in *U.S. Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir.

2004), filed with the Commission as part of Appellant's Motion for Reconsideration on April 20, 2004.

As an initial matter, it must be recognized that the effect of the *U.S. Telecom* case on any issue that was considered by the Commission is entirely speculative. While the Court disagreed with the FCC's justification for its list of national UNEs, the court did not preclude the FCC from unbundling those same UNEs in its remand proceeding. Indeed, the FCC has already responded to *U.S. Telecom* by publishing interim regulations for unbundling requirements generally designed to maintain the *status quo*, and announcing its intent to adopt final rules governing the provision of UNEs. *In the Matter of Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, CC Docket No. 01-338 (August 20, 2004). In response, the D.C. Circuit issued an Order holding the mandamus proceeding in abeyance until January 4, 2005, to give the FCC the opportunity to conclude its rulemaking. *United States Telecom Association vs. FCC, et al.*, Case No 00-1012 (Order entered October 6, 2004).[1]

In recognizing the speculative effect of the *U.S. Telecom* case, the Commission found that while the case "does muddy the waters as to the future of

[1] While the FCC Interim Rules and D.C. Circuit decisions are not a part of the record in this case, since they were issued after the Order on Motions for Reconsideration, the Court can take judicial notice of such orders.

certain UNEs," it "does not rise to the level that would necessitate that we reconsider our decision," and as a result "does not require a change to our conclusions in this case." (Reconsideration Order at 8-9, R19:3825-3826) As evidenced by the numerous cases that have appeared before this Court construing the legislative restructuring of the telecommunications industry in Florida, Chapter 95-403, Laws of Florida, and the amendments thereto, and the effect of the federal Telecommunications Act of 1996, the standards applicable to the provision of local, intrastate, and interstate telecommunications service have been in considerable flux. Decisions construing the state and federal laws shift the competitive balance between incumbents and competitors, sometimes subtly and other times dramatically. If **absolute** certainty regarding the future effect of any individual rule, regulation, or administrative or judicial decision was required before Commission orders could become final, actions of the Commission would grind to a halt. For that reason, this Court has upheld the authority and the obligation of the Commission to respond to those shifts in the telecommunications landscape, and has traditionally allowed the Commission considerable discretion in the exercise its expertise and judgment. Moreover, this Court has recognized "the well-established rule that 'orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the

Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.'" *GTC, Inc. v. Garcia*, 791 So.2d 452, 456 (Fla. 2000) (citations omitted).

In this case, the Commission reviewed the potential effect of the *U.S. Telecom* case, provided a full analysis of the effect of that case to the issues of this proceeding, and concluded that in its current posture, the case did not affect the outcome of the Commission's Petition Order. That determination should be upheld by this Court.

B. The Commission's Orders Are Supported by Competent, Substantial Evidence

The Attorney General argues, in Issue I.B. of his Amended Initial Brief, that there was no competent, substantial evidence in the record to support the Commission's conclusion that the ILEC petitions "induce enhanced market entry" within the meaning of Section 364.164(1)(b), Florida Statutes. The Appellant's argument on that point is incorrect.

In its Orders, the Commission concluded that the aggregate $343.5 million of artificial support for basic local telecommunications service provided by intrastate access charges essentially acts as an artificial subsidy of local service that "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" (Petition Order at 16, R17:3306), and that "the elimination of such support will induce enhanced market entry into the local exchange market." (Petition Order at 16, R17:3306) Ample record evidence supports the Commission's findings and conclusions on that issue.

In reaching its conclusion that artificial support of local service provided by access charges impedes competition in the residential local exchange market, the Commission cites, in its Orders, to testimony provided by all parties, including the Appellants. Its analysis completely and exhaustively considered and discussed the factual bases for its decision. Even the Attorney General recognized that evidence was provided in the record that supported the Commission's conclusion (Attorney General's Amended Initial Brief, at 36, 38) arguing only that other "real record evidence" (Attorney General's Amended Initial Brief, at 38), or "common sense" (Attorney General's Amended Initial Brief, at 40) tends to refute it.

Whether there is evidence in the record that could support the Appellants' position is not the issue before this Court. Rather, the issue is whether there is any competent, substantial evidence in the record to support the findings of the trier of fact, **even if other evidence in the record contradicts the findings**. *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447, 453 (Fla. 2003); *Citizens of Florida v. Public Service Commission*, 435 So.2d 784, 788 (Fla.1983). As this

Court has held, “[i]t is not this Court's function on review of a decision of the Public Service Commission to re-evaluate the evidence or substitute our judgment on questions of fact.” *City Gas Co. of Florida v. Florida Public Service Commission*, 501 So.2d 580, 583 (Fla. 1987).

As to the nature of the evidence sufficient to support a finding, this Court has recently reaffirmed the construction given the term "competent substantial evidence" standard in *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957), wherein the Court held:

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

Verizon Florida, Inc. v. Jaber, ___ So.2d ___ 29 Fla. L. Weekly S459, fn.1 (Fla. 2004). Thus, the standard of evidence is one of reasonableness, not one of absolute certainty as suggested by the Appellants.

The Commission's recognition, discussion, and consideration of the testimony of Mr. Ruscilli, Dr. Gordon, Dr. Banerjee, Dr. Staihr, Mr. Boccucci, Dr. Mayo, and Mr. Fonteix (Petition Order at 34-36, R17:3326-3326) demonstrates the existence of competent, substantial evidence in support of its decision. In addition, the Commission recognized, discussed, and considered the testimony of Appellants' witnesses Mr. Ostrander, Dr. Gabel, and Mr. Cooper in its determination of the facts. (Petition Order at 37, R17:3327) The Appellants did not, as they have the burden to do, demonstrate that each of the factual underpinnings for the Commission's Orders were unsupported by competent substantial evidence in the record. The fact that each of the Appellants consume so much of their briefs regurgitating those narrow portions of the factual record that support their view only demonstrates their real intent - to have this Court **re-weigh** the evidence - which is not the function of appellate review. Therefore, the Order of the Commission must be affirmed.

III. The Commission Did Not Err in Addressing the Extent to which Section 364.01(4)(a), Florida Statutes, Applies to Rate Rebalancing

The Attorney General argues, in Issue III of his Amended Initial Brief, that the Commission failed to consider and apply Section 364.01(4)(a), Florida Statutes, in its Orders. However, the Attorney General fails to address the issue set forth by the Commission as to the construction of Section 364.01(4)(a) in light of the subsequent enactment of the statute at issue in this case, Section 364.164, Florida Statutes.

Section 364.01, Florida Statutes, entitled "Powers of commission, legislative intent," is essentially a general policy statement regarding telecommunication services in Florida. This section offers broad statements in support of the public interest and competition by "ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation" Section 364.01(4)(c), Florida Statutes. Section 364.01, Florida Statutes, contains no independent rulemaking or standard-setting authority, and requires no action on the part of the Commission to implement its terms.

In contrast, Section 364.164, Florida Statutes, is a very specific expression of the will of the Florida Legislature to eliminate artificial subsidization of local telecommunication service. It grants specific authority to the Commission to take action on petitions for rate rebalancing, establishes specific criteria to be

considered, and establishes definitions for terms such as "revenue neutral" that define the parameters for the approval of petitions. Section 364.164, Florida Statutes, enacted in 2003, establishes a more recent, more specific expression of the will of the Legislature regarding rate rebalancing than does Section 364.01(4), Florida Statutes.

As recognized by this Court, in a case cited by the Commission:

> a specific statute covering a particular subject area **always** controls over a statute covering the same and other subjects in more general terms. *Adams v. Culver*, 111 So.2d 665, 667 (Fla.1959); *State v. Billie*, 497 So.2d 889, 894 (Fla. 2d DCA 1986), *review denied*, 506 So.2d 1040 (Fla.1987). The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. *Floyd v. Bentley*, 496 So.2d 862, 864 (Fla. 2d DCA 1986), *review denied*, 504 So.2d 767 (Fla.1987) (emphasis supplied).

McKendry v. State, 641 So.2d 45, 46 (Fla. 1994); see also *Stoletz v. State*, 875 So.2d 572, 575 (Fla. 2004). The *McKendry* Court continued in its analysis to provide that "[f]urther, when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent." *Id.* (citations omitted); see also *Askew v. Schuster*, 331 So.2d 297, 300 (Fla. 1976).

Because Section 364.164, Florida Statutes, is a more specific and more recently enacted statute on the standards for approving petitions for rate rebalancing, Section 364.01(4)(a), Florida Statutes, is inapplicable to the process

regarding the petitions. Therefore, the specific provisions of Section 364.164(1), Florida Statutes, which require the Commission to reduce intrastate switched network access rates in a revenue-neutral manner, prevail over Section 364.01(4)(a), Florida Statutes, which provides a general expression of intent regarding public health, safety, and welfare. To conclude otherwise would render Section 364.164(1), Florida Statutes, meaningless.

Even if Section 364.01(4)(a), Florida Statutes, was found to be applicable as establishing a standard for review, the Commission fully harmonized and addressed its effect. The Commission determined that "[i]n granting the Petitions, we have also considered the provisions of Section 364.01(4)(a) and concluded that our action will preserve reasonable and affordable prices for basic local service." (Reconsideration Order at 5; R19:3822) The Commission specifically identified the factual evidence upon which it based its finding, including:

> 1) Experience from other states shows that approval of the ILECs' proposals will have little, if any, negative impact on the availability of universal service. (Order at 18.)
>
> 2) The record shows that basic local service will continue to remain affordable for the vast majority of residential customers. (Order at 18.)
>
> 3) The amended Lifeline provisions in Section 364.10 will help to protect economically disadvantaged

> customers from the effect of local rate increases. (Order at 19.)

(Reconsideration Order at 6, R19:3823)

Although the Appellants identified other evidence allegedly supporting its position, they have failed in their burden to demonstrate that **each** of the factual underpinnings for the Commission's Orders were unsupported by competent substantial evidence in the record. Therefore, the Orders of the Commission on appeal must be affirmed.

CONCLUSION

Consistent with its statutory obligations and responsibilities, the Commission weighed the facts contained in the evidentiary record of this proceeding, applied the appropriate elements of law to its findings, and performed its legislative duty in approving the rate rebalancing petitions. In so doing, the Commission properly refused to place undue emphasis on any single factor, but rather considered all of the factors as a whole in approving the rate rebalancing petitions. Based on its review and balancing of the record in this proceeding and the statutory factors applicable, the Commission's action was fair, reasonable, based on competent and substantial evidence, and in accordance with applicable elements of law. The Orders on appeal should thus be affirmed by the Court.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Response to AARP's Motion to Relinquish Jurisdiction has been prepared using Times New Roman 14-point font.

_____
Floyd R. Self

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery and/or U. S. Mail this third day of November, 2004.

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