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 BY APPELLANT CHARLES J. CRIST, JR., ATTORNEY GENERAL, STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

On December 24, 2003, the Florida Public Service Commission approved a record $343 million increase in Floridians' local telephone rates, 88% of which will fall upon residential customers. Although the telephone companies have created a record of over 10,000 pages in their attempts to justify the increases, they have not submitted evidence a reasonable mind would accept as adequate proof that the increases will: induce market entry, benefit residential customers, or result in reasonable and affordable basic telephone service for all Floridians. Because the telephone companies failed to meet their burden in these areas, the Commission's decision granting the increases should be reversed.

Background

Since 1911, when the Florida Legislature first mandated that telephone service be regulated, the purpose and focus of the regulation has been to protect consumers. *See* Ch. 6186, Laws of Fla. (1911) (directing the Railroad Commissioners to ensure telephone rates were "in each and every case just, fair and reasonable"). The Legislature retained its focus on consumer protection in the near-century that followed, including in 1995 when it substantially modified telephone regulation to encourage local competition. In 1995, the Legislature found competition for local telephone service is "in the public interest" and will provide customers freedom of

choice, and encourage new services, innovation, and investment. Ch. 95-403, § 5, Laws of Fla. (1995). However, the Legislature also found the transition of local service from a monopoly to competitive service "will require appropriate regulatory oversight to protect consumers," and required the Florida Public Service Commission (PSC) to protect the public "by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices," and "by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation." Ch. 95-403, § 5, Laws of Fla. (1995). The PSC remains obligated to carry out these duties today. § 364.01(4)(a), (c), Fla. Stat. (2003).

Competition for local telephone service in Florida is developing very slowly. Although more than 400 companies have sought and received certificates permitting them to offer local telephone service in Florida, the local market remains dominated by the same three companies that provided local service prior to 1995: BellSouth Telecommunications, Inc. (BellSouth), Verizon Florida Inc. (Verizon), and Sprint-Florida, Inc. (Sprint) ("local incumbents" or "petitioners"). (Ex. 15 at 8-9). Competitors comprise just 16% of the total local market, and only 9% of the local

residential market. (Ex. 15 at 4,7).[1] The local incumbents were the petitioners below, and are the primary appellees before this Court.

The local incumbents each own the existing connections between their networks and their customers' homes or office buildings. (Ex. 15 at 5). Therefore, a competitor seeking to provide traditional telephone service using existing wiring must either purchase service from a local incumbent and resell it at a higher rate ("resale"), or lease access to individual elements of an incumbent's network to create an end-to-end circuit ("unbundled network element-platform" or "UNE-P").[2] (Ex. 15 at 5, 13, G-4). A competitor may also build its own network facilities ("facilities-based"), which might use nontraditional telephone technology such as cable or the Internet. (Ex. 15 at 5). Facilities-based competition is more prevalent in metropolitan areas,

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

Example	Explanation
R1:32	Record volume # : clerk's page #
T1:1	Hearing transcript volume # : court reporter's page #
Ex. 79	Hearing exhibit #
Confid. 502	Documents labeled confidential on index w/clerk's page #
Corresp. 722	Correspondence w/clerk's page #

[2]Federal law requires incumbents to provide "access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . and in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). This provision is implemented by rules promulgated by the Federal Communications Commission (FCC).

where there are higher population densities and more high-margin business customers. (Ex. 15 at 19). Competitors often enter the market using resale or UNE-P while working toward building and operating their own facilities-based services. (Ex. 15 at 5). Of the 432 companies authorized to compete for local telephone service in Florida and the 150 actually doing so, only nine offer local services to residential customers using their own facilities. (Ex. 15 at 4, 55, A-1 to A-6).

The Act

Last year, the Florida Legislature passed the "Tele-Competition Innovation and Infrastructure Enhancement Act" ("Act"). Ch. 2003-32, Laws of Fla. The Act permits a local incumbent to increase its basic local rates if the incumbent can prove the rate increase will, in addition to other effects, increase local competition and benefit residential customers. Ch. 2003-32, Laws of Fla.; § 364.164, Fla. Stat. (2003). The Act also requires an incumbent seeking to increase local rates to reduce the rate it charges long distance carriers to connect long distance calls within Florida ("*intra*state access rate"), to be equal to the rate it charges long distance carriers to connect long distance calls between Florida and other states ("*inter*state access rate"). Ch. 2003-32, Laws of Fla.; § 364.164, Fla. Stat. (2003). In evaluating a local incumbent's petition under the Act, the PSC is required to consider whether granting the incumbent's 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) [Bring] intrastate switched network access rate[s] . . . to parity over a period of not less than 2 years or more than 4 years.
>
> [Subsection 5 defines "parity" as when a local incumbent's *intra*state access rate is equal to its *inter*state access rate.]
>
> (d) Be revenue neutral as defined in [subsections 2 and 7].
>
> [These subsections require that the local incumbent's combined revenues from basic local service charges and intrastate access charges remain the same before and after the rate adjustments permitted by this section.]

§ 364.164(1)(a)-(d), (2), (5) & (7), Fla. Stat. (2003) (emphasis added).

The Act requires long distance carriers who receive the benefit of the reduced intrastate access rates to "decrease [their] intrastate long distance revenues by the amount necessary to return the benefits of such reduction to both [their] residential and business customers." § 364.163(2), Fla. Stat. (2003). The Act does not require the long distance carriers to maintain these rate reductions for any period of time.

After a local incumbent has reached parity under the Act, its basic local rates are no longer subject to PSC regulation. § 364.051(6), Fla. Stat. (2003). An incumbent can then raise its rates for basic services by 6% per year until there is one competitor in the incumbent's market, at which time the incumbent can raise its basic rates up to 20% per year. § 364.051(5)(a), Fla. Stat. After parity, regulation of the incumbent's service quality is also reduced. § 364.051(6), Fla. Stat. (2003).

The Commission Proceedings

On August 27, 2003, the local incumbents each filed petitions under the Act seeking to raise their rates for basic local telephone service while reducing their intrastate access rates. (R1:54-76, 77-94, 95-100). The proceedings involving the three petitions were consolidated. (R1:194).

The next day, the Office of the Public Counsel intervened on behalf of the Citizens of Florida. (R1:124-25, 137-38, 156-57). AARP intervened shortly thereafter. (R2:268-69). The Public Counsel moved to dismiss the petitions because they proposed to implement the rate adjustments over a one-year period rather than the minimum two-year period permitted by the Act. (R1:165-70, 172-77, 179-84). In response, the petitioners claimed the rate adjustments need only be conducted in two "annual adjustments" or "installments." (R2:227, 243). The PSC found the petitioners' position was based on a "tortured reading of the statute" and granted the

motion to dismiss, allowing the petitioners to file amended petitions complying with the Act's timing requirements within 48 hours. (R2:357-58; R5:871-89). The petitioners did so. (R2:352-56, 359-77, 378-401).

AARP then moved to dismiss the amended petitions for failure to join indispensable parties. (R5:900-09). AARP asserted that in order for the PSC to determine whether the petitions benefit residential consumers as required by Section 364.164(1)(a), the PSC must examine the manner in which long distance carriers would reduce the rates on intrastate calls. (R5:900-09). The PSC denied AARP's Motion to Dismiss, finding the Act does not mandate consideration of the impact on the toll market but also does not preclude such consideration. (R9:1848-49; R13:2454-67; R17:3302).

The PSC opened a separate docket to address issues regarding the "flow through" reductions to long distance customers, which it subsequently consolidated with the docket involving the local incumbents' petitions. (R8:1454-56; R10:1923-24). Three long distance carriers were granted leave to intervene in the consolidated proceeding on the amended petitions: MCI WorldCom Communications, Inc. (MCI), AT&T Communications of the Southern States, LLC (AT&T), and BellSouth Long Distance, Inc. (R8:1608-09; R12:2383-91). Knology, a company which competes for local telephone service in the Panama City area, also was permitted to intervene.

(R8:1445-48; R12:2383-91).

The Attorney General intervened in the proceeding based on his interest in upholding the intent and public purpose of the Act. (R12:2365-70; R14:2779). The Attorney General also filed a contemporaneous Motion for Summary Final Order, arguing the petitions and evidence submitted in support did not raise a genuine issue of fact as to whether the petitions would benefit residential consumers. (R12:2371-76). The Public Counsel and AARP joined in the Attorney General's motion. (R14:2679, 2718-20). The PSC denied this motion. (R17:3305).

Fourteen public hearings were conducted throughout the state, at which more than 250 individuals spoke. (R19:3811). The speakers overwhelmingly opposed the incumbents' petitions. (R19:3811). Additionally, the PSC received over 1,800 pages of written correspondence relating to the petitions, nearly all of which was negative. (Corresp. 1-1851).

The Evidence

The PSC conducted a final hearing on the local incumbents' petitions December 10-12, 2003. The majority of the direct and rebuttal witness testimony was prefiled. The pertinent evidence is summarized below.

1. Inducing Market Entry

a. *UNE-P*

The evidence demonstrated that of the various methods for entering the local telephone market, the method of choice in Florida is through leasing unbundled network elements from an incumbent, or "UNE-P." (T5:482). Nearly three-quarters of residential lines served by competitors are served through UNE-P. (Ex. 15 at 17). In its own 2003 report on local competition in Florida, the PSC acknowledged an ongoing debate about whether competitors are impaired in the market without access to UNE-P. (Ex. 15 at 17). The PSC concluded that no matter the debate's outcome, UNE-P is a "significant element" in the business plans of competitors that serve the mass market, and the availability of UNEs at reasonable prices is a "key determinant" of competitive market entry. (Ex. 15 at 14, 17). The report reflected input from 344 competitors. (Ex. 15 at 55). Their most commonly reported barrier to competition in Florida was UNE pricing. (Ex. 15 at 56). The other barriers reported were problems with interconnection agreements, service outages, billing, and high connection charges. (Ex. 15 at 56). The competitors did not mention basic local rates as a barrier to entry. (Ex. 15 at 56). At the hearing, Dr. David Gabel testified on behalf of Public Counsel that the lack of competition in Florida is more accurately explained by high UNE-P prices than by low basic rates. (T13:1575-76).

Numerous witnesses testified that in deciding whether to enter a new market competitors will consider all factors affecting overall profitability, including the cost of UNE-P lines. (T2:216-17; T5:482; T12:1508-09; T13:1581-84; Ex. 15 at 11-12). A witness for AT&T, the only UNE-P-based competitor to provide testimony at the hearing, said "if UNE rates increase, the likelihood of market entry decreases proportionately." (T10:1279; *see also* T11:1292). Although he asserted that raising basic local rates is essential to increasing market entry, he testified that such increases would not by themselves be sufficient to bring about market entry. (T10:1279-80).

A PSC analyst testified there would be a "strong disincentive" for a competitor to enter a market where UNE-P costs exceed the price for local service. (T12:1525-26). >>**CONFIDENTIAL EXCERPT 1**<<.[3]

b. *Theoretical Evidence*

Several of the incumbents' witnesses testified in favor of the petitions based on general economic theory. Economist Kenneth Gordon, the incumbents' lead witness regarding the effect of the petitions, opined that the petitions would induce market entry based upon the generic economic proposition that "increasing the price of a

[3]Pursuant to this Court's order dated September 9, 2004, references to information designated by the PSC as confidential are contained in a separate Confidential Appendix filed simultaneously with this Amended Initial Brief.

service . . . will make for a more attractive market for actual and potential competitors." (T2:145). Dr. Gordon explained, "[h]olding all other factors constant," when the price of a service increases, the cash flow analysis makes the investment in that service more profitable and thus more attractive. (T2:146). He acknowledged the theory is "rather simple . . . if there are more profits to be made, there will be more [competitive] entry." (T2:215-16). His conclusion is not based on any Florida-specific research indicating that competition will increase. (Ex. 5 at 194). In fact, the theory is not limited to regulated utilities, but is "just a general proposition in industry behavior." (T2:145, 215-16).

Other witnesses testified in favor of the petitions on similar grounds. (Banerjee, T5:478-80) (it is a "fundamental precept of market competition" that competitive market entry by new providers depends on, "among other things," the rates incumbents charge); (Danner, T8:815-16) ("Prices that more closely reflect underlying costs . . . will make the local exchange market more attractive to competitors and induce enhanced market entry."); (Ruscilli, T3:283) ("Raising local exchange prices to end users makes those end users more attractive to competitors."); (Staihr, T9:1037) ("Rebalancing rates for basic local service will create a situation where competitors will find that, on average, a larger percentage of the residential market is financially attractive to serve."); (Mayo, T10:1168-69) ("While the entry decisions of

new [local competitors] are multifaceted, economic theory clearly indicates that the decrease in overpriced access charges together with the corresponding elevation in the retail price of residential service in Florida will positively affect the likelihood of market entry."). This testimony was all based on general theory rather than on any analysis of the specific competitive environment in Florida.

c. *Empirical Evidence*

As "empirical evidence" that granting the petitions will make the local telephone market more attractive, Dr. Gordon claimed a study by his colleagues found a "significant and positive association between states that have more 'balanced' tariffs and residential competition." (T2:150; Ex. 5 at 148-167). Dr. Gordon stated this study controlled for factors that varied between the states and concluded that "rebalancing" tariffs by 10% led to an increase in residential competition of 9% or 13%. (T2:150). Although the study did not consider any Florida-specific data, Dr. Gordon opined its significance to Florida is "if consumers and producers in Florida have the same characteristics generally as people in the rest of the United States and behave the same way in response to economic incentives, this will tend to be the case." (T2:215).

Although Dr. Gordon testified very generally that rate rebalancing in Massachusetts, Illinois and Pennsylvania increased competition, he provided no

documentary or statistical support for this statement. (T3:248-51; Ex. 5 at 196-97). Further, he acknowledged that other states' experiences qualified as mere "anecdotal evidence" because one couldn't determine whether factors other than the rebalancing were affecting competition. (T3:243). He explained, "a before or after scenario in a single state, while helpful, is difficult to draw strong inferences from." (T3:243; *see also* Ex. 8 at 51, where Dr. Gordon said any conclusion based on effects of rebalancing in other states would be "subject to serious doubt").

AT&T witness Wayne Fonteix testified that Michigan and Georgia experienced vibrant competition after they lowered intrastate access charges and required "true" UNE rates. (T10:1261). However, Mr. Fonteix acknowledged competitors will not have the same incentive to enter the local market in Florida because Florida's UNE rates are higher than in Michigan and Georgia. (T11:1292).

The only actual record evidence comparing Florida with other states that have rebalanced local rates and intrastate access fees was provided by AARP witness Mark Cooper. This evidence indicates competition did not grow any faster in states that implemented rebalancing than in Florida during the same period. (T14:1845; Ex. 83 at MNC-7).

d. *Competitor Testimony*

Of the 432 companies permitted to compete for local service in Florida, just two

testified at the hearing: Knology and AT&T.

(1) *Knology*

Knology purchased a base of cable customers in Panama City in 1997, and began competing for local telephone service in the Panama City area in 1998 by offering facilities-based local and long distance service "bundled" with cable and data services. (T8:749-751, 764, 790). Although Knology does not focus its marketing efforts on standalone basic telephone service, Knology's witness asserted that the basic local rates in Florida have prevented Knology from attracting capital necessary to expand elsewhere in Florida. (T8:754, 759). The witness testified that by combining telephone, internet, and cable services, customers have an opportunity to lower their combined charges for these services. (T8:754). Knology currently serves 15-20,000 residential customers in the Panama City area. (T8:787-88). The witness could not commit to expanding Knology's offerings in Florida if the petitions are granted. (T8:782).

Knology has purchased cable and data assets from Verizon Media in Pinellas County and intends to offer bundled telephone, cable, and data services there. (T8:749). It asserts that "[t]he prospect of rate rebalancing was a significant factor in Knology's consideration of this purchase." (T8:759). However, Knology will not seek to rescind the Verizon purchase if the local incumbents' petitions are ultimately

denied; nor will it cease offering its services in the Panama City area if the petitions are denied. (T8:775, 776).

(2) *AT&T*

AT&T's witness testified that, after the Act was passed, AT&T entered the local residential telephone market in Florida. (T10:1256, 1266). Because its service to the mass market is UNE-P based, it selected markets with high density and low UNE rates. (T10:1266, 1280). The witness would not commit to entering additional markets if the petitions are granted. (T10:1279). After the hearing, AT&T reversed course with respect to competing in the local residential market, announcing that it "is shifting its focus away from traditional consumer services such as wireline residential telephone services, and . . . will no longer be competing for residential local . . . customers." *See* News Release, AT&T, *AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets* (July 22, 2004), *available at* www.att.com/news/item/0,1847,13163,00.html.

2. Financial Impact of Petitions

The evidence established the local incumbents' petitions will increase basic local service rates for residential customers between $3.50 and $6.86 per month,

generating a total revenue increase to the three local incumbents of $343 million.[4] (T3:273; T6:616; Ex. 68 at JMF-12). The evidence further established that residential customers will pay at least 88% of this $343 million increase. (T3:273; T6:616; Ex. 68 at JMF-12). The two larger incumbents, BellSouth and Verizon, will apply their increases in recurring rates to customers who subscribe to basic local service only and do not subscribe to a "bundled" package or plan. (Ex. 8 at 8; Ex. 11 at 6). Even if the petitions succeed in increasing local competition, basic local rates are not anticipated to fall in the long run. (T5:568; T12:1513-14).

While residential customers will pay the bulk of the local rate increases, the vast majority of the long distance reductions will flow through to businesses. The three major long distance carriers anticipated passing through reductions to residential customers as follows:

Long Distance Carrier	% Pass-Through to Residential Customers
AT&T	**CONFIDENTIAL EXCERPT 3**
Sprint	**CONFIDENTIAL EXCERPT 3**
MCI	**CONFIDENTIAL EXCERPT 3**

Verizon Long Distance, which is concentrated in Verizon's local territory and serves

[4]**CONFIDENTIAL EXCERPT 2.**

only the residential and small business market, expects approximately >>**CONFIDENTIAL EXCERPT 4**<< of the reductions to flow through to residential customers. (T12:1476-77, 1490, 1493; Confid. 664). For average residential customers, the increases in local rates will exceed the reductions in long distance rates. (T13:1702-11; Ex. 79 at BCO-2).

3. Qualitative Effects of Petitions

The evidence showed >>**CONFIDENTIAL EXCERPT 5**<< and that it is no longer appropriate to view basic local service in isolation. (*E.g.*, T8:770; T10:1271; Confid. 1516).

There was general testimony that competition causes providers to offer new bundles of services that have more value to consumers. Dr. Gordon, the incumbents' economist, testified that "consumers will be better off because they will be consuming a different mix of telecommunications services that provides more value than they are currently receiving." (T2:134-35). Dr. Banerjee, BellSouth's economic consultant, testified that customers "can" benefit from the petitions through increased choice of providers and services. (T5:564). He said the indirect benefits are not measurable because it is hard to anticipate how individual customers will react to these factors. (T5:564). Carl Danner, a consultant for Verizon, testified that consumers will get "increased consumer welfare" by increasing long distance usage in response to lower

long distance rates and by new service options that will become available through competition. (T8:820-21; T9:945-46). John Ruscilli, a BellSouth employee, testified the alleged benefits to residential customers will be the new choices of providers and services additional competition will bring. However, he could not identify any such benefits or services. (T3:290-91; Ex. 8 at 47, 49).

A PSC analyst testified that a new offering is only "a benefit to those consumers who find [the new offering] to be an attractive service offering." (T12:1527). He explained it is not necessarily a positive outcome for consumers to have the opportunity to switch to alternative services that provide more features but are also higher-priced. (T12:1513, 1517-18). Verizon's regulatory director acknowledged that customers who cannot afford to pay a higher rate will not benefit from a choice of providers or services if the choices are more expensive than they can afford. (T7:688).

4. Reasonableness and Affordability

Many citizens who spoke at the public hearings or wrote to the PSC said they were on fixed incomes and could not afford the rate increases. (*E.g.*, Corr. 25, 78, 87, 376, 436-37, 442, 448, 1006-07, 1019, 1031, 1063, 1073, 1114-15, 1186, 1190, 1196, 1227, 1243, 1250, 1252, 1269, 1271, 1277, 1279, 1281, 1290, 1303-04, 1312, 1315-16, 1323, 1325-26, 1330, 1335-36, 1338, 1344, 1351). Many citizens also said the rate increases would force them to choose between telephone service or purchasing food or medication. (*E.g.*, Corr. 75, 83, 95, 96, 111, 157, 292, 307, 395, 448, 1015, 1137, 1150, 1250, 1252, 1275, 1336, 1407, 1517, 1562, 1687). The PSC staff opined, without citation of authority, that the concerns raised by the public were not "representative of the residential customer population as a whole." (T16:1984-85).

The citizen testimony also included those who said they would have to discontinue service if the rate increase was implemented. (*E.g.*, Corr. 53, 56, 375, 490, 539, 589, 608, 611, 1006, 1256, 1266, 1315, 1321, 1322, 1325, 1333, 1337, 1402, 1443, 1496, 1520, 1526, 1623, 1666). **>>CONFIDENTIAL EXCERPT 6<<**

A Sprint witness characterized a 1% loss in residential lines in the six months following a rate increase in Ohio as a "minor decline." (T9:1101). A similar result in Florida would be a loss of 80,000 lines. (*See* Ex. 15 at 8, showing approximately 8 million residential lines in Florida). Dr. Gordon testified residential rates were

increased in Massachusetts and Maine with little or no impact on residential telephone subscribership levels. (T2:162-64; T3:253). Carl Danner testified local rate increases in California caused "no harm to universal service and no customer outcry." (T8:890-91; *see also* T9:959-61).

An economic consultant for BellSouth testified basic local service is extremely price-inelastic, meaning that people are very dependent upon the service and want to keep it at all costs. (T5:557-58). Similarly, many members of the public commented they view local telephone service as a necessity. (*E.g.*, Corr. 21, 122, 157, 281, 340, 357, 373, 436, 1017, 1037, 1150, 1152, 1227, 1273).

BellSouth and Verizon intend to apply all the increases in residential local rates to residential consumers who do not subscribe to "bundled" services. (Ex. 8 at 8; Ex. 11 at 6). **>>CONFIDENTIAL EXCERPT 7>>**

Verizon's analysis demonstrated the net increase will affect seniors over age 76 more than any other age group. (T8:913). Indeed its witness testified the impact will be approximately five times greater for seniors over age 76 than for customers aged 26 to 35, perhaps because younger customers buy more features. (T8:913-19).

The Decision

At the conclusion of the hearing, the PSC unanimously approved the

incumbents' petitions. (T16:2056-57). This action approved the following increases:

	BELLSOUTH	SPRINT	VERIZON
TOTAL INCREASE = **$343 million**	**$125 million**[5] ($109 million recurring) *(R2:354; T3:273)*	**$142 million** *(R2:372)*	**$76 million** *(R2:383)*
Portion of increase borne by residential customers	**$108 million**[6] *(T3:273)* (99%)[7]	**$123 million** *(Ex. 68 at JMF-12)* (87%)	**$71 million** *(R2:383)* (93%)
Increase in monthly basic local service rates (residential)	**$3.50** *(R2:354)*	**$6.86** *(R2:372-73)*	**$4.73** *(R2:384*)

The PSC also approved additional commitments the local incumbents made during the hearing. Among other things, BellSouth agreed to reduce the amount of its increase to the basic local residential rate by $.36 and increase residential non-recurring charges to offset this reduction. (T15:1877; R17:3346). Verizon agreed to shift $1.2

[5]BellSouth's amended petition proposed two alternative methodologies; the PSC approved the typical network composite methodology. (R17:3337).

[6]This number does not include any increases in non-recurring charges and therefore is understated. BellSouth does not specify how it will allocate its $16 million increase in non-recurring charges between residential and business customers.

[7]This is a percentage of recurring increases only, as BellSouth does not specify how it will allocate its increase in non-recurring charges.

million of its increase from recurring to non-recurring charges. (R17:3346). The PSC asked Sprint to implement its increase over three years instead of two, and Sprint agreed. (T9:1068; T15:1889-90; R17:3346).

The PSC memorialized its ruling in an "Order on Access Charge Reduction Petitions" ("final order") dated December 24, 2003. (R17:3291-3349). The PSC found all of the Act's criteria satisfied. It concluded that revenues from intrastate access charges support basic local service and this support prevents the creation of a more competitive market for basic local service. (R17:3311-12, 3314-16). The PSC also found that, although the oral and written public comments about the petitions were mostly negative, "customers as a whole will benefit" from the petitions and "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, 3321). The PSC found theoretical and empirical evidence that the petitions will induce market entry. (R17:3328-29). The final order also concluded that the local incumbents will reach parity within two to four years, and that implementation of the petitions will be revenue neutral to the local incumbents as defined in the Act. (R17:3328-29, 3336-37).

Post-Decision Proceedings

The Attorney General and Public Counsel appealed the final order to this Court

on January 7, 2004. (R17:3350-51, 3411-12). The appeal by these public bodies automatically invoked a stay pending review. Fla. R. App. P. 9.310(b)(2).

The Attorney General also filed a motion for reconsideration with the PSC. Simultaneous with his motion for reconsideration, the Attorney General moved this Court to relinquish jurisdiction of the appeal to allow the PSC to decide the motion for reconsideration. (Motion to Relinquish Jurisdiction But Maintain Stay, filed January 8, 2004). AARP also filed a motion for reconsideration with the PSC, and a Motion to Relinquish Jurisdiction with this Court. (R18:3514-27; AARP Original Motion to Relinquish Jurisdiction, But Maintain Stay, filed January 23, 2004).

While the motions for reconsideration were pending, the United States Court of Appeals for the District of Columbia Circuit decided *U.S. Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004). This decision invalidated the FCC rules that allowed state utility commissions to require local incumbents to provide UNE-P access to local competitors at wholesale rates. *Id.* at 594. The Attorney General filed the *U.S. Telecom Ass'n* decision with the PSC as supplemental authority in support of his Motion for Reconsideration. (R19:3762).

This Court relinquished jurisdiction of the appeal for the PSC to rule on the pending motions for reconsideration and directed the PSC to do so by May 3, 2004. (Order dated March 3, 2004). The PSC set the motions for hearing on May 3, 2004.

(R19:3758-59).

At the hearing, the Attorney General argued the PSC had failed to take into account its overriding duty to "protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices," as required by Section 364.01(4)(a), Florida Statutes (2003). (R19:3842). He also argued BellSouth's and Verizon's proposals were anti-competitive because they would raise the rates only of customers who subscribe to basic local service and do not subscribe to a bundled plan. By not raising their rates for bundled services, these companies' petitions will discourage competitors from entering the market for bundled services. (R19:3846). The Attorney General further argued that the effect of the *U.S. Telecom Ass'n* decision, if implemented, would be to make UNE-P lines so prohibitively expensive as to eliminate the possibility of local competition based on UNE-P. (R19:3847). The Attorney General noted that there was universal agreement within the telecommunications industry that the decision had thrown local competition into a state of turmoil. (R19:3848). In light of this significant change in circumstances, he urged the PSC to reconsider its finding the petitions would increase local competition. (R19:3849).

The PSC voted immediately following the hearing to deny the motions for reconsideration, and entered an order to this effect the following day. (R19:3818-35,

3887). Although the PSC did not change its ultimate ruling, its order on reconsideration substantially modified its initial final order. The PSC essentially withdrew its initial finding that the increase in basic local rates would be offset by reductions by long distance carriers (R17:3320), replacing this finding as follows:

> [T]he preponderance of the 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, 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 increases in local rates.

(R19:3833). On reconsideration, the PSC also found that the "net impact" of granting the petitions is consistent with preserving reasonable and affordable prices for basic local service as required by Section 364.01(4)(a), Florida Statutes. (R19:3823). The PSC stated the *U.S. Telecom Ass'n* decision did "muddy the waters as to the future of certain UNEs" and that it was "concerned about the uncertain state of the FCC's unbundling rules," but that the decision did not require reconsideration because it did not automatically eliminate UNE-P, at least not immediately. (R19:3825). The PSC also noted the decision would not affect facilities-based competitors. (R19:3825). The reconsideration order also clarified that the PSC did not consider the local incumbents' additional commitments made during the hearing to constitute amendments to the petitions and that the PSC first approved the petitions as filed and

then separately approved the additional commitments. (R19:3838-29).

The Attorney General and Public Counsel amended their notices of appeal to include the PSC's May 4, 2004 Order on Reconsideration. (R20:3892-93, 3973-74). AARP filed a notice of appeal on June 3, 2004. (R20:3978-79). The petitioners did not cross-appeal. By order dated June 28, 2004, the Court consolidated for all appellate purposes the appeals by the Attorney General, the Public Counsel, and AARP.

SUMMARY OF THE ARGUMENT

As the proponents of a record $343 million increase in local telephone rates, the local incumbents had the burden of proving the statutory criteria were met with competent substantial evidence. This they failed to do. Although they succeeded in creating a voluminous record, volume does not equate to proof. Examination of the incumbents' claims and the evidence relied upon by the PSC in granting the petitions proves this decision should be reversed.

The PSC's finding the petitions will induce enhanced market entry is unsubstantiated by competent substantial record evidence. Even if accurate at the time of the initial final order, the finding should have been reconsidered in light of *U.S. Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004). That case calls into question the continuing viability of UNE-P, which in the PSC's own words is a "key determinant" of market entry. In a remarkable foreshadowing of future events, a witness from AT&T, the only UNE-P based competitor to testify at the hearing, stated that market entry is inversely related to UNE-P rates. Shortly after the mandate was issued in the *U.S. Telecom Ass'n* decision, AT&T announced it would no longer seek to compete for traditional local telephone service. On this record, increased market entry is not likely to result from implementation of these petitions.

Even apart from the future uncertainty of UNE-P caused by *U.S. Telecom Ass'n*, the remaining evidence regarding future market entry was insufficient to support a finding of induced market entry. Most of the remaining evidence was based on general economic principles. This evidence is not sufficient, by itself, to support the PSC's conclusion that enhanced market entry "will" occur. Nor is there competent substantial empirical evidence that demonstrates increased market entry will occur. Indeed, the evidence showed that BellSouth's and Verizon's petitions were intentionally designed to prevent competition, not encourage it. Most significantly, there was not competent substantial evidence from competitors saying they would enter the market. Although the incumbents and their consultants professed the ability to predict these competitors' actions with absolute certainty, all but one of the 432 competitors remained silent at the hearing.

Nor was there competent substantial evidence the petitions will benefit residential customers as required by the Act. The PSC's finding that the petitions will provide "qualitative" benefits that will outweigh the quantitative costs is wholly unsupported by the record. The record unequivocally demonstrates residential customers will bear more than $303 million in rate increases, and only a fraction of this amount will be passed through to consumers in the form of reductions in long distance charges. The evidence of "qualitative benefits" was conjectural at best. There was no

evidence whatsoever of the value of any qualitative benefits to residential customers, and therefore no basis for concluding the value of the benefits outweighed the financial harm.

Finally, the competent substantial evidence did not demonstrate the petitions result in "reasonable and affordable" basic telephone service for all Florida consumers. Hundreds of these customers contacted the PSC in person and in writing to express their inability to afford the proposed increases. The PSC improperly ignored this testimony. The anecdotal evidence regarding drop-off rates in other states that have raised rates has no evidentiary significance to the projected effect in Florida. More importantly, a low drop-off rate is not proof of affordability. The evidence was that consumers view local phone service as a necessity and will forego food and medicine to continue their service. Additionally, the evidence was that the proposals by the two larger incumbents would impose the full burden on those least able to afford it.

STANDARD OF REVIEW

The standard of review is whether the PSC's order is supported by competent, substantial evidence. *Gulf Coast Elec. Coop., Inc. v. Clark*, 674 So. 2d 120, 122 (Fla. 1996). Competent substantial evidence is evidence that proves a factual basis from which the fact at issue can be reasonably inferred, and such relevant evidence "a reasonable mind would accept as adequate to support a conclusion." *Duval Util. Co. v. Florida Public Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

ARGUMENT

I. THE PETITIONS WILL NOT INDUCE ENHANCED MARKET ENTRY

The Act requires the PSC to consider whether the petitions "will . . . induce enhanced market entry." § 364.164(1)(b), Fla. Stat. (2003). Although the PSC claimed both theoretical and empirical evidence supported market entry (R17:3328), there was no competent substantial evidence to support this claim.

A. The PSC erred by failing to reconsider the petitions in light of the *U.S. Telecom Ass'n* decision.

The hearing evidence established that, to the limited extent local competition exists in Florida, the vast majority of such competition occurs through UNE-P. (Ex. 15 at 17). Nearly three-quarters of residential lines in Florida served by competitors are served through UNE-P. (Ex. 15 at 17). According to 344 of the companies that seek to compete in Florida, the number one barrier to entry is UNE pricing. (Ex. 15 at 55-56). The only UNE-P-based competitor to testify at the hearing, AT&T, said market entry is inversely proportional to UNE rates. (T10:1279; T11:1292). The AT&T witness also said he did not believe the petitions were sufficient to induce market entry without other considerations such as UNE-P pricing. (T10:1279-80).

The D.C. Circuit's March 2, 2004 decision in *U.S. Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004) threw the availability and

pricing of UNE-P into turmoil.[8] (R19:3848). This decision vacated Federal Communications Commission ("FCC") rules that required local incumbents to provide competitors UNE-P access to the incumbent's network for residential and small business customers, subject to a determination by a state regulatory commission that such access was necessary. *Id.* at 564-71. Without these rules, local incumbents have no incentive to offer UNE-P access to their competitors at reasonable rates. Therefore, the elimination of the FCC rules makes it likely that UNE-P access will become so expensive as to eliminate it as a viable means of operation by competitors. For example, shortly after *U.S. Telecom Ass'n* was decided, BellSouth attempted to raise the UNE-P rates charged to competitors by $7-$10 per line. (R. 3847-48; Almar Latour, *BellSouth Offers Rivals a Deal For Access to Its Local Network*, WALL STREET J., Mar. 24, 2004; Beatrice E. Garcia, *BellSouth Tries to Cut New Deals*

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[8]The PSC unquestionably had authority to reconsider its ruling in light of events occurring after its final order. This is because the PSC is charged with deciding issues according to the public interest, which necessarily "changes with shifting circumstances and the passage of time." *Reedy Creek Util. Co. v. Florida Public Serv. Comm'n*, 418 So. 2d 249, 253 (Fla. 1982); *see also McCaw Communications v. Clark*, 679 So. 2d 1177, 1179 (Fla. 1996) (rate-setting is "not a one-time adjudication of rights but rather a process that must take into account a multiplicity of factors affecting the telecommunications industry and its customers"); *Sunshine Util. v. Florida Public Serv. Comm'n*, 577 So. 2d 663, 666 (Fla. 1st DCA 1991) ("the issue of prospective rate-making is never truly capable of finality"), *rev. denied*, 589 So. 2d 293 (Fla. 1991). If the PSC could consider events occurring after the final order, so, too, can this Court.

With Rivals, MIAMI HERALD, Mar. 25, 2004).

The D.C. Circuit stayed its decision in *U.S. Telecom Ass'n* for 60 days. 359 F.3d at 595. The court extended the stay until June 15, 2004, and ultimately issued the mandate on June 16, 2004. The FCC did not seek to appeal to the United States Supreme Court. AT&T, the National Association of Regulatory Utility Commissioners (NARUC), and the State of California filed petitions for certiorari with the United States Supreme Court on June 30, 2004. *See* Case Nos. 04-12, 04-15, and 04-18. These petitions remain pending.

A little over a month after the *U.S. Telecom Ass'n* mandate issued, AT&T announced it would no longer attempt to compete for traditional telephone services in the residential market: "As a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for residential local and standalone long distance customers." *See* News Release, AT&T, *AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets* (July 22, 2004), *available at* <www.att.com/news/item/0,1847,13163,00.html>.

Additionally, the FCC recently issued proposed rules that would hold UNE-P access and pricing constant for a short period and then allow local incumbents to begin increasing UNE-P rates in six months. *See* Order and Notice of Proposed

Rulemaking, *In re Unbundled Access to Network Elements*, Federal Communications Commission, WC Docket No. 04-313 (Aug. 20, 2004), *available at* <http://hraunfoss.fcc.gov/ edocs_public/attachmatch/FCC-04-179A1.pdf>.

Thus, the Attorney General's fears regarding the potential impact of the *U.S. Telecom Ass'n* decision are being realized. The only UNE-P based competitor to testify it would enter the market if the petitions were granted has now publicly reversed course. The only remaining competitor testimony is from Knology, a facilities-based provider that has offered bundled local service with cable service in Panama City since 1998 and intends to expand to Pinellas County. (T8:749-51, 787-88, 790). Of 432 companies authorized to compete for local service in Florida, there is testimony from just *one* company competing in *one* market, with plans to enter a second market. This hardly constitutes "substantial" evidence from which a reasonable mind can infer that increased market entry will occur.

By the PSC's own admission, the *U.S. Telecom Ass'n* decision "mudd[ies] the waters" as to the future of UNE-P and causes concern about the uncertain state of the FCC's bundling rules." (R19:3825; *see also* R19:3883-84). Nevertheless, it refused to reconsider its ruling because the decision does not "automatically" make UNEs unavailable and, even if they are eventually eliminated, "that process will likely take place over an extended period of time." (R19:3825). These statements miss the point.

The question is not how long it will take for the full effect of the *U.S. Telecom Ass'n* decision to be realized, but rather whether, in light of the uncertainties it creates in the current market, it can still reasonably be inferred that the incumbents' petitions will cause competitors to enter the local market in Florida.

By refusing to reconsider its ruling in light of the effect of *U.S. Telecom Ass'n*, the PSC concluded the petitions will still induce enhanced market entry even if the entry method chosen by three-quarters of the competitors in Florida, a method the PSC has dubbed a "key determinant" of competitive market entry, is eliminated. This finding is not supported by competent, substantial evidence. To the contrary, the evidence establishes that if UNE-P access is not reasonably priced or is unavailable, it will not matter what the basic local rates or intrastate access rates are because the primary means of market entry in Florida will be eliminated. The PSC's own analyst acknowledged that competitors would not enter a market where UNE-P costs exceed the price of local service (T12:1525-26), >>**CONFIDENTIAL EXCERPT 8**<<. At a minimum, the PSC should have reopened the hearing to allow additional evidence in light of the significant change in circumstances brought about by the *U.S. Telecom Ass'n* decision.

B. Even apart from the *U.S. Telecom Ass'n* decision, the evidence did not demonstrate that the petitions will induce enhanced market entry.

1. Theoretical Evidence

Nearly all testimony in favor of the petitions was based on the general economic principle that increasing the price of basic local service will make the market more attractive for potential competitors and therefore induce competitive entry. (*E.g.*, T2:145-46; T5:478-80; T8:815-16; T10:1168-69). Some of the petitioners' witnesses, and even some commissioners, seemed to suggest this theoretical evidence is sufficient by itself to satisfy this element of the Act. (T5:559-60, R19:3881). It is not.

The Act requires the PSC to consider whether the petitions "will" induce market entry. A general theory cannot, by itself, establish that specific rate proposals will cause specific behavior in a specific market with specific characteristics. As the testimony reflected, the decision to enter a new market is based on many factors, and the general theory espoused by these witnesses assumes that "all other factors" are held constant. (*E.g.*, T2:146; T10:1168-69). The witnesses did not address the influence of these "other factors" on market entry in Florida and did not perform or review any studies or analyses specific to the participants or conditions in Florida. (Ex. 5 at 194). An expert opinion does not excuse a party from proving the facts

necessary to support the opinion. *Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957).

If the Florida Legislature believed it was appropriate to increase local rates based purely on a general economic principle that this action would make the market more attractive for competitors, it could have simply passed a law allowing such an increase. Instead, it required the PSC to analyze each petition to determine whether, based on the terms of the particular petition and the existing competitive climate in Florida, the petitions "will" induce competition. If this element of the Act can be satisfied by theory alone, then the PSC serves no meaningful role in evaluating the impact of individual petitions in the context of the existing market.

A particularized finding of increased competition is necessary not only because the clear language of the Act requires it, but also because approval of the petitions starts the incumbents on a rapid and automatic path toward deregulation. Once an incumbent's petition has been granted and it reaches parity as defined in the Act, it can raise its basic rates by 6% every year, even if there are no competitors in its territory. § 364.051(5)(a), (6), Fla. Stat. (2003). An incumbent facing just one local competitor can increase basic rates by 20% per year. § 364.051(5)(a), Fla. Stat. (2003). Regulation of the incumbent's service quality also substantially decreases. § 364.051(6), Fla. Stat. (2003). These subsequent phases of the Act do not depend

upon real competition, but are premised on the prior finding that the petitions will increase competition. It is therefore imperative that there be competent substantial evidence at this stage that competition *will* occur if the petitions are granted. Once the petitions are implemented rates will go up regardless of whether the promised competition ever materializes.

2. Empirical Evidence

Although the PSC found there would be an increase in choice of providers "as evidenced in other states," (R17:3318), there is no competent substantial evidence to support this conclusion. Two witnesses testified very generally that "rate rebalancing" in other states had resulted in increased competition, but neither provided any documentary or statistical support for these statements. (T3:248-51; T10:1261). Nor did either witness provide any basis for comparing these other states' experiences with Florida. In fact, one witness acknowledged that such a comparison was inappropriate because Florida's UNE rates are higher than in other states, and another acknowledged it is inappropriate to draw strong inferences from the experiences in other states because other factors might affect competition. (T3:243). Although Dr. Gordon cited a multi-state study for the proposition that the petitions will induce competition, he made no attempt to relate the results of this study to Florida. (T2:150, 216). The only real record evidence of competition in other states that have adjusted

local rates and intrastate access rates indicated that competition did not grow any faster in those states than in Florida during the same period. (T14:1845; Ex. 83 at MNC-7).

The evidence also showed that BellSouth's and Verizon's petitions are designed to prevent competition, not encourage it. Both BellSouth and Verizon will apply the increases in residential local rates to consumers who subscribe to basic local service only and do not subscribe to a "bundled" service plan. (Ex. 8 at 8; Ex. 11 at 6). >>**CONFIDENTIAL EXCERPT 9**<<

Even accepting for purposes of argument that low basic rates are preventing competitors from entering the local telephone market, the rate changes proposed by these petitions will not address this problem. Implementation of these petitions will keep BellSouth's and Verizon's prices for bundled services at current levels, thus providing customers incentive to stay with them instead of switching to a competitor. This will discourage, rather than encourage, competitors from entering the market for bundled services. Competitors currently serve just 14% of the residential customers in BellSouth's territory and 2% in Verizon's territory. (Ex. 15 at 9). If these incumbents do not increase their bundled service rates, new competitors will not be induced to compete with them.

Ultimately, what is most striking about the petitioners' evidence relating to

market entry is what was not presented. Of the 432 competitors authorized to compete for local business in Florida, just two testified that granting the petitions will induce them to enter new markets in Florida–and one has already changed its mind. The other 430 remained silent.[9] And when the PSC surveyed these would-be competitors just six months before the hearing, they did not even mention basic local rates as a barrier to entry. (Ex. 15 at 55-56) (listing UNE rates as the number one barrier to entry). Common sense suggests competent substantial evidence of what competitors will do if local rates are raised must include testimony from the very competitors whose actions the incumbents claim to predict.

Because the evidence fails to establish "a substantial basis of fact" from which enhanced market entry can "reasonably be inferred," the PSC's finding to the contrary should be reversed, or, in the alternative, remanded for further evidentiary proceedings in light of the *U.S. Telecom Ass'n* decision. *See Duval*, 380 So. 2d at 1031; *GTC, Inc. v. Garcia*, 791 So. 2d 452, 461 (Fla. 2000) (reversing in part where witnesses' conclusory testimony was insufficient to support PSC's decision); *Gulf Coast Elec.*

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[9]One of these 430 competitors is MCI. (Ex. 15 at A-3, A-39). MCI participated in the hearing as a long distance carrier but remained silent on whether the petitions would induce it to offer local service in Florida. (T12:1412-1437). BellSouth and Sprint also have related entities that compete for local service outside of their territories in Florida (Ex. 8 at 30; Ex. 9 at 267; Ex. 15 at A-1, A-5), but there was no testimony from these entities regarding future market entry.

Coop. v. Clark, 674 So. 2d 120, 122-23 (Fla. 1996) (reversing due to lack of competent substantial evidence to support PSC's findings).

II. THE PETITIONS DO NOT BENEFIT RESIDENTIAL CONSUMERS

The Act also requires the PSC to consider whether the petitions will benefit residential customers. § 364.164(1)(a), Fla. Stat. (2003). Premised entirely upon its unsupported finding that the petitions will induce market entry, the PSC found that the petitions will provide residential consumers "qualitative and quantitative" benefits which will "outweigh" the increase in local rates. (R17:3319-20, R19:3833). There is no support for this finding.

To the contrary, while there is indeed concrete record evidence of the quantitative effect of the petitions on residential consumers, it cannot be characterized as a "benefit." Of the $343 million increase in local charges, residential customers will pay more than $303 million, or 88% of the total increase. (T3:273; T6:616; Ex. 68 at JMF-12). The limited evidence submitted by the long distance carriers indicates the vast majority of the decreases will flow through to businesses. The anticipated percentage of reductions flowing to residential customers is **>>CONFIDENTIAL EXCERPT 10.**<< Verizon Long Distance, which services primarily residential and small business customers in Verizon's local territory, expects approximately

>>**CONFIDENTIAL EXCERPT 11**<< of the reductions to flow through to residential customers. (T12:1476-77, 1490, 1493; Confid. 664). Thus for average residential customers, the increases in local rates will exceed the reductions in long distance rates. (T13:1702-11; Ex. 79 at BCO-2).

Moreover, once implemented, the increases in basic local rates will be here to stay. Although the PSC suggested that the basic local rates will only be increased "in the short term" (R17:3318; *see also* R17:3307), the record evidence was that, even with competition, these rates will not return to pre-petition levels. (T5:568; T12:1513-14). The witness the PSC relied upon for its finding that rates would increase only in the short term, Wayne Fonteix of AT&T, did not testify that basic local rates would fall with competition. Rather, he testified that in Michigan, rates for *bundled* services dropped with competition. (T11:1295-96; *see also* T10:1270). Mr. Fonteix was at best equivocal regarding whether basic local rates would eventually return to current rates or lower, saying there was a "potential[]" that this would occur and it was "possible" that competition would cause some downward pressure on basic local rates. (T10:1271).

Notwithstanding the uncontroverted record evidence that residential consumers as a whole will be financially harmed by implementation of the petitions, the PSC found that this quantitative harm will be outweighed by the "qualitative benefits"

associated with the petitions. (R19:3833). This determination is defective because there is no competent substantial evidence that the so-called qualitative benefits will occur at all, much less that their value to residential consumers is greater than their financial cost.

Much like the evidence of "induced market entry," the evidence of qualitative benefits to residential consumers was based upon general economic principles, unaccompanied by any attempt to relate these principles to the particular market conditions and market participants in Florida. (*E.g.*, T2:134-35; T5:564; T8:820-21). This testimony is of no evidential value. *See Arkin*, 99 So. 2d at 561 (expert's conclusion has no evidential value where not supported by facts in evidence); *Harris v. Josephs of Greater Miami, Inc.*, 122 So. 2d 561, 562 (Fla. 1960) (expert opinion does not eliminate necessity of proving foundation facts necessary to support the opinion).

The only fact-based testimony on this issue came from Knology, whose witness testified that by bundling telephone, internet, and cable, its customers can lower their overall bill for telecommunications services. (T8:754). However, when asked about new technology, Knology emphasized services that benefit business customers, not residential customers. (T8:751-52). Knology's testimony is insufficient, by itself, to support a reasonable inference that Florida's residential consumers as a whole will

benefit from the petitions.

Even assuming there was competent substantial evidence of qualitative benefits to residential customers, there was simply no evidence residential consumers would view the value of these benefits as greater than their financial costs. Indeed, those witnesses that addressed this question acknowledged the value of a new service or option cannot be measured without knowing the value placed on the service by the consumer. The PSC's own analyst, Gregory Shafer, testified that a new offering is only a benefit to a consumer who finds the new offering attractive; it is not necessarily a positive outcome for a consumer to have the opportunity to subscribe to a service with more features at a higher price. (T12:1513, 1517-18, 1527). Similarly, Dr. Banerjee said that potential benefits such as increased choice of services, providers, and pricing plans are "not directly measurable because it's hard to observe how individual customers react [to] these different factors." (T5:564). A Verizon witness acknowledge that a choice of providers or services is not a benefit if the choices are all more expensive than a consumer can afford. (T7:688).

Without evidence of the value that residential customers would place on any potential qualitative effects of the petitions, there was no evidentiary basis for the PSC's conclusion that these benefits would "outweigh" the financial costs of the petitions to residential consumers.

III. THE PETITIONS DO NOT RESULT IN REASONABLE AND AFFORDABLE BASIC TELEPHONE SERVICE FOR ALL FLORIDA CONSUMERS

Consistent with its longstanding policy of protecting consumers, the Florida Legislature obligates the PSC to exercise its exclusive jurisdiction to "[p]rotect the public health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in Florida at reasonable and affordable prices." § 364.01(4)(a), Fla. Stat. (2003). The PSC did not address this requirement in its initial final order, but on rehearing amended its decision to say it concluded the petitions will "preserve reasonable and affordable prices for basic local service." (R19:3823). The record contains no competent substantial evidence supporting this conclusion.

Common words used in a statute should be construed in their plain and ordinary sense. *E.g.*, *Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000). "Reasonable" is defined as "fair, proper, just, or moderate under the circumstances." *Black's Law Dictionary* 1272 (7th ed. 1999). "Affordable" means to be able to manage "without serious consequence." *Random House Webster's College Dictionary* 23 (1999). The proposed rate increases are neither.

Hundreds of Floridians told the PSC they were on fixed incomes and could not afford the rate increases. (*E.g.*, Corr. 25, 78, 87, 376, 436-37, 442, 448, 1006-07,

1019, 1031, 1063, 1073, 1114-15, 1186, 1190, 1196, 1227, 1243, 1250, 1252, 1269, 1271, 1277, 1279, 1281, 1290, 1303-04, 1312, 1315-16, 1323, 1325-26, 1330, 1335-36, 1338, 1344, 1351). Many citizens said the rate increases would force them to choose between telephone service and food or medication. (*E.g.*, Corr. 75, 83, 95, 96, 111, 157, 292, 307, 395, 448, 1015, 1137, 1150, 1250, 1252, 1275, 1336, 1407, 1517, 1562, 1687). A number of citizens also said they would have to discontinue telephone service if the rate increases are implemented. (*E.g.*, Corr. 53, 56, 375, 490, 539, 589, 608, 611, 1006, 1256, 1266, 1315, 1321, 1322, 1325, 1333, 1337, 1402, 1443, 1496, 1520, 1526, 1623, 1666). **>>CONFIDENTIAL EXCERPT 12<<**

The PSC rejected the citizen testimony, apparently adopting the view of a PSC staff member that the concerns expressed were "not representative of the residential customer population as a whole." (T16:1984-85). This wholesale rejection of the public testimony not only is erroneous as an evidentiary matter, but also is irreconcilable with the Florida Legislature's mandate that the PSC exercise its jurisdiction to protect the public by ensuring basic local rates are reasonable and affordable for everyone.

The record does not support the PSC's finding that experience from other states indicates the incumbents' proposals will have little negative impact on the availability of universal service. (R19:3823). A Sprint witness testified that in Ohio the

number of residential lines fell by 1% within six months of a local rate increase. (T9:1101). If this happens in Florida, nearly 80,000 residential customers will lose basic local phone service. (*See* Ex. 15 at 8). Although there was some general testimony regarding low drop-off rates following local rate increases in other states (T2:162-64; T3:253; T8:890-91; T9:959-61; T10:1101), there was no documentary support for this testimony and no evidence relating the experiences in other states to the anticipated impact in Florida. Just as the general testimony regarding experiences in other states is not predictive of market entry or customer benefits in Florida, this testimony is insufficient to support the PSC's conclusion that there will not be a significant loss of residential telephone lines in Florida.

In any event, proof of a low drop-off rate is not proof of affordability. The evidence showed basic local service is price inelastic, meaning citizens will not cancel it even when the price goes up because they view it as a necessity. (T5:557-58; *e.g.*, Corr. 21, 122, 157, 281, 340, 357, 373, 436, 1017, 1037, 1150, 1152, 1227, 1273). The fact that consumers may not cancel their phone service as a result of an increase merely proves that the service is not sensitive to price; it does not mean that the rate increase can be managed "without serious consequence." Because local phone service is essential, consumers of this service are a captive market who must absorb a price increase by foregoing spending on other important items such as food and

medicine. This potential for consumer exploitation is the very reason the PSC is charged with keeping basic local rates reasonable and affordable for all consumers.

BellSouth and Verizon may not reasonably impose all of their increases to recurring residential rates upon the customers who subscribe to basic service only and do not subscribe to packages. >>**CONFIDENTIAL EXCERPT 13**<<, yet they will bear 100% of the recurring residential increases by these companies. These are the people least able to afford the increases, yet they are, unreasonably, forced to bear the brunt of them.

This disproportionate impact on basic-only customers is also reflected in the testimony by Verizon's consultant that the impact of its increases will be five times greater for seniors over age 76 than for customers aged 26-35. (T8:913-19). As Verizon's consultant explained, the probable reason for this disparity is that older customers are less likely to subscribe to additional or bundled features. (T8:916). The PSC improperly dismissed this fact, finding instead that the "net impact" of the petitions was consistent with the requirement of reasonable and affordable rates for basic local service because "consumers in all age groups will receive some benefits from the long distance rate reductions that will offset, to varying degrees, the impact of the increase in basic local service rates." (R19:3823). This statement necessarily assumes that all consumers make some long distance calls, an assumption which has

no support in the record. In any event, nothing in Section 364.01(4)(a) calls for a "net impact" analysis. Because not all Florida citizens who subscribe to basic local service make long distance calls, it is improper to consider long distance reductions in determining whether basic local rates are reasonable and affordable for all Florida citizens. A rate increase in basic telephone service that discriminates against Florida's senior citizens by raising their rates five times more than the rates of younger citizens is simply not fair, proper, or just, and is at odds with the PSC's mission of ensuring reasonable rates for all Floridians.

CONCLUSION

Because BellSouth, Verizon, and Sprint failed to prove by competent substantial evidence that their petitions satisfy the elements of the Act, the Attorney General respectfully requests this Court reverse the decision of the Florida Public Service Commission approving these companies' petitions. In the alternative, the Attorney General requests the case be remanded to the Commission for further evidentiary proceedings in light of *U.S. Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004).

Respectfully Submitted,

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The undersigned attorney hereby certifies that the foregoing brief was typed in Times New Roman, 14-point type.

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