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

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

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This case is about evidence. More specifically, it is about the lack of competent, substantial record evidence supporting the PSC's decision. Appellees' filings muddle the issues while ignoring the evidentiary defects.

I. THERE IS NO COMPETENT SUBSTANTIAL EVIDENCE THE PETITIONS WILL INDUCE ENHANCED MARKET ENTRY.

A. Reconsideration was warranted after *U.S. Telecom Ass'n*.

The Act requires consideration of whether the petitions will induce enhanced market entry. The *U.S. Telecom Ass'n*[1] decision threatens the validity of UNE-P, a "key determinant" of market entry. The PSC therefore had a duty to reconsider market entry in light of that decision.

While Appellees do not dispute the *U.S. Telecom Ass'n* decision threatens the viability of UNE-P as a means of market entry, they contend the decision did not constitute a substantial change in circumstances warranting reconsideration because the availability and pricing of UNEs have remained in flux since the inception of local competition in 1996. However, the unchallenged record evidence, as described in the Attorney General's initial brief, demonstrates UNE-P is critical to the future of

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[1]*U.S. Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, Case Nos. 04-12, 04-15, 04-18 (Oct. 12, 2004).

competition in Florida. (A.G. Amended Initial Brief at 9-10, 31).

Appellees do not dispute, for example, that UNE-P is the entry method of choice for competitors in Florida and that the availability of UNE-P at reasonable prices is a "key determinant" of market entry in this state. (T5:482). Nor do Appellees dispute that potential competitors identify UNE pricing as the number one barrier to competition. (Ex. 15 at 56). Appellees also do not dispute the hearing testimony by a UNE-P based competitor that market entry is inversely proportional to UNE rates. (T10:1279-80; T11:1292). On this undisputed record, any event that endangers the continuing viability of UNE-P constitutes a significant change in circumstances which warrants reversal or, at a minimum, reopening of proceedings for additional evidence.

The local incumbents quote at length from the testimony of Brian Staihr, a Sprint employee, regarding emerging competition in nontraditional telephone technology such as wireless telephones, power lines, and the Internet. Staihr does not testify, however, that competitors using these technologies will be induced to enter the market for local service *in Florida* as a result of the rate increases proposed *by these petitions*. At most, Staihr's testimony provides general information regarding the anticipated progress of companies using nontraditional telephone technologies; he does not even attempt to predict whether or how these companies will react to the petitions. This testimony is not evidence that implementation of the local incumbents'

petitions will induce market entry in Florida.

The local incumbents also erroneously rely upon testimony by two witnesses who opined that the petitions should be granted regardless of the status of UNE-P. (Local Incumbents' ("LI") Brief at 26, 28, quoting testimony of Kenneth Gordon and Wayne Fonteix). The cited testimony represents nothing more than these witnesses' opinions that the PSC should ignore the role of UNE-P in evaluating the petitions. Neither witness says the petitions will induce market entry regardless of the availability or pricing of UNE-P. In no event is the testimony *evidence* of whether the petitions will successfully induce market entry if UNE-P costs rise dramatically or if UNE-P is altogether unavailable.

Moreover, Wayne Fonteix's words have been superceded by his employer's actions. Just a month after the mandate issued in *U.S. Telecom Ass'n,* AT&T exited the local residential market for wireline telephone service "[a]s a result of recent changes in regulatory policy governing local telephone service." (*See* A.G. Amended Initial Brief at 33). In light of AT&T's retreat from the local competitive market, any reliance upon an AT&T representative's testimony as support for enhanced market entry after *U.S. Telecom Ass'n* is inappropriate.

Obviously there cannot be absolute certainty regarding the status or effect of all telecommunications policies before the PSC can act. However, the petitions cannot

be approved, either in the first instance or on appeal, unless the statutory criteria are supported by competent substantial evidence. By denying reconsideration, the PSC turned a blind eye to the sea change in the competitive landscape brought about by *U.S. Telecom Ass'n*, concluding--without taking any additional evidence, and in the face of record evidence to the contrary--that the loss of UNE-P will not materially affect market entry. This conclusion should be reversed or remanded for consideration of additional evidence.

B. **Even before *U.S. Telecom Ass'n*, the record lacked competent substantial evidence of enhanced market entry.**

1. Theoretical Evidence

Appellees fail to address how testimony regarding general economic theory establishes that *these petitions* will induce competitors to enter the local telephone service market *in Florida*. Appellees do not explain how an economic theory which assumes "all other factors" are held constant applies when there is no evidence regarding the effect of these "other factors" on the competitive market in Florida. Nor do appellees identify record facts necessary to support application of the expert opinions to the petitions' effects in Florida. *E.g, Harris v. Josephs of Greater Miami, Inc.*, 122 So. 2d 561, 562 (Fla. 1960) (expert opinion does not eliminate necessity of proving facts necessary to support opinion). Purely conclusory testimony not

supported by documentary or factual evidence will not sustain a PSC order. *See GTC, Inc. v. Garcia*, 791 So. 2d 452, 461 (Fla. 2000) (reversing portion of PSC order based not on "documents or factual support," but on "conclusory statements" of witnesses).

The local incumbents confuse admissibility with sufficiency, arguing the PSC properly relied upon the theoretical testimony because it satisfied the *Frye*[2] test and no party objected to the testimony when it was given. The mere fact the theoretical evidence was admissible does not mean it constitutes competent substantial evidence the local incumbents' petitions will induce market entry.

2. Evidence from Other States

In defense of the PSC's reliance upon "the results in other states" for its conclusion providers in Florida will increase (R17: 3318), the local incumbents rely on testimony by Kenneth Gordon.[3] But Dr. Gordon did not make any predictions for Florida based on experiences in other states and specifically cautioned that "any conclusions on [the effects of rate adjustments] on a state specific basis . . . would

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[2]*Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923).

[3]The local incumbents' citation to a "discussion" between a PSC commissioner and staff member regarding Dr. Gordon's testimony (LI Brief at 32-33, citing T16:1980) is improper. The staff member was attempting (unsuccessfully) to recount Dr. Gordon's testimony from memory.

require a substantial and detailed investigation, and even then the conclusions would be subject to serious doubt." (Ex. 8 at 51).[4] Where the primary witness on this point expressly refused to view other states' experiences as evidence of what will occur in Florida, the PSC's reliance on these experiences was improper.

The remaining testimony cited by the local incumbents similarly fails to justify the PSC's reliance upon other states. Sprint employee Felz testified there was "virtually no negative customer reaction to the increases in local rates" in Pennsylvania and Ohio. (T9:1101). Mr. Felz did not testify, as represented (LI Brief at 32), that the rate changes in Pennsylvania and Ohio are expected to increase competition. Indeed, his statement the local rate increases resulted in virtually no decrease in Sprint's subscribership levels suggests the increases in those states were *not* effective in inducing competition, as effective competition will cause an incumbent to lose subscribers. Verizon consultant Danner testified pricing changes in California did not cause "notable difficulties" for customers, but did not testify regarding the actual effect of the pricing reform on competition. (T8:834).

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[4]This statement was in response to interrogatories requesting data that might have supported the inference the local incumbents now wish to make. The interrogatories requested, for instance, information regarding the level of competitive market entry, the reductions in long distance charges, and the new services offerings following rate adjustments in other states. (Ex. 5 at 50-52, 54). Instead of providing the requested information, the local incumbents objected to the interrogatories and disclaimed any attempt to base a conclusion on the experiences of other states.

Appellees fail to explain how the Ros & McDermott econometric study introduced by Dr. Gordon constitutes evidence of what will happen in Florida if the local incumbents' petitions are implemented. The local incumbents' contention that "Florida is in the same position now as were other states before rates were rebalanced, so it is reasonable to expect that Florida will have similar results" (LI Brief at 36) has absolutely no record support. There is no evidence comparing local markets in Florida with those of any other state, nor any evidence comparing the local incumbents' petitions with the rate adjustments undertaken by other states in the study. Indeed, the study's authors use the term "rebalancing" to mean raising local rates for residential customers while lowering *local rates for business customers* (Ex. 5 at 165), which is different than what the local incumbents' petitions propose. Moreover, the study held constant all other factors that might affect competition (Ex. 5 at 149), and there is no testimony regarding the effect of these "other factors" on local competition in Florida. The Ros & McDermott study may support the authors' general hypothesis that inefficiencies between local rates for residential and business service inhibit residential competition (Ex. 5 at 149), but it does not address the specific question of whether the local incumbents' petitions *in this case* will bring about increased market entry *in Florida*.

3. Evidence From Potential Competitors

The PSC determined "companies like Knology and AT&T provide empirical evidence of how the [petitions] will increase competition." (R17:3328). AT&T's testimony regarding its future intention to compete in the local residential wireline market is invalidated by its subsequent retreat from this market. Indeed, AT&T's conduct demonstrates current competitors are *leaving* the market following the *U.S. Telecom Ass'n* decision. There is no evidence implementation of the petitions will stem the exodus of UNE-P based competitors from the local market.

Knology's witness testified that although Knology does not market stand-alone basic local telephone service, low rates for basic service in Florida have prevented Knology from attracting capital necessary to expand elsewhere in Florida. (T8:754, 759, 762). Even if true, this proves only that *one* company *might* enter new markets in Florida as a result of implementation of the petitions. There is no evidence Knology is representative of other competitors. Indeed, Knology is one of just a handful of facilities-based competitors providing local residential service in Florida. (A-1 to A-6). Knology's testimony does not provide a substantial basis of fact from which enhanced market entry by any entity other than Knology can be inferred.

In response to the Attorney General's contention that their petitions discourage market entry by exempting bundled service plans from the rate increases, BellSouth

and Verizon argue their proposals are permissible because the Act does not define basic local service to include bundled service plans. If true, this raises the obvious question of whether Sprint's petition, which *does* propose increases in bundled service rates (Ex. 9 at 20), is consistent with the Act. But even if BellSouth and Verizon's petitions comply with the Act's definitions, this does not address the more relevant, independent inquiry of whether they will induce market entry. For the reasons expressed in the Attorney General's Amended Initial Brief (at p. 39), BellSouth's and Verizon's petitions will actually thwart market entry, not foster it.

4. Effect of Section 364.164(1)(a)

Finally, in support of "enhanced market entry" Appellees rely heavily upon the PSC's finding that granting the petitions will "[r]emove current support for basic local telecommunications services" and that such support "prevents the creation of a more attractive competitive local exchange market." In other words, Appellees rely upon the PSC's findings as to paragraph (1)(a) of Section 364.164 as evidence that paragraph (1)(b) has been satisfied.

These statutory criteria are not interchangeable. Whereas paragraph (1)(a) measures the anticipated attractiveness of the local market before and after implementation of the petitions, paragraph (1)(b) goes one step further by inquiring whether the market will be sufficiently attractive to actually increase the level of

competition. Appellees' interpretation would render paragraph (1)(b) meaningless, violating the well-established principle that statutes should be construed to give significance and effect to all of their parts. *See, e.g., Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003).

Not even the PSC equated the requirements of paragraph (1)(b) with the requirements of paragraph (1)(a). Instead, the PSC appropriately evaluated the market entry requirement of (1)(b) by examining whether the theoretical and empirical evidence proved that the petitions would improve the level of competition. (R17:3328). While the Attorney General disputes the PSC's finding that the record evidence proved enhanced market entry under paragraph (1)(b), he does not dispute the PSC's determination there must be independent record evidence of such market entry. As all parties agree, the PSC's interpretation of this statute should not be disturbed unless clearly erroneous. *E.g., Florida Interexchange Carriers v. Clark*, 678 So. 2d 1267, 1270 (Fla. 1996).

II. THE PSC'S FINDING THAT THE BENEFITS TO RESIDENTIAL CONSUMERS WILL OUTWEIGH THE HARM IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

Appellees attempt to characterize the PSC's conclusion that the petitions will benefit residential consumers as one of statutory construction entitled to great deference. But the PSC's statutory construction is not at issue. The PSC correctly considered whether the "cumulative benefits resulting from granting the . . . petitions . . . would offset the impact of the local rate increases." (R19:3833). The PSC found it should "carefully weigh[] the evidence presented on this issue" to determine whether residential consumers will experience an "overall benefit" from implementation of the petitions. (R19:3832-33). Thus the issue is not whether the PSC correctly construed the Act to require a net benefit to residential consumers–it did–but whether its conclusion that the local incumbents' petitions will produce such a net benefit is supported by competent substantial evidence. It is not.

Appellees do not dispute implementation of the petitions will financially harm residential consumers as a class. Instead, they argue the Act does not require proof of a financial benefit to residential customers, and the projected effects on residential consumers, albeit financially harmful, are consistent with the purpose and structure of the Act. This argument suggests any petition filed under the Act necessarily will financially harm residential consumers. But the Act does not require "one size fits all"

petitions--the local incumbents retain significant latitude regarding the proposed allocation of the rate increases between residential and business customers, between recurring and non-recurring charges, and between basic-only and bundled services. The Act also gives long distance carriers significant latitude regarding the allocation of rate decreases between residential and business customers. Therefore, it is both possible and necessary for a petition under the Act to provide an overall net benefit to residential consumers as a class.

Appellees spend much of their briefs reciting their witnesses' conclusory testimony that the petitions will result in qualitative benefits to residential consumers such as new features and more bundled services. Even assuming the petitions will yield these results, Appellees point to no record facts supporting the PSC's conclusion these "benefits to residential customers as a whole . . . . will *outweigh* the increases in local rates." (R19:3833) (emphasis added). For example, there is no evidence local telephone customers in Florida are dissatisfied with the current choices of providers, features, or service quality, or that customers would be willing to pay higher rates in exchange for more choices or better service. Indeed, it is unlikely a customer who currently purchases basic local telephone service from a local incumbent for $15 per month will view it as a "benefit" to be able to purchase the same service from several providers for more than $20 per month.

Appellants do not insist upon a "mechanical" weighing process that would require every benefit to be quantified and netted. Rather, Appellants assert the record lacks evidence of any weighing process at all–mechanical or otherwise. The PSC's determination that the benefits "outweigh" the costs should be reversed due to lack of competent substantial evidence.

III. THERE IS NO COMPETENT SUBSTANTIAL EVIDENCE THE PETITIONS RESULT IN REASONABLE AND AFFORDABLE BASIC SERVICE FOR ALL FLORIDA CONSUMERS.

The issue of whether local rates will be "reasonable and affordable" following implementation of the petitions is a question of evidence, not construction. The PSC found there was no conflict between the requirements of Sections 364.01(4)(a) and 364.164 (R19:3822), and the Attorney General does not challenge that construction. As with the other issues on appeal, the Attorney General challenges the existence of competent, substantial record evidence to support the PSC's finding.

Appellees cite the experiences following rate adjustments by other states and the FCC as evidence that basic local rates will be reasonable and affordable for all Florida consumers, yet fail to explain how the general testimony regarding these other contexts provides evidence of the affordability of the proposed rate increases in Florida. Most importantly, Appellees do not demonstrate why it is appropriate to equate low drop-off rates with evidence of affordability. *Basic local telephone service is regulated*

precisely because consumers will bear rate increases at great personal expense! Consumers' willingness to absorb rate increases by forgoing other important expenditures is *not* proof that rate increases are "affordable."

The PSC's finding the proposed increases are within the "zone of affordability" for "seniors on fixed incomes" misstates the evidence relied on for this conclusion. (R17:3322). Exhibit 85 reflects that roughly half of consumers over age 61 have an internet connection and a wireless telephone. (Ex. 85). This exhibit includes data for *all* survey respondents over age 61, not just those "on fixed incomes." (Ex. 85). In any event, this exhibit certainly does not prove the rate increases are affordable for seniors who *do not* have an internet connection in their home and *do not* subscribe to wireless telephone service.

The local incumbents' last-minute proposals to expand Lifeline eligibility cannot be used to support the PSC's decision. When AARP challenged the PSC's consideration of these additional proposals as procedurally improper, the PSC found the additional commitments "were addressed and approved <u>after</u> the [local incumbents'] petitions had been approved which demonstrates that the Commission did not consider the additional commitments to constitute amendments to the petitions." (R19:3828-29) (emphasis in original). Having deflected a challenge to the propriety of these commitments by disclaiming reliance upon them for their final

decision, the PSC may not now use the commitments to shore up evidentiary deficiencies identified on appeal.

CONCLUSION

The record does not contain competent substantial evidence that the local incumbents' petitions satisfy the elements of the Act. The Attorney General therefore requests this Court reverse the decision of the Florida Public Service Commission approving the 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.*

Respectfully submitted,

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I certify that Times New Roman 14-point, non-proportionately spaced type is used in this brief, in accordance with Fla. R. App. P. 9.210(a)(2).

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