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October 7, 2002

VIA HAND DELIVERY

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard, Room 110
Betty Easley Conference Center
Tallahassee, FL 32399-0850

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COMMISSION CLERK

Re: Docket No. 000075-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of US LEC of Florida Inc. ("US LEC") are the following documents:

1. Original and fifteen copies of US LEC's Response in Opposition to Motion of Sprint-Florida, Inc.'s Motion for Reconsideration or, in the Alternative, Motion for Stay Pending Appeal;

2. Original and fifteen copies of US LEC's Response in Opposition to Motion of Verizon Florida, Inc. and Alltel Florida for Partial Reconsideration, and, in the Alternative, Motion for Stay Pending Appeal; and

3. A disk containing a copy of the documents in Word Perfect 6.0.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

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Thank you for your assistance with this filing.

Sincerely,

Martin P. McDonnell

MPM/rl
Enclosures
cc: All Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.	))))	Docket No. 000075-TP (Phase II)
		Filed: October 7, 2002

US LEC OF FLORIDA INC.'S RESPONSE IN OPPOSITION TO MOTION OF SPRINT-FLORIDA, INC.'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR STAY PENDING APPEAL

Comes now, US LEC of Florida Inc. (hereinafter "US LEC"), by and through undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby submits this response in opposition to Sprint-Florida, Inc.'s ("Sprint") Motion for Reconsideration or, in the Alternative, Motion for Stay Pending Appeal.

INTRODUCTION

On September 10, 2002, in Order No. PSC-02-1248-FOF-TP, the Commission issued its Order on Reciprocal Compensation (the "Order"). Among other issues, the Order addressed a default mechanism for establishing "the local calling area" for purposes of reciprocal compensation among carriers.

On September 25, 2002, Sprint filed its Motion for Reconsideration of the above Order or in the Alternative, Motion for Stay Pending Appeal. In the Motion, Sprint asks the Commission to reconsider its adoption of the originating carrier's retail local calling area as the default mechanism for reciprocal compensation obligations.

The Commission should deny Sprint's Motion for Reconsideration. A motion for reconsideration must identify points of fact or law that were *overlooked or not considered* in

rendering the Order.[1] As demonstrated below, the Commission has already considered, and rejected the points of fact and law raised in Sprint's Motion. Thus, Sprint overlooks the well-established rule that a motion for reconsideration should not reargue matters that have already been considered.[2] Sprint's Motion largely parrots the same arguments that the Commission already considered and rejected in the Order, and thereby fails to meet the Commission standard for a motion for reconsideration, which must be "based upon specific factual matters set forth in the record and susceptible to review" and "not based upon an arbitrary feeling that a mistake may have been made."[3]

Unable to establish a sufficient case for reconsideration, Sprint seeks to undermine the effectiveness of the Commission's Order by requesting that the Commission stay the above portion of its Order pending conclusion of an appeal of the Order regarding the default local calling area That request is premature and should be summarily denied as Sprint has not filed an appeal of the Order and the Commission's rule addressing a stay of an Order is only triggered by the timely filing of a notice of appeal.[4] The Commission's decision is wholly consistent with federal and state law and likely to withstand any appellate review. Should Sprint file a notice of ap that request must be rejected if the Order is to retain the effect necessary to discharge the Commission's statutory obligation to ensure the availability of the widest possible range of consumer choice in the provision

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[1]See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); see also *Diamond Cab Company v. King*, 146 So.2d 889 (Fla. 1962). (emphasis supplied)

[2]See *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959).

[3]See *Stewart Bonded Warehouse, Inc. v. Bevis*, at 317.

[4]See Fla. Admin. Code R. 25-22.061.

of telecommunications services for Florida consumers.

ARGUMENT

I. Sprint's Motion that the Commission reconsider its decision adopting the originating carrier's retail local calling area as the basis for determining reciprocal compensation obligations should be denied.

In the Motion for Reconsideration, Sprint reargues the very position the ILECs explicitly asserted at the hearing and in posthearing briefs: that the Commission adopt the ILEC's local calling area as the default local calling area. The legal and factual arguments raised in the Motion for Reconsideration are merely a rehash of the arguments submitted in the posthearing briefs, and should be rejected. Sprint's assertion that the Commission "overlooked" issues of fact regarding the issue is simply wrong. In fact, the Commission clearly considered, and soundly rejected Sprint's proposal:

> Verizon witness Trimble contends that the existing systems, which defines reciprocal compensation obligations based on ILEC-tariffed local calling areas, "has the advantage because it has worked well over the years and it is easier to maintain an existing, proven system than to implement and administer a new one." ... While Verizon apparently believes the use of an ILEC's retail local calling area is the basis for determining compensation is simple, we conclude that the issue of simplicity appears to be in the eye of the beholder... We are leery of the competitive neutrality argument advanced by witness Trimble.... [I]t would seem paradoxical to assume neutrality in a competitive market paradigm will result from the imposition of a compensation structure that is geographically routed in monopoly era regulation.

Order, pg. 43-44.

Because it is clear that the Commission has already considered and rejected Sprint's proposal, it is not appropriate for Sprint to reargue or for the Commission to entertain, the same arguments in a Motion for Reconsideration. *See Stewart Bonding Warehouse, supra.*

A. The Commission's order does not violate federal or state law.

Sprint's claim that defining the local calling area as the originating caller's retail local calling area for reciprocal compensation violates the law should be rejected. This argument, like the other arguments foisted on the Commission in the Motion for Reconsideration, are merely attempts to get the Commission to rule in the way that ILECs have championed all along. That is:

> If parties cannot agree on a local calling area definition in negotiations, then the ILECs definition should be the default. (Tr. 109, Tr. 536, Verizon posthearing brief, pages 8 and 9, Sprint posthearing brief, pgs. 7-9).

The Commission should decline to adopt the ILECs position, just as it did in its Order. As the Commission stated in the Order:

> FCC 96-325, ¶1035 appears unequivocal in granting authority to state commissions to determine what geographic area should be considered "local areas" for the purpose of applying reciprocal compensation obligations under Section 251(b)(5) of the Act. ILEC parties nothing to dispute what appears to be a clear delegation of authority from the FCC to state commissions to make determinations as to the geographic parameters of a local calling area. (Order, pg. 41)

The Commission exercised its authority consistent with federal law and its ruling should not be disturbed.

The Commission's decision to set the calling party's local calling area as the default is also well within its authority as granted by the Florida Legislature. Sections 364.01(4)(b) and 364.01(4)(g), Florida Statutes, grant the Commission broad powers to support local competition, and direct the Commission to:

> (b) Encourage competition through the flexible regulatory treatment among providers of telecommunications services in order to insure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.

* * *

> (g) Insure that all providers of telecommunications services are treated fairly by preventing anti-competitive behavior and eliminating unnecessary regulatory restraint.

The Commission's jurisdiction to establish a local calling area for reciprocal compensation purposes also is enunciated in *Florida Interexchange Carriers v. Beard*, 624 So.2d 248, 251 (Fla. 1993), wherein the Florida Supreme Court stated:

> The exclusive jurisdiction in Section 364.01 to regulate telecommunications gives us the authority to determine local routes.

Sprint argues that Sections 364.16(3)(a) and 364.163, Florida Statutes, preclude the Commission from establishing a local calling area. This is simply not the case. Section 364.16(3)(a) states:

> (a) No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, *for which terminating access charges would otherwise apply*, through a local interconnection agreement without paying the appropriate charges for such terminating access service.. (emphasis added)

Clearly, section 364.16(3)(a), precludes a local (or alternative local) exchange telecommunications company from delivering access traffic without paying the appropriate terminating access charges to the terminating carrier for such traffic. It is equally clear, however, that Section 364.16(3)(a) does not address and certainly does not impede the Commission's authority to establish local calling areas. While the Commission's decision defining a "local calling area" may alter the compensation scheme for particular traffic routes in the state, it clearly does not violate the import of Section 364.16(3)(a), because all carriers will still be required to pay terminating access charges where applicable.

Sprint's reliance on Section 364.163, Florida Statutes, to assert that the Commission does not have the authority to define the default local calling area is equally misplaced. As the Commission pointed out in the Order:

> [T]he ILEC parties are failing to distinguish between access rates and access revenues. It is clear from the plain language of Section 364.163, Florida Statutes, that the Legislature has reserved for itself the authority to determine access charge *rates*. What is not clear from the ILEC's brief is how Section 364.163 governs access charge *revenues*. We do not believe a decision by us to [establish LATAs as] a default local calling area translates into rate-setting.

(Order, pg. 41).

In short, in the Motion for Reconsideration, Sprint merely ask the Commission to change its ruling to a position more beneficial to them. The legal arguments in the Motion for Reconsideration are merely a rehash of the very same arguments Sprint already presented. These arguments were considered by the Commission, and were firmly rejected. In fact, Sprint must concede that the Commission has authority to determine the local calling area for reciprocal compensation purposes, as Sprint put forth the proposition that the Commission should adopt the ILEC's local calling area as the default mechanism.

B. Using the originating party's local calling area as a mechanism for determining reciprocal compensation is consistent with current practice in Florida.

BellSouth witness Shiroishi testified that using an originating carrier's local calling area as the default mechanism is technically feasible. (Order, p. 46). In fact Ms. Shiroishi asserted that BellSouth currently has implemented the very process sprint insists would cause "critical administrative and implementation issues." (Sprint Motion, pgs. 7-9). Ms. Shiroishi stated that:

> [F]or purposes of determining the applicability of reciprocal compensation, a "local calling area" can be defined as mutually agreed to by the parties and pursuant to the terms and conditions contained in the parties' negotiated interconnection agreement *with the originating parties' local calling area determining the intercarrier compensation between the parties. BellSouth currently has the arrangement [sic] described in many of its interconnection agreements, and is able to implement such agreement through the use of billing factors.* These factors allow the originating carrier to report to the terminating carrier the percent of usage that, is interstate, intrastate, and local.

(See Order, pg. 46-47).

Sprint's arguments that the ruling is erroneous because it fails to consider "several critical administrative and implementation issues" is belied by BellSouth's testimony in this docket. BellSouth currently has the arrangement in many of its interconnection agreements and is able to implement the arrangement through the use of billing factors.[5] Therefore, Sprint's speculative claims of "critical administrative and implementation issues " must be rejected.

II. Sprint's Motion for Stay Pending Appeal Also Should be Denied

Sprint alternatively seeks a stay if the Commission declines to reconsider its local calling area decision. Sprint has the same appellate rights as any other party to this proceeding. If and when it chooses to file an appeal, it can then request a stay. Until that happens, the request for a stay is premature and should be summarily denied. There is nothing in Rule 25-22.061 which even remotely authorizes the granting of a stay absent the timely filing of a notice of appeal.

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[5]Clearly, BellSouth doesn't believe this arrangement violates state or federal law, nor did the Commission when it approved these interconnection arrangements.

Should the Commission decide to address Sprint's arguments regarding a stay - - in the event that Sprint decides in the future to file an appeal - - it's arguments supporting a stay should be rejected.

Rule 25-22.061(1)(a), Florida Administrative Code requires the Commission to stay an order pending judicial review "when the order being appeal involves the refund of monies to customers or a decrease in rates charged to customers..." Sprint's argument that Rule 25-22.061 is implicated by the Commission's order regarding the local calling area is erroneous. Sprint argues that if the ALEC defines its local calling area larger than the ILECs' tariffed local calling area, the ALEC will then pay reciprocal compensation rates instead of access charges on traffic traversing an ILEC's local calling area. The Commission ruling only impacts intercarrier compensation, and thereby, by definition does not involve the refund of "monies to customers" or a "decrease" in rates charged to customers as addressed in Rule 25-22.061(1)(a). Indeed, as the Commission stated in a 1999 order denying BellSouth's request for a stay of its Commission ordered obligation to pay reciprocal compensation for ISP traffic terminated by certain ALECs pending BellSouth's appeal:

> This rule (Rule 25-22.061(1)(a)) does not apply to this case, because, contrary to BellSouth's assertion, the complainants, competitive telecommunications carriers, are not "customers" for purposes of this rule. The rule is designed to apply to rate cases or other proceedings involving rates and charges to end user ratepayers or customers, not to contract disputes between interconnecting telecommunications providers. Furthermore, this case does not involve a "refund" or a "decrease" in rates. It involves payment of money pursuant to contractual obligations.

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc., et. al., ("*WorldCom*"), Order No. PSC-99-0758-FOF-TL, at 4.

The Commission should further deny the request for a stay because Sprint has not, and cannot, establish all of the conditions for obtaining a discretionary stay pending judicial review pursuant to Rule 25-22.061(2), which states, in pertinent part:

> In determining whether to grant a stay, the Commission may, among other things, consider: (a) whether the petitioner is likely to prevail on appeal; (b) whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and (c) whether the delay will cause substantial harm or be contrary to the public interests.

Sprint states that it is likely to prevail on appeal based upon arguments made in the motion for reconsideration. The Commission order regarding local calling area is consistent with federal and state law, although inconsistent with Sprint's desired result. In a proposed appeal, the Commission's ruling regarding local calling areas, clearly a matter within the Commission's field of expertise, would be entitled to great deference from the appellate court and is not likely to be overturned. (See *BellSouth Communications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla. 1998) "An agency's interpretation of the statute it is charged with enforcing is entitled to great deference.") The legal hurdles Sprint faces in an appeal of this Order, as well as the fact that the Commission's decision is consistent with federal and state law, renders a successful appeal unlikely.

Sprint also claims that it will likely suffer irreparable harm if a stay is not granted. This is not the case. Sprint merely complains about competitive losses to the ALECs. Whether Sprint will actually suffer *any* losses in the future is speculative, however, there is nothing "irreparable" about a company's competitive losses due to the Commission's revisions to the out-moded monopoly era local calling areas.

Finally, Sprint argues that a delay in the implementation of this Commission's ruling regarding local calling areas will not cause substantial harm or be contrary to the public interest. This argument is equally untenable. Again, referring to the *WorldCom* decision and the Commission's rejection of BellSouth's assertions under Rule 25-22.061(2) that BellSouth would be irreparably harmed if a stay was not granted but there would be no harm to the public by ordering a stay, the Commission held:

> The harm to the development of competition from further delay is the discernible harm in this case. Harm to the development of competition is harm to the public interest.

Order No. PSC-99-0758-FOF-TP, at 8.

The Commission's rationale in *WorldCom* is equally applicable in the instant case. The Commission's decision, which is well within its authority, was made precisely because the Commission determined it to be in the public interest. The public interest in the development of local exchange competition is not served by a further delay. A stay, if timely sought upon the filing of an appeal, would relegate the ALECs back to the time and expense of arbitrating this issue in the future - - contrary to the basic purpose of this generic docket - - at the expense of Florida's consumers who await the promise and benefits of full local exchange competition..

CONCLUSION

The Commission's Order complies with state and federal law and is well within its authority. Sprint has raised no issues which the Commission overlooked or misapplied. Instead, the Motion for Reconsideration or Stay Pending Appeal merely rehashes the very same arguments the Commission specifically rejected. The Commission should reject these arguments once more and deny the Motion for Reconsideration and Alternative Motion for Stay.

Respectfully submitted,

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On behalf of US LEC of Florida Inc.

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