BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Verizon Florida Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes.	DOCKET NO. 030867-TL
In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes.	DOCKET NO. 030868-TL
In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.	DOCKET NO. 030869-TL ORDER NO. PSC-03-1331-FOF-TL ISSUED: November 21, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING AARP'S MOTION TO DISMISS

BY THE COMMISSION:

During the 2003 Regular Session, the Florida Legislature enacted the Tele-Competition Innovation and Infrastructure

Enhancement Act (Tele-Competition Act or Act). The Act became effective on May 23, 2003.

Part of the Tele-Competition Act is the new Section 364.164, Florida Statutes, whereby the Legislature established a process by which each incumbent local exchange telecommunications carrier (ILEC) may petition the Commission to reduce its intrastate switched network access rate in a revenue-neutral manner. We are required to issue our final order granting or denying any such petition within 90 days of the filing of a petition. Section 364.164 sets forth the criteria this Commission shall consider in determining whether to grant the petition.

On August 27, 2003, Verizon Florida Inc. (Verizon), Sprint-Florida, Incorporated (Sprint), and BellSouth Telecommunications, Inc. (BellSouth), each filed petitions pursuant to Section 364.164, Florida Statutes, and respective Dockets Nos. 030867-TL, 030868-TL, and 030869-TL have been opened to address these petitions in the time frame provided by Section 364.164, Florida Statutes. On September 4, 2003, the Prehearing Officer issued an Order Establishing Procedure and Consolidating Dockets for Hearing, Order No. PSC-03-0994-PCO-TL. Because of the expedited nature of these proceedings, the schedules and procedures set forth therein recognized and applied this Commission's decisions made at the September 2, 2003, Agenda Conference in Docket No. 030846-TL. At the September 15, 2003, Agenda Conference, we addressed the Office of Public Counsel's/Citizens' (hereafter OPC) Motion(s) to Hold, and to Expedite Scheduling of, Public Hearings filed in each of the identified Dockets on August 28, 2003. The Commission decided to hold public hearings in the above referenced dockets.

On September 3, 2003, OPC filed Motions to Dismiss the petitions in each of the dockets. On September 10, 2003, Verizon filed its Response to OPC's Motions to Dismiss. Also on September 10, 2003, Sprint and BellSouth filed their Joint Response to OPC's Motion to Dismiss. On September 23, 2003, AARP filed a Motion to Dismiss joining the arguments put forth by OPC. By Order No. PSC-03-1172-FOF-TL, issued October 20, 2003, we granted OPC's Motions to Dismiss, allowing the petitioners to refile within 48 hours correcting the failing identified therein. We also found that our decision on OPC's Motions rendered AARP's Motion moot. The

petitioners all refiled within the 48 hour time limitation, and the schedule was amended accordingly.

On October 20, 2003, AARP filed another Motion to Dismiss the Petitions in these Dockets for failure to join indispensable parties. On October 27, 2003, BellSouth, Verizon and Sprint filed separate responses to AARP's Motion to Dismiss. This Order addresses AARP's new Motion to Dismiss and the responses thereto. At the outset, we note that on October 27, 2003, AT&T and MCI, registered IXCs, filed Petitions to Intervene in these Dockets, which have since been granted.

We have jurisdiction over this matter pursuant to Section 364.164, Florida Statutes.

I. APPLICABLE STANDARD OF REVIEW

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. See also Flye v. Jeffords, 106 So. 2d 229 (1st DCA 1958)(consideration should be confined to the allegations in the petition and the motion). The moving party must specify the grounds for the motion to dismiss, and we must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

When determining whether a named person or entity is, in fact, an indispensable party, such that failure to join them would result in a failure to state a cause of action upon which relief can be granted, the proper standard is found in Rule 1.210, Florida Rules

of Civil Procedure (FRCP), which states, in pertinent part, that: "Any person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause." "An indispensable party is one whose interest in the subject matter of the action is such that if he is not joined, a complete and efficient determination of the equities and rights and liabilities of the other parties is not possible." Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th DCA 1972); *citing* Grammar v. Roman, 174 So.2d 443 (Fla. 2nd DCA 1965). The question is not whether a case *should* continue without the identified person or entity, but whether on the facts of the case it *can* proceed. See Phillips v. Choate, 456 So. 2d 556, 558 (Fla. 1984).

II. MOTION TO DISMISS

In its Motion, AARP contends that essential to a determination in these proceedings is whether or not the petitions, in accordance with Section 364.164(2), Florida Statutes:

> 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. [Emphasis in Motion]

AARP contends that when this legislation was being proposed, proponents of the bill asserted that residential consumers would ultimately benefit from the legislation, or at least "break even," on their monthly telephone bills because of the savings that they would receive in their intrastate toll calls. AARP argues that this alleged benefit was critical in passage of the bill, and is also part of the Petitioners' arguments in support of their proposals.

AARP cites to arguments at page 11 of Sprint's Petition, wherein Sprint contends that residential consumers will benefit not only from a more attractive market for competitors, but they will also see savings as a result of the reduction in intrastate toll rates, and elimination of the in-state connection fee. AARP also refers to the testimony of Sprint's witnesses Staihr and Felz, who offer similar commentary on the likely benefit to residential consumers resulting from the decline in toll rates.

Similarly, AARP references the testimony of Verizon's witness Danner at page 10, where he asserts that toll and long distance prices will fall due to the requirement that IXCs flow through the access charge reductions. BellSouth's witness Ruscilli is also noted as providing testimony that the pass-through of the access charge reductions will result in rate reductions for users of long distance services. AARP also notes the testimony of jointly sponsored witness Gordon at page 16, where he states:

> If there is an increase in the customer's bill, it will likely result in large part from increased stimulation from lower long distance charges that represent real gains to consumers because they are now able to make more calls at the new lower prices.

AARP argues that in spite of these assertions about the beneficial reductions in long distance prices, none of the Petitioners have put forth any evidence on how and to what extent IXCs will reduce their in-state toll rates for residential consumers. AARP contends that while Section 364.163(2), Florida Statutes, does require the IXCs to reduce their intrastate long distance revenues "by the amount necessary to return the benefits of such reduction to both its residential and business customers. . .," the statute clearly leaves it up to the IXCs as to how they should apportion those reductions. AARP emphasizes that the statute provides that, "The intrastate interexchange telecommunications company may determine the specific intrastate rates to be decreased. . . ."

AARP maintains that under a worst case scenario, IXCs could apportion 1% of the benefits from the access charge reductions to residential consumers, and 99% to business. Under this scenario, AARP argues that residential consumers will not benefit as contemplated by the statute and as described by the Petitioners' own witnesses. AARP contends, therefore, that the IXCs must be made to participate in these proceedings in order to address "the rest of the story," so that the record is clear on whether the alleged benefits to residential consumers resulting from reduced toll charges are true.

For the above reason, AARP asks that we determine whether or not we have authority to join the IXCs as indispensable parties.

If we do have such authority, AARP asks that this Commission do so. If we do not, AARP asks that we dismiss the Petitions, with leave to amend when and if the Petitioners are able to convince the IXCs to show what their toll reductions will be.

III. RESPONSES

A. BellSouth's Response

In its response, BellSouth contends that the interexchange carriers are not indispensable parties. BellSouth further asserts that AARP's Motion to Dismiss should be denied because the procedural statutes and rules applicable to this proceeding do not contemplate joinder of "indispensable parties," and the Rule of Civil Procedure relied on by AARP is inapplicable to the Commission's proceedings. BellSouth also asserts that the motion is nothing more than a second attempt by AARP to have this Commission expand the scope of the proceeding beyond that authorized by the Florida Legislature.

Specifically, BellSouth maintains that the Florida Rule of Civil Procedure 1.140(b)(7), upon which AARP relies for its motion, has not been made applicable to proceedings before this Commission by statute or rule. BellSouth states that "it is well recognized that the powers of all administrative agencies are measured and limited by the statutes or acts expressly granting the agencies their powers, or by those powers implicitly conferred." Department of Professional Regulation v. Marrero, 536 So 2d 1094, 1096 (Fla. 1st DCA 1998). BellSouth further contends that Section 120.52(12), Florida Statutes, defines "party" in relevant part as follows:

> (12) "Party" means:
> (a) Specifically named persons whose substantial interests are being determined in another proceeding.
> (b) Any other person, who as a matter of constitutional right, provision of statute or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action , and who makes an appearance as a party.

BellSouth contends that the seminal case on whether a person or entity is, or should be, a party is Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). Therein, the Court explained that "before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of significant immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect." Id. at 482.

Two provisions of the Uniform Rules of Procedure govern parties to a proceeding. Rule 28-106.109, provides:

> If it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

(Emphasis added.)

Thus, BellSouth concludes that if the substantial interests of a nonparty could be determined in a proceeding, the presiding officer would have the discretion to enter an Order notifying those persons of the proceeding and advising them of the opportunity to be joined. BellSouth contends, however, that nothing in Rule 28-106.109 *requires* joinder of anyone.

BellSouth also indicates that Rule 28-106.206, Florida Administrative Code, provides that a person whose substantial interests will be determined or affected *may* petition to intervene if that person *desires* to become a party. BellSouth argues that absent a statutory provision or rule, the Commission cannot compel joinder of interexchange telecommunications carriers. BellSouth states that unless created by constitution, an administrative agency has no common law powers, and has only such powers as the Legislature chooses to confer upon it by statute. Mathis v. Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999).

BellSouth contends that Section 364.164, Florida Statutes, set forth the criteria that this Commission must consider to determine whether the petitions to reduce switched network access charges should be granted. BellSouth asserts that Section 364.164, Florida Statutes, does not authorize us to consider how the interexchange carriers will reduce their specific in-state toll rates to flow through the access charge reductions. Further, BellSouth states that AARP referenced this same point in its Motion at Page 7, when it says that "Section 364.163(2), Florida Statutes, clearly leaves the decision on how to apportion these reductions among business and residential callings plans or programs in the sole discretion of interexchange carriers, so long as each class gets some of the reductions." BellSouth opines that Section 364.164, Florida Statutes, does not include an evaluation of how or what levels, the IXCs will reduce their intrastate toll rates. Rather, Section 364.163, Florida Statutes, gives this Commission regulatory oversight of the IXCs' implementation of long distance rate decreases. BellSouth asserts that Docket No. 030961-TI is designed to carry out that oversight responsibility. BellSouth concludes that the interexchange carriers are not indispensable parties because their participation is not essential to our consideration of the ILECs' petitions. BellSouth further disagrees with AARP's contention that the ILECs will be unable to provide sufficient evidence to support their Petitions without the participation of the IXCs. Therefore, BellSouth requests that we deny AARP's Motion to Dismiss the petitions.

Verizon's Response

In its Response, Verizon states that AARP's Motion to Dismiss should be dismissed for several reasons. Verizon contends that AARP's reliance on Rule 1.140(b), Florida Rules of Civil Procedure is misplaced because it is not a discovery rule, and there is no authority permitting its application to administrative proceedings. Verizon also states that it is not necessary to join the IXCs to seek discovery from them. Verizon references Section 364.163(3), Florida Statutes, which states that this Commission shall have continuing regulatory oversight of intrastate switched network access and customer long distance rates. Therefore, Verizon contends, we have the power to seek discovery from the IXCs regardless of whether they are joined or not.

Verizon explains that pursuant to Sections 350.117, 364.17, and 364.183, Florida Statutes, we may request any necessary information from the IXCs. In support of its Motion, Verizon also asserts that the instant proceeding is not designed to address the IXC flow-through of the access charge reductions; rather those issues are appropriate for consideration in Docket No. 030961-TI, *Flow-Through of LEC Switched Access Reductions by IXCs Pursuant to Section 364.163(2), Florida Statutes.*

Verizon also states that Section 364.164, Florida Statutes, sets forth the criteria and issues that should be considered in this proceeding. Pursuant to Section 364.164, Florida Statutes, this Commission must consider whether granting Verizon's petition "will 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." Verizon maintains that AARP's Motion to Dismiss is an attempt to expand the scope of the issues in this proceeding. Verizon asserts that an expansion of the issues in this docket would not only be contrary to the Legislature's expressed intent but also arduous, if not impossible, to address based on the statutory 90-day schedule of this proceeding. For these reasons, Verizon requests that we deny AARP's Motion to Dismiss.

Sprint's Response

In its Response, Sprint states that AARP's Motion to Dismiss is based upon a faulty premise that the specifics of the statutory access charge reduction flow-through requirement is an issue to be determined or considered by this Commission in this proceeding. Sprint indicates that a plain reading of the statute demonstrates that the statutory access charge reduction flow-through requirement is not one of the enumerated criteria we must consider in addressing these Petitions. Sprint references Order No. PSC-03-1061-PCO-TL, Order on Issues for Hearing, which does not identify any issue to which the AARP's proposed issue or its demand for data would apply. In that Order, Sprint asserts, the Prehearing Officer decided the issues for this proceeding, and the flow-through of benefits by IXCs is not an issue for determination in this proceeding.

Sprint further asserts that Section 364.163(3), Florida Statutes, gives us specific jurisdiction over interexchange carriers to ensure compliance with the statutory mandate. Consequently, Sprint opines, we are not required to consider the level of the resulting toll rates in order to grant Sprint's petition. Additionally, Sprint contends that it would be pure speculation for Sprint to estimate how the access rate reductions will impact each interexchange carrier, or how each interexchange carrier will adjust its intrastate toll rates, because the rate reductions are based on historical pricing units. Sprint states that the benefits consumers will reap as a result of the flow-through of the access charge reductions is not appropriate for consideration in this proceeding; instead, this issue should be addressed in Docket No. 030961-TI, *Flow-Through of LEC Switched Access Reductions by IXCs Pursuant to Section 364.163(2), Florida Statutes*.

Sprint argues that even if the benefits of the IXC flow-through are to be considered in this proceeding, AARP's contention that the interexchange carriers have the requisite toll rate information, and are, therefore "indispensable parties" is without merit. Sprint contends that an "indispensable party" is a common law concept applicable to civil litigation and has no counterpart in administrative law. Sprint states that an "indispensable party" is defined as "one who has an interest in the controversy of such a nature that a judgment cannot be made without affecting that interest or cannot be made with leaving the controversy so that its final determination is inconsistent with equity." *§ 4-4, Trawick's Florida Practice and Procedure (2003)* See also State Department of Health & Rehabilitative Services v. State of Florida, 472 So 2d 790 at 792 (Fla. 1st DCA 1985)("An indispensable party is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder.").

Sprint asserts that AARP has failed to demonstrate how interexchange carriers fall within the ambit of "indispensable parties." In the context of administrative law, Sprint states that determination of whether a party should be joined depends on whether the party has a substantial interest. Section 120.52(12), Florida Statutes, provides that a "substantially interested person" is one whose substantial interests will be affected by proposed agency action. Sprint argues that AARP has failed to show how the

information the IXCs may have regarding the flow-through benefit equates with a "substantial interest." Even if the IXCs are held to be "substantially interested persons," Sprint asserts that administrative law only requires that they have notice of the proceeding, it does not require dismissal of the proceeding if they choose not to join as parties. For these reasons, Sprint requests that AARP's Motion to Dismiss be denied.

IV. DECISION

After careful review of the statutory language at issue, as well as the pertinent legislative history, we do not believe that the IXCs are indispensable parties as contemplated by Rule 1.210, Florida Rules of Civil Procedure.[1] While the IXCs' participation could be useful in our consideration of the Petitions before us in these Dockets, their participation as parties is not necessary such that this Commission cannot proceed without them. See Order No. 16391, issued in Dockets Nos. 820467-TP, 830064-TP, 830365-TP, on July 21, 1986 (one must not only have an interest in the proceeding, but an interest that renders it impossible to make a final determination in good conscience without[2]). It is possible for us to make ". . . a complete and efficient determination of the equities and rights and liabilities of the other parties. . . " without the IXCs' participation. Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th DCA 1972); *citing* Grammar v. Roman, 174 So.2d 443 (Fla. 2nd DCA 1965).

In reaching this conclusion, we refer to the language of Section 364.164, Florida Statutes. Contrary to AARP's assertions, none of the four criteria set forth for our consideration in addressing the petitions necessitates participation by the IXCs. As plainly stated by the Legislature, the first factor set forth in Section 364.164(1), Florida Statutes, for our consideration does

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[1]Recognizing the ILECs' arguments that the concept of "indispensable parties" does not have a corollary in administrative law, we, nevertheless, note that the Commission has, in past proceedings, taken a somewhat different view. See, e.g. Order No. PSC-99-0648-PCO-WS, issued April 6, 1999; Order No. PSC-93-1724-PCO-WS, issued December 1, 1993; Order No. PSC-92-1210-FOF-EQ, issued October 26, 1992, and Order No. 16391, issued July 21, 1986.

[2]*Citing* National Title Insurance Co. v. Oscar E. Dooley Associates, Inc., 377 So. 2d 730, 731 (Fla. 3rd DCA 1980).

not direct the Commission to consider how the ILECs' proposals will affect the ***toll market*** "for the benefit of residential consumers." Instead, the plain language states that consideration should be given to whether granting the petitions will:

> (a) Remove current support for basic local telecommunications services that prevents the creation of **a more attractive local exchange market** for the benefit of residential consumers. [Emphasis added].

As such, the relevant market for use in making the final determination on the Petitions is the local exchange market. Thus, we find that, for purposes of Section 364.164, Florida Statutes, consideration of the impact on the toll market (and resulting impact on toll customers) is not *required* for the Commission's full and complete determination of the Petitions[3].

The language of Section 364.164, Florida Statutes, appears clear; thus, under principles of statutory interpretation, this Commission need not look further to divine the Legislature's intent. Southeastern Utilities Service Co. v. Redding, 131 So.2d 1 (Fla. 1950). That said, we nevertheless acknowledge AARP's contention that the Legislature considered the impacts on customers' toll bills in passing the new legislation.[4] We emphasize, though, that the Legislature did address the impact on the toll market if the Petitions are granted, but it did so through a separate section of the statutes, Section 364.163, wherein intrastate toll providers are required to pass the benefits of the access charge reductions on to their residential and business customers. This Commission is charged under that section with ensuring that reductions are, in fact, flowed through.

As for AARP's references to the testimony filed thus far that refers to benefits to toll customers, we note that the fact that

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[3]In reaching this conclusion, we do not find that we are precluded from such consideration, rather we conclude only that we are not required to do so.

[4]At footnote 1 of the Motion, AARP states that it is in the process of having the relevant industry and legislator comments recorded and transcribed for filing at a later date.

such testimony has been filed does not require that the IXCs be made parties, nor does it somehow promote the issue of the impact on the toll market to the level of the four statutorily defined factors in Section 364.164. To the extent that it has been offered, the testimony says what it says, and we can give it the weight that we deem appropriate. If AARP believes that the testimony is not sufficiently supported in the record, AARP has the opportunity to not only cross-examine those witnesses offering such testimony, but also to conduct depositions of IXC employees, to subpoena documents, and to subpoena witnesses to testify at hearing.

Therefore, for all the foregoing reasons, AARP's Motion to Dismiss is denied.

It is therefore

ORDERED by the Florida Public Service Commission that AARP's Motion to Dismiss is hereby denied for the reasons set forth in the body of this Order. It is further

ORDERED that these Dockets shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 21st Day of November, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing Services

(S E A L)

BK

DISSENT

Chairman Lila A. Jaber

Chairman Jaber dissents without comment from the majority's decision set forth herein.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.