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SPEAKER



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December 5, 2003

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 030867-TL, 030868-TL, 030869-TL & 030961-TI

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Citizens' Motion For Reconsideration of Commission Order No. PSC-03-1331-FOF-TL for filing in the above-referenced docket.

Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

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Sincerely,

H F. Mann
Associate Public Counsel

HFM/dsb

Enclosures

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- SEC 1 _____
- OTH _____

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

1 copy to each docket

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Verizon Florida Inc. to Reform Its Intrastate Network Access and Basic Local Telecommunications rates in Accordance with Florida Statutes, Section 364.164)	Docket No. 030867TL
In re: Petition of 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 by BellSouth Telecommunications, Inc., To Reduce Its Network Access Charges Applicable To Intrastate Long Distance In A Revenue-Neutral Manner)	Docket No. 030869-TL
In re: Flow-through of LEC Switched Access Reductions by IXCs, Pursuant to Section 364.163(2), Florida Statutes)	Docket No. 030961-TO Filed December 5, 2003

**CITIZENS' MOTION FOR RECONSIDERATION OF
COMMISSION ORDER NO. PSC-03-1331-FOF-TL**

The Citizens of Florida ("Citizens"), through Harold McLean, Public Counsel, and pursuant to Rules 25-22.0376, and 28-106.204, Florida Administrative Code, hereby file their motion for reconsideration of Florida Public Service Commission ("Commission") Order No. PSC-03-1331-FOF-TL. In support of this motion, Citizens state that:

1. The standard of review for a motion for reconsideration is "whether the motion identifies a point of fact or law that was overlooked or that this Commission failed to consider in rendering its Order." *See, e.g., In re: Initiation of show cause proceedings against Aloha Utilities, Inc., etc.*, Order No. PSC-03-

0259-PCO-SU, Docket No. 020413-SU (issued Feb. 24, 2003). It is inappropriate to reargue matters in a motion for reconsideration that have already been considered, and a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Id.*, quoting *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315, 317 (Fla. 1974).

2. On November 21, 2003, the Commission issued Order No. PSC-03-1331-FOF-TL, denying AARP's Motion to Dismiss ILECs' petitions.

3. AARP's motion was considered by the Commission at the November 3, 2003, agenda conference. "Attachment A," which is affixed to this Motion for Reconsideration, is a copy of the pertinent portion (pages 54 – 66) of the transcript of Item No. 4A of that agenda conference.

4. Page 64 of the transcript reflects a very pointed question posed by Commissioner Deason, after much deliberation about the issue had taken place. The straightforward response of Staff attorney, Beth Keating, follows Commissioner Deason's question.

COMMISSIONER DEASON: Staff, you're not making any interpretation as to the amount of discretion or the reading of the terminology benefit of residential consumers as it relates to whether this should or not be dismissed. That's a matter which we are going to ultimately address, but you are not making any

recommendation on that at this point. So if I vote to approve staff's recommendation, that issue is remaining open.

MS. KEATING: That's correct, Commissioner. We have tried very hard to make sure that we are not prejudging any issues.

5. Pages 54 through 64 reflect further comments by Commissioner Deason, as well as comments by Commissioners Baez and Davidson, voicing, respectively, their agreement with Commissioner Deason's concern. Chairman Jaber casts a solitary "Nay" vote to the dismissal of AARP's motion.

6. The expressed will of the Commissioners, on the record, was that their votes not be interpreted as to "the reading of the terminology of residential consumers as it relates to whether this should or not be dismissed." Ms. Keating explicitly answered, on the record, "That's correct, Commissioner. We have tried very hard to make sure that we are not prejudging any issue." Nevertheless, Order 1331 contains the following language on page 11:

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 IXC's. As plainly stated by the Legislature, the first factor set forth in Section 364.164(1), Florida Statutes, for our consideration does 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.

7. Citizens contend that a point of fact, and possibly of law, was overlooked in the issuance of Order 1331, as demonstrated by "Attachment A." That, in fact, an issue does appear to have been prejudged.

8. The Citizens have been adversely affected by this order, as evidenced by at least two Petitioners' responses to the Attorney General's Motion for Summary Final Order, which suggest that Commission Order 1331 has been interpreted to have already determined and circumscribed - - prior to hearing and contrary to the will and the votes of the Commissioners at agenda - - the meaning of "for the benefit of residential consumers."

WHEREFORE, for the specific factual matters that are set forth in the record cited in the above paragraphs and the accompanying attachment, Citizens request that the Commission to grant them reconsideration of Order 1331, and request oral argument to further elucidate the necessity of reconsideration or to answer any questions of the Commissioners.

Respectfully submitted,

Harold McLean
Public Counsel
Florida Bar No. 193591



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Attorneys for Florida's Citizens

**DOCKET NOS. 030869-TL, 030868-TL, 030867-TL and 030961-TI
CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing CITIZENS' MOTION FOR RECONSIDERATION OF COMMISSION ORDER NO. PSC-03-1331-FOF-TL has been furnished by U.S. Mail, hand-delivery and/or overnight delivery to the following parties on this 5th day of December, 2003.

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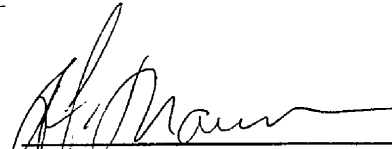
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H F. Mann
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1 needed -- the AARP just needed them. It was never that. We
2 need them and their tariffs so we can see what they propose to
3 do with this wealth of access fee reductions they will enjoy if
4 the ILECs' petitions are granted.

5 CHAIRMAN JABER: Okay. Commissioners, if I may, I've
6 got a series of questions for staff just to try to make sense
7 of all of this in my own mind. And forgive me, because some of
8 it gets into Item 5, and I'm not really trying to get into the
9 substance of Item 5. I'm more concerned with the logistics of
10 all of this. And as I understand reading the two items
11 together, you envisioned that if this Commission granted the
12 petitions in some form, that the flow-through reductions would
13 be made simultaneously, very close together. Item 5 is PAA.

14 MS. KEATING: That's correct.

15 CHAIRMAN JABER: It is possible Item 5 gets
16 protested. Assume with me -- I'm going to come back to 4A, but
17 if you assume with me that there is a protest in Item 5,
18 logistically how do you accomplish implementation of granting
19 the petition if that's what's done with flow-through
20 reductions?

21 And I ask that question, Beth, because I come full
22 circle wanting all of this information in one hearing, one
23 time, comprehensive review, and contrary to what was stated, I
24 think that's what the Legislature contemplated.

25 MS. KEATING: You hit on a point that staff has

1 talked about, Madam Chairman, and that is that if Item 5 does
2 get protested, then you're looking potentially at a hearing.
3 The hope is, is that if that occurs, that we could do something
4 on a fairly expedited basis.

5 CHAIRMAN JABER: I'm here to tell you we can't. If
6 Item 5 is protested, we cannot have a hearing before the end of
7 the year. We are currently scheduled to have a hearing in the
8 docket with 4A December 10th, 11th, 12th. So what does that
9 do? Again, if you assume this Commission at the end of the
10 hearing grants the petitions, does the statute give us the
11 flexibility to not allow implementation of any rate increases
12 until the flow-through reductions are made?

13 MS. KEATING: To be quite honest, Madam Chairman,
14 that's not something that I've really thought about directly.
15 I think that an argument could probably be made that you can,
16 but I would like a little more time to look at that because I,
17 quite frankly, haven't looked at it.

18 CHAIRMAN JABER: Mr. Twomey has taken --

19 COMMISSIONER DEASON: I'm sorry, I'm sorry. Could
20 she repeat that again?

21 CHAIRMAN JABER: Sure. Ms. Keating.

22 MS. KEATING: I'm sorry.

23 CHAIRMAN JABER: The question, Commissioner Deason --

24 COMMISSIONER DEASON: I just need -- could you just
25 repeat what you just said in answer to the Chair?

1 MS. KEATING: The question that the Chairman put
2 forth is not one that I personally have looked at directly.
3 Whether or not the Commission could defer implementation of the
4 ILECs' tariffs implementing increases until such time as the
5 IXCs' flow-throughs have been approved and considered and that
6 process is in place such that what staff had been recommending
7 that the increases and the concurrent flow-through actually
8 occur on a concurrent basis, it's not something I have looked
9 at directly. I think maybe an argument could be made that you
10 could do that, but again, I was just asking to have an
11 opportunity to look at that a little more.

12 CHAIRMAN JABER: Mr. Twomey, it comes out pretty
13 strongly, and, frankly I'm surprised, but he comes out strongly
14 and suggests that the PSC doesn't have any flexibility with
15 regard to the allocations of flow-throughs between residential
16 and business. I have to tell you, as we sit here today, I
17 disagree with you, but saying that, what is your legal opinion
18 about the statutory interpretation of that sentence? It says,
19 "By the amount necessary to return the benefits of such
20 reduction to both its residential and business customers."

21 MS. KEATING: I think it's pretty clear,
22 Madam Chairman, that you definitely have discretion to make
23 sure that some of the benefit is flowed through to both
24 residential and business. The argument does get a little more
25 tenuous to the extent that the statute says the IXC may

1 determine the specific rates to be decreased. That being said,
2 I think you've also raised another possible argument that the
3 Commission could perhaps make, in that if the Commission
4 doesn't believe what they filed accurately flows through the
5 benefit.

6 CHAIRMAN JABER: Well, it seems to me the general
7 discretion is how it gets allocated in terms of percentages
8 between residential and consumers, and perhaps the discretion
9 the IXCs have relates to where the specific rates in the
10 residential bill and in the consumer bill will be reduced.

11 COMMISSIONER DAVIDSON: And as we sit here, I have a
12 follow-up because --

13 CHAIRMAN JABER: Commissioner Davidson.

14 COMMISSIONER DAVIDSON: -- I mean, you're reading my
15 mind on this and this does get into 5 a bit, but a follow-up on
16 one of your answers to the Chairman's question. If we have the
17 discretion to make sure that the flow-through is in an amount
18 necessary to return the benefits of such reduction to both its
19 residential and business customers, and you say we have that
20 discretion, if we have that discretion, then don't we also have
21 a fiduciary obligation to, to the extent possible, reflect the
22 intent of the legislation in exercising that discretion?

23 MS. KEATING: Commissioner, again, I think that's an
24 argument that you can certainly make. I just feel obligated
25 though to point out that the language though as stated actually

1 says that the IXCs may determine the specific rate, but again,
2 that's not to say that the argument that you make isn't a
3 viable one.

4 COMMISSIONER DAVIDSON: No, I understand that. As I
5 sit here, I have to tell you I don't think there was one member
6 who voted for this bill who thought that 90 percent of the
7 benefit would go to large business customers and 90 percent of
8 the burden would go to individual customers. They just didn't
9 think that when they were talking about their parents not
10 having bill increases, and they were talking about the
11 customers. So I was comforted by your general statement that
12 we do have the discretion to address at some broad level that
13 allocation, and then what perhaps is the best way of doing that
14 we'll have to take up.

15 CHAIRMAN JABER: Yeah, and, Beth, I'm done with the
16 questions, but let me just say it is not my intent to put you
17 on the spot. The very fact though that those are arguments
18 that can be made brings me back to where I am, Commissioners,
19 at the end of this item. I want to preserve the opportunity to
20 address those arguments, which is why, frankly, Mr. Twomey, I
21 was so surprised at how adamant you were that the IXCs had the
22 discretion. I want to hear that argument, and I want to hear
23 it all together because I want to understand what discretion we
24 have or may not have. And I recognize that may be a legal
25 argument, but I think the opportunity to hear it is at this

1 hearing.

2 Commissioners, I don't know what your pleasure might
3 be, but just in an effort to disclose where I am, when we had
4 to appear -- when I appeared in front of the Legislature on
5 behalf of the Commission and talked about the comprehensive
6 review, not to put ourselves in the position of the Legislature
7 because we have what we have now and it's our job to implement
8 it, but the comprehensive review we discussed, I think, related
9 to rate structures across the board, and the Legislature time
10 and time again said, we want to give the PSC the tools and
11 discretion necessary to make this decision. I say that as a
12 foundation. But the second thing as a secondary point is that
13 it is how you view this. And we have yet to interpret some of
14 those provisions in this statute. And I want to preserve that
15 opportunity. I don't know what the right answer is today, but
16 the agenda conference isn't designed to address that.

17 I don't think it's been decided what discretion we
18 have in terms of allocating the flow-throughs between
19 residential and business. And for me, they're not separable.
20 If I could understand what the allocations to be proposed will
21 be, then I may understand where the tangible monetary benefits
22 may be to the residential consumer. And I say that carefully
23 because I have an appreciation, Mr. Hatch, for there are a
24 multitude of benefits that all of you collectively, I assume,
25 are going to address, whether they're the benefits associated

1 with technological advances, a competitive market in terms of
2 product offerings, but the reality is I want to see where the
3 monetary benefits are, and that would help me in terms of
4 understanding where the flow-throughs will be.

5 I think that the IXCs should come forward with a
6 commitment. I think there should be a comprehensive review.
7 Personally, I'm disappointed that we haven't had that thus far.

8 Commissioners, I also personally believe that the
9 opportunity to find that these were indispensable parties does
10 exist. We are obligated to follow the Uniform Rules of
11 Procedure now.

12 One of the things I circled, Beth, in your legal
13 analysis was the standard says, "Any person may at any time be
14 made a party if the person's presence is necessary or proper."
15 And maybe I'm reading it too broadly, but I think it was proper
16 for them to be here.

17 I recognize that a couple of them have intervened,
18 but I'm coming at this recommendation the way it was filed. I
19 don't know what's in the testimony that was filed by AT&T and
20 MCI. It may be just fine; I don't know.

21 But for all of those reasons I just stated,
22 Commissioners, I'm going to support AARP's motion to dismiss.
23 And recognize, that's not a motion. I just want you all to
24 know where I am.

25 COMMISSIONER DEASON: Well, let me say where I am

1 then. I agree with much of what you said, Madam Chair, but I
2 cannot reach the conclusion that we need to dismiss the
3 petitions that are in front of us. And the reason for that, to
4 me, is one of burden of proof. Now, we all know that there are
5 criteria set out in 364.164(1)(a) through (d).

6 In (a), there is language which refers to benefit of
7 residential consumers. I'm a little bit concerned with the
8 very narrow interpretation the incumbent LECs are taking of
9 that particular provision. I would point out to them that they
10 have a burden to meet, and it may behoove them to look at that
11 a little bit more broadly to make sure they meet their burden.
12 And they may have to get the information, provide it to this
13 Commission that we need from the IXCs, who also want to see
14 these petitions granted.

15 But, Madam Chair, while I share in your frustration
16 and share with you that the information is needed for us to
17 make -- to exercise whatever discretion we have, and we have
18 not determined how much discretion we have as of yet, but it
19 falls down to the burden. And I don't think that we can
20 dismiss the petitions at this point. We may very well deny
21 them after hearing because the burden's not been met, but
22 that's their burden.

23 CHAIRMAN JABER: Commissioner Baez.

24 COMMISSIONER BAEZ: Commissioner Deason, I guess I'm
25 hung up on the same thing you are in part. Something I said

1 earlier is that this motion to dismiss, at least in my mind,
2 has placed one of those ultimate questions squarely before us
3 as to what we consider to be benefits. And to decide one
4 way -- certainly to decide in favor of the motion to dismiss,
5 in my mind, would answer that question which I believe is
6 better left as part of the entire case.

7 I think that the definition of what a benefit is, is
8 wrapped up in exactly what the burden -- you know, whether the
9 petitioners are going to carry their burden or not. I would
10 agree with you that at the end of the day it's up to us to
11 decide, well, you know, were we persuaded or not. I will say
12 this. I think much has been made of the tariffs, the need for
13 tariffs to be presented. We did have a long conversation of
14 what the IXCs' ability or even willingness to provide even pro
15 forma estimates and something, but in truth, I see all of that
16 as helping the case along.

17 I cannot sit here and say that the existence or
18 absence of a tariff as part of the record or even any estimates
19 are, in fact, completely determinative of the case. I can't
20 say that. I agree with you that there is an incremental
21 effect, perhaps. It certainly has a persuasive effect. I
22 would join the rest of the Commissioners that have expressed
23 their sense of frustration over at least at this point a
24 feeling that not enough information will be put before us, and
25 I hope certainly that we're proven wrong at the end one way or

1 the other. But I don't think that approving or dismissing the
2 petitions at this point does anything more than to decide
3 ultimate questions, and I don't -- I guess I just don't feel
4 comfortable doing that.

5 CHAIRMAN JABER: Commissioner Davidson.

6 COMMISSIONER DAVIDSON: Thank you, Chairman. I agree
7 with everything that's been said with one caveat that I am
8 going to, with having given this a lot of thought, support
9 staff on AARP's motion. And I approach this from a purely
10 legal standpoint. If we set sort of as a tribunal of equity
11 purely, I would probably support AARP's motion here, but we
12 also have an obligation to apply the law. And I believe that
13 with regard to the standard for a motion to dismiss that the
14 key criteria is whether or not taken the petitions on their
15 face they state a cause of action for which relief can be
16 granted. I believe that under the statute they state a cause
17 of action. Ultimately, whether they prove the elements of
18 their claim, that's a completely different story, and that goes
19 to the issue of burden here. And I hope the parties have taken
20 all of the comments constructively and will really do their
21 best to meet their burden. So with that, I will support staff.

22 CHAIRMAN JABER: Okay. Commissioner Bradley, do you
23 have anything to add?

24 COMMISSIONER BRADLEY: No.

25 CHAIRMAN JABER: Okay. Motion.

1 COMMISSIONER DAVIDSON: Move staff.

2 CHAIRMAN JABER: There's a motion to approve staff.

3 COMMISSIONER DEASON: Well, I want to make one thing
4 clear, and I don't think this is contained in staff's
5 recommendation, but I want to make sure before I just support a
6 motion which approves staff.

7 CHAIRMAN JABER: That's a good point.

8 COMMISSIONER DEASON: Staff, you're not making any
9 interpretation as to the amount of discretion or the reading of
10 the terminology benefit of residential consumers as it relates
11 to whether this should or not be dismissed. That's a matter
12 which we are going to ultimately address, but you are not
13 making any recommendation on that at this point. So if I vote
14 to approve staff's recommendation, that issue is remaining
15 open.

16 MS. KEATING: That's correct, Commissioner. We have
17 tried very hard to make sure that we are not prejudging any
18 issue.

19 COMMISSIONER DEASON: I thought that was the case,
20 and I just wanted to confirm that.

21 COMMISSIONER BAEZ: I can second the motion now.

22 CHAIRMAN JABER: And a second. All those in favor
23 say "aye."

24 COMMISSIONER DEASON: Aye.

25 COMMISSIONER BAEZ: Aye.

1 COMMISSIONER DAVIDSON: Aye.

2 COMMISSIONER BRADLEY: Aye.

3 CHAIRMAN JABER: Oppose, "nay."

4 Nay.

5 So the motion carries 4:1.

6 That takes us to Item 5.

7 Staff, let me take an opportunity to compliment you
8 and the parties for their presentation. It didn't really
9 matter what the vote was going to be today. I really felt like
10 we had everything we needed to make a decision today, so I
11 appreciate that.

12 MS. KEATING: Thank you, Madam Chair.

13 CHAIRMAN JABER: Let's take a 15-minute break, and
14 we'll come back to Item 5.

15 - - - - -

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1 STATE OF FLORIDA)
 :
2 COUNTY OF LEON) CERTIFICATE OF REPORTER

3

4 I, TRICIA DeMARTE, RPR, Official Commission Reporter, do
5 hereby certify that the foregoing proceeding was heard at the
6 time and place herein stated.

7

8 IT IS FURTHER CERTIFIED that I stenographically
9 reported the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript constitutes a true transcription of my notes of said
12 proceedings.

13

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a relative
16 or employee of any of the parties' attorneys or counsel
17 connected with the action, nor am I financially interested in
18 the action.

19

20 DATED THIS 10th DAY OF NOVEMBER, 2003.

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TRICIA DeMARTE, RPR
FPSC Official Commission Reporter
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