

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
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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
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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
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In re: Flow-through of LEC Switched Access) Reductions by IXC's, Pursuant to Section) 364.163(2), Florida Statutes)	Docket No. 030961-TO Filed December 8, 2003

**AARP MOTION FOR RECONSIDERATION OF
COMMISSION ORDER NO. PSC-03-1331-FOF-TL, OR
IN THE ALTERNATIVE TO HAVE ORDER REFLECT
ACTUAL COMMISSION VOTE**

AARP, through its undersigned counsel, pursuant to Rules 25-22.0376, and 28-106.204, Florida Administrative Code, hereby files its motion for reconsideration of Florida Public Service Commission ("Commission") Order No. PSC-03-1331-FOF-TL, or in the alternative to have order reflect actual Commission vote. In support of this motion, AARP states:

1. Commission Order No. PSC-03-1331-FOF-TL, issued November 21, 2003, denying AARP's Motion to Dismiss the ILECs' petitions contains two related conclusions that are extremely prejudicial to AARP and other consumer

parties, are not consistent with the Commission's vote on the issue and, in fact, are directly contrary to the explicit statements of the Commissioners. Furthermore, the order's legal conclusion on the "clarity" of Section 364.164(1), Florida Statutes, which is inapposite to the Commissioners' agenda discussions, supports the Commission Staff witness's ILEC-biased view of the case, while simultaneously attempting to short-circuit AARP's foundation argument that Section 364.164(1)(a), Florida Statutes, is so linguistically convoluted that one must refer to the legislative history to ascertain the legislative intent. That intent, which appears to be a "burden of proof" issue for all Commissioners voting, is clearly that residential consumers must have the opportunity of offsetting the huge local rate increases by reduced instate toll rates. The order must be corrected to properly reflect the intention of the Commissioners when voting.

2. Order 1331 contains the following language at pages 11 & 12:

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 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.

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. [footnote omitted.]

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. (All emphasis throughout this motion is supplied by AARP.)

3. While the exact above-cited language in the order also appears in the staff recommendation on this issue and was presumably "cut and paste" from the recommendation into the order, it reaches two important conclusions not warranted by the Commissioners' discussion surrounding the vote: (1) that the language of Section 364.164(1)(a) is so clear of meaning as to prohibit resort to the House and Senate floor debates on the legislation to ascertain the legislative intent; and (2) that the Commission concluded that this statutory provision "does not direct the Commission to consider how the ILECs' proposals will affect the toll market 'for the benefit of residential consumers'."

4. The fact is that the debate of all Commissioners focused not on whether the statute precluded the ILECs having to demonstrate whether their residential customers would have to be shown to benefit in some manner by

instate toll rates being reduced as a counter to their local rates increasing dramatically, but, rather, whether that showing was: (1) merely a burden of proof issue that the ILECs had to address at hearing, or (2) a basis for dismissing the petitions because the ILECs had not joined the IXCs, who must necessarily provide the missing half of the equation, namely, how much, if any, instate toll rates available to residential customers will be reduced in exchange for their local rates increasing by \$355.5 million annually.

5. While she was on the losing side of the final vote on AARP's motion, Chairman Jaber's discussion of the issue of benefits to residential customers was relevant and appears consistent with that of the rest of the Commissioners.

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

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

I don't think it's been decided what discretion we have in terms of allocating the flow-throughs between residential and business. And for me, they're not separable. If I could understand what the allocations to be proposed will be, then I may understand where the tangible monetary benefits may be to the residential consumer. And I say that carefully because I have an appreciation, Mr. Hatch, for there are a multitude of benefits that all of you collectively, I assume, are going to address, whether they're the benefits associated with technological advances, a competitive market in terms of product offerings, but the reality is I want to see where the monetary benefits are, and that would help me in terms of understanding where the flow-throughs will be.

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

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

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

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

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

6. Immediately following Chairman Jaber's above-cited comments, Commissioner Deason made the following critical observation, beginning at page 60 of the transcript, showing that he believed not only that demonstrating a showing of benefits to residential customers was the burden of the ILECs, but, importantly, that a narrowly constrained view of the statute (as taken by staff's

recommendation, the ILECs and staff witness Shafer) as it refers to “benefit to residential consumers” troubling and that the companies would do well to take a broader view:

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

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

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

7. Given his emphasized remarks above on the ILEC's burden of proof and his trouble with the narrow view the ILECs took of the statutory benefit due to residential consumers, it is inconceivable to think that Commissioner Deason voted to constrain the definition of Section 364.164(1) as being “clear” as stated in the staff recommendation and now in Order No. 1331.

8. Commissioner Baez shared Commissioner Deason's concerns and immediately expressed them beginning at page 61 of the transcript:

COMMISSIONER BAEZ: Commissioner Deason, I guess I'm hung up on the same thing you are in part. Something I said earlier is that this motion to dismiss, at least in my mind, has placed one of those ultimate questions squarely before us as to what we consider to be benefits. And to decide one way -- certainly to decide in favor of the motion to dismiss, in my

mind, would answer that question which I believe is better left as part of the entire case.

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

I cannot sit here and say that the existence or absence of a tariff as part of the record or even any estimates are, in fact, completely determinative of the case. I can't say that. I agree with you that there is an incremental effect, perhaps. It certainly has a persuasive effect. I would join the rest of the Commissioners that have expressed their sense of frustration over at least at this point a feeling that not enough information will be put before us, and I hope certainly that we're proven wrong at the end one way or the other. But I don't think that approving or dismissing the petitions at this point does anything more than to decide ultimate questions, and I don't -- I guess I just don't feel comfortable doing that.

9. Commissioner Davidson apparently echoed the concerns of

Commissioners Deason and Baez, stating, beginning at page 63:

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

10. As if his previous statements were not sufficiently clear on the point, at page 64 of the transcript Commissioner Deason asks the following question of Staff attorney, Beth Keating:

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.

11. Earlier in the agenda discussion, Commissioner Davidson attempted to make the point that the division of toll reductions that would be applicable to residential consumers was a remaining and important consideration in the following discussion with Attorney Beth Keating:

COMMISSIONER DAVIDSON: A couple of follow-ups, Chairman. Does staff agree that the information being discussed by Mr. Twomey, the type of information is relevant to the proceeding notwithstanding staff's position on the motion to dismiss for failure to join an indispensable party?

MS. KEATING: Honestly, Commissioner, we have tried not to address that question just because we believe that that is one of the big questions that's pending before the Commission as to whether the information is relevant. But I think that --

COMMISSIONER DAVIDSON: And that's a fair response. Let me ask you then, if the information is ultimately relevant or important to our inquiry, does staff agree that it is the petitioners' burden to bring forth that information?

MS. KEATING: Yes, Commissioner, I believe so. And let me also point out that I think both yourself and Commission Baez hit on a point that third-party discovery is available.

12. Chairman Jaber, at this point, interjected the notion that the Commission may independently need the residential customer benefit information, saying at page 34:

CHAIRMAN JABER: You know what else is important? It should matter what the Commissioners need to make an informed decision.

13. Earlier in the debate, Commissioner Davidson raised the importance of the residential consumer benefit, saying beginning at page 35:

COMMISSIONER DAVIDSON: I was in the Ready Infrastructure Council the first time this bill came through, and we all monitored the progress on this bill closely this go-around. And so agreeing with what the Chairman has said, you all were there supporting the bill, arguing where the benefits would go, and my understanding of how members of the Legislature viewed this was that in one area there may be an additional burden on consumers and another area there may be additional benefit, but it's all going to be from the consumer standpoint of revenue neutral.

Mr. Twomey's point throughout these proceedings that it appears most of the burden is going to residential and small business customers and there's the possibility that all of the benefit -- most of the benefit will go to business customers is, from my standpoint as I sit here today, based on where we are in the case, not an irrelevant question, not an irrelevant focus. I'm not saying I agree with it. I'm saying it's not irrelevant from my standpoint.

The Chairman asked you a question earlier and Commissioner Baez followed up. Can't you give us at least sort of a pro forma big idea picture of how you would do this? And it may be from a business standpoint you're just not prepared to do that, and if that's the answer, that's the answer. But I know I'm going to be interested in knowing and understanding that every individual consumer is not going to have equal benefit and burden, and we're focused on the statewide pool of consumers. I'm still going to be interested in knowing if this percent of the residential customers is likely to have a burden, what percent of residential customers on the long distance side is likely to have a benefit. I mean, I am going to the extent possible trying to compare apples to apples, oranges to oranges. And I want to know, is 90 percent of the burden going to individuals and 90 percent of the benefit going to business? That's a relevant inquiry.

Can't you based on what information is out there at least, not today, perhaps not in the next few days, but sometime in the foreseeable future, give us some parameters that if this is going to be how this petition, BellSouth version one or BellSouth version two, is implemented, this right now subject to change is roughly what we would do? We would anticipate passing on some 10 to 30 percent of these access charge reductions to residential and 70 to 90 percent to business. That type of generality, can we get that?

14. Despite the above expressions of concern by the Commissioners, Order 1331 contains language stating that it is plainly stated by the legislature that the Commission will not "consider how the ILECs' proposals will affect the toll market 'for the benefit of residential consumers'." Additionally, and worse yet, the Order, despite the clear statement from Commissioner Deason that he was not voting in a manner that would be "making any interpretation as to the amount of discretion or the reading of the terminology benefit of residential consumers," which concern was clearly supported by Commissioner Baez, does just that by attempting to state that the statute is so clear that any delving into legislative intent is prohibited.

15. AARP has 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, AARP requests that the Commission grant it reconsideration of Order 1331, or in the alternative, correct the order to have it

reflect the actual decision of the Commission by deleting the following language, which is both unnecessary to the decision to deny AARP's motion, and, in fact, contrary to the stated logic of the Commissioners voting:

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 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:

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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.

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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.

AARP also requests oral argument on this motion.

Respectfully submitted,

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

I HEREBY CERTIFY that a copy of the foregoing document has been furnished by U.S. Mail, hand-delivery, email and/or overnight delivery to the following parties on this 8th day of December, 2003.

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