State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER ● 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED FPSC
02 NOV 22 AM 9:52
COMMISSION CLERK

DATE: NOVEMBER 22, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BANKS, DODSON, B. KEATING)
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (MARSH, SANDS, SIMMONS)

RE: DOCKET NO. 000075-TP - INVESTIGATION INTO APPROPRIATE METHODS TO COMPENSATE CARRIERS FOR EXCHANGE OF TRAFFIC SUBJECT TO SECTION 251 OF THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: 12/02/2002 - REGULAR AGENDA - POST HEARING DECISIONS
ISSUE A: REQUEST FOR ORAL ARGUMENT ON ISSUES 1 & 2 - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF
ISSUES 1 - 4: MOTIONS FOR RECONSIDERATION/CROSS-MOTION FOR RECONSIDERATION - ORAL ARGUMENT HAS BEEN REQUESTED ON ISSUES 1 & 2 ONLY, BUT MAY BE ENTERTAINED ON ISSUES 1 - 4 AT THE COMMISSION'S DISCRETION PURSUANT TO RULE 25-22.060(1)(F), F.A.C.
ISSUES 5-6: MOTION TO STRIKE AND REQUESTS FOR STAY - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\000075R3.RCM

DOCUMENT NUMBER-DATE
12845 NOV 22 02
FPSC-COMMISSION CLERK

CASE BACKGROUND

On January 21, 2000, this docket was established to investigate the appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996 (the Act). Staff notes that by Order No. PSC-00-2452-PCO-TP, issued December 20, 2000, the issues in this docket were bifurcated into two phases: Phase I and Phase II. Subsequently, Phase IIA resulted when the Commission decided to conduct another evidentiary hearing on Issues 13 and 17 of Phase II.

Phase I

An administrative hearing regarding Issues 1-9 delineated for Phase I of this docket was conducted on March 7 - 8, 2001. In accordance with Order No. PSC-00-2229-PCO-TP, issued November 22, 2000, as modified by Order No. PSC-01-0863-PCO-TP, issued April 5, 2001, post-hearing briefs were filed on April 18, 2001. Thereafter, on April 19, 2001, the Federal Communications Commission (FCC) released its decision in FCC Dockets Nos. 96-98 and 99-68 on matters regarding intercarrier compensation for traffic to Internet Service Providers that had been remanded to the FCC for further determination by the Court of Appeals for the District of Columbia Circuit. On April 27, 2001, Order No. PSC-01-1036-PCO-TP was issued requiring all parties in this proceeding to file supplemental post-hearing briefs addressing the decision of the FCC in Dockets Nos. 96-98 and 99-68 (FCC Order) within 10 days of the issuance of the FCC's Order memorializing the April 19, 2001, decision. On that same day, the FCC Order was memorialized in Docket Nos. 96-98 and 99-68.

On May 2, 2001, AT&T Communications of the Southern States, Inc., TCG of South Florida, Global NAPS, Inc., MediaOne Florida Telecommunications, Inc., Time Warner Telecom of Florida, LP, Florida Cable Telecommunications Association, Inc., Allegiance Telecom of Florida, Inc. and the Florida Competitive Carriers Association (collectively "Joint Movants") filed a Joint Motion for Extension of Time to File Supplemental Post Hearing Brief. Order No. PSC-01-1094-PCO-TP, issued May 8, 2001, was issued granting the Joint Movants' Motion for Extension of Time.

On March 27, 2002, the parties filed a Joint Stipulation, suggesting we defer action on the issues raised in Phase I of this

docket. In support of this proposal, the parties stated that on April 27, 2001, the FCC issued its ruling in the case of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order* (*ISP Remand Order*), FCC 01-131. The parties asserted that the *ISP Remand Order* established certain nationally applicable rules regarding intercarrier compensation for ISP-bound traffic. Therein, the parties contended that the FCC had asserted jurisdiction over ISP-bound traffic and hence, we should decline to issue a ruling on the issues in Phase I, which addresses reciprocal compensation for ISP-bound traffic. The parties asserted that although the *ISP Remand Order* was under court review, it had not been stayed and was, therefore, binding.

On May 7, 2002, this Commission issued Order No. PSC-02-0634-AS-TP, approving the Joint Stipulation, but leaving the docket open pending the resolution of issues to be addressed in Phase II of this proceeding.

Phases II and IIA

A hearing was conducted on July 5, 2001, concerning the Phase II issues dealing with non-ISP reciprocal compensation matters. On December 5, 2001, a special agenda conference was held to consider issues designated for resolution in Phase II of this docket (Issues 10-19). At the special agenda conference, decisions were reached on Issues 10, 12, 14, 15, 16, 18, and 19, and decisions were deferred on Issues 13 and 17. The deferred issues were set for a one-day hearing. The Commission's decisions on Issues 10, 12, 14, 15, 16, 18, and 19 were not memorialized in an order, pending final decisions on Issues 13 and 17. A prehearing conference was held April 19, 2002, on the two issues that comprise Phase IIA. At the prehearing, it was determined that testimony previously filed in Phase II of this proceeding would be refiled for informational purposes, and the witnesses sponsoring testimony for Phase II would not be susceptible to cross-examination. A hearing was conducted on May 8, 2002. On September 10, 2002, the Final Order on Reciprocal Compensation was issued, then later amended by Order No. PSC-02-1248A-FOF-TP, issued on September 12, 2002.

On September 25, 2002, Verizon and ALLTEL filed a Motion for Partial Reconsideration and, in the alternative, Motion for Stay

Pending Appeal. On that same day, the following filings were made: Motion for Reconsideration and Request for Oral Argument by AT&T Communications of the Southern States, LLC, TCG of South Florida and AT&T Broadband Phone of Florida, LCC (collectively "AT&T"); Sprint's Motion for Reconsideration, or, in the Alternative Motion for Stay Pending Appeal by Sprint; Notice of Adoption of AT&T's Motion for Reconsideration by FCCA; Notice of Adoption of AT&T's Motion for Reconsideration by Time Warner Telecom of Florida, L.P., and Florida Cable Telecommunications Association; Notice of Adoption of AT&T's Motion for Reconsideration by US LEC of Florida Inc. On October 2, 2002, Frontier Communications of the South, Inc., GTC, Inc. d/b/a GT Com, ITS Telecommunications Systems, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, Smart City Telecommunications LLC d/b/a/ Smart City Telecom and TDS Telecom/Quincy Telephone filed a Response to Verizon and ALLTEL's Motion for Partial Reconsideration.

On October 7, 2002, the following filings were made: Response in Opposition to Sprint's Motion for Reconsideration, Or, in the Alternative, Motion for Stay Pending Appeal by AT&T Communications of the Southern States, LLC, TCG South Florida, AT&T Broadband Phone of Florida, LCC, the Florida Cable Telecommunications Association, Florida Competitive Carriers Association, and Time Warner Telecom of Florida, LP; Response in Opposition to Verizon and ALLTEL's Partial Motion for Reconsideration, and in the Alternative Stay by AT&T et.al; Response in Opposition to Sprint's Motion for Reconsideration by US LEC of Florida Inc.; Response in Opposition to Verizon and ALLTEL's Partial Motion for Reconsideration by US LEC of Florida Inc.; Opposition to AT&T's Motion for Reconsideration by Verizon; Opposition to AT&T's Request for Oral Argument on its Motion for Reconsideration by Verizon; Opposition to AT&T's Motion for Reconsideration by BellSouth and BellSouth's Cross Motion for Reconsideration. On October 8, 2002, FDN filed a Notice of Adoption of AT&T's Responses to Verizon and Sprint's Motions for Reconsideration.

Staff notes that on October 24, 2002, Verizon filed a letter indicating, among other things, that Rhode Island's Public Utilities Commission found that designating competing and inconsistent local calling areas for purposes of intercarrier compensation seems contrary to federal law. On November 5, 2002, AT&T filed a Response to Verizon's October 24, 2002, letter, stating that the Commission should disregard the Rhode Island's

Public Utilities decision because it is not relevant and lacks authoritative stature. Staff considers these filings as untimely and hence they are not addressed herein.

On October 31, 2002, GNAPs filed a Notice of Adoption of AT&T/TCG/AT&T Broadband's Motion for Reconsideration. On November 12, 2002, Verizon filed a Motion to Strike GNAPs' Notice. To date, GNAPs has not filed a response, but should one be filed prior to the Commission's consideration of this matter, copies will be provided to the Commissioners for their consideration.

This recommendation addresses the filings regarding motions for reconsideration of the Final Order on Reciprocal Compensation resulting from Phases II and IIA.

JURISDICTION

Staff believes that the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, the FCC's rules and orders and Sections 364.161 and 364.162, Florida Statutes, so long as not otherwise inconsistent with the FCC rules and orders and the Act. Further, staff believes that Section 120.80(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act.

The Commission retains jurisdiction of its post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

DISCUSSION OF ISSUES

ISSUE A: Should the Commission grant AT&T/TCG/AT&T Broadband's Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-02-1248-FOF-TP?

RECOMMENDATION: No. Pursuant to Rule 25-22.060(1)(f), Florida Administrative Code, oral argument on any post-hearing motion for reconsideration may be granted solely at the Commission's discretion. In this instance, staff believes that oral argument will not aid the Commission in evaluating issues before it. **(BANKS, KEATING, DODSON)**

STAFF ANALYSIS: Rule 25-22.060(1)(f), Florida Administrative Code, provides that oral argument on any motion for reconsideration of a post-hearing decision by the Commission may be entertained at the Commission's discretion. Because this rule specifically addresses oral argument within the context of a motion for reconsideration, it appears that it is not necessary for a party to specifically comply with Rule 25-22.058, Florida Administrative Code, in order for the Commission to entertain oral argument. Such a request is not, however, precluded and can be helpful in identifying whether the Commission should exercise its discretion to entertain oral argument.

Here, AT&T has requested oral argument on the issue of when an ALEC is entitled to the tandem interconnection rate. Particularly, AT&T would like to address the Commission's decision that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation. AT&T believes that oral argument addressing the FCC's decision in an arbitration of an agreement between WorldCom and Verizon, *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc. and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act*, DA 02-1731 (*Virginia Arbitration Order*) (July 17, 2002), will provide needed guidance on this issue. Therefore, AT&T asks that oral argument be heard on these issues (Issues 1 & 2 of this Recommendation).

AT&T states that briefs addressing the issues in this case were filed with the Commission on August 10, 2001, and staff's recommendation was first presented to the Commission on November 20, 2001. AT&T acknowledges that the Commission voted on most of the issues in this proceeding on December 5, 2001. AT&T asserts

that because the *Virginia Arbitration Order* was not released until July 17, 2002, the parties did not have an opportunity to present and argue that FCC decision at or before the July 5 and 6, 2001, hearing or prior to the Commission's vote regarding the issues. Therefore, AT&T requests an opportunity to present oral argument to the Commission addressing the *Virginia Arbitration Order*.

On October 7, 2002, Verizon filed its Opposition to AT&T's Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-02-1248-FOF-TP. Verizon states that AT&T claims that the Commission's rulings are inconsistent with FCC precedent issued after the Commission rendered its rulings. Verizon argues that AT&T's sole support for this claim is the July 17, 2002, Opinion of the FCC's Wireline Bureau resolving issues in the three Virginia ALECs' petitions for arbitration with Verizon Virginia Inc. Verizon declares that no oral argument is necessary to confirm that AT&T has seriously mischaracterized the *Virginia Arbitration Order*. Verizon concludes that because AT&T's allegation is demonstrably false, there is no reason to hold oral argument before denying AT&T's Motion for reconsideration.

As previously noted, pursuant to Rule 25-22.060(1)(f), Florida Administrative Code, the decision whether to grant or deny a request for oral argument on a Motion for Reconsideration is entirely at the Commission's discretion. In this instance, staff believes that oral argument will not aid the Commission in comprehending and evaluating the issues before it, because these issues were fully litigated at the hearing. Staff notes that the FCC decision referenced by AT&T does not appear to be controlling on this issue. Consequently, staff recommends that AT&T's Request for Oral Argument be denied.

ISSUE 1: Should the Commission grant the various Motions for Reconsideration filed regarding the tandem interconnection rate and definition of "comparable geographic area" in Order No. PSC-02-1248-FOF-TP?

RECOMMENDATION: No. The Motions have not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the Motions for Reconsideration regarding the tandem interconnection rate and definition of "comparable geographic area" in Order No. PSC-02-1248-FOF-TP should be denied. **(BANKS, DODSON)**

STAFF ANALYSIS:

As stated in the Case Background, on September 25, 2002, AT&T Communications of the Southern States, LLC, TCG of South Florida and AT&T Broadband Phone of Florida, LLC (collectively "AT&T") filed a Motion for Reconsideration of Final Order on Reciprocal Compensation, Order No. PSC-02-1248-FOF-TP. On October 7, 2002, Verizon Florida Inc. filed a Response to AT&T's motion for reconsideration. On that same day, BellSouth filed its Opposition to AT&T's Motion for Reconsideration and BellSouth's Cross Motion for Reconsideration. Staff notes that Verizon's arguments encompasses BellSouth's arguments and therefore only Verizon's arguments are addressed and BellSouth's Cross-Motion is addressed in Issue 4. In the Commission's Order, it determined what constitutes a "comparable geographic area" when deciding whether an ALEC is entitled to the tandem interconnection rate pursuant to the Act and FCC's rules and orders.

Motion for Reconsideration

In its Motion for Reconsideration, AT&T states that in its decision, the Commission placed more onerous burdens on ALECs to establish that they are entitled to the tandem interconnection rate than are required by FCC rules. AT&T explains that the Commission stated that it is appropriate for an ALEC to provide a list of the NPA/NXXs that an ALEC has opened to show that it is prepared to serve customers in specific rate centers. Order at 18. Additionally, the Order states that an ALEC is required to make a showing of its actual capability to serve those customers. Id. AT&T contends that the Commission now demands a much more detailed demonstration of an ALEC's network ability than do the FCC's rules and orders.

AT&T states that the Commission expressed concern regarding the dearth of direction from the FCC regarding Rule 51.711, stating:

> Absent any direction from the FCC regarding what they meant by the word "services" as contained in the FCC Rule 51.711, we believe. . . .

Order at 17. AT&T asserts that the FCC has given state commissions full and accurate direction regarding Rule 51.711 and has recently resolved any ambiguity regarding what is meant by the word "serves" in FCC Rule 51.711. AT&T believes that it is entitled to reciprocal compensation at the tandem interconnection rate if its switch is capable of serving customers in areas geographically comparable to the area served by the ILEC's tandem. AT&T states that it is clear that in order to prove that its switch "serves" such an area, an ALEC need only demonstrate the capability of its switch to serve the area. AT&T opines that the FCC adopted Rule 51.711 establishing that ALECs are entitled to the tandem interconnection rate on a showing that their switch serves a geographic area comparable to the area served by the incumbent LEC's tandem switch. AT&T states that in 2001, the FCC clarified that in order to receive the tandem interconnection rate pursuant to Section 51.711(a)(3), an ALEC need only demonstrate that it serves a geographic area comparable to the incumbent LEC. *Developing a Unified Intercarrier Compensation Regime*, CC Docket NO. 01-92, *Notice of Proposed Rulemaking* 16, FCC Rcd 9610, 9648, ¶105 (2001) (*Intercarrier Compensation NPRM*).

AT&T asserts that on July 17, 2002, the FCC issued an Order resolving three petitions for arbitration of interconnection agreements between Verizon-Virginia, Inc., AT&T, WorldCom and Cox Telecom, *Petitioner WorldCom, Inc. pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket Nos. 00-218 et.al, Memorandum Opinion and Order, DA 02-1731 (2002) (*Virginia Arbitration Order*). AT&T contends that the *Virginia Arbitration Order* established the quantum of evidence necessary for an ALEC to prove that its switch serves a geographic area comparable to the ILEC's tandem switch, and therefore is entitled to receive the tandem interconnection rate. AT&T further asserts that in this case, the FCC adopted AT&T's and WorldCom's proposals that entitlement to the tandem interconnection rate must

be based on switch capability alone. Staff notes that in that case Verizon conceded that AT&T's and WorldCom's switches satisfied the standard. Id. at ¶ 309. In making its decision, the FCC's Wireline Competition Bureau applied the plain language of the existing rule, and declined Verizon's request to graft onto Rule 51.711 the additional requirements urged by Verizon. Consequently, AT&T contends that the Commission overlooked or misapplied the requirements of federal law. AT&T states that the FCC has pre-empted the issue of tandem rate entitlement, and this Commission is not free to require ALECs to meet a greater burden than that set by the FCC. Therefore, AT&T requests the Commission to reconsider its order as it relates to tandem interconnection and definition of "comparable geographic area."

Responses

Verizon states that AT&T has not met the standard for reconsideration because AT&T has not raised any point of fact or law that the Commission overlooked or failed to consider. Verizon contends that AT&T is not seeking reconsideration but rather, trying to reopen the record to introduce additional and irrelevant evidence. Verizon explains that because a carrier performing tandem switching will incur additional costs (relative to a carrier performing only end-office switching), the FCC permits state Commissions to set different tandem and end-office rates, to allow recovery of these additional costs. Verizon states that the Commission decided that the FCC requires payment of the tandem rate if the ALEC meets one of two criteria: when its switch either performs functions similar to those of the ILEC tandem switch or when the ALEC's switch "serves a comparable geographic area to that served by an ILEC tandem switch." Order at 19.

Verizon asserts that AT&T is improperly seeking to introduce new evidence in an attempt to get an even more favorable ruling than it sought during the proceeding. Verizon states that the parties to the Virginia arbitration disputed the conditions of entitlement to the tandem switching rate, as the parties here do. Verizon asserts that the Wireline Competition Bureau is a subdivision of the FCC, but that it is not the FCC itself. Hence, Verizon opines that the bureau's decisions do not represent FCC policy or FCC legal interpretations. BellSouth concurs. Instead, Verizon explains that in resolving state arbitration petitions, the Bureau, acting pursuant to delegated authority within the FCC, "stands in stead" of the state Commission. *Virginia Arbitration*

Order at ¶ 1. Verizon asserts that the Bureau made clear that its decision governed only "the commercial relationships between the interconnecting carriers before us in Virginia." Id. Moreover, Verizon contends that the Bureau's Order is under reconsideration now, and its final decision is subject to review by the FCC itself.

Verizon opines that FCC Rule 51.711 permits assessment of the tandem rate when the ALEC's switch "serves a geographic area comparable to the area served by the incumbent LEC's switch." Verizon states that the Commission accepted the position of AT&T that ALECs need only show that its switch is capable of serving an area comparable to that served by the ILEC's tandem. To show such capability, Verizon maintains that the Commission will require proof that the ALEC has deployed a switch and obtained NPA/NXX codes to serve the relevant area, and that it is serving the area either through its own facilities or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices. Order at 19. Verizon contends that AT&T argues that, under the Bureau's Order, the ALEC "need only present evidence relating to the capability of its switch to serve the area." Verizon states the Commission has done exactly what the Bureau has decided. However, Verizon declares that AT&T is not disputing the ruling, but the examples of the types of showing the Commission will require to meet the "capable of serving" standard.

Verizon states that AT&T's reliance on the *Virginia Arbitration Order* examples to show that the Commission demands a more detailed demonstration of an ALEC's ability to serve a comparable geographic area is flawed. Verizon identifies several problems with AT&T's claim. First, Rule 51.711, which sets forth the geographic comparability test, states nothing about the nature or quantum of evidence a state Commission can accept as a showing that the ALEC's switch serves a comparable geographic area. Second, the Bureau did not interpret Rule 51.711 in the way that AT&T asserts. Verizon contends that the Bureau did not determine that the Rule either required or did not require the ALEC to offer any particular type of evidence to prove capability of serving. Third, the Bureau's decision is in no way binding on this Commission. Fourth, Verizon asserts that AT&T supported the very factors the Commission identifies as capability to serve a "comparable geographic area." Verizon states that AT&T acknowledged the importance of a showing of an ALEC's "investments in both switch capacity and network capacity to offer service to the rate

center with which the NXX is associated." (Joint ALEC's Brief at 12). Verizon explains that AT&T's witness Selwyn presumed an ALEC would have a switch, rather than just reliance on the ILEC's facilities through UNE-P.

Verizon summarizes that it is not clear what kind of evidence AT&T believes would suffice to meet the "comparable geographic" test, but AT&T has no right to reopen the record to explain its newly revised views. Because AT&T has failed to meet the standard of review for a motion for reconsideration and has not requested relief that may be addressed through reconsideration, Verizon requests that AT&T's Motion for Reconsideration be denied. BellSouth concurs.

Staff Analysis

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, 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." Steward Bonded Warehouse, Inc. vs. Bevis

Staff believes that AT&T has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, staff believes that AT&T's Motion for Reconsideration should be denied.

AT&T states that in its decision, the Commission placed more onerous burdens on ALECs to establish that they are entitled to the tandem interconnection rate than are required by FCC rules. Verizon responds that the FCC permits state Commissions to set different tandem and end-office rates, to allow recovery for additional costs. Verizon explains that this Commission decided that the FCC requires payment of the tandem rate if the ALEC meets one of two

criteria: (1) when its switch either performs functions similar to those of the ILEC tandem switch or (2) when the ALEC's switch "serves a comparable geographic area to that served by an ILEC tandem switch." Order at 19. Staff agrees. In its Order, the Commission determined that "an ALEC is entitled to be compensated at the ILEC's tandem interconnection rate when its switch either serves a comparable geographic area to that served by an ILEC tandem switch, or performs functions similar to those performed by an ILEC tandem." Order at 9. Therefore, staff and parties appear to agree as to what the appropriate standard is for determination of the tandem interconnection rate.

However, parties and staff appear to differ in opinion on how an ALEC can show that it is serving a "comparable geographic area." AT&T contends that this Commission demands a much more detailed demonstration of an ALEC's network ability than do the FCC rules and orders it was interpreting for an ALEC to be entitled to the tandem interconnection rate. Verizon responds that to show capability, this Commission will require proof that the ALEC has deployed a switch and obtained NPA/NXX codes to serve the relevant area.

AT&T states that in the *Virginia Arbitration Order* the FCC's Wireline Bureau determined that entitlement to the interconnection rate must be based on switch capability alone. Further, AT&T asserts that the FCC has preempted the issue of the tandem rate entitlement and that this Commission is not free to require ALECs to meet a greater burden than that set by the FCC. Verizon responds that AT&T's claims are flawed. Staff agrees. The FCC's Wireline Bureau's decision does not appear to be binding on this Commission because the Bureau's decision was limited to the commercial parties included in that arbitration proceeding. Also, the Bureau's decision is not recognized as an FCC order or rule. Therefore, presumably, the Bureau's decision is not binding on this Commission. Even if the Bureau's decision was binding, it does not address the nature of the demonstration that is needed. Further, Verizon asserts that AT&T's argument regarding the FCC's Wireline Bureau decision is new argument, which is not appropriate for a motion for reconsideration.

Staff believes that AT&T fails to demonstrate that a point of fact or law was overlooked. It is clear this Commission considered the arguments regarding the tandem interconnection rate and the definition of the "comparable geographic area." Thus, AT&T's

motion is mere reargument, which is inappropriate for a motion for reconsideration. In addition, the new arguments that Movants raise do not lay the foundation for reconsideration. See Order No. PSC-02-0878-FOF-TP, citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974). See also Order No. PSC-97-0552-FOF-WS, issued in Docket No. 920119-WS, on May 14, 1997; and Order No. PSC-97-0518-FOF-TP, issued in Docket No. 930330-TP, on May 6, 1997. Therefore, staff believes that AT&T's Motion for Reconsideration should be denied.

ISSUE 2: Should the Commission grant the various Motions for Reconsideration filed regarding assignment of telephone numbers and the related intercarrier compensation in Order No. PSC-02-1248-FOF-TP?

RECOMMENDATION: No. The Motions have not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the Motions for reconsideration regarding assignment of telephone numbers and the related intercarrier compensation in Order No. PSC-02-1248-FOF-TP should be denied. **(BANKS, DODSON)**

STAFF ANALYSIS

As stated in the Case Background, on September 25, 2002, AT&T Communications of the Southern States, LLC, TCG of South Florida and AT&T Broadband Phone of Florida, LLC (collectively "AT&T") filed a Motion for Reconsideration of Final Order on Reciprocal Compensation, Order No. PSC-02-1248-FOF-TP. On October 7, 2002, Verizon Florida Inc. filed a Response to AT&T's motion for reconsideration. On that same day, BellSouth filed its Opposition to AT&T's Motion for Reconsideration and BellSouth's Cross Motion for Reconsideration. As previously noted, Verizon's arguments encompasses BellSouth's arguments and therefore only Verizon's arguments are addressed and BellSouth's Cross-Motion is addressed in Issue 4. On page 26 of the Order, the Commission was presented with two issues. First, the Commission was asked to determine under what conditions carriers may assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed. Second, the Commission was asked to consider whether the intercarrier compensation for calls to these numbers should be based upon the physical location of the calling and called parties or upon a comparison of the NPA/NXXs assigned to them.

Motion for Reconsideration

AT&T asserts that in deciding these issues, the Commission erroneously rejected the ALECs' position that jurisdiction of traffic should be based upon the NPA/NXXs assigned to the calling and called parties. AT&T opines that the Commission erred by concluding that intercarrier compensation for calls to both virtual NXX and FX customers should be based upon the end points of the particular call, and not based on the NPA/NXX assigned to the

number. Order at 30. AT&T declares that this ruling irreparably harms the ALECs, especially in light of the Commission's admission that parties rate the jurisdiction of intercarrier traffic by looking at the NPA/NXXs to determine if a call is local or toll. Id.

AT&T argues that the Commission overlooked applicable FCC precedent on the payment of reciprocal compensation for traffic based on NPA/NXX comparison, overlooked the difficulty and expense associated with implementing the decisions, and overlooked the impractical and unreasonable burdens placed on ALECs who attempt to receive any compensation for virtual NXX or FX traffic on their networks. AT&T claims that the record in this case indicates that the long-standing industry standard for rating telephone calls is based on a comparison of the NPA/NXX of the originating and terminating telephone numbers. AT&T concludes that deviation from this standard would give ILECs the ability to reclassify local calls as toll calls. AT&T asserts that ALECs would have to revise their billing systems to initiate a reciprocal compensation scheme that is not based upon a comparison of NPA/NXX codes but includes the identification of the physical location of the terminating customer. AT&T reasons that the Commission must have misinterpreted or overlooked the difficulty and expense associated with implementing the decision, and overlooked the impractical and unreasonable burdens on the ALECs who attempt to collect compensation for virtual NXX or FX traffic on their networks.

AT&T claims the Commission also overlooked applicable FCC precedent. AT&T states that the FCC addressed the issue of whether FX and VFX (Virtual FX) traffic should be subject to reciprocal compensation in the *Virginia Arbitration Order*. AT&T alleges that such calls are subject to reciprocal compensation. AT&T states the *Virginia Arbitration Order* rejected Verizon's proposal that would have rated calls according to geographical end points. ¶ 301. AT&T asserts that the FCC determined that it is technically impossible to rate calls by geographical starting and ending points. AT&T concludes that the Commission overlooked applicable FCC precedent and misapprehended the burden placed on ALECs. Therefore, AT&T requests that the Commission reconsider its decision.

Staff notes that on October 31, 2002, Global NAPS, Inc. filed an untimely Notice of Adoption of AT&T's Motion for Reconsideration. (See Issue 5)

Response

In its response, Verizon states that AT&T's request for reconsideration of the virtual NXX compensation issue is the same as its request regarding the tandem compensation issue in the *Virginia Arbitration Order*. As previously stated, Verizon avers that the *Virginia Arbitration Order* is not FCC precedent. Verizon argues that the Commission could not have overlooked this decision because it did not exist at the time the Commission voted on the virtual NXX issue in this case. As noted previously, the *Virginia Arbitration Order* decision was rendered by the FCC's Wireline Bureau. The South Carolina Commission[1] determined that this decision did not address whether virtual NXX is subject to reciprocal compensation and "provides no basis for failing to implement the clear requirements of federal law in South Carolina." In affirming that intercarrier compensation for virtual NXX calls is properly "based on the geographic end points of the call," the Ohio Commission[2] determined that the *Virginia Arbitration Order* was neither a "final decision nor a legally binding precedent." Verizon maintains that the *Virginia Arbitration Order* provides no basis for reconsideration of this Commission's conclusion about the nature of virtual NXX traffic.

Verizon charges that instead of citing evidence of difficulty, expense, or other burdens that the Commission overlooked, AT&T reiterates the same arguments that were made during the proceeding. Verizon states that the Commission considered and explicitly rejected AT&T's claim that basing reciprocal compensation on the end points of a call (rather than on its NPA/NXXs) changes existing local traffic into toll traffic. The Commission stated:

> Although presently, in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, we believe this practice was established based upon the understanding that NPA/NXXs were assigned to customers

---

[1] *Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc. on Arbitration*, Order No. 2002-619 at 15, (S.C.P.S.C. August. 30, 2002).

[2] *Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc., Arbitration Award, Case No. 01-876-TP-ARb at 10 (Ohio P.U.C. September 5, 2002).*

> within the exchanges to which the NPA/NXXs are homed. Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of a call.
>
> We believe that a comparison of NPA/NXXs is used as a proxy for determining the actual physical location of the particular customer being called. In other words, the NPA/NXX provides a reasonable presumption of the physical location of a customer as being within the calling area to which the NPA/NXX is homed. Therefore, carriers have been able to determine whether a call is local or toll by comparing the NPA/NXXs of the calling and called parties. However, this presumption may no longer be valid in an environment where NPA/NXXs are disassociated from the rate centers to which they are homed.

Order at 28. Verizon asserts that the Commission concluded that "classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. . .regardless of whether a call is rated as local for the originating end user." Id. Verizon states that reargument of matters that have already been considered is not a proper basis for a motion for reconsideration. See Sherwood vs. State, 111 So.2d 96 (Fla. 3rd DCA, 1959). BellSouth concurs.

Verizon argues that AT&T's assertion that the Commission overlooked the evidence about the costly billing system modifications that LECs will need to charge reciprocal compensation on the end points of a call is incorrect. Because the Commission could not determine, on the basis of the record, whether billing systems modifications to apply access charges to virtual NXX voice traffic would be worth the trouble and expense to the ILECs and ALECs, it declined to mandate the development of a database to separate out virtual NXX traffic from local traffic. Instead, it left it to the parties themselves to determine what, if any, compensation to apply to such traffic. Order at 30-31. BellSouth concurs. Verizon indicates that AT&T did not provide any support of its contention that the geographic end points of a call would be extraordinarily costly and difficult to implement.

Based on the foregoing, Verizon requests that AT&T's Motion for Reconsideration be denied.

Staff Analysis

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, 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." Steward Bonded Warehouse, Inc. vs. Bevis

Staff believes that AT&T has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, staff believes that AT&T's Motion for Reconsideration should be denied.

AT&T asserts that the Commission overlooked applicable FCC precedent on the payment of reciprocal compensation for traffic based on NPA/NXX comparison. AT&T states that the FCC addressed the issue of whether FX and VFX traffic should be subject to reciprocal compensation in the *Virginia Arbitration Order*. Verizon responds that the Commission could not have overlooked this decision because it did not exist at the time the Commission voted on the virtual NXX issue in this case. Further, the *Virginia Arbitration Order* was rendered by the FCC's Wireline Bureau and hence it is not a decision of the FCC itself. As previously noted, staff acknowledges that the Ohio and South Carolina Commissions determined that the *Virginia Arbitration Order* was neither a final decision nor a legally binding precedent. Further, the South Carolina Commission found that the *Virginia Arbitration Order* did not address whether virtual NXX is subject to reciprocal compensation. Therefore, it appears evident to staff that the Commission did not overlook any FCC precedent that would warrant a different conclusion.

AT&T asserts that the Commission overlooked the difficulty and expense associated with implementing its decision. Verizon,

however, declares that instead of citing evidence of difficulty or expense that the Commission overlooked, AT&T reiterates arguments that were made during the proceeding. Verizon asserts that the Commission found that "classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of the call. . .regardless of whether a call is rated as local for the originating end user." Order at 28. Further, Verizon declares that since the Commission could not determine whether the billing systems modifications would be cost effective, it declined to mandate a requirement to separate out virtual NXX from local traffic. The parties were left to determine what, if any, compensation to apply to such traffic. Respondent asserts further that AT&T has failed to identify a point of fact or law which the Commission overlooked. Instead, Verizon states that AT&T's motion does nothing more than make an attempt to recycle arguments raised previously. Verizon states that reargument is inappropriate in a motion for reconsideration. Staff agrees.

The Commission's Order clearly demonstrates that it considered the arguments raised by AT&T. Hence, AT&T has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, staff recommends that the AT&T's Motion for Reconsideration should be denied.

ISSUE 3: Should the Commission grant the various Motions for Reconsideration regarding the definition of local calling area defined by Order No. PSC-02-1248-FOF-TP?

RECOMMENDATION: Yes. The Motions have identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the Motions for Reconsideration regarding the definition of local calling area established by Order No. PSC-02-1248-FOF-TP should be granted. Staff recommends that no default option specifying the applicable local calling scope for purposes of intercarrier compensation should be set at this time. **(DODSON, BANKS)**

STAFF ANALYSIS: As stated in the Case Background, on September 25, 2002, Verizon Florida, Inc. and ALLTEL Florida, Inc. (Verizon), filed a Motion for Partial Reconsideration and, in the alternative, Motion for Stay pending appeal of Order No. PSC-02-1248-FOF-TP. Sprint filed a Motion for Reconsideration on the same date. On October 2, 2002, Frontier Communications of the South, Inc., GTC, Inc. d/b/a GT Com, ITS Telecommunications Systems, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, Smart City Telecommunications LLC d/b/a Smart City Telecom, and TDS Telecom/Quincy Telephone filed a response in support of the Motion filed by Verizon. In its Order, the Commission determined that the originating carrier's retail local calling area would be the default for determining reciprocal compensation obligations.

On October 7, AT&T Communications of the Southern States, LLC, TCG South Florida, AT&T Broadband Phone of Florida, LLC (formerly known as MediaOne Florida Telecommunications, Inc.), the Florida Cable Telecommunications Association, the Florida Competitive Carriers Association, and Time Warner Telecom of Florida filed a Response in Opposition to the Motion of Verizon Florida, Inc. and ALLTEL Florida, and a separate Response in Opposition to Sprint's Motion for Reconsideration. On that date, US LEC of Florida, Inc. also filed separate Motions in Opposition to the Verizon/ALLTEL and Sprint Motions.

On October 8, 2002, Florida Digital Network, Inc. filed a Notice of Adoption of the responses of the Respondents.

<u>Motions for Reconsideration</u>

In their motion, Verizon requested partial reconsideration on several points of fact and law, asking the Commission to adopt the ILECs' local calling areas as the default, or in the alternative, the Primary Staff Recommendation on this issue as set forth in staff's August 20, 2002 recommendation. Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership also filed a Motion for Reconsideration on September 25, 2002. For the paragraphs where Sprint's arguments mirror Verizon's their concurrence will be noted. If Sprint did not offer any argument on a paragraph, no notation will be entered. Where Sprint's arguments differ from Verizon's, Sprint's arguments will be noted.

<u>1. The originating carrier ruling violates federal law</u>.

Verizon alleges that the originating carrier scheme violates Section 251(b)(5) of the Telecommunications Act of 1996 (Act) and the FCC's implementing regulations, because it is not reciprocal in nature, does not yield symmetrical rates, and ignores the Act's distinction between local and access traffic.

Verizon contends that the requirement of Section 251(b)(5) of the Act that all local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications" has been interpreted by the Federal Communications Commission (FCC) to apply only to local traffic, and not to traffic subject to intrastate access regulations or interstate access regulations. Congress, they state, did not intend for the newly created reciprocal compensation obligation to affect compensation for traffic that was subject to state access regimes before the Act was passed.

Further, Verizon asserts that the *ISP Remand Order* requires states to establish symmetrical reciprocal compensation rates, unless the state Commission finds, based on a cost study, that the costs of the ILEC's and ALEC's systems justify a different compensation rate. In addition, Verizon adds, the rate paid by an incumbent ILEC must be the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier. The symmetrical rate rule, Verizon adds, is based on the FCC's assumption that both parties usually will be providing service in the same geographic area.

Verizon contends that the originating carrier ruling will produce reciprocal compensation arrangements that are not reciprocal because the same transport and termination arrangements will not apply to the same traffic exchanged between the parties. If the ALEC designates a larger local calling area than the ILEC has, different transport and termination arrangements will apply to the traffic exchanged, depending upon its direction, it alleges. Verizon says the Commission's decision allows an ALEC to unilaterally redefine intercarrier compensation obligations, so that the ALEC could designate a LATA, the state, or even the entire country as its local calling area within which all calls will be subject to reciprocal compensation. The ILEC, however, Verizon asserts, cannot redefine its local calling area. Sprint concurs.

In addition, Verizon maintains that the rates for transport and termination of interconnecting carriers' traffic will not be symmetrical, as required by the FCC. If the ALEC designates a larger calling area than the ILEC does, it pays lower rates than the ILEC does for the same traffic, because the traffic crosses the ILEC's boundaries. Sprint concurs.

Verizon also contends that the originating carrier ruling violates the FCC's ruling that the jurisdiction of a call is to be determined by reference to its physical end points. Under this ruling, it states, jurisdiction will depend on the retail local calling plan of the customer making the call, so that a call with the same end points can be classified as local for one carrier and toll for another carrier. Sprint concurs.

Moreover, Verizon maintains that the originating carrier ruling ignores the Act's distinction between access and local traffic. It charges that the Commission has created a "reciprocal compensation" scheme that could include intrastate, or even interstate, access traffic. Verizon contends that federal law prevents states from using the reciprocal compensation requirement as a vehicle to modify their intrastate access regimes.

2. The originating carrier ruling violates state law.

Verizon states the Commission has interpreted its jurisdictional grant in Section 364.01, Florida Statutes, to allow it to establish local calling areas for reciprocal compensation purposes in any way it believes best promotes customer choice and competition. Once the local calling area is defined through that

choice, then the Commission contends, it must abide by the directives in Sections 364.163 and 364.16(3), Florida Statutes. This, Verizon contends, is a misapplication of the law. Sprint concurs.

Verizon states that the 1993 Florida Supreme Court decision in Florida Interexchange Carriers Association v. Beard, 624 So.2d 248 (1993), (*FIXCA*) that the Commission cites as its authority to determine local calling routes, predates the 1995 legislative changes. The current statute states that the Commission cannot modify the intrastate access charge regime or allow ALECs to circumvent it. Verizon states the Commission's decision is impermissible because it will change access traffic into local traffic, in contravention of Section 364.163, Florida Statutes, and will allow ALECs, through their interconnection agreements, to avoid otherwise applicable access charges, in contravention of Section 364.16(3)(a), Florida Statutes.

Verizon finds no conflict between Section 364.01 and Sections 364.163 and 364.16(3)(a) that justifies the Commission in construing the statute to ignore the latter provisions when it establishes local calling areas. Sprint adds that pursuant to Section 120.536, Florida Statutes, a general grant of authority is not sufficient to support an agency action. Section 364.01, Verizon states, is a general jurisdictional grant and any authority it gives must be exercised in accordance with the more specific provisions of Sections 364.163 and 364.16(3), Florida Statutes. Sprint adds that the Commission misinterpreted the law when it held that the specific provisions of Sections 364.163 and 364.16(3)(a) should be subordinated to the general provisions of Section 364.01, Florida Statutes.

Under the Commission's interpretation, Verizon says, an ALEC could define the whole state as its local calling area, and only then would the Commission become subject to Section 364.163's strictures against modification of the access charge regime and Section 364.16(3)(a)'s prohibition on carriers using local interconnection arrangements to deliver traffic for which access charges would otherwise apply. This, Verizon states, renders Sections 364.163 and 364.16(3)(a), Florida Statutes, meaningless, because after eliminating the access/local distinction, it is impossible for the Commission to then enforce this same distinction.

Verizon further states that it is incorrect as a matter of law to conclude that the FCC eliminated any state statutory constraints on Commission jurisdiction to designate local calling areas for intercarrier compensation purposes. Verizon contends that the FCC affirmed the states' authority to establish local calling areas "consistent with the state commission's historical practice of defining local service areas for wireline LECs." The FCC, it avers, did not preempt any state constraints on local calling area designation, including Sections 364.163 and 364.16(3), Florida Statutes. Sprint contends that the FCC's grant of authority to state commissions does not supercede or alter the authority granted the Commission by state statutes. Based on constitutional issues of Federalism, Sprint argues, Congress cannot create or directly grant powers to a state agency; a state agency has only those powers accorded to it by the state Legislature. Therefore, Sprint states, the FCC's grant of authority in paragraph 1035 of the *Local Competition Order* specifically proscribed the state's role in determining the parameters of local calling areas for telecommunications traffic.

Verizon also contends that if the *FIXCA* case affirms the Commission's right to define local calling areas, then the Commission can also ignore the 1995 provision eliminating its authority to mandate expanded local calling. However, Verizon declares, that would contradict the view the Commission has consistently taken in denying requests to initiate expanded area service.

In addition, Verizon contends the Commission's ruling is impermissible rate-setting. Verizon states its terminating access charge rate is about $.05 and its reciprocal compensation rate, which must be TELRIC-based under the Act, is about $.004. Verizon believes the Commission would agree that it could not order Verizon to reduce its access rate from $.05 to $.004. But, Verizon states, the same outcome occurs by allowing carriers to adjust their own access charges. In fact, Verizon states, the Legislature proposed and withdrew an amendment that stated "Both interconnection services and network access services shall . . . be offered at cost-based prices." (Sen. Comm. on Commerce & Ec. Opp., Proposed Am. 35, Apr. 4, 1995 pkg.) Therefore, Verizon concludes, the Commission cannot disregard the Legislature's plainly expressed intent to keep the intrastate access regime intact and to protect against circumvention of access charges.

Further, Verizon states, the Commission has not explained its departure from its prior interpretation of the *BellSouth/Telenet Arbitration Order*, 1997 Fla. PUC Lexis 476 (*Telenet*). In *Telenet* Verizon contends, the Commission made exactly the opposite interpretation of Section 364.16(3)(a)-- that it does not require the ALEC to pay otherwise applicable access charges when it designates a calling area larger than the ILEC's. Verizon declares that the Commission's explanation that the decision occurred in an arbitration order is insufficient to explain an opposing interpretation of law. Verizon avers that differences in facts do not change the law itself. The law is the same as it was in 1997, so Verizon contends that the Commission's interpretation of that law to answer the same question, should be the same, and its failure to follow the principle of *stare decisis*, which applies to administrative agencies, renders its decision arbitrary.

Verizon disputes the Commission's justification for its conclusion that the Commission has unconditional legal authority to designate the local calling area because "no party to this proceeding has provided evidence or testimony based in fact or law that would prohibit us from defining a local calling area." Order at 39. Verizon contends that parties are not required to present testimony or evidence on legal issues. However, Verizon adds, witnesses for Verizon and others did, in their testimony, express their opinions that the law does not permit the Commission to use the LATA or larger areas as the local calling area for reciprocal compensation.

3. The originating carrier ruling will create the very anticompetitive effects the Commission sought to prevent.

Verizon notes that the Commission's primary criterion for the local calling area default is that it must be "as competitively neutral as possible." Order at 50. The Commission, Verizon states, rejected the LATA-wide reciprocal compensation default because it does not satisfy this requirement and for the additional reason that it would "provide ALECs with a disincentive to negotiate" and would thus undermine the Commission's preference for a "business solution, as opposed to a regulatory solution, to industry disputes." Order at 49. But, Verizon argues, these conclusions apply equally to the chosen default because if ALECs define their local calling area as the entire LATA, they avoid access charges. The result of both defaults is the same--a more costly form of intraLATA toll service. In fact, Verizon claims, the local calling

area default creates greater competitive neutrality problems because it creates directional differences in application of intercarrier compensation, thus discriminating against IXCs and ILECs. Sprint concurs.

Verizon notes that although the Commission acknowledged that directional differences in compensation arising from the originating carrier option "appear to be anomalous and inequitable" it dismissed this concern by concluding that these differences would not likely be sustainable over time and that "more uniformity will emerge as a result." Order at 51. This means, however, that carriers will move toward uniform retail local calling areas which, Verizon contends, is contrary to the Commission's asserted goal of choosing the approach that would yield the widest range of consumer choice. Moreover, Verizon adds, the uniformity that would result would be uniform LATA-wide local calling, completely eliminating intraLATA access charges, in direct conflict with Florida law. In addition, Verizon contends, the artificial cost advantages available to ALECs are more pronounced under this default than they would be under the LATA-wide approach. Plus, the competitive advantages given ALECs over both IXCs and ILECs would create as great a disincentive to negotiate as in the LATA-wide approach.

Sprint adds that statutory and regulatory constraints restrict the flexibility of ILECs to expand their local calling scopes, including the parameters of price regulation set forth in Section 364.051, Florida Statutes. This, Sprint contends, negates the Commission's assumption that the local calling areas would even out over time and that compensation payments would be equalized.

Therefore, Verizon argues, the Commission has not supported its decision with competent, material and substantial evidence to support the position that the originating carrier approach is the most competitively neutral option. Verizon maintains it is arbitrary and capricious to choose a default option that suffers the same drawbacks as the rejected option and that the Commission believes will yield the very uniformity of calling areas that it purports to prevent.

4. The originating carrier ruling is arbitrary and capricious because it fails to consider the massive administrative problems and enormous costs it would cause.

Verizon contends that the Commission's decision ostensibly requires the receiving carrier to customize its intercarrier billing on a customer-by-customer basis, because a single ALEC may have a number of different retail local calling areas under different calling plans. Sprint adds that customers of a particular ALEC may subscribe to many different retail local calling areas. Therefore, billing reciprocal compensation rates by customer, rather than carrier, discriminates among carriers, and poses great challenges to implementation. Although the Commission concluded that all ILECs could implement the BellSouth "billing factor" system, relying on the originating carrier to accurately report its own usage, Verizon states the record contains no details on how this would work, or how complex it would be to administer. Verizon further contends that there is no competent and substantial evidence supporting the Commission's conclusion that all ILECs can administer an originating carrier approach to defining intercarrier obligations, and therefore the Commission's decision is arbitrary. Further, Verizon is concerned that ALECs have a motivation to misreport traffic to avoid access charges and cites dockets before this Commission and others where misreporting has been an issue. Verizon Motion at 24. Verizon contends that the originating carrier approach creates greater opportunities for arbitrage, inevitably leading to more Commission complaints about that practice.

Sprint adds that the Commission failed to establish how the parties to an interconnection agreement will demonstrate that a particular local calling scope is their retail local calling area. This issue, Sprint states, is similar to establishing "comparable geographic area" for the purposes of applying the tandem switching charge, addressed in this docket. On that issue, Sprint maintains, the parties presented and the Commission considered, extensive testimony on how the scope was to be determined. However, here, Sprint states, the Commission did not explore criteria. Sprint argues that the failure to address this preludes effective implementation of the Commission's decision and will likely result in proceedings before the Commission to resolve disputes.

Further, Sprint contends that the decision of the originating carrier default calling area fails to consider the impact it has on the Commission's decision in this docket addressing reciprocal

compensation in the context of virtual NXXs. Sprint asserts that applying the Commission's decision on originating carrier calling area to virtual NXXs means that whether a virtual NXX call was subject to reciprocal compensation or access charges would depend on the customer originating the call. In addition, there is no evidence that a reliable, auditable billing mechanism could be developed to accommodate all scenarios that might be applicable.

5. <u>There is no need to adopt a default option</u>.

Verizon states the Commission adopted a default local calling area for purposes of reciprocal compensation because it was "becoming too commonplace in arbitration cases . . . and some finality is important in order to avoid litigating this issue multiple times." Order at 50; <u>see also</u> <u>id</u>., at 51. However, Verizon contends that the Commission offers no account of how many times the issue has been litigated. In fact, Verizon states it has been able to negotiate this issue in virtually all cases, as has BellSouth. Verizon Motion at 26. In fact, Verizon argues, adoption of a default local calling area favors regulatory solutions over negotiated business solutions, because ALECs will have less incentive to negotiate. Sprint adds that allowing the parties to negotiate the local calling area, as the parties have generally agreed, based on the circumstances of the two carriers' relationship, is the most competitively neutral alternative.

Also, Verizon maintains, carriers cannot agree in negotiations to something that they cannot do, and carriers' existing systems cannot accommodate the originating carrier ruling without enormous expense. In addition, under the FCC's conditions of the merger between GTE and Bell Atlantic, Verizon maintains it is required to offer interconnection agreement provisions that are voluntarily negotiated in one state to carriers across the entire Verizon footprint. Therefore, if Verizon agrees to the originating carrier approach in a Florida contract, it risks exporting this approach to other states.

<u>Responses in Opposition</u>

The Respondents contend that the legal and factual arguments raised in the Motions for Reconsideration are a rehash of arguments submitted in the posthearing briefs, and should be rejected. Respondents state that the Commission clearly considered and rejected the proposals of Sprint and Verizon:

> Verizon witness Trimble contends that the existing system, 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 as 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 at 43-44. Therefore, Respondents contend, it is not appropriate for the Commission to entertain the same arguments in a Motion for Reconsideration.

<u>1. The originating carrier ruling does not violate Federal law.</u>

Respondents contend Verizon's argument that the originating caller's local calling area is "not symmetrical" is erroneous. Verizon argues that the *ISP Remand Order* at ¶1089 requires states to establish symmetrical reciprocal compensation <u>rates</u>, unless the state commission finds, based on a cost study that the system justifies a different compensation rate. Respondents declare the Commission's order does not violate the rule requiring symmetrical <u>rates</u>. It only addresses the scope of the local calling area, a matter clearly within the Commission's jurisdiction.

<u>2. The originating carrier ruling does not violate state law.</u>

Respondents cite Sections 364.01(4)(b) and 364.01(4)(g), Florida Statutes, as granting the Commission broad powers to support local competition, and directing 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.

Further, Respondents contend the Commission's authority was further articulated in Florida Interexchange Carriers v. Beard, 624 So.2d 248, 251 (Fla. 1993), where the Florida Supreme Court stated "The exclusive jurisdiction in Section 364.01 to regulate telecommunications gives us the authority to determine local rates."

In addition, Respondents declare, Verizon must concede that the Commission has authority to determine a local calling area for reciprocal compensation purposes, as Verizon and ALLTEL put forth the proposition that the ILECs' local calling area should be the default mechanism.

Although the Movants argue that Sections 364.16(3)(a) and 364.163, Florida Statutes, preclude the Commission from establishing a local calling area, Respondents state that 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)

It is clear, Respondents hold, that this section does not address, and does not impede, the Commission's authority to establish local calling areas. It only precludes, they contend, a local or alternative local exchange telecommunications company from delivering access traffic without paying the appropriate terminating charges to the terminating carrier for such traffic. Therefore, Respondents reason, while a decision defining a local calling area may alter the compensation scheme for particular traffic routes in the state, it does not violate Section 364.16(3)(a) because all carriers will still be required to pay terminating access charges where applicable.

Respondents argue that Movants' reliance on Section 364.163, Florida Statutes, is also misplaced. The Commission, Respondent's declare, clearly stated 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 <u>rates</u>. What is not clear from the ILEC's brief is how Section 364.163 governs access charge <u>revenues</u>. We do not believe a decision by us to [establish LATAs as] a default local calling area translates into rate-setting.

Order at 41.

Further, Respondents state, although Verizon continues to argue reliance on the Commission's decision in *Telenet*, Order No. PSC-97-0462-FOF-TP, the Commission considered and rejected their argument in its Order which stated:

> We note, however, the Telenet Order was issued in 1997 on an issue involving call forwarding. Given that the Telenet Order addressed a specific issue in an arbitration proceeding, we appreciate its conclusion but do not believe that decision has precedential value in the instant proceeding.

Consequently, Respondents declare, Movants' arguments were considered by the Commission and firmly rejected.

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

Respondents point out that BellSouth witness Shiroishi testified that using the originating carrier's local calling area as the default mechanism is technically feasible. Order at 46. Ms. Shiroishi stated, they argue, that BellSouth has currently implemented the process that Movants say would cause administrative problems. <u>See</u> Order at 46-47. Also, Respondents add, Movants' assertions of administrative problems and huge costs are speculative. Verizon witnesses, Respondents add, testified that Verizon does not currently use the originating caller's local

calling areas as a default and therefore has not determined what costs would be involved. BellSouth, Respondents note, has the arrangement in many of its interconnection agreements, implementing the arrangement through billing factors.

Staff Analysis

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974);Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, 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." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Of the arguments made by Sprint, Verizon, and ALLTEL in support of their request for reconsideration of the Commission's decision on the default local calling area, staff believes that the majority are repetitive of points which this Commission has already considered. However, staff believes that Verizon and Sprint have raised two arguments that do merit the Commission's reconsideration. Therefore, staff believes that the Motions for Reconsideration of Verizon and Sprint should be granted.

1. The originating carrier ruling does not violate federal law.

Verizon contends that Congress did not intend for the newly created reciprocal compensation obligation to affect compensation for traffic that was subject to state access regimes before the Act was passed. In the Order, the Commission considered the effect of Section 251(b)(5) of the Act, and concluded:

> Furthermore, FCC 96-325, ¶1035 appears unequivocal in granting authority to state commissions to determine what geographic areas should be considered "local areas" for

> the purpose of applying reciprocal compensation obligations under Section 251(b)(5) of the Act.

Order at 41. This argument was further stated in Sprint's Posthearing Brief at 4 and Verizon's posthearing brief at 7-8.

Staff concurs with Respondents' statement that the *ISP Remand Order* discusses compensation rates. The Commission's order only addresses the scope of the local calling area, which is clearly within the Commission's jurisdiction. However, as stated in the Order, the Commission considered Verizon's arguments and noted:

> We note that although the *ISP Remand Order* does indicate that our jurisdiction has been narrowed in the context of determining rates for ISP-bound traffic, we can specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic consistent with Section 251 of the Act.

Order at 7.

Verizon also alleges that compensation arrangements, and rates, would not be reciprocal because the same transport and termination arrangements will not apply to the same traffic exchanged between the parties. The Commission, however, clearly considered this problem and determined that over time, as carriers experiment with different retail local calling areas, market forces would determine the most viable plans, and more uniformity would result. Order at 54. Thus, the Movants have not identified an error on this point.

2. <u>The originating carrier ruling does not violate state law</u>.

Staff also concurs with Respondents that the Commission thoroughly addressed the issue of its authority to consider local calling areas under state law. Pages 39 through 41 of the Order give a detailed analysis of the reasoning behind the Commission's decision. Further, as Respondents state, this interpretation does not render the access/local distinction meaningless because, while the compensation scheme for a particular traffic route may be altered, all carriers will still be required to pay terminating access charges where applicable. Therefore, Section 364.16(3)(a) is not violated. Staff also agrees that Movants' reliance on Section 364.163, Florida Statutes, is misplaced as it does not

apply to revenues, as the Commission noted in the Order. Order at 41. Further, this issue was previously argued in Movants' posthearing briefs. ALLTEL Posthearing Brief at 4-5; Verizon Posthearing Brief at 13-14 and Sprint Posthearing Brief at 4-6, 9-11.

Verizon further argues that if the Commission follows *FIXCA*, then it can ignore the 1995 statutory provisions eliminating authority to expand local calling. This argument was also made in the posthearing briefs. The Commission considered the effect of the 1995 changes to Chapter 364 on p. 39 of the order, stating that "the general grants of authority set forth in Section 364.01, Florida Statutes, authorizes the Commission to address the specific issue in this case in the same manner as those interpreted by the Court" in *FIXCA*.

Verizon contends the Commission's ruling is impermissible rate-setting, but as the Commission stated in the Order at 41, Section 364.163, Florida Statutes, does not apply to revenues.

Telenet, which Verizon argues applies here (as was argued in Verizon's Posthearing Brief, p. 7), was considered, and the Commission stated that since that order addressed a specific issue in an arbitration proceeding, the decision did not have precedential value in this proceeding. Order at 41.

Verizon disputes the Commission's statement that "no party to this proceeding has provided evidence or testimony based on fact or law that would prohibit us from defining a local calling area." However, Verizon acknowledges that witnesses for Verizon and others, in their testimony, expressed only their opinions on the subject. Thus, Verizon has not identified an error in the Commission's decision on this point.

3. The originating carrier ruling will create the very anticompetitive effects the Commission sought to prevent.

Verizon argues that the originating carrier ruling provides the same disincentive to negotiate as the LATA-wide reciprocal compensation alternative. The Commission clearly disagreed. Order at 53.

Verizon hypothesizes that the originating carrier ruling, because it will result in more uniform retail local calling areas, will eventually lead to uniform LATA-wide calling areas. However,

Sprint reasons that because of the ILECs' statutory and regulatory constraints, the local calling areas would not even out over time. This divergence in opinions indicates that it is pure speculation that consumers' range of choice will diminish. The Commission unmistakably considered the originating carrier local calling area to be the most competitively neutral and pointed out that market forces would eventually determine the most viable plans. Order at 53-54.

Further, the Commission has only stated that the originating carrier local calling area is the least anticompetitive of the alternatives offered. Again, no error has been identified on this point.

4. The originating carrier ruling is arbitrary and capricious because it fails to consider the massive administrative problems and enormous costs it would cause.

Although Verizon considers implementation of the originating carrier ruling to be administratively complex and costly, the Commission clearly considered these arguments. Order at 54. As Respondents note, BellSouth has found an administratively feasible solution.

However, Sprint, Verizon and ALLTEL argue that there is a conflict between the Commission's decision on the default local calling area and its decision that the jurisdiction of a call is to be determined by the originating and terminating points of a call. These companies argue that the combined effect of the two decisions is that jurisdiction will no longer be based on end points, but rather on end points *and* the retail local calling scope of the caller. While the originating carrier could be viewed as integral to the originating point of a call, staff acknowledges that there does seem to be some tension between the Commission's decision on the default local calling area and its decision that the jurisdiction of a call is to be determined by the originating and terminating points of a call.

In addition, Sprint raises the point that the Commission did not specify how the parties are to demonstrate or define "retail local calling scope," and further states that the decision could be applied on a customer-specific basis or by carrier. More importantly, Sprint cites to a lack of record basis for the Commission to address this point. While there is testimony from

BellSouth witness Shiroishi that her company uses the originating carrier approach in many of its interconnection agreements, staff believes that there is insufficient record to establish implementation. Therefore, staff recommends reconsideration be granted on this point, because of possible conflict in the Commission's decision on this point and its decision regarding the jurisdiction of calls and because there appears to have been insufficient record, and thus insufficient consideration of the implementation of the Commission's decision.

5. There is no need to adopt a default option.

Clearly the Commission believed it was important to establish a default local calling areas for purposes of reciprocal compensation. "This issue is becoming too commonplace in arbitration cases filed with us, and some finality is important in order to avoid litigating this issue multiple times." Order at 53.

Verizon states that under the FCC's conditions of the merger between GTE and Bell Atlantic, Verizon is required to offer interconnection agreement provisions that are voluntarily negotiated in one state to carriers across the entire Verizon footprint. The originating carrier local calling area is a default. Verizon is still free to negotiate a different solution in its interconnection agreements. While staff does not believe that the Commission erred in determining that a default option was appropriate, as set forth in the previous section, staff does believe certain aspects of the chosen default system were overlooked. Thus staff believes reconsideration is appropriate to allow the Commission to consider facts which may have been overlooked or which the Commission may have failed to consider in rendering its decision. Posed as the foregoing, staff believes the Motions for Reconsideration should be granted, and that no default option determining the applicable local calling scope for purposes of intercarrier compensation should be set at this time.

ISSUE 4: Should the Commission grant the various Motions for Reconsideration regarding the ruling requiring the originating carrier to bear all the cost of transport to a distant point of interconnection in Order No. PSC-02-1248-FOF-TP?

RECOMMENDATION: No. The Motions have not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, the Motions for Reconsideration regarding the ruling requiring the originating carrier to bear all the cost of transport to a distant point of interconnection in Order No. PSC-02-1248-FOF-TP should be denied. However, staff believes the Commission should clarify and emphasize that this Commission's ruling will remain in effect only until such time as the FCC makes a definitive ruling on this issue. In addition, staff believes that the Commission should clarify that the point of interconnection designated by the ALEC, to which the originating carrier has the responsibility for delivering its traffic, must be within the ILEC's network. **(DODSON, BANKS)**

STAFF ANALYSIS: As stated in the Case Background several parties filed Motions for Reconsideration regarding the ruling requiring the originating carrier to bear all the cost of transport to a distant point of interconnection in Order No. PSC-02-1248-FOF-TP (Order). Verizon Florida Inc. and ALLTEL Florida, Inc. (Verizon) ask the Commission to reconsider its decision requiring the originating carrier to bear all the costs of transporting traffic to a distant point of interconnection designated by the alternative local exchange carrier (ALEC). Verizon asks instead that the Commission require each party to bear a fair share of the costs of such transport.

On October 2, 2002, Frontier Communications of the South, Inc., GTC, Inc. d/b/a GT Com, ITS Telecommunications Systems, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, Smart City Telecommunications LLC d/b/a Smart City Telecom, and TDS Telecom/Quincy Telephone filed a response in support of the Motion filed by Verizon.

On October 7, 2002, AT&T Communications of the Southern States, LLC, TCG South Florida, AT&T Broadband Phone of Florida, LLC (formerly known as MediaOne Florida Telecommunications, Inc.), the Florida Cable Telecommunications Association, the Florida Competitive Carriers Association, and Time Warner Telecom of Florida (AT&T Group) filed a Response in Opposition to the Motion

of Verizon Florida, Inc. and ALLTEL Florida. On that date, US LEC of Florida, Inc. also filed a Motion in Opposition to the Verizon/ALLTEL Motion. Since US LEC's motion mirrors that of the AT&T Group and because the two motions of the AT&T Group contain only minor differences, all motions will be considered together and the parties shall be referred to collectively as the Respondents.

On October 7, 2002, BellSouth Telecommunications, Inc. submitted a Cross Motion for Reconsideration adopting Verizon's Motion for Reconsideration on this issue, *in toto*.

Motion for Reconsideration

In their motion, Verizon and ALLTEL requested a partial reconsideration on several points of fact and law regarding the requirement that the originating carrier bear all the costs of transporting traffic to a distant point of interconnection designated by the ALEC. Verizon contends the Commission should instead require each party to bear a fair share of the costs of such transport.

1. The Commission's ruling is inconsistent with Federal law, its own prior decision, and sound public policy.

Verizon contends that the Commission misinterpreted 47 U.S.C. § 252(d)(2)(A), *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (2000) (TRS Wireless Order), and *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd. 9610 (2001) (Intercarrier Compensation NPRM) by concluding that ILECs are precluded from charging ALECs for the transport that the ILEC must perform when an ALEC's POI is located outside of the local calling area where a local call originates. The Commission, Verizon claims, reasoned that adopting the ILECs' proposals would lead to unequal recovery of costs, and would therefore potentially conflict with the 47 U.S.C. § 252(d)(2)(A) requirement that reciprocal compensation arrangements provide for "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination . . . of calls that originate on the network facilities of the other carrier." U.S.C. § 252(d)(2)(A).

However, Verizon argues that the ILEC proposal at issue pertains to the cost of interconnection under § 252(d)(1), not to reciprocal compensation. In support of this argument, Verizon

contends that the FCC, in interpreting § 252(d)(1), explained that "[o]f course," an ALEC that "wishes a 'technically feasible' but expensive interconnection" point is "required to bear the cost of that interconnection." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1966*, First Report and Order, 11 FCC Rcd. 15499 (1996) (Local Competition Order) (subsequent history omitted) at ¶199 and at ¶209 (ALEC "must usually compensate incumbent ILECs for the additional costs incurred by providing interconnection"). In the BellSouth Arbitration Order[3], Verizon states, the Commission held that it is "consistent with ¶199 of the Local Compensation Order" to require Sprint "to bear the costs of facilities from [a] local calling area to Sprint's POI" when "Sprint designates a POI outside of BellSouth's local calling area." *BellSouth-Sprint Arbitration Order* at 60. Verizon declares that the Commission's failure to explain its departure from prior precedent renders its decision arbitrary.

Verizon further asserts, that although the Commission attempted to distinguish ¶199 of the FCC's *Local Competition Order* in its own Order by saying the FCC's order "limits consideration of technical feasibility to operational or technical concerns and excludes the use of economic factors" (Order at p. 22), that argument is incorrect. Verizon alleges that the FCC excluded consideration of costs only with respect to the <u>selection</u> of a point of interconnection.

Verizon disputes that the *TSR Wireless Order* addressed calls that must be transported to a wireless carrier's switch located outside of the originating or terminating local calling area. Verizon contends that although the Commission stated that the FCC had subsequently amended 47 C.F.R. § 51.703(b) to delete the word "local," the FCC has recently explained that the *TSR Wireless Order* addressed calls originating and terminating over facilities situated entirely within a single MTA, and that the deletion of the word "local" from its reciprocal compensation regulations did not

---

[3]Final Order on Arbitration, *Petition of Sprint Telecommunications Company Limited Partnership for Arbitration of Certain Unresolved Terms and Conditions of a Proposed Renewal of Current Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 000828-TP, Order No. PSC-01-1095-FOF-TP (May 8, 2001) (*BellSouth-Sprint Arbitration Order*).

alter the scope of that order. Mountain Communications, Inc. v. Qwest Communications, Int'l, Inc. 17 FCC Rcd. 2091, 2097, ¶ 11 & n.33 (Chief, Enf. Bur.), aff'd 17 FCC Rcd. 15135 (2002). Therefore, Verizon states, the Commission erred in finding that the TSR Wireless Order is relevant to the issue of where traffic must be transported outside the local calling area in which it originates.

Verizon also contends that the Commission misconstrued that the *Intercarrier Compensation NPRM* "appear[s] to prohibit" the ILECs' proposals. Verizon contends that the FCC, in the *Intercarrier Compensation NPRM*, at ¶ 112, stated that the application of its reciprocal compensation rules "has led to questions concerning which carrier should bear the cost of transport to the POI." Further, Verizon declares, in its *Pennsylvania 271 Order*[4], the FCC stated that a Verizon policy requiring ALECs to bear the cost of transporting traffic from an interconnection point (IP) to the POI "do[es] not represent a violation of our existing rules." 16 FCC Rcd. at ¶ 100.

Next, Verizon claims that to the extent the Commission's rejection of the ILECs' position was based on the conclusion that there is "no discernible authority" for the proposition "that a point of interconnection and an interconnection point are separate entities," that conclusion is erroneous. Verizon asserts that in the *Pennsylvania 271 Order*, the FCC found a Verizon policy that differentiates the POI from the IP "does not represent a violation of our existing rules." *Pennsylvania 271 Order*, 16 FCC Rcd. at ¶ 100 & nn.341, 343, 346. In addition, Verizon claims the *BellSouth-Sprint Arbitration Order* also recognized the distinction, although the IP is referred to as a virtual point of interconnection, or VPOI. In that decision, the VPOI was an implicit POI for billing purposes, which meant a physical point on BellSouth's network delineating the point beyond which BellSouth could recover delivery costs for BellSouth-originated local traffic to Sprint end-users. Verizon states the Commission required Sprint to "designate at least one VPO*I* 'within' [each] BellSouth local calling area" in which Sprint has obtained an NXX code and to compensate BellSouth

---

[4]*Application of Verizon Pennsylvania Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd. 17419 (2001) (*Pennsylvania 271 Order*).

at "TELRIC rates for Interoffice Dedicated Transport . . . between . . . Sprint's VPOI and Sprint's POI." *BellSouth-Sprint Arbitration Order* at 62, 63. Verizon claims neither of these orders are addressed in the Commission's Order.

Verizon further claims that the Commission's finding that transportation costs are *de minimus* is also contrary to the *BellSouth-Sprint Arbitration Order*. There, Verizon asserts, the Commission found there were costs associated with transporting a call to the POI outside the calling area where the call originates and for the use and maintenance of transport facilities. Further, Verizon declares, the Commission found TELRIC rates to provide a basis for the quantification and recovery of those costs. Therefore, Verizon reasons, when those rates are applied to the millions of minutes of traffic exchanged, the costs are not de minimus, and that is why the ALECs are opposed to paying for their transport.

Verizon declares that it is good public policy for ALECs to bear the costs because they cause them by deciding where to establish the POI. Forcing the ILECs to bear the costs means they would receive no compensation for transporting calls outside the local calling area, which the Commission recognized in the *BellSouth-Sprint Arbitration Order* is beyond the "typical activities" that an ILEC should be expected to perform in completing local calls. This would mean that end users do not receive "accurate price signals," which the FCC says "undermines the operation of competitive markets." *ISP Remand Order* a ¶¶ 68, 71.

2. The Commission should clarify that an originating carrier's obligation to transport traffic ends at a POI that is located on the ILEC's network.

Finally, Verizon disputes that the Commission's holding does not go far enough. The point of interconnection to be designated by the ALEC, to which the originating carrier has the responsibility for delivering its traffic must be, as FCC regulations point out, "within the incumbent LEC's network." 47 C.F.R. § 51.305(a)(2). Verizon states that by leaving those words out, the Order creates ambiguity, which Verizon would like the Commission to clarify.

Responses in Opposition

Respondents declare that, contrary to Verizon's argument, the default under FCC rules and orders, is that the physical connection of the parties' networks and the dividing line for financial responsibility is the POI. Under 47 U.S.C. § 251(c)(2)(B), respondents contend, ILECs must provide ALECs interconnection at a technically feasible point selected by the ALEC. This means, they aver, that an ALEC "has the option to interconnect at only one technically feasible point in each LATA."[5] Furthermore, they add, the Act and the *Local Competition Order* place the burden on the ILECs to show that interconnection at a single POI per LATA is not feasible.

Respondents also point out that Verizon raised these arguments before the FCC and they were rejected. The FCC reasserted its position that the originating carrier bears the sole financial responsibility to deliver its traffic to the POI.[6]

Further, Respondents contend that Verizon's reliance on the *BellSouth-Sprint Arbitration Order*, which was extra-record evidence that was not subject to cross-examination or challenge in this proceeding, does not meet the standard for reconsideration.

Staff Analysis

Staff recommends that the Motion for Reconsideration and Cross- Motion should be denied because the companies have failed to

---

[5]*Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to provide in-region, interLATA services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶78 (2000).

[6]*Petition of WorldCom, Inc. pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket Nos. 00-218, et al., Memorandum Opinion and Order, Da. 02-1731, ¶66, 68 (Wireline Competition Bureau, rel. July 17, 2002).

identify any fact that the Commission overlooked, or any point of law upon which the Commission erred in rendering its decision.

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974);Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, 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." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Verizon contends that the Commission misinterpreted 47 U.S.C. § 252(d)(2)(A), the *TRS Wireless Order* and the *Intercarrier Compensation NPRM*. The Commission clearly considered this argument in its Order and stated:

> AT&T witness Follensbee points out that Section 252(d)(2)(A) establishes a "just and reasonable" standard for compensation that requires "mutual and reciprocal recovery" by each carrier for costs associated with transport and termination. We cannot reconcile the compensation proposals advocated by BellSouth witness Ruscilli, Sprint witness Maples and Verizon witness Beauvais with the Act's requirement for "mutual and reciprocal recovery." If the ILEC proposals are adopted, a terminating carrier would be responsible for paying a portion of the transport costs of an originating carrier's traffic. We believe such a system would provide for asymmetrical recovery and, in addition, would appear to be contrary to 47 C.F.R. 51.703(b), which prohibits a LEC from assessing charges on any other carrier for traffic originating on the LEC's network.

Order at 23.

Verizon asserts that the Commission's failure to explain its departure from prior precedent renders its decision arbitrary, but staff agrees with Respondents that Verizon ably raised this argument in its Post-Hearing Brief on Issue 14, pp. 12-15. The Commission considered the effect of the *TSR Wireless Order*:

> BellSouth witness Ruscilli's efforts to refute the application of the TSR Wireless Order in this proceeding appear to be contingent on his belief that the order must be read in context with 47 C.F.R. 51.701(b)(2) and 51.703(b) . . . . As noted earlier in connection with POI issues in this Order, the definition in Rule 51.703(b) on which witness Ruscilli relies in his testimony and on which BellSouth relies in its brief was changed by the FCC in Order No. 01-131.

Order at 24.

The Commission considered Verizon's arguments and determined:

> We find nothing in the record to support the imposition by us of the intercarrier compensation scheme advocated by the ILEC witnesses. We believe the concerns expressed by the ALEC witnesses are valid and that the mandated sharing of originating carrier transport costs proposed by the ILEC witnesses potentially conflicts with the requirements of Section 252(d)(2)(A) of the Act. Additionally, ALEC witnesses cite recent interpretations of the FCC's rules at paragraph 34 of the TSR Wireless Order, and in FCC Order No. 01-132, ¶112, that appear to prohibit an originating carrier from imposing any originating costs on a co-carrier.

Order at 25-26.

Further, staff agrees with Respondents that the Commission's prior *BellSouth-Sprint Arbitration Order* is not controlling precedent, since it involved a specific arbitration. The Commission stated its reasoning for excluding arbitration orders when describing the exclusion of the *Telenet Arbitration Order* from consideration in the originating carrier's retail local calling area default. Thus, staff does not believe that Verizon has

identified a mistake of fact or law by the Commission's lack of reliance on that decision.

In light of the above discussion, staff believes that the matters addressed in the Motions for Reconsideration are ably presented by the pleadings and addressed in the Commission's decision, and therefore do not present a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

However, upon further review of the arguments submitted and the record in this proceeding, staff agrees that the Commission should clarify its statement at p. 25 of its Order that the point of interconnection designated by the ALEC, to which the originating carrier has the responsibility for delivering its traffic, must be within the ILEC's network.

ISSUE 5: Should Verizon's Motion to Strike GNAP's Notice of Adoption be granted?

RECOMMENDATION: Yes. GNAPs' Notice of Adoption appears to be an untimely Motion for Reconsideration or Response to a Motion. It is not otherwise contemplated by Commission rules. **(B. KEATING)**

STAFF ANALYSIS: On October 31, 2002, GNAPs filed a Notice of Adoption of the positions and arguments set forth in AT&T/TCG/AT&T Broadband's Motion for Reconsideration. Thereafter, on November 12, 2002, Verizon filed a Motion to Strike GNAPs' filing as untimely.

Verizon argues that GNAPs' Notice of Adoption should have been filed within the time for filing a Motion for Reconsideration since it is adopting AT&T's arguments on reconsideration. At a minimum, Verizon argues that it should have at least been filed within the time for filing a response to AT&T's Motion, which would have been by October 7, 2002. Verizon argues that under any interpretation, GNAPs' filing is untimely and should be stricken.

Staff can find no provision in Commission rules for Notices of Adoption with regard to the positions and arguments in a Motion for Reconsideration. Staff believes that GNAPs' pleading is akin to its own Motion for Reconsideration, and since the Commission is without jurisdiction to extend the time for filing a Motion for Reconsideration, the pleading should be stricken. See City of Hollywood v. Public Employee Relations Commission, 432 So.2d 79 (Fla. 4th DCA 1983) and Citizens of the State of Florida v. North Fort Meyers Utility, Inc. and Florida Public Service Commission, Case No. 95-1439 (Fla. 1st DCA, November 16, 1995). Even if GNAPs' pleading is instead considered a response to AT&T's Motion, the October 31, 2002, filing of it can in no way be considered timely. Therefore, staff recommends that Verizon's Motion to Strike be granted.

ISSUE 6: Should the various requests/motions for stay pending appeal be granted?

RECOMMENDATION: If staff's recommendation in Issue 3 is approved and reconsideration is granted, staff believes that the requests for stay are rendered moot. If, however, the Commission denies staff's recommendation in Issue 3, staff recommends that the requests for stay be denied. **(B. KEATING)**

STAFF ANALYSIS:

ARGUMENTS

On September 25, 2002, Verizon, ALLTEL, Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership (hereinafter "Sprint")asked that the Commission grant a stay pending appeal of its decision in this matter, if the Commission does not reconsider its decision that the originating carrier's local calling area will serve as the default for determining the applicable intercarrier compensation. They contend that if the Commission does not grant reconsideration on this issue, they will appeal the decision.

Specifically, they assert that the Commission should grant the stay pursuant to Rule 25-22.061, Florida Administrative Code, because the decision at issue is one that involves a decrease in rates charged to customers. They assert that this is the case, because under the Commission's decision, ALECs could pay the incumbents TELRIC-based reciprocal compensation, rather than the higher charge for access, based upon the ALECs' larger calling area. The companies contend that this is manifestly a reduction in rates that they may charge for this traffic. As such, they believe that a stay should be granted as a matter of right.

Even if the Commission does not agree with the rationale that its decision amounts to a reduction in rates, the companies contend that a stay should still be granted because they meet the criteria set forth in Rule 25-22.061(2), Florida Administrative Code. They contend that: (1) they are likely to prevail on appeal; (2) they will suffer irreparable harm in the absence of a stay; and (3) the status quo will not be detrimental to the public interest. They argue that the Commission's decision on this issue was arbitrary and not supported by the evidence in the record. The companies also contend that in the absence of a stay, they are subject to

substantial revenue losses on an annual basis. Furthermore, they emphasize that there is no evidence that the public was ever harmed prior to this decision without a default in place, and therefore, staying the decision to set a default would not create or exacerbate any public harm.

For these reasons, Verizon, ALLTEL, and Sprint ask that the decision to set a default calling area for purposes of determining intercarrier compensation based on the originating carrier's calling area be stayed, if the Commission does not reconsider its decision on this issue.

On October 2, 2002, Frontier Communications, GT COM, ITS Telecommunications, Northeast Florida Telephone, Smart City Telecom, and TDS Telecom/Quincy, filed a response in support of the Motion for Partial Reconsideration and, in the alternative, Motion for Stay Pending Appeal filed by Verizon and ALLTEL.

On October 7, 2002, AT&T, TCG, AT&T Broadband, FCTA, FCCA, and Time Warner filed joint responses in opposition. That same day, US LEC also filed responses in opposition. On October 8, 2002, FDN filed a Notice of Adoption of these responses in opposition to the motions filed by Verizon, ALLTEL, and Sprint. The respondents opposing the stay are hereinafter referred to as the "ALECs."

The ALECs contend that the request for stay is untimely, because no appeal has been filed. They contend that Rule 25-22.061, Florida Administrative Code, contemplates that a stay would only be requested after an appeal has been filed.

If, however, the Commission prefers to address the requests for stay, the ALECs contend that Rule 25-22.061(1)(a), Florida Administrative Code, only applies to the refund of money to "customers" and a decrease in charges to "customers," i.e. end users and ratepayers, not providers contractually obligated to pay compensation for the transfer of telecommunications traffic.[7]

---

[7]*Citing* In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc., Order No. PSC-99-0758-FOF-TL, at p. 4 (quoting, in part, ". . . the rule is designed to apply to rate cases or other proceedings involving rates and charges to end user ratepayers or customers. . . .")

Thus, they do not believe that the requests for stay should be granted as a matter of right.

Furthermore, the ALECs argue that Verizon, ALLTEL, and Sprint have not met the conditions for granting a discretionary stay pending appeal. They contend that the Commission's decision on this issue complies with federal and state law, and would be given great deference on appeal. Thus, the ALECs believe that success on appeal is unlikely.

The ALECs also contend that it is speculative whether Verizon, ALLTEL, and Sprint would suffer any actual losses as a result of the Commission's decision. Regardless, the ALECs believe that any losses experienced would be competitive losses, and should not be considered "irreparable," because they would be the result of proper "revisions to the out-moded monopoly era local calling areas."

In addition, the ALECs contend that a stay would cause substantial harm to the public interest, because the development of local exchange competition would be delayed.[8]

ANALYSIS

If the Commission approves staff's recommendation in Issue 3, staff believes the pending requests for stay are rendered moot.

If, however, the Commission does not grant reconsideration in Issue 3, staff believes that the requests for stay should be rejected outright, because they are premature. Rule 25-22.061, Florida Administrative Code, contemplates that a request for stay would be submitted when an appeal of a Commission decision has been taken, not before. No notice of appeal has been filed in this proceeding.

---

[8] *Citing* WorldCom Complaint, Order No. PSC-99-0758-FOF-TP at p. 8.

ISSUE 7: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation, no further action would be required. **(BANKS, DODSON)**

ANALYSIS: If the Commission approves staff's recommendation, no further, action would be required.