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October 27, 2003

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of the Commission
Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

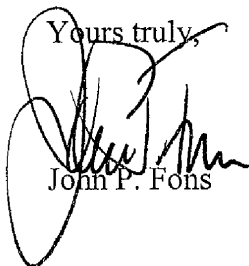
Re: Docket No. 030868-TL

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and fifteen (15) copies of Sprint-Florida, Incorporated's Response in Opposition to AARP's Motion to Dismiss.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Yours truly,

John P. Fons

Enclosures

cc: Certificate of Service List

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: SPRINT-FLORIDA, INCORPORATED'S
PETITION TO REDUCE INTRASTATE
SWITCHED NETWORK ACCESS RATES TO
INTERSTATE PARITY IN A REVENUE
NEUTRAL MANNER PURSUANT TO
SECTION 364.164(1), FLORIDA STATUTES

DOCKET NO.: 030868-TL
FILED: October 27, 2003

**SPRINT-FLORIDA, INCORPORATED'S RESPONSE IN
OPPOSITION TO AARP'S MOTION TO DISMISS**

Sprint-Florida, Incorporated ("Sprint"), pursuant to Rule 28.106.204, Florida Administrative Code, hereby responds in opposition to AARP's Motion to Dismiss ("Motion"), stating as follows:

1. On October 20, 2003, AARP filed its second Motion to Dismiss, in which AARP contends that Sprint, as well as BellSouth and Verizon, has made "repeated assurances that residential customers will be able to benefit from the flow-through of access reductions to reduced instate toll rates." AARP Motion at ¶ 13. AARP goes on to allege that "there is not a single word in the testimony of the three companies' witnesses, or in their exhibits, or petitions, stating how, or to what levels, the IXC's will reduce their instate toll rates in programs available to residential customers." AARP Motion at ¶ 13. On that basis, AARP further contends that "it is impossible for this Commission, or any party, including AARP, to be able to ascertain whether a given residential customer, or any residential customers for that matter, may 'benefit' by offsetting savings resulting from reduced instate toll rates without knowing what those rates will be." AARP Motion at ¶ 17. According to AARP, "[t]he petitioners have failed to supply this Commission with an essential and indispensable part of the financial picture necessary to determine both the public and residential customer benefit." AARP Motion at ¶ 19. It is then

AARP's contention that "the petitions should be dismissed, with leave to be refilled with the essential, but missing information." AARP Motion at ¶ 19. Finally, AARP requests that "this Commission Dismiss the Petitions of BellSouth, Verizon and Sprint for Failure to Join the Inter-Exchange Telecommunications Carriers Serving the State of Florida as Indispensable Parties." AARP Motion at p. 9.

2. A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the petition to be true and determine whether the petition states a cause of action upon which relief may be granted. Heekin v. Florida Power & Light Co., Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 *2 (citing to Varnes, 624 So. 2d at 350). All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id. Further, in order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements required to be alleged under the substantive law on the matter. Id. Applying this standard to the case at hand, it is clear that AARP's Motion to Dismiss must be denied.

3. AARP's Motion is based upon a faulty premise that the specifics of the statutory access charge reduction flow-through requirement is an issue to be determined or considered by the Commission in this proceeding. A plain reading of the factors the Legislature established to be considered by the Commission in addressing Sprint's Petition to Reduce Intrastate Switched Network Access Rates in a Revenue Neutral Manner ("Petition") demonstrates that the statutory access charge reduction flow-through requirement is not one of the enumerated criteria to be considered by the Commission. *See* Section 364.164(1)(a)-(d), Florida Statutes. Consequently, the list of issues contained in the Commission's *Order on Issues for Hearing*, Order No. PSC-03-1061-PCO-TL, issued September 23, 2003, does not identify any issue to which the AARP's

proposed issue or its demand for data would apply. In that Order, the prehearing officer observed that the issues framed by Staff adequately reflected the "language identified by the Legislature, but it also provides adequate opportunity for all parties to present their arguments regarding how that language should be construed for purposes of our final decision." Order at p.

3. The statutorily mandated and assumed benefits of the flow-through is not an issue in this proceeding. Therefore, the presence of the interexchange carriers for purposes of obtaining information about their resulting toll rates is not required, and AARP's request for relief is groundless.

4. In fact, the entire issue of flowing-through of the benefits of any intrastate switched network access rate reductions is irrelevant to the Commission's determinations in this proceeding because the Legislature has addressed the IXCs' flow-through requirement in detail and has left nothing for the Commission to determine or speculate about in this proceeding. Section 364.163(2), Florida Statutes provides:

Any intrastate interexchange telecommunications company whose intrastate switched network access rate is reduced as a result of the rate adjustments made by a local exchange telecommunications company in accordance with s. 364.164 shall decrease its intrastate long distance revenues by the amount necessary to return the benefits of such reduction to both its residential and business customers. The intrastate interexchange telecommunications company may determine the specific intrastate rates to be decreased, provided that residential and business customers benefit from the rate decreases. Any in-state connection fee or similarly named fee shall be eliminated by July 1, 2006, provided that the timetable determined pursuant to s. 364.164(1) reduces intrastate switched network access rates in an amount that results in the elimination of such fee in a revenue-neutral manner. The tariff changes, if any, made by the intrastate interexchange telecommunications company to carry out the requirements of this subsection shall be presumed valid and shall become effective on 1 day's notice.

Section 364.163(2), Florida Statutes. (Emphasis added)

5. For purposes of addressing Sprint's Petition, the Commission must therefore assume that if it grants Sprint's Petition, each interexchange carrier receiving intrastate switched network access rate reductions will act in accordance with the Legislature's mandate that the benefits of such reductions be returned to its residential and business customers, and that any "instate connection fee" be eliminated. The statute gives the Commission specific jurisdiction over interexchange carriers to ensure compliance with the statutory mandate. *See* Section 364.163(3), Florida Statutes. Consequently, the Commission is not required to consider the level of the resulting toll rates in order to grant Sprint's Petition, and Sprint is under no obligation to provide information regarding the level of the interexchange carriers' resulting intrastate toll rates. Additionally, because Sprint's estimates of the revenue impact of intrastate switched network access rate reductions are based upon historical pricing units, it would be pure speculation for Sprint's to estimate how the access rate reductions will impact each interexchange carrier or how each interexchange carrier will adjust its intrastate toll rates. In fact, the Legislature has given the interexchange carriers broad discretion to determine the specific intrastate rates to be decreased. At this time it appears that there may be an issue in this docket about what the proper intrastate switched network access rate elements and rate levels meet the statutory definition of "parity." Prior to a Commission decision, any opinion offered by an interexchange carrier about how end user rates might be structured would be pure speculation and not germane to any issue in this proceeding. Any issue of whether an interexchange carrier has not lived up to the requirements of Section 364.163(2), Florida Statutes, is a matter which will be resolved in a separate Commission proceeding.¹

6. Even assuming, *arguendo*, that the benefits of the flow-through requirement is an issue to be considered by the Commission in this proceeding, AARP's contention that the

¹ In fact the Commission has established a separate docket to "ensure compliance" with the statutory flow-through requirement. See, Docket No. 030961-TI, *Flow-through of LEC switched access reductions by IXCs, pursuant to Section 364.163(2), Florida Statutes*.

interexchange carriers have the alleged requisite resulting toll rate information and are, therefore, "indispensable parties" is without merit. AARP relies upon Rule 1.140, Florida Rules of Civil Procedure, for its claim that the absence of the interexchange carriers as parties requires the Commission to dismiss Sprint's Petition. But, "indispensable party" is a common law concept applicable to civil litigation; and from a procedural standpoint, it has no counterpart in administrative law. In civil litigation, an "indispensable party" has been defined as "one who has an interest in the controversy of such a nature that a judgment cannot be made without affecting that interest or cannot be made without leaving the controversy so that its final determination is inconsistent with equity." § 4-4, *Trawick's Florida Practice and Procedure* (2003 Edition). See also *State Department of Health & Rehabilitative Services v. State of Florida*, 472 So.2d 790 at 792 (Fla. 1st DCA 1985) ("An indispensable party is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder.") Consequently, in civil litigation, the failure to bring an indispensable party (that is, a person whose "interests" must be determined) into a lawsuit as either a plaintiff or defendant can result in dismissal of the action. But that is not the situation here. AARP has failed to demonstrate how, in this proceeding, using the generally accepted civil litigation definition, the interexchange carriers fall within the ambit of "indispensable parties." Just because the interexchange carriers might have information about resulting toll rates, which information AARP thinks could be useful for purposes of supporting AARP's position,² the possession of such information does not cause the interexchange carriers to have an "interest" to be determined in this proceeding, nor does it require dismissal of Sprint's Petition because of their absence.

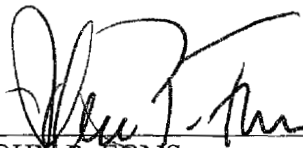
7. In administrative law there is the concept of a "substantially interested person." See Section 120.52(12), Florida Statutes. In the context of an administrative proceeding, a

² Although AARP claims to need information about the level of the resulting toll rates, there are processes available to AARP for obtaining such information that do not require the interexchange carriers to be parties to this proceeding. See Section 120.569(2)(f), Florida Statutes.

"substantially interested person" is one whose substantial interests will be affected by proposed agency action. Again, AARP has failed to show how the interexchange carriers' potential for having information about resulting toll rates equates to a "substantial interest" which will be determined in this proceeding. Even if the interexchange carriers are held to be substantially interested persons, administrative law only requires that they have notice of the proceeding (*see* Rule 28-106.109, Florida Administrative Code); it does not require dismissal of the proceeding if the interexchange carriers choose not to join as parties.

WHEREFORE, having shown that AARP's efforts to create an issue where none exists is unwarranted, and having demonstrated that the absence of the interexchange carriers from this proceeding is not grounds for dismissal, Sprint respectfully requests that AARP's Motion to Dismiss be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 2003.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, e-mail or hand delivery (*) this 27th day of October, 2003, to the following:

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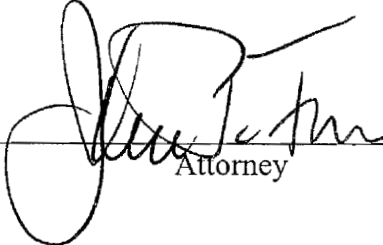
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