UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA DIGITAL NETWORK, INC.,

VS

CASE NO. 4:03cv282-RH/WCS

SPRINT-FLORIDA, INC., et al.,

050000 -OT

JUDGMENT

This action came to trial or hearing before the Court with the Honorable Robert L. Hinkle presiding. The issues have been tried or heard and a decision has been rendered.

The decision of the Florida Public Service Commission is affirmed.

WILLIAM M. McCOOL, CLERK OF COURT

November 2, 2005
DATE

s/Pam Lourcey
Deputy Clerk: Pam Lourcey

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

FLORIDA DIGITAL NETWORK, INC.,

Plaintiff,

v. CASE NO. 4:03cv282-RH

SPRINT-FLORIDA, INC., et al.,

Defendants.

_____/

ORDER ON MERITS

This is an action challenging a decision of the Florida Public Service Commission setting the rates charged by an incumbent local exchange carrier for network elements provided to competitive carriers under the Telecommunications Act of 1996. I uphold the Commission's decision.

I
Background - The Statutory Framework

Historically, local telephone service was provided in the United States on a monopoly basis by carriers regulated under state law by state public service commissions. Congress fundamentally changed that approach by enacting the

Telecommunications Act of 1996. *See* 47 U.S.C. §§251-52. The Act imposes on local carriers, as a matter of federal law, various duties designed to foster competition. The Act allows state commissions the option of taking a major role in implementing the Act's requirements.

The federal duties imposed on each "incumbent local exchange carrier"—that is, on each carrier who previously provided local service on a monopoly basis—include the obligation to sell local services at wholesale to any competing carrier for resale by the competing carrier to customers; the obligation to allow competitors to interconnect with the incumbent's facilities for the purpose of providing services to the competitor's own customers; and, of importance in the case at bar, the obligation to make certain "network elements"—parts of the incumbent's telecommunications system—available to competing carriers for their use in providing service to their own customers. The Act directs the Federal Communications Commission ("FCC") to determine which network elements must be made available to competitors and to consider, in making that determination, whether access to proprietary network elements is "necessary" and whether the failure to provide access would "impair" the ability of the competitive carrier to provide services. 47 U.S.C. §251(d)(2).[1]

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[1] These duties are described in greater detail in an ever growing list of judicial decisions. *See, e.g., AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999); *MCI Telecomms. Corp. v. BellSouth*

The Act also imposes on each incumbent the duty to negotiate in good faith with any requesting carrier on the terms and conditions of an agreement under which these various duties will be fulfilled. *See* 47 U.S.C. §251(c)(1). The Act likewise imposes on requesting carriers the duty to negotiate in good faith. *Id.*

If the parties reach a negotiated agreement, it must be submitted to the state commission for approval. *See* 47 U.S.C. §252(e)(1). If the parties fail to agree on all terms and conditions, any party to the negotiation may request binding arbitration before the state commission of "any open issues." 47 U.S.C. §252(b)(1).[2]

The Act provides for judicial review of the state commission's determinations in federal district court. *See* 47 U.S.C. §252(e)(6). The case at bar is an action for judicial review under this provision.

II
Background—The Case at Bar

This case involves the rates to be charged by defendant Sprint-Florida, Inc.

Telecomms., Inc., 112 F. Supp. 2d 1286 (N.D. Fla. 2000). A comprehensive review of FCC and judicial interpretations of the "necessary and impair" standard is set forth in *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19020 (2003).

[2] If the state commission chooses not to act on either a negotiated agreement or request for arbitration, the FCC must assume the responsibilities of the state commission. *See* 47 U.S.C. § 252(e)(5).

("Sprint"), the incumbent local exchange carrier in parts of the State of Florida, for the provision of local loops and other network elements to competitive carriers, including plaintiff Florida Digital Network, Inc. ("Florida Digital") and intervenor The Ultimate Connection LC. d/b/a Daystar Communication ("Daystar"). There is no dispute concerning Sprint's obligation to provide these network elements; the only issue is price.

The defendant Florida Public Service Commission ("the Commission") conducted a proceeding to address this issue. Although begun as a generic docket on the issue of network element prices for all incumbents in the state, the proceeding was, in substance, an arbitration pursuant to 47 U.S.C. § 252(b), as all parties readily agree. Following submission of evidence and briefs, the Commission issued a 275-page final order ("Arbitration Order") and, in due course, a 46-page order on reconsideration ("Order on Reconsideration"), addressing rates to be charged by Sprint. Other incumbents' rates were addressed in separate hearings and separate orders.

Florida Digital filed this action challenging the Commission's decision in specific respects. Florida Digital named as defendants Sprint, the Commission, and the members of the Commission in their official capacities.[3] Daystar, which

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[3] Such an action for judicial review of a state commission's decision may proceed against the individual commissioners in their official capacities in accordance with *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714

did not participate in the proceedings before the Commission, sought and was granted leave to intervene in this action as a plaintiff.[4]

The parties have agreed that this court's review should be conducted based solely on the record as compiled in the Commission. The parties have submitted briefs and presented oral argument. This order constitutes the court's ruling on the merits.

(1908), and thus is not barred by the Eleventh Amendment. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645-48, 122 S. Ct. 1753, 1760-61, 152 L. Ed. 72 751 (2002); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 1997 WL 1133453 (N.D. Fla. 1997). Whether the Commission may be sued in its own name is unclear. *Compare, e.g., MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 512-13 (3d Cir. 2001) (holding that a state commission waives its Eleventh Amendment immunity when it enters a ruling under the Telecommunications Act) (collecting cases), *with Verizon Maryland Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 871 (2002) (declining to decide whether state commission waives immunity because, in any event, action may proceed against individual commissioners in their official capacities under *Ex parte Young*). The Commission has not sought dismissal of this action under the Eleventh Amendment. Had the Commission done so, I would have dismissed the action as against the Commission as redundant. *See id.*; *see also Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (approving dismissal of official capacity defendants whose presence was merely redundant to naming of institutional defendant).

[4] Because Daystar did not participate below, it is at least questionable that Daystar would have been able to bring this action in its own right. Daystar was, however, allowed to intervene. Daystar has taken positions identical to Florida Digital's without variation.

III
Standard of Review

The Telecommunications Act provides for actions such as the case at bar in a single sentence:

> In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [the Act].

47 U.S.C. § 252(e)(6). The Act does not further specify the standard of review to be applied in determining "whether the agreement . . . meets the requirements of" the Act.

For the reasons set forth at length in *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000), I review *de novo* issues regarding the meaning and import of the Telecommunications Act, and I review the Commission's determinations of how to implement the Act as so construed only under the arbitrary and capricious standard. This apparently is the standard of review advocated by all parties to this proceeding. A decision is arbitrary and capricious if contrary to governing legal standards, not supported by substantial evidence in the record, or not based on a reasoned analysis in light of all the evidence pro and con.

IV
Burden of Proof

The Commission explicitly held that the burden of proof was on Sprint as the party seeking approval of rates it would charge for its services. *See* Reconsideration Order, at 11 ("We agree that in this proceeding, Sprint bears the burden of proof in establishing the reasonableness of its proposed [network element] rates."). No party to this action has challenged that conclusion here. I assume, for purposes of this decision, that the burden of proof was on Sprint.

V
Merits

Sprint, like any incumbent local exchange carrier, provides service to customers using "network elements," including, for example, "local loops" running from Sprint's wire centers to customer locations. Local loops are among the network elements that must be made available to competitors for their use in providing service to their own customers. There is no dispute in the case at bar with respect to Sprint's obligation to make the network elements at issue available to plaintiffs. The only issue is price.

The Telecommunications Act directs state commissions to set "just and reasonable" prices for network elements "based on the cost (determined without

reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element." 47 U.S.C. § 252(d)(1). The FCC has determined that prices must be based on total element long-run incremental cost ("TELRIC"), a forward-looking methodology that takes into account the cost that would be incurred by an efficient carrier using the best available technology and operating from the incumbent's existing wire centers. *See* 47 C.F.R. §51.505. The Supreme Court has upheld the FCC's adoption of this methodology. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002).

The Commission recognized its obligation to set the prices at issue using TELRIC methodology. Plaintiffs assert, however, that the Commission erred in its handling of five substantive issues that affected the ultimate decisions on rates: fill factors, operations support systems, work times, customer locations, and geographic deaveraging. I conclude that with respect to each of these issues, the Commission's decision comported with governing legal standards, was supported by substantial evidence in the record, was based on a reasoned analysis in light of all the evidence pro and con, and thus was not arbitrary or capricious. This order addresses each of plaintiffs' contentions in turn.

A. *Fill Factors*

The Commission accepted Sprint's calculation of the appropriate "fill

factors" used in determining the rates at issue. The concept of "fill factors" has been well explained as follows:

> Any sensible carrier builds more network capacity than can be used at the moment; that way capacity will be available as additional customers demand service, without waiting for the arrival of new equipment, excavating streets to lay new wire, and so on. Moreover, many kinds of telecommunications equipment have minimum efficient sizes; a switch able to handle 100,000 circuits may be cheaper than two switches able to handle 50,000 circuits apiece. The fill factor reflects the extent of this (economically justified) unused capacity. If an efficient network configuration would have 50% of the circuits in use and 50% idle—ready for new customers, a shift in demand, or use in the event of a breakdown—then the price per loop to a rival would be the average long-run cost per loop divided by 0.5. If the efficient fill factor were to have 2/3 of the circuits in use, then the price would be the long-run cost divided by 0.667, and so on. The lower the efficient fill factor, the higher the price per loop the incumbent can charge to rivals. And TELRIC does not contain an algorithm for determining the fill factor. The FCC has approved several. In the Triennial Review Order the FCC explained that many issues have a range of reasonable answers for the parties—or state regulators, acting under state law—to flesh out. See Report and Order, FCC 03-36, 68 Fed. Reg. 52,276, 52,284 (Aug. 21, 2003).

AT&T Communications of Illinois, Inc. v. Illinois Bell Tel. Co., 349 F.3d 402 (7th Cir. 2003).

Sprint introduced expert testimony in support of its calculation of the appropriate fill factors. The testimony was fully consistent with the required TELRIC methodology and constituted substantial support in the record for the Commission's findings. Although plaintiffs criticize the findings, Sprint's

testimony was unrebutted, and while the Commission was not required to accept the testimony, neither was the Commission required to reject it. The Commission's fill factors rulings were supported by substantial evidence and were not arbitrary or capricious.

Five assertions made by plaintiffs do not compel a different conclusion.

First, plaintiffs say that fill factors cannot properly be based on anticipated "future growth" of an incumbent's network. As support for this assertion, plaintiffs rely on the FCC's statement, in another context, that fill factors should be based on "current demand" rather than "ultimate demand." *In re Federal-State Joint Board on Universal Service*, 14 FCC Rcd. 20156, ¶200 (1999). But for this purpose "current demand . . . includes an amount of excess capacity to accommodate short-term growth." *Id.*, at ¶201. Moreover, in considering "current demand," a regulator properly can and should consider the manner in which an efficiently operating carrier would deploy its network in light of that current demand. This is all the Commission did. In asserting the contrary, plaintiffs seize on the Commission's statement that it considered Sprint's "future needs." Arbitration Order, at 83. But the very essence of fill factors is future needs; that is the whole point, as the Seventh Circuit's discussion of the concept (quoted above) makes clear. The Commission did not improperly consider future (that is, long term) growth or "ultimate demand" in its calculation of fill factors.

Second, plaintiffs criticize the Commission's consideration of Sprint's current practices as relevant to the determination of fill factors. It is true, as plaintiffs suggest, that fill factors cannot properly be based on current practices alone; the issue is how an efficient carrier would provide network elements, not how the incumbent in fact has done so. Still, current practices are not irrelevant. As plaintiffs acknowledged at oral argument, how a carrier in fact has deployed its network in the real world may provide some evidence of how an efficient carrier would operate. *See* Tr. of Oral Argument, at 14-15. This is so because carriers have an incentive to act efficiently, at least when there is competition, as there now is to some extent in this field, both from competing local exchange carriers and from providers of such alternatives as cellular service and voice over internet. The Commission was not precluded from considering as one piece of relevant evidence—along with all the other evidence in this record—Sprint's current practices.

Third, plaintiffs criticize Sprint's calculation of fill factors based partly on an allocation of two lines per residence and six lines per business. Plaintiffs call this "grossly inefficient" but point to no evidence in this record that supports that assertion. The Commission concluded that allocating two lines per household is "more effective than adding an additional line when a household requests a second line." Arbitration Order, at 83. While that observation would hardly be sufficient,

standing alone, to justify calculation of fill factors based on two lines per residence, the Commission did not rest its conclusion solely on that observation. Making judgments of this type is the Commission's function. When, as here, the only evidence in the record supports the result, is credited by the Commission, and is reasonable, the Commission's decision cannot properly be labeled arbitrary or capricious.[5]

Fourth, it is true, as plaintiffs assert, that the fill factors adopted for Sprint were not the same as the Commission approved for other carriers or at other times. But fill factors are not a one-size-fits-all concept. The customer base and efficient network configuration for Sprint's territory are not identical to those of the carriers with which plaintiffs now seek to compare fill factors. Thus, for example, Sprint's territory is more rural, a factor that affects fill factors, as the Commission explicitly concluded.[6] The Commission adequately explained its adoption of these fill

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[5] Florida Digital notes that in an earlier case, the Commission allocated 1.5 lines per household. The Commission does not disagree but says it also has allocated 2.0 and 2.16 lines per household for other carriers. The number of lines reasonably allocated per household or business is not static over time or for differing territories. Thus, for example, lines devoted to internet access increased dramatically at one point but now are being supplanted to some extent by broadband. Other technologies also have increased or decreased the demand for additional lines. The Commission could have made a different decision, but based on this record, for this carrier, the Commission's allocations were reasonable.

[6] Plaintiffs say this cuts the other way, because rural areas have slower growth. But it is not that simple. Retrofitting additional capacity is expensive in both urban and rural settings but not necessarily equally so. Determining where

factors for Sprint.

Fifth, plaintiffs suggest the Commission improperly allocated the burden of proof on this issue and accepted Sprint's rates just because there was no contrary evidence, failing to recognize that it could reject Sprint's evidence. But that is not what happened. The Commission explicitly recognized that the burden of proof was on Sprint, fully analyzed the evidence and the factors properly informing its analysis, and announced its findings. This was sufficient.

To be sure, the Commission expressed its findings oddly; rather than saying explicitly that it found these fill factors appropriate based on TELRIC methodology and the evidence in this record, the Commission said:

> Understanding that Sprint's customers are more rural, coupled with the lack of record evidence proposing another fill rate, we find that Sprint's feeder fill in the model shall be set at its [least cost model] fill of 59.17 percent.
>
> Therefore, we find that the appropriate assumptions and inputs for fill factors in the forward-looking [network element] costs studies shall be the fills filed by Sprint.

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efficient deployment of additional capacity ends and wasteful excess begins requires the striking of a balance that takes into account many factors, only one of which is the rate of growth. And any suggestion that in Florida only urban areas have high growth rates is demonstrably false; in Florida, growth is ubiquitous, or nearly so. What is clear is that Sprint's territory is not identical to another carrier's, that Sprint's fill factors thus need not be the same, and that the appropriate factors for Sprint reasonably could be higher or lower than another carrier's, depending on all the circumstances.

Arbitration Order, at 84. One could perhaps read this as a refusal to make the critical finding that these fill factors were appropriate and as a conclusion instead that, in the absence of contrary evidence, Sprint's proposals would be accepted, right or wrong. But as plaintiffs acknowledge, in other cases the Commission has not hesitated to reject a carrier's proffered testimony, even if unrebutted; the Commission obviously knows it can do so. Moreover, in the case at bar the Commission explicitly said, as a generic comment applicable to the case as a whole, that it "chose to accept Sprint's evidence," Reconsideration Order, at 12, and, turning to fill factors, that Sprint's proposal was not unreasonable. *Id.* at 19. Fairly read, the Commission's orders set forth a finding based on this record that the appropriate fill factors were those that Sprint proposed and that the Commission adopted.[7]

In sum, the Commission's fill factors findings were supported by substantial evidence, comported with the governing law, and were not arbitrary or capricious.

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[7] To be sure, the Commission also said that Florida Digital *did* "have an obligation to place before us some evidence to support [its] position." Reconsideration Order, at 12. That statement was true only because Sprint presented credible evidence sufficient, in the absence of contrary evidence, to persuade the Commission, that is, sufficient to carry Sprint's burden of proof; given the sufficiency of Sprint's evidence, Florida Digital had to present contrary evidence or lose. Had Sprint's evidence been insufficient standing alone to carry the burden of proof, Florida Digital would have had no obligation to present evidence, absent a decision by the Commission to require Florida Digital "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues." 47 U.S.C. §252(b)(4)(B).

B. ***Operations Support Systems***

Operations support systems ("OSS") are the systems used by an incumbent to process a new order placed by a competitive carrier for unbundled network elements that will be used to service a new customer signed up by the competitive carrier. An incumbent is entitled to charge the competitor based on the cost of providing OSS. As both sides agree, under the mandatory TELRIC methodology, the charge must be calculated based on the cost that would be incurred by an efficient carrier using the best available technology, regardless of whether the incumbent in fact operates inefficiently or uses outdated technology. As both sides also agree, Sprint in fact uses outdated technology (processing many orders manually).

Plaintiffs contend that the Commission set OSS charges based on Sprint's actual (inefficient) practices rather than based on the practices that would be followed by an efficient carrier using the best available technology. But that is not so. Sprint prepared a model based on fully automated provision of OSS. It was that model, not Sprint's actual practices, that was used as a basis for the Commission's decision. In accepting that model, the Commission explicitly recognized the requirement to use TELRIC methodology based on the most efficient available technology.

Plaintiffs also attack the Commission's decision in three more specific respects. None of the attacks is well founded.

First, plaintiffs say Sprint's model (which the Commission accepted) used an excessive "fallout" rate, that is, that Sprint assumed that too high a percentage of orders placed in a fully automated system would have errors or otherwise would be incapable of automated processing and would instead require manual intervention. Sprint introduced testimony that 10% of order placed by competitive carriers actually involve customers of another carrier rather than Sprint, and that competitive carriers make other errors in 15% of cases.[8] The fact that this has been the historic error rate of course is not controlling; the issue is the error rate that would attend a fully automated, efficient system. But nothing in this record suggests the rate would be different. Sprint introduced testimony in support of its model, and the Commission credited that testimony. Given the state of this record, the Commission's decision was not arbitrary or capricious.

Second, plaintiffs criticize Sprint's model and supporting testimony for having insufficient documentary back-up. The testimony was, however, fully admissible and indeed admitted without objection. The lack of additional back-up was a factor the Commission was entitled to consider in determining whether to

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[8] Davis Dep. at 22-23. An exhibit showed an additional 6% of cases requiring minimal manual processing for account set up or maintenance. *See* Pl. Exh. 9.

credit the testimony. But the lack of additional back-up did not *mandate* the Commission's rejection of the testimony.

Third, plaintiffs take issue with the Commission's statement that there is no requirement to "use some hypothetical, fully automated, near perfect OSS as [Florida Digital] would have us believe." Arbitration Order, at 162. The standard, of course, is a hypothetical efficient carrier using the best available technology, as the Commission recognized. An efficient carrier using the best available technology is not necessarily "near perfect." The Commission's statement rejecting any "near perfect" requirement immediately followed its quotation of the proper standard: "the most efficient telecommunications technology currently available." *Id.*, quoting 47 C.F.R. §51.505(b)(1). In context, the Commission's statement was simply a recognition that the most efficient technology currently available in any given context is not necessarily "near perfect." In telecommunications, as in most fields of human endeavor, perfection remains an elusive goal, not a currently available norm.

In sum, the Commission's treatment of OSS was supported by substantial evidence and was not arbitrary or capricious.

C. *Work Times*

When a competitive carrier signs up a new customer and places an order

with the incumbent for the necessary network elements, the incumbent is entitled to charge the competitor based on the cost that would be incurred to initiate the service by an efficient incumbent using the best available technology. Because these charges ordinarily are incurred only once with respect to any given customer, they are labeled "non-recurring charges."

Sprint supported its requested non-recurring charges with studies of the time actually spent by Sprint employees performing designated tasks and with input from "subject matter experts," that is, persons qualified to offer opinions on the time and expense reasonably required to perform tasks of this type. The work time studies included thousands of entries and, as one might expect, some errors. Thus, for example, one entry showed a start time of 10:16, an end time of 11:27, and a task time of 111 minutes, when the actual task time (based on the recorded start and end times) was one hour, 11 minutes; the task time thus should have been shown as 71, not 111, minutes.[9]

The Commission acknowledged the errors in the work time studies and also noted the possibility that the subject matter experts might be biased—they were hired by Sprint and knew their opinions would be used in setting rates. But while "acknowledging problems with the studies," the Commission "found them

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[9] Even so, it is unclear whether, when totals were compiled and conclusions reached, this entry was in fact treated as one hour and 11 minutes, or 111 minutes. Either way, the effect of this one entry on the overall result was inconsequential.

acceptable." Reconsideration Order, at 37. The Commission reached this conclusion after noting that the time Sprint said was required for some of the tasks at issue was less than had been claimed, and approved, for another carrier.

Florida Digital asserts the Commission should not have accepted flawed studies, and that by doing so the Commission in effect relieved Sprint of the burden of proof. That is not, however, a fair characterization of the Commission's decision. The burden of proof was on Sprint, as the Commission explicitly recognized. But the burden was to prove the case by the preponderance of the evidence, not by perfect or irrefutable evidence. Perfection is not demanded even in criminal cases. And perfection is, in any event, unattainable for a projection of the time that would be required by a hypothetical efficient provider to perform given tasks in the future. While the data derived from Sprint's study were not perfect, there is no indication that the errors were significant to the overall result, that the errors consistently cut one way or the other, or that the model Sprint produced using the data was not an accurate projection of the costs at issue.[10] The Commission's acceptance of the study results and subject matter experts' conclusions was fully supported by the record.

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[10] At oral argument, plaintiffs said they counted the errors. When asked the effect on the overall results, however, plaintiffs said they did not compile that information. Error rates, without an assessment of the impact on the overall results, say little about whether the results are reliable.

Plaintiffs also assert that the Commission's reliance on Sprint's actual results was a departure from the governing standard of a hypothetical efficient carrier. Again, however, that is incorrect. The Commission acknowledged the governing standard and concluded that these studies yielded the appropriate results. Nothing in this record suggests that the employees whose efforts were observed were operating inefficiently or that better technology or procedures would have improved performance. The Commission concluded that the charges it approved reflected the costs that would be incurred by a hypothetical efficient carrier. This conclusion was supported by the record and was not arbitrary or capricious.

D. ***Customer Locations***

Modeling the cost of providing network elements in a hypothetical efficient network requires information regarding customer locations. The FCC has expressed its preference for geocode data that reliably pinpoint actual customer locations by longitude and latitude. *See In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 21323, ¶33 (1998) (noting that geocode data, when available, provide the most accurate model). The Commission, too, has noted that geocode data "can better design" the facilities at issue. *See* Arbitration Order, at 57 (quoting earlier order in another docket).

Sprint's model used geocode data only for the highest volume customers.

The model assigned all other customers to their census blocks and assumed that the customers in any given census block were evenly distributed therein. The Commission accepted this approach, concluding that it yielded reasonable results, that Sprint was not on notice when it prepared its model that geocoding would be required, and that geocode data for Sprint customers were not readily available but could be produced only with significant effort. Plaintiffs challenge the Commission's failure to require Sprint to submit geocode data.

Both the FCC and the Commission have noted that geocode data are more reliable than Sprint's approach. Sprint introduced testimony, however, that reliable geocode data were not available for much of Sprint's (somewhat rural) territory and would not have had a material effect on the overall calculation of costs. Florida Digital's assertion that geocode data could have been obtained easily by running customer addresses through available programs is not supported by evidence in this record and is not self-evident.[11]

The issue here, moreover, is not whether, as an original matter, Sprint should be required to model its costs using geocode data. The issue is whether the

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[11] In the FCC order on which Florida Digital relies, the FCC recognized that geocode data are not always available, especially in rural areas. *See In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 21323 ¶33 & n.71 (1998). A state commission of course would be justified in insisting that an incumbent provide geocode data to the extent available.

Commission's decision—based on geocode data for the highest volume customers but census block data for the remainder—was arbitrary and capricious. It was not. Although geocode data are more reliable and thus preferable, there is no requirement that they be used in every case without fail. If, in a particular case, geocode data are not available, census block data yield reliable results, and any available geocode data would not improve reliability sufficiently to warrant incurring whatever effort or expense would attend their compilation, then a state commission is not required to insist on such data. The Commission concluded, in effect, that this is such a case.

In addition, there is no reason to believe, based on the evidence in this record, that Sprint's approach increased the costs yielded by its model. For all that appears here, the model was reasonably reliable and in any event no more likely to increase than to decrease the costs that would have resulted from a model using geocoding. The Commission's determination to rely on Sprint's data was not arbitrary or capricious.

E. ***Geographic Deaveraging***

Under the Telecommunications Act, the rates charged by an incumbent to a competitor for providing network elements must be based on costs, as determined using TELRIC methodology. The cost of providing network elements is not

always the same in different geographic areas or even for different customers in the same geographic area. Because it is not feasible to set rates separately based on the actual cost of providing network elements that will be used to service any specific customer, rates must be based on *average* costs.

Even so, the use of average costs as a basis for setting network element rates has the potential to distort competition and interfere with the pro-competitive goals of the Telecommunications Act. In order to reduce this risk, the FCC has adopted a rule prohibiting statewide averaging and instead requiring the use of appropriate rates for at least three separate geographic areas within a state. *See* 47 C.F.R. §51.507(f) (2004).

Recognizing this requirement, Sprint submitted alternative proposals, one using three geographic zones and the other using nine. Arbitration Order, at 25. The Commission used Sprint's data to develop four more alternatives with a minimum of three and maximum of five zones. *Id.*, at 27. The Commission analyzed the advantages and disadvantages of each approach and adopted one of its own alternatives, denominated "Alternative 4." *Id.*, at 29.

Plaintiffs challenge the Commission's decision on both procedural and substantive grounds.

First, plaintiffs contend the Commission's adoption of its own alternative, developed after the record was closed and all arguments were in, deprived Florida

Digital of an opportunity to be heard and thus violated due process. But this is plainly not so. It is commonplace in the administrative and judicial systems for a decision maker to reach a conclusion (based on the evidence) that is different from the result proposed by any party. Thus, for example, many (and probably most) plaintiff's verdicts in personal injury cases award an amount of damages different from the amount either side proposed. The sentence imposed in many (perhaps most) criminal cases, absent a plea agreement, is for a different term of imprisonment than either side proposed. The suggestion that a decision maker who has heard all the evidence and arguments must either accept in full a proposal specifically advanced by a party or, if not, give additional notice and opportunity to be heard prior to making a different ruling is nonsense.

Nor is there anything about the circumstances of this case suggesting the Commission should have followed a different procedure. The Commission took under advisement all the evidence and argument submitted by all parties. The Commission developed its own alternative geographic zones, but it did so by making only limited changes to Sprint's nine-zone proposal. Alternative 4, which the Commission adopted, used the first three zones from Sprint's nine-zone proposal, without change, and combined the other six zones from Sprint's nine-zone proposal into a single zone. (*Compare* Arbitration Order, at 25, *with id.*, at 27.) After having considered Sprint's three-zone and nine-zone proposals and the

arguments of all parties (including Florida Digital), the Commission was well within bounds when it opted to alter Sprint's nine-zone proposal in this manner.

Plaintiffs' challenge to the substance of the Commission's decision is also unfounded. The first of the four zones included only 5.11% of Sprint's total lines, but the other three zones had 23.43%, 34.17%, and 37.29% of the lines, respectively. There were thus three zones—the minimum required by the FCC—that each comprised a substantial share of Sprint's territory. Plaintiffs have not suggested any flaw in the Commission's decision where to draw the lines.

Plaintiffs do say that the Commission failed to explain how these particular lines will promote competition. The answer to that inquiry, however, is inherent in the Telecommunications Act itself and in the FCC's rule requiring at least three geographic areas. Competition is promoted by requiring incumbents to provide network elements to competitors, subject to the "necessary" and "impair" standards; this gives competitors an additional way to provide service. Competition is promoted by requiring the charges for network elements to be based on cost; competitors are not hamstrung by having to pay more to use the incumbent's network elements than the competitors would have to spend to provide their own. And competition is promoted if costs are not determined based on statewide average costs but instead on costs averaged over at least three smaller zones; the smaller the zone, the closer the average usually will be to the actual cost

of serving any given customer. The lines drawn by the Commission promote competition in exactly this way.

Plaintiffs also say that these zones produce rates that will put them in a "price squeeze" with respect to some of the customers they would like to serve. Thus, plaintiffs say, for some of the zones, the Commission's decision will not allow plaintiffs to cover their own costs (including payments to Sprint for network elements) without charging plaintiffs' customers more than the rates Sprint charges its own retail customers (under tariffs approved by the Commission). This, plaintiffs say, will prevent them from effectively competing with Sprint; customers will pay Sprint's lower retail rates rather than sign up with one of the plaintiffs.

If it is true that these network element rates will keep plaintiffs from competing effectively in some zones—and it may be—the genesis of this problem, at least so far as this record reflects, is not the setting of network element rates that are insufficiently deaveraged or otherwise too high, but the setting of *retail rates* for Sprint that are insufficiently deaveraged or otherwise below cost. The setting of an incumbent's retail rates is an issue of some complexity that is beyond the scope of this proceeding; Sprint's retail rates are not on review here. What is important, for present purposes, is this: network element rates must be based on cost. Network element rates ought not be set artificially low in order to offset other anomalies in the competitive market.

The Commission's decision to establish these four geographic zones and to set Sprint's network element rates based on the average cost (properly calculated under TELRIC methodology) of providing these services in these zones accorded fully with the Telecommunications Act and implementing regulations, was supported by substantial evidence, and was not arbitrary or capricious.

V
Conclusion

The Florida Public Service Commission recognized its obligation to set rates for network elements provided by Sprint to competitive carriers based on cost as calculated in accordance with the TELRIC methodology. The Commission placed the burden of proof on Sprint, considered all the evidence in the record, and made the decision it concluded was appropriate based on the governing law and evidence. The decision accorded with the governing law and was not arbitrary or capricious. Accordingly,

IT IS ORDERED:

The decision of the Florida Public Service Commission is affirmed. The clerk shall enter judgment accordingly and close the file.

SO ORDERED this 2d day of November, 2005.

s/Robert L. Hinkle
Chief United States District Judge