

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Verizon Florida Inc. to Reform)
Its Intrastate Network Access and Basic Local) Docket No. 030867-TL
Telecommunications rates in Accordance with)
Florida Statutes, Section 364.164)
_____)
In re: Petition of Sprint-Florida, Incorporated,)
To reduce intrastate switched network) Docket No. 030868-TL
Access rates to interstate parity in)
Revenue neutral manner pursuant to)
Section 364.164(1), Florida Statutes)
_____)
In re: Petition by BellSouth)
Telecommunications, Inc.,) Docket No. 030869-TL
To Reduce Its Network Access Charges)
Applicable To Intrastate Long Distance In)
A Revenue-Neutral Manner)
_____)
In re: Flow-through of LEC Switched Access) Docket No. 030961-TL
Reductions by IXCs, Pursuant to Section)
364.163(2), Florida Statutes) Filed Sept. 8, 2004
-----)

**AARP MOTION FOR EVIDENTIARY HEARING AND MODIFICATION
OF COMMISSION ORDERS NOS. PSC-03-1469-FOF-TL AND
PSC-04-0456-FOF-TL ON THE BASIS OF SIGNIFICANTLY
CHANGED CIRCUMSTANCES AND PUBLIC NEED**

AARP, through its undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code and Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) and the Florida Supreme Court cases following it, hereby files its motion for additional evidentiary hearing and

modification of Florida Public Service Commission (“Commission”) Orders Nos. PSC-03-1469-FOF-TL (the “Initial Order”) and PSC-04-0456-FOF-TL (the “Order on Reconsideration”) (or collectively the “Rate Increase Orders”) on the basis that the quid pro quo to residential customers – increased residential competition – to be received in exchange for the substantial increases in their basic local rates ordered by the rate increase orders referenced above of increased residential competition is rendered highly improbable, if not impossible. In support of this motion, AARP states:

SUMMARY OF MOTION

On December 24, 2003 this Commission approved over \$344 million annually in residential local service rate increases for BellSouth, Sprint and Verizon. The chief statutory and regulatory justification given for the 30 to 90 percent local service rate increases¹ was that they would increase local service competition and, thus, benefit residential customers with both the fruits of enhanced local competition, as well as a reduction in instate toll

¹ Uniform dollar increases were applied to different urban and monthly local rates resulting in varying percentage increases not only between companies, but within each company’s service territory as well.

charges. All parties representing the interests of residential customers objected vehemently to the increases.²

Potential local service competitors party to the case included long distance companies AT&T and MCI; Sprint, which is both an incumbent local provider and a competitor; and, a relatively small cable television provider, Knology. While these and other competitors were expected to be drawn to the market by the increased profit margins resulting from higher local rates, the evidence, as described in the Commission's 2003 Report on Competition, was overwhelming that recent increases in residential local service competition were almost exclusively the result of the local service competitors having access to the incumbent companies' wire loops and computer switches at Federal Communications Commission (FCC)-mandated, low-cost UNE-P wholesale rates.

However, on March 2, 2004 the FCC's order requiring the low-cost UNE-P rates was reversed by a federal appellate court in an opinion strongly rebuking the FCC for overstepping its jurisdiction. Both the FCC and U.S. Solicitor General declined to appeal. There was no stay mandating the continued availability of the low-cost UNE-P rates for either

² In addition to AARP, which has over 2.6 million members in Florida, the Florida Attorney General and the

existing or future customers, and negotiations for new wholesale rates largely failed. Moreover, the interim rates recently unveiled by the FCC, unless overturned, will only extend current wholesale rates until early 2005.

Citing the uncertainty of the ongoing availability of low-cost UNE-P rates as a major factor, the board of the largest potential local service competitor party to these cases, AT&T, on July 22, 2004, announced that it would cease local service competition throughout the nation, including, of course, Florida. AT&T also announced that it would immediately cease its efforts to acquire new residential customers for its long distance services, while focusing instead on its business long distance customers. There are also published reports that both MCI and Sprint are scaling back their efforts to compete for local service customers and that they might completely cease their efforts to compete in the local residential market.

Whatever the “value” of enhanced local service competition would have been to residential customers, the likelihood of it occurring has now been rendered highly unlikely, if not impossible, by the March 2 federal court opinion, AT&T’s subsequent decision to cease its local service competitive efforts and the apparent decisions of MCI and Sprint to cease

marketing their competitive local service offerings. Simply put, the stated quid pro quo for the large residential local rate increases – the “benefits of increased competition” – has now largely evaporated. Worse yet for residential customers, AT&T’s decision to abandon its competition for residential long distance customers necessarily means that residential customers, as a group, will receive an even smaller percentage of the flow-back of reduced instate toll rates than currently anticipated by the Commission’s orders.

Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (1966), and the cases following it, provide that this Commission may modify its final orders in the face of “changed conditions or other circumstances not present in the proceedings which led to the order being modified,” so as to “act in the public interest.” AARP believes the March 2 federal court opinion, coupled with the AT&T announcements to abandon residential local service and long distance competition, plus MCI’s and Sprint’s apparent decisions not to market their local service products, are “changed circumstances” of a most fundamental nature and require modification of the Rate Increase Orders. Simultaneously with the filing of this motion, AARP is moving the

Florida Supreme Court to relinquish jurisdiction of these cases to the Commission for the purpose of holding an evidentiary hearing to determine whether the changed circumstances compel the reversal of the historically large local service rate increases.

AARP believes that such an evidentiary hearing will prove that enhanced local service competition of any meaningful degree is now impossible in Florida and, consequently, that the rate increases can no longer statutorily stand.

THE COMMISSION MAY MODIFY ITS FINAL ORDERS

The Legal Standard

1. In June, 1965, this Commission entered an order by which it attempted to rescind and withdraw its approval of a territorial service agreement between two regulated gas distribution companies it had previously granted in a final order entered in 1962. Upon review by the Florida Supreme Court in the case of Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (1966), the Court found that the Commission could not modify the order in question but enunciated the standard by which the Commission had “the inherent power . . . to reopen or modify a final order

after it has become final by passage of time.” Recognizing that the inherent authority was a limited one, the Court discussed the necessity for regulatory agencies to modify final orders with more frequency than courts.

In this regard, the Court said:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to the public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

Peoples Gas at 339. (Emphasis supplied.)

While the Court found that the order modification under review in Peoples Gas was not “based on any change in circumstances or on any demonstrated public need or interest,” it further held as follows:

Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the

agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified. This view accords requisite finality to orders of the commission, while still affording the commission ample authority to act in the public's interest.

Peoples Gas at 339, 340. (Emphasis supplied.)

2. The holding in Peoples Gas was affirmed in Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979) (modification disallowed because “respondents have failed to show any significant change in circumstances or great public interest which would be served by permitting the 1974 proceeding to supersede the finding of dormancy in the 1972 order.”) See also Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979) (Florida case law recognizes the rule that an administrative agency may alter a final decision under “extraordinary circumstances.”)

3. In the more recent case of Mann v. Department of Professional Regulation, Bd. Of Dentistry, 585 So.2d 1059 (Fla. 1st DCA 1991), the Court, citing to Peoples Gas, remanded to the Board of Dentistry an unappealed four-year-old order of suspension following the agency's denial

of the respondent's motion for modification on the basis that the final order in question was ambiguous. Later yet, in Russell v. Department of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994), the Court cited to Peoples Gas, but declined to remand the case because "appellant has failed to demonstrate in his motion to set aside the 'extraordinary circumstances' which are a prerequisite for revisiting a closed case." Ibid. at 119.

4. AARP would submit to the Commission that the legal standard here is that the Commission may, under the appropriate circumstances, modify one of its final orders, as late as four years after the entry of that order, and even if the initial order had not been appealed, so long as there has been "a significant change in circumstances" since the entry of the final order or where there is a "great public interest" which might be served by the modification of such an order.

5. Although the "passage of time" cited by the Peoples Gas court has been relatively short in duration here, AARP believes the "shifting circumstances" since the entry of the final order in these cases have been monumental and fundamentally undermine the basis for the local service

rate increases. It is AARP's position that there is a very great public interest warranting modification of the Rate Increase Orders resulting in denial of the local service rate increases.

SIGNIFICANT CHANGED CIRCUMSTANCES/ PUBLIC INTEREST

Legal and Factual Status Quo At Entry of Rate Increase Orders

6. At the time the Initial Order was entered on December 24, 2003, and during the administrative hearings leading to that order, both the federal and state orders of the day held that Incumbent Local Exchange Companies (ILECs), like BellSouth, Sprint and Verizon, had to make their local loops (the proverbial "last mile" of copper wiring to the retail customer) and their computer switching facilities (part of the Unbundled Network Element - Platform or "UNE-P") available to their local phone service competitors (Competitive Local Exchange Companies or CLECs) at wholesale rates based upon an FCC pricing methodology called the "Total Element Long Run Incremental Cost" or "TELRIC" method. Pursuant to the FCC's order requiring TELRIC rates, this Commission instituted a generic docket (No. 990649-TP) for the purpose, among others, of conducting a generic UNE pricing proceeding for BellSouth, Verizon (then

GTE Florida, Inc.) and Sprint. The Commission later bifurcated the proceeding and established a separate docket for the purpose of setting Verizon and Sprint UNE rates (Docket No. 990649B). Ultimately, the Commission established TELRIC-based UNE rates for all three local companies, although the implementation of Verizon's rates were stayed pending resolution of its appeal to the Florida Supreme Court. BellSouth's and Sprint's TELRIC-based UNE rates approved by the Commission were not stayed and were available to CLECs at the time of the evidentiary hearing in this case and at the time the final order was entered. The Verizon appeal was decided by the Florida Supreme Court September 2, 2004 in Case No. SC02-2647 in which the Commission's order was upheld.

7. The approval, and availability, of the cost-based UNE-P rates by the Commission were highly significant to the expansion of, and presumed continuation of, local service competition in Florida. The Commission's own 2003 Report on Competition in Telecommunications Markets (2003 Report) to the legislature, which is Exhibit 15 in this case,

repeatedly stresses the criticality of the UNE-P rates to enhanced local service competition in Florida.

Background on the UNE-Ps' Importance to Increased Competition

8. This Commission's 2003 Report addressed the role of the legislature's 1995 Act in helping consumers through enhanced telephone competition, saying:

In 1995, the Florida Legislature amended Chapter 364, Florida Statutes, to allow for competition in the state's telecommunications industry. The Legislature found that "the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure."

2003 Report at 4. (Emphasis supplied.) The 2003 Report also addressed the importance of the subsequent Federal Telecommunications Act of 1996 Act (the 96 Act) saying, in part:

The 96 Act established a national framework to enable CLECs to enter the local telecommunications marketplace. The FCC's Local Competition Order specified that opening the local exchange and exchange access markets to competition was intended to "pave the way for enhanced competition in all telecommunications markets."

Ibid. (Emphasis supplied.)

9. The 2003 Report stated the 96 Act established three methods by which CLECs could enter the local exchange market: (1) resale, (2) leasing of unbundled network elements (UNEs), and (3) investing in their own facilities. Because it found the ILECs dominate the last mile of the local network, the 2003 Report concluded the CLECs must either use the ILEC's local loops or build their own facilities. The 2003 Report also discussed the importance of the TELRIC-based UNE-P rates to both of these strategies, saying, in part:

Unbundled Network Elements (UNEs)

UNEs are the building blocks of ILEC networks used to provide telecommunications services. This method of entry requires ILECs to unbundle their networks and lease the piece parts or elements to CLECs at rates based on a total element long-run incremental cost (TELRIC) methodology.

Facilities

Facilities-based CLECs are those that have invested in and built-out their own networks. Frequently, CLECs enter the market using resale or UNE-based services while investing the financial resources necessary to build a telecommunications network and eventually provide facilities-based services independent of the ILECs. Many CLECs have chosen a UNE-P or resale platform, and true facilities-based competition in the local telecommunications market is not yet widespread. Fairly robust intermodal and facilities-based competition currently exists in the advanced communications market primarily through cable companies, wireless providers, and a

handful of other wireline providers that mainly target the high-demand business market.

2003 Report at 5. (Emphasis supplied.)

10. The clear thrust of the 2003 Report, as well as the testimony of the CLECs in this case, is that expanded residential competition in most of Florida depends almost entirely on the continued availability of UNE-P to the CLECs from the ILECs and at the relatively lower rates based on the FCC-mandated TELRIC methodology. The 2003 Report demonstrates this fact by disclosing, for example, that the CLECs' residential customers in 2003 totaled 726,638, up from 366,653 in 2001.³ However, of that total, 668,261 were taken from BellSouth, while only 32,175 were in Sprint territories, and fewer yet, 23,772, were taken from Verizon. The Rural ILECs lost only 2,430 to competitors. 2003 Report at 8, 9. The over 100 percent increase in CLEC residential customers in less than two years in the BellSouth service territory clearly has a correlation in time to the reduced BellSouth UNE-P rates which were reduced to their lowest levels

³ The 2003 Report also showed that while the CLEC's residential market share had increased to 9 percent in 2003 from 7 percent the previous year, the vast number of those new customers were in predominantly urban areas of BellSouth's service territory, with the result that meaningful competition for most Floridians still does not exist.

in September 2002, and seemingly no relation to the large increases in local rates authorized by the Rate Increase Orders, which have yet to be implemented due to the appellate stay.

11. The 2003 Report is replete with other citations to how critical the continued availability of TELRIC-based UNE-P rates have been to the expansion of residential local service competition in Florida. These Report assertions include:

A. Of the top 10 telephone exchanges with the most CLEC providers, all were in BellSouth's territory and largely due to the availability of low-cost UNE-P rates. The Report says, in part:

CLECs concentrate on larger metropolitan areas for a number of reasons including higher population densities, which improve economics of scale and scope. Lower UNE rates in these higher density zones also attract competitors. Notably, each exchange shown in Table 4 is in BellSouth's territory. One explanation of the greater CLEC presence in these exchanges is that BellSouth has the lowest UNE-P rates among all the ILECs (See Section B for further discussion).

2003 Report at 11. (Emphasis supplied.)

B. While discussing the considerations CLECs face when deciding to compete in a given area, the 2003 Report highlights the importance of UNEs, among other factors, saying:

Customer acquisition costs can be significant as new entrants attempt to wrest long-time customers away from the incumbent and keep them long enough for payback. Other market entry considerations include collocation availability and cost, adequate and nondiscriminatory access to ILEC operations support systems (OSS), the timeliness and quality of ILEC installations and maintenance, and the availability of UNEs at reasonable (cost-based) prices, especially UNE-P.

2003 Report at 11, 12. (Emphasis supplied.)

C. The 2003 Report observes BellSouth's probable self-interest in seeing the TELRIC-based UNE-P rates established in Florida, at least temporarily, so that it could begin providing expanded long distance service within the state. The report notes that only BellSouth had to obtain FCC approval prior to providing long distance service within its in-region service area. The approval would come only if BellSouth:

complied with a 14-point checklist showing the local market is sufficiently open to competition. The checklist includes requirements to provide adequate access to OSS and to UNEs at reasonable prices.

2003 Report at 12. (Emphasis supplied.)⁴

⁴ It was fortunate timing for BellSouth that it was able to use the low-cost UNE-P rates to obtain its long distance service approval from the FCC prior to its appellate success in stripping the FCC of its ability to require the continued availability of these same low-cost UNEs. The long distance service approval allowed BellSouth the critical ability to "bundle," which is now effectively denied to its potential competitors in the long distance business, who now do not believe they can afford to provide local service at competitive rates.

D. The 2003 Report observes that BellSouth is the only Florida ILEC to have to obtain this FCC approval, that it has six of the ten most densely populated areas of the state, and the lowest UNE-P rates by far. With respect to the importance of UNE-P availability and price in promoting local service competition, the report continues, saying:

3. UNE-P Availability and Price

An additional factor attracting competitors to BellSouth's territory appears to be the availability of UNE-P at the lowest prices in the state. In short, UNE-P is an unbundled network element platform that provides a CLEC with all of the necessary components to provide end-user service (*i.e.*, loop, local switching, interoffice transport, and tandem switching). A CLEC may add some of its own services to UNE-P, repackage UNE-P, or market UNE-P in a different manner than the ILEC. A CLEC providing end-user service via UNE-P does not require any capital investment by the CLEC in telecommunications infrastructure.

As stated earlier, the availability and price of UNEs, especially UNE-P, are key determinants of CLEC market entry. UNE-P appears to be the entry strategy of choice for many CLECs serving the mass market (*i.e.*, residential and small business customers). This Commission first set UNE rates for BellSouth in 1996. After evidentiary proceedings, the Commission subsequently reduced UNE rates in May 2001, then increased them slightly in October 2001. Finally, after additional evidentiary proceedings, the Commission reduced rates for certain UNE-P components in September 2002 below the levels set in May 2001.

2003 Report at 12, 13. (Emphasis supplied.)

E. The 2003 Report states BellSouth's level of competition is clearly related to its UNE-P rates, which were established much earlier than those for Sprint and Verizon and which are very much lower than those of the other two ILECs in the two largest rate zones. Forty eight percent (48%) of total CLEC access lines are UNE-P lines in BellSouth's territory, while UNE-P comprises only 3% of CLEC lines in Verizon's territory and 5% in Sprint's.

2003 Report at 14.

F. The Report states that the availability of cost-based UNE-P lines from the ILECs has not just led to new competition, but has also dramatically replaced the less desirable resale competitive alternative, the only non capital-intensive method left for competitors if TELRIC-based UNE-P rates are no longer required and available. On this point, the 2003 Report says:

Moreover, UNE-P lines in BellSouth's territory have increased significantly over the last three years while resale lines have declined. As would be expected, CLECs will replace resale lines if higher margins are available through UNE-P. As of June 30, 2001, 219,907 resale lines were serving customers in BellSouth's territory, nearly twice the number of UNE-P lines. One year later, following the Commission's reductions to BellSouth's UNE rates in 2001, UNE-P lines nearly quadrupled to 420,390, more than a three-to-one ratio over resale lines.

Resale lines declined by more than 90,000 during this period, with most being converted to UNE-P. As of June 30, 2003, UNE-P lines had increased to 686,242, with growth fueled by the Commission's further UNE rate reductions in September 2002. In this latest reporting period, the ratio of UNE-P to resale lines was more than nine-to-one, and the number of resale lines further declined by almost 57,000.

2003 Report at 15. (Emphasis supplied.)

G. The Report discusses whether CLECs can effectively compete for residential customers without access to UNE-Ps, saying:

There is an ongoing debate about the appropriate level of UNE-P rates and about whether CLECs are impaired in the market without access to UNE-P. Whatever the outcome of these debates, UNE-P appears to be a significant element in the current business plans of CLECs serving mass market customers. In Florida, 73% of CLEC residential lines are served via UNE-P. The remainder are served in almost equal amounts via resale and subscriber loops that are tied to CLEC switches.

Where UNE-P has become a prevalent method of market entry, proponents of UNE-P argue that UNE-P is critical to ensuring competition in the local telecommunications market and that it must be preserved. The argument on the other side of the debate is that UNE-P is not viable as a long-term competitive strategy. Critics of UNE-P maintain that this strategy is not economically rational and that it serves to drain capital from an industry in dire need of investment. Instead, they argue that regulatory policies should promote facilities-based competitive models – and not business models reliant on market participants leasing the facilities of their competitors.

Ibid. (Emphasis supplied.)

H. The 2003 Report also discusses the FCC's then-continuing procedure for examining the importance of the role of UNE-P in local service competition and this Commission's fact-finding role in that process. On the Triennial Review Order and the FCC's presumption that UNE-P is required to serve residential customers, the report says:

The FCC is at center stage of the debate, and in August 2003, the agency issued its Triennial Review Order (TRO), which presumptively concluded that CLECs serving mass market customers are impaired without access to unbundled local switching (a key element in UNE-P). This finding is subject to a more granular determination, which determination must be completed by the states within 9 months of the effective date of the TRO. Whether the FCC's finding of impairment is upheld by the individual state commissions will impact the future of UNE-P as a competitive strategy in those states.

The importance of UNE-P to current CLEC business plans was also illustrated in a recent announcement by Sprint. In the wake of the FCC's Triennial Review Order, Sprint announced that its CLEC arm was launching a portfolio of bundled service offerings, including local, long distance, and wireless, which will be provisioned using UNE-P and available to approximately 80 percent of U.S. households in 36 states and the District of Columbia. Sprint apparently believes that the FCC's finding of impairment will be upheld in most states, thus continuing the availability of UNE-P. Moreover, the expansion of Sprint's local UNE-P based business appears to be a key driver in the company's even more recent decision to restructure in hopes of shedding \$1 billion in annual operating costs.

2003 Order at 18. (Emphasis supplied.)

12. While perhaps a bit lengthy, the above discussion of the 2003 Report is intended to demonstrate this Commission's recognition of the criticality of TELRIC-based UNE-P rates in expanding residential local service competition in Florida. When the TELRIC-based UNE-P rates became available, as in the BellSouth service areas, residential local service competition took off, at least in a historically relative sense, in the more urban areas. Where these rates were not available, the 2003 Report shows residential local service competition remained stagnant and the alternative resale and facilities-based service methods were not seen as economically viable by competitors. In short, the relative and recent expansion of residential local service has been almost totally dependent upon TELRIC-based UNE-P rates, and this Commission reported this fact to the Florida Legislature in the 2003 Report. These TELRIC-based UNE-P rates were available when the Commission approved the requested rate increases, but, as described below, they are now a thing of the past.

CLECs had a right to TELRIC-based UNE-P rates on December 24, 2003

13. During the evidentiary hearings and when the Initial Order was entered on December 24, 2003, the legal and factual status quo was that

the CLEC parties to the case had a legal right to Commission-approved, TELRIC-based UNE-P rates in the service territories of BellSouth and Sprint and an expectation that they would eventually have access to the same type of rates the Commission had approved for Verizon, but which were stayed pending the now resolved appeal. In these cases the Commission heard the testimony of AT&T's witness Fonteix that his company's announced decision to compete for local service customers in two of BellSouth's largest urban areas was based in large part on the fact that the spread between the local BellSouth rates and the approved UNE-P rates were the greatest there, as well as its expectation that the rate rebalancing would take place. There was a clear expectation on the Commission's part that AT&T, the largest of the CLECs in the case, would engage in local service competition to the supposed benefit of residential customers. This Commission noted at page 28 of the Initial Order:

While it is uncontested that some customers will not receive a direct benefit as a result of the implementation of the ILECs' proposals, we find that Florida consumers as a whole will reap the benefits of increased competition and, ultimately, competition will serve to regulate the level of prices consumers will pay. Increased competition will lead not only to a wider choice of providers, but also to technological innovation, new service offerings, and increased quality of service to the customer. The evidence in this case shows that Knology will

continue its plans to enter Florida markets if the Petitions are granted, and will consider broadening the number of Florida markets it enters, as demonstrated through the testimony of witness Boccucci. AT&T witness Fonteix has also indicated that AT&T's entry into BellSouth's territory has been largely influenced by the 2003 Legislation and the hope that with the granting of these Petitions, the raising of local rates will make Florida markets more profitable for competitors.

Order No. PSC-03-1469-FOF-TL at 28. (Emphasis supplied.)

14. The Commission also noted in its Initial Order that it expected the increased local service competition would serve to protect Lifeline customers, who, with approval of the rate increases, would receive only limited duration protection from the increases despite the fact that there was no provision for increasing their financial assistance proportionally.

This Commission said:

We agree, and expect that, over time, competition should take care of those protected by Lifeline, in spite of the current limited duration that these customers are protected from the local increases at issue here.

Order No. PSC-03-1469-FOF-TL at 30. (Emphasis supplied.)

Absent significant and actual local service competition, Lifeline customers will not be taken care of and will experience higher local rates without commensurate financial assistance.

15. Again, stressing the expectation that AT&T would provide a part of the competition that would allegedly “benefit” residential customers, the Commission in defending its conclusion that the rate increases would “induce enhanced market entry,” said at page 36 of the Initial Order:

. . . . In addition, AT&T indicated that it has entered the BellSouth territory as a result of the 2003 Act.

We are persuaded that companies like Knology and AT&T provide the empirical evidence of how the ILECs’ proposals will increase competition.

Order No. PSC-03-1469-FOF-TL at 36. (Emphasis supplied.)

16. It appears clear from the above that the Commission, and residential customers for that matter, had an expectation that some level of actual increased competition should result from the 30 to 90 percent rate increases being granted and, further, that a portion of that actual competition was to be expected from AT&T per the testimony of its witnesses.

17. As this Commission is aware, the state “granular determination” required by the FCC’s August, 2003 TRO, referenced in paragraph 11(H) above, was to be made in this Commission’s Docket No. 030851-TP. A hearing was held in this docket in late February, 2004 at which time

BellSouth and Verizon argued generally that UNE-P rates, let alone at TELRIC levels, were not warranted in their service territories.

18. As this Commission is also aware, on March 2, 2004, before the Commission had an opportunity to make its decision in Docket No. 030851-TP, the D.C. Circuit Court of Appeals' reversed the FCC's Triennial Review Order requiring low-cost UNE-P rates in the case of United States Telecom Ass'n v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").⁵ In what was widely viewed as a stinging rebuke of the FCC's decision making, the USTA II Court threw out a major portion of the FCC's Triennial Review Order, saying, amongst other things, that the FCC erred when it delegated to state commissions the authority to determine what network elements must be unbundled at discounted rates for use by competitive carriers.

19. The USTA II decision was viewed as a significant victory for the ILECs and a major defeat for the CLECs, who would no longer have a right to TELRIC-based UNE-P rates established by state commissions, but, rather, would have to pay "competitive" rates established unilaterally by the ILECs they were seeking to compete with. Believing USTA II to be a

⁵ Opinion attached as Attachment 1.

significant change to the status quo, Attorney General Crist, on April 19, 2004 filed his Notice of Supplemental Authority with this Commission, attaching a copy of the USTA II opinion as supplemental authority in support of his Motion for Reconsideration and asserting that the “decision is pertinent to the Attorney General’s arguments on reconsideration that the petitions are not in the public interest, do not benefit residential customers, and will not induce enhanced market entry.”

20. On reconsideration the Commission rejected the Attorney General’s concerns over the impact of the USTA II opinion, stating:

. . . we conclude that the D.C. Circuit’s decision in United States Telecom Ass’n v. Federal Communications Commission does not rise to the level that would necessitate that we reconsider our decision. While the decision does muddy the waters as to the future of certain UNEs, it does not, by itself, automatically remove any UNEs from the national list. Furthermore, the D.C. Circuit’s decision is currently stayed, and further appeals are possible. While we are concerned about the uncertain state of the FCC’s unbundling rules, even if the D.C. Circuit’s decision remains in place, and UNEs are removed from the list as a result, that process will likely take place over an extended period of time. Furthermore, even if the D.C. Circuit’s decision remains in place, carriers that compete using their own facilities would not be directly affected.

Order No. PSC-04-0456-FOF-TL at 8.

21. AARP believes the Commission erred in not giving greater weight to the USTA II opinion on reconsideration as requested by the Attorney General. More importantly, since the Order on Motions for Reconsideration was entered on May 4, 2004 a number of significant additional actions have taken place which the Commission could not have had an awareness of when both making its initial decision and its decision on reconsideration, but which definitively signaled the death knell of local service competition in Florida. Specifically, the FCC and the U.S. Solicitor General declined to appeal the USTA II decision to the United States Supreme Court, and that Court has declined to grant a stay in connection with the separate appeals filed by AT&T and others.⁶ The chances of success at the U.S. Supreme Court were viewed as slim without the presence of the FCC and Solicitor General on the appeal. Furthermore, negotiations between the ILECs and CLECs over what level of wholesale rates will be charged after the existing TELRIC UNE-P rates expire have apparently had limited success and AARP is not aware of any current settlements that will beneficially impact residential customers in Florida. It has been reported that BellSouth will voluntarily continue honoring its

⁶ See CNET News.com June 14, 2004 article "Chief justice rejects telecom case," Attachment 2.

current UNE-P rates through the end of the year, while Verizon will honor its existing rates (not the lower, but stayed UNE-P rates), but only just past the general election to November 11, 2004. The FCC, apparently in a private vote on July 21, 2004, approved a 6-month extension on the validity of the current UNE-P rates that would leave those rates available to CLECs until early 2005 while the FCC is attempting to draft new permanent rules.⁷ However, Verizon and others have already appealed the order granting the extension claiming that the FCC has granted itself an illegal stay in violation of the USTA II opinion. In any event, at this point, the availability of the lower-cost, TELRIC-based UNE-P rates may only be until sometime in early 2005 if the FCC extension is sustained on appeal.

22. While the changed circumstances described in Paragraph 21 above will arguably cause uncertainty in the minds of most CLECs and lead them to think twice about attempting to compete in local service markets in Florida, there are more concrete and specific changed circumstances which AARP believes will necessarily greatly reduce the level of enhanced local service competition to be attained in Florida and, therefore, in turn, reduce, if not eliminate, the “benefits” of competition

⁷ See The Wall Street Journal August 23, 2004 article at Attachment 3.

residential customers are supposed to receive in exchange for paying substantially higher local rates.

23. The most definitive changed circumstance is reflected in the attached (Attachment 4) July 22, 2004 AT&T News Release titled "AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets." In connection with reporting greatly reduced second quarter profits as compared to the same period in 2003, AT&T stated that it would cease competing for local service customers, as well as drop attempts to secure new standalone residential long distance customers. The specific language of the release states:

The company also announced that it is shifting its focus away from traditional consumer services such as wireline residential telephone services, and concentrating its growth efforts going forward on business markets and emerging technologies, such as Voice over Internet Protocol (VoIP), that can serve businesses as well as consumers.

As a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for residential local and standalone long distance (LD) customers. The company stressed that existing residential customers will continue to receive the quality service they expect from AT&T; however, the company will no longer be investing to acquire new customers in this segment.

(Emphasis supplied.)

24. The consequences of AT&T's decision on enhanced local service competition in Florida are clear cut and undeniable: Any growth in local service competition in Florida from AT&T is out of the question absent a corporate reversal of this decision. Furthermore, it appears reasonable to assume that any existing AT&T local service competition in Florida now will necessarily decline due to normal attrition and customer "churn," coupled with the likelihood that attrition will accelerate if AT&T is forced to increase its local service rates to match the expected UNE-P increases from the ILECs following the expiration of the FCC's interim rules. As reflected in the attached August 4, 2004 NY Times article titled "AT&T Plans to Raise Its Rates for Residential Calling Plans (Attachment 5), AT&T has already announced plans to raise its local service rates by two to three dollars a month in 40 states, specifically including Florida. The article notes the risk of these increases causing AT&T to lose even more local service customers than the existing 10 percent per quarter declines already reported.

Predictably, there can be no benefits to residential customers in Florida from enhanced competition flowing from AT&T's local service competition after the Commission's higher and approved rates become effective because AT&T has said it will not compete.

25. The detriment to residential customers from AT&T's decision doesn't stop with the complete lack of enhanced local service competition, however, although AARP believes this changed circumstance alone is sufficient for this Commission to reverse the planned rate increases. Additionally, however, is the harm to residential customers from AT&T no longer competing for residential long distance customers. The Commission accepted AARP's criticism on reconsideration that the Initial Order overstated the financial benefits that would be received by residential customers from granting the petitions (quantitative financial benefits cannot outweigh the increase in local rates) and modified the text of the order, as reflected on page 16 of the Order on Reconsideration. The Commission did so in recognition of the fact that residential customers will pay for 90 percent of all local service rate increases

(single-line business customers will bear the remaining 10 percent), while multi-line business customers, who pay no local service increases, will receive substantially more than half of the interstate toll reductions. It is now clear that AT&T's newly announced policy of foregoing additional standalone residential long distance customers, while focusing more on large business customers, will necessarily result in residential customers receiving an even smaller percentage of "benefits" from AT&T in the form of reduced in-state toll charges. AT&T's percentage of revenues derived from residential long distance versus from large business long distance services was falling even before its decision to abandon new residential accounts, which necessarily will make the ratio skewed more to the benefit of big business customers. Since residential customer benefits in the form of reduced in-state toll charges will be based "in proportion to the respective access minutes of use"⁸ versus the access minutes used by large business customers, the confidential,⁹ but woefully small, percentage testified to in the

⁸ Initial Order at 53, 54.

⁹ The confidential exhibit was filed with the Florida Supreme Court by AARP on January 23, 2004 in conjunction with its Original Motion to Relinquish Jurisdiction, but Maintain Stay.

hearing to be returned to residential customers will necessarily decline even more with the fall in AT&T's residential long distance minutes. That residential customers will have to bear 90 percent of the cost of local service rate increases will remain the same. Unless the local service rate increases are reversed or revised due to this additional change in circumstances, Florida's residential telephone customers will get zero benefits from future local service competition from AT&T, while financing an even larger reduction in the in-state tolls AT&T's large business customers pay. Here are the rough numbers demonstrating this result from the same July 22, 2004 AT&T News Release cited above:

AT&T Consumer

Revenue was \$2.0 billion, a decline of 14.6 percent versus the prior-year second quarter, driven by lower standalone LD voice revenue as a result of the continued impact of competition, wireless and Internet substitution and customer migration to lower-priced products and calling plans, partially offset by targeted price increases.

* * *

According to industry estimates, more than 40% of American households have now migrated to some combination of bundled communications services. Recent regulatory decisions make it financially infeasible for AT&T to offer a competitive bundle of services to

consumers. AT&T has determined that it cannot effectively compete against bundled competition by selling only standalone LD.

(Emphasis supplied.) The fact that the Commission approved ILEC petitions that impose the local service rate increases only on those without bundled services can only serve to exacerbate AT&T's inability to meet bundled competition from ILECs since AT&T cannot "bundle" without offering local services too. The decision exempting ILEC bundled customers from the rate increases will also drive more local service customers to ILEC bundles to avoid the approved rate increases, with the result that the ILECs will acquire a tighter grip on their now near local service monopolies. The end result will be that local service competition will be deterred, not enhanced as required by the statute.¹⁰

26. While not as definitive and clear-cut as AT&T's departure from local service competition, it appears that the other non-facilities based potential competitors to these cases may also be retreating from local service competition in Florida and throughout the United States. While

¹⁰ This "anti-competitive" aspect of the rate increases is matched only by the ILECs' "brilliance" in convincing the Commission to approve uniform dollar rate increases for both urban and rural service areas (as opposed to the historic practice of imposing uniform percentage increases), which tends to make the most CLEC desirable urban customers less profitable than they otherwise would be if uniform percentage increases had been approved. Rural customers, who are logically and economically the last

AARP has been unable, to date, to find any “official” company statements from Sprint and MCI on the subject, recent published accounts report that both companies are scaling back their efforts to compete for local service customers and may be thinking of departing completely from such markets. For example, an August 6, 2004 The Washington Times article titled “MCI set to downsize residential service” included the following regarding the company’s scaled back residential service plans:

MCI Inc. said yesterday that it doesn't expect to add new residential calling customers because costs are increasing, the second major phone company in two weeks to announce its exit from residential phone service.

“We anticipate to downsize our [consumer business] effort significantly,” said Wayne Huyard, president of MCI’s U.S. sales and service division.

Mr. Huyard didn’t offer details about MCI’s plans, but the nation’s second-largest long-distance provider wants to turn its attention to the more profitable commercial business.

AT&T Corp., the nation’s largest long-distance provider, said July 22 that it will stop trying to attract customers but continue to provide long-distance and local service to its 35 million residential customers. AT&T is walking away from the residential-calling business because revenue has fallen owing to increased competition and higher costs.

(Emphasis supplied.) Full article at Attachment 6.

to be sought by local service competitors, are forced to pay up to 90 percent rate increases (Sprint) from their virtual monopoly ILECs with no competitors to turn to.

27. Still on the subject of MCI's retreat from residential local service competition, an August 9, 2004 article from BusinessWeek/online, titled "At MCI, The Worst May Be Over," reported the following:

STRATEGIC RETREAT. As arch rival AT&T (T) sounds the siren over asset write-downs and a pullout from the consumer telecom market, MCI's better-than-expected performance could signal that its dog days are on the wane. Indeed, the company, which was wracked by an \$11 billion accounting scandal under its former name, Worldcom, produced operating income of \$41 million during the quarter.

* * *

The long-distance market remains brutal, with prices falling and new technologies threatening MCI's core voice and data business. The end of cheap rates for access to local telephone customers is expected to cut revenues harshly in MCI's consumer and small-business unit. MCI has 3.6 million local customers and 8.8 million consumer long-distance lines. Meanwhile, regulatory changes are increasingly enabling the Baby Bells to hunt for customers in MCI's long-distance segment. The result: MCI said yesterday that it will reduce efforts to attract new consumer customers and revalue some assets, although it doesn't expect to fully exit the segment, as AT&T has done. "We anticipate downsizing our [consumer] acquisition efforts significantly," says Wayne Huyard, president of MCI's U.S. sales and services unit.

(Emphasis supplied.) Full article at Attachment 7.

28. Sprint, an ILEC in portions of Florida that wants to compete as a CLEC in the service territories of other ILECs and

which is also a long distance carrier throughout the country, is also reportedly cutting back its efforts to compete for residential local service customers. As reflected in a July 29, 2004 article found on the website of Virgo Publishing Inc. titled "Sprint Stops Marketing Residential "Complete Sense" Calling Plans," Sprint, like MCI, will not actively market its local service offerings as a consequence of USTA II. Specifically, the article says in pertinent part:

Sprint Corp. has stopped actively marketing a number of residential local and long-distance calling plans in 36 states and the District of Columbia known as Sprint Complete Sense, according to company representatives.

The company listed 336,000 Sprint Complete Sense customers at the end of the first quarter, the most recent figure disclosed, according to spokesman Travis Sowders.

Sowders says Sprint never launched a mass marketing campaign to promote the calling plans and primarily sold the packages to existing customers. Sprint will continue to support existing customers, he says, and provide Sprint Complete Sense to people who request it. The decision to stop marketing the calling plans was made in recent weeks, Sowders says.

Sprint introduced the calling plans last year after the FCC released rules that helped foster local-phone competition by requiring BellSouth Corp., Qwest Communications International Inc., SBC Communications Inc. and Verizon Communications Inc. to rent their networks to competitors such as AT&T Corp. and Sprint at government-set rates. Those rules have expired, and numerous telecommunications

companies anticipate a significant spike in the wholesale phone rates beginning next year.

Attributing its decision to regulatory developments, AT&T last week announced plans to stop competing for local and long-distance phone customers in the traditional residential market. Analysts expect other phone companies, including possibly MCI, to scale back their residential services as a result of the regulatory developments. MCI was not immediately available for comment.

(Emphasis supplied.) Full article at Attachment 8.¹¹

29. A further indication of Sprint's intention to not actively pursue local service competition anywhere, including Florida, is evidenced in an Associated Press July 30, 2004 article titled "Sprint Corp. stops marketing small local-service plan," which reported the following:

NEW YORK - Sprint Corp. said it would stop marketing a small local-service calling plan called Complete Sense that depends on the company renting equipment from the dominant regional Bells.

Sprint never spent much on marketing the service, which had 336,000 customers at the end of the first quarter. Sprint said it will continue to serve customers who use the service.

Overland Park, Kan.-based Sprint owns its own local service network, with 7.8 million access lines in 18 states, letting the company sell local service to customers without renting equipment from the regional Bells.

¹¹ <http://www.vpico.com/articlemanager//printerfriendly.aspx?article=19770>

Complete Sense is the only plan Sprint offers that depends on renting equipment. The price of such rentals is expected to rise following a March federal court decision overturning rules that kept the prices low.

The court decision prompted AT&T Corp., which does not own its own local access lines, to announce last week that it would no longer spent an estimated \$1 billion a year to win residential customers. Instead, AT&T will focus on business customers. It, too, said it would continue to serve its existing customers.

(Emphasis supplied.) Full article at Attachment 9.¹²

SIGNIFICANT CHANGED CIRCUMSTANCES COMPEL REVERSAL OF LOCAL SERVICE RATE INCREASES

30. The Florida Legislature clearly intended that residential local telephone service customers receive some measure of actual local service competition if their rates were to be increased by the large amounts requested by the ILECs and now approved by this Commission. Mere theoretical possibilities for competition are not enough to meet either the needs of residential customers or the requirements of law. There were at least three non-facilities based CLECs in these proceedings indicating that they would compete in Florida to a greater extent than they were previously. It was understood by all that AT&T, MCI and Sprint would have to take

¹² http://www.mercurynews.com/mlid/mercurynews/business/financial_markets/9284641.htm

advantage of the TELRIC-based UNE-P rates to engage in such competition. However, those rates will soon be gone. Irrespective of the timing of the expiration of these UNE-P rates, each of the three CLECs, AT&T, MCI and Sprint, have indicated in some fashion that they will either cease residential local service competition or curb marketing efforts to obtain new customers in that market. The continued service offerings of cable operator Knology in two relatively small markets in Florida are inadequate to provide to all the customers of BellSouth, Verizon and Sprint the so-call “benefits” of competition promised by this Commission as the quid pro quo of the large local service rate increases approved. AT&T, MCI and Sprint will not compete in this state, so there can be no benefits flowing to Florida’s residential customers.

31. Significantly changed circumstances mean that the telephone company parties to these proceedings, and, indeed, this Commission can no longer deliver on the benefits promised to residential local service customers. The public interest requires that the rate increases previously approved by this Commission be

reversed. Pursuant to Peoples Gas this Commission has the authority and, AARP would submit, the obligation to modify its orders to reflect the changed circumstances and the adverse financial impact they will have on Florida consumers absent such a modification.

REQUEST FOR HEARING

32. AARP recognizes Peoples Gas, the Florida Statutes and this Commission's rules would not condone modification of the orders in this case and reversal of the local service rate increases based solely on "evidence" presented through CLEC press releases and news articles. Accordingly, AARP would respectfully request that: (1) this Commission join it in requesting that the Florida Supreme Court relinquish jurisdiction over these cases, (2) for the purpose of the Commission holding an evidentiary hearing to ascertain what level of local service competition is now possible, or likely, in light of the USTA II decision and the announcements of seemingly all major CLECs that they will not so compete, and (3)

whether the public interest and statutes authorizing the increases require that the rate increases be reversed.

NO SUBSTANTIAL HARM TO TELEPHONE PARTIES BY DELAY

33. There should be no harm claimed to result from the telephone parties to these proceedings by the delay occasioned by this Commission holding an evidentiary hearing to determine whether the significant changed circumstances claimed by AARP compel the reversal of the rate increases. As this Commission is fully aware, the ILECs are to be treated in a revenue-neutral fashion by the statute, which means that they cannot keep the revenues associated with the increased local rates, but must, instead, give them over to the long distance companies in the form of reduced access fees. To the extent that the rate increases would result in the ILECs actually losing customers and the revenue associated with them to competitors, as they all claimed would result, the ILECs will actually benefit by such a delay. Likewise, the long distance carriers are charged by the law and this Commission's order with returning all the access fee reductions to their instate toll customers (mostly their big business customers) so that they, too, are held revenue-neutral and cannot gain

financially by the rate increases. The only parties to these proceedings that might be heard to complain about the adverse impact of the delay occasioned by the Commission revisiting this issue are the potential local service competitors, the only one of which is apparently left is Knology, which does not use the ILECs' UNE-Ps and can only claim disadvantage because its rates would look more attractive if the ILECs' customers were forced to pay more for local service. Residential consumers, at least those represented by AARP, the Office of Public Counsel and Attorney General Charlie Crist, never wanted to pay for increased competition and will gladly forego the \$344 million in rate increases while the Commission hears evidence on the level of local service competition, if any, that may be expected to result from the rate increases if they are allowed to be charged.

34. The undersigned attorney has contacted opposing counsel and is authorized to represent that the Attorney General of the State of Florida and the Office of Public Counsel do not object to this motion, that the Florida Public Service Commission takes "no position," but that

BellSouth, Verizon, AT&T, MCI, Sprint Corporation, Sprint-Florida, Inc. and Knology are opposed and will file objections.

WHEREFORE, AARP respectfully requests that the Florida Public Service Commission join AARP in petitioning the Florida Supreme Court for a relinquishment of jurisdiction for the purpose of the Commission holding an evidentiary hearing to determine whether it should modify Order No. PSC-03-1469-FOF-TL as requested in this pleading.

Respectfully submitted,

Michael B. Twomey
Post Office Box 5256
Tallahassee, FL 32314-5256
(850) 421-9530

Attorney for AARP

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following on this ____ day of September, 2004:

Charles J. Crist, Jr., Esquire
Christopher M. Kise, Esquire
Lynn C. Hearn, Esquire
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Susan F. Clark, Esquire
Donna E. Blanton, Esquire
Radey Thomas Yon & Clark
313 North Monroe Street, Ste.
200
Tallahassee, Florida 32301
(Counsel for BellSouth)

Harold McLean, Esquire
Charlie Beck, Esquire
H.F. Rick Mann, Esquire
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street,
Rm. 812
Tallahassee, Florida 32399-1400

George N. Meros, Jr., Esquire
Gray Robinson
Post Office Box 11189
Tallahassee, Florida 32302-
3189
(Counsel for Knology)

Richard Melson, Esquire
David E. Smith, Esquire
Division of Legal Services,
Rm. 370
Florida Public Service
Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

John P. Fons, Esquire
Jennifer L. Heckman, Esquire
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(Counsel for Sprint-Florida)

Floyd R. Self, Esquire
Messer Caparello & Self
215 South Monroe Street, Ste.
701
Tallahassee, Florida 32302-1876
(Counsel for AT&T and MCI)

Richard Chapkis, Esquire
Elizabeth B. Sanchez, Esquire
Verizon Florida, Inc.
201 North Franklin Street,
FLTC0717
Tampa, Florida 33601

Attorney