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Via Hand Delivery

September 13, 2000

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 990994-TP; Post Hearing Comments of Sprint.

Dear Ms. Bayó:

Enclosed for filing are the original and fifteen (15) copies of the Post Hearing Comments of Sprint in this rulemaking. Service has been made this same day via electronic transmission and U.S. Mail to the interested parties listed on the attached service list.

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

Sincerely,

Charles J. Rehwinkel

CJR/tk
Enclosure

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed amendments to Rules 25-4.003, F.A.C., Definitions; 25-4.110, F.A.C., Customer Billing for Local Exchange Telecommunications Companies; 25-4.113, F.A.C., Refusal or Discontinuance of Service by Company; 25-24.490, F.A.C., Customer Relations; Rules Incorporated; and 25-24.845, F.A.C., Customer Relations; Rules Incorporated.	**Filed: September 13, 2000** **Docket No. 990994-TP**

POST HEARING COMMENTS OF SPRINT

COMES NOW Sprint Communications Company Limited Partnership ("Sprint") and, pursuant to Section 120.54[1], Florida Statutes (2000), and Rule 28-103.004(7), Florida Administrative Code, provides these post hearing comments in opposition to the proposed amendments to Rules 25-24.490(1) and 25-24.845(1), Florida Administrative Code, insofar as they would apply proposed new Sections (2) and (19) of Rule 25-4.110 to interexchange carriers (IXCs) and alternative local exchange carriers (ALECs). Sprint submits that the proposed rules constitute an invalid exercise of delegated legislative authority and are contrary to the provisions of Chapter 364.337(2) and (4) as well as not supported by the record in this matter.

Sprint Communications Company Limited Partnership is an Interexchange Telecommunications Company (IXC) and Alternative Local Exchange Company (ALEC or CLEC) authorized by the Florida Public Service Commission ("Commission") to operate as an IXC and CLEC.

[1] All statutory citations are to Florida Statutes 2000, unless otherwise noted.

This rulemaking presents an opportunity for the Commission to strike a balance between its goals of protecting consumers and discharging the Legislative mandate to encourage competition. Sprint recognizes that the Commission has proposed to implement a statutory requirement that certain information appear on the bills of all telecommunications companies – including ALECs and IXCs (both also referred to collectively herein as "competitive carriers"). This balance can be struck by withdrawal of the rules.

All carriers would continue to be responsible for meeting the content requirements of the statute (Section 364.604, Florida Statutes). The Commission could continue to enforce that section and meet the statutory objective of protecting consumers by sanctioning violations of the statute pursuant to Section 364.285. Furthermore, a bill blocking option (BBO) should not be adopted. Instead, the competitive marketplace and the automatic charge removal provision of Rule 25-4.110(18) (as applied to ALECs and IXCs through the very recent amendments to Rules 25-24.490(1) and 25-24.845(1)) should be allowed the opportunity to work.

Sprint adopts and incorporates herein its previously filed comments in opposition to these rules (September 17, 1999 (pp.2-4); April 7, 2000, August 8, 2000 and August 16, 2000). Sprint will not rehash the extensive testimony from the competitive carriers demonstrating that the proposed rules will have a detrimental impact on competition generally and on the offering of competitive services. The rules would have a detrimental and chilling effect on competition in general and on the introduction of new and innovative services by competitors, including Sprint. This contention was largely unchallenged in the Staff presentation. Instead, the harm identified was speculative and the primary driver identified was that the Commission should be "proactive" in case the predicted harm ever materialized.

The record in this case demonstrates several things. First, a record and legal basis exists for regulating competitive carriers differently. Second, it was obvious that a need to implement the rules is virtually non-existent. Third, the rules proposed would be an invalid exercise of delegated legislative authority. Fourth, the Commission has not developed a good faith estimate of the cost of implementing the rules. Fifth, the Commission has not adequately assessed the impact on competition and the competitive offering of services.

Sprint's posthearing comments will address the two proposals, the relevant record and certain of the legal, factual and policy issues surrounding them. All compel that the Commission refrain from adopting rules altogether.

I. A Record Basis Exists For Treating Competitive Carriers Differently.

Sections 364.337 (2) & (4) and 364.01(4)(b), (d), (e), (f), (g) & (h) require that the Commission consider the impact on competition in adopting any rules for competitive carriers. Sprint's legal position on this issue is contained in its September 17, 1999, April 7, 2000, August 8, 2000 and August 16, 2000 comments and are incorporated herein by reference. These provisions allow, if not command, the Commission to create a two-tiered regulatory approach in rulemaking. Staff witness Simmons acknowledged this. [TR.48]. Also, staff witness Moses agreed that the competitive carriers may well have an ability to better keep undesirable third parties (e.g. "crammers") out of their billing systems. [TR. 107]. Likewise, Staff witness Durbin acknowledged that there have been few if any cramming and bill formatting complaints from competitive carriers. [TR. 68,76].

The Commission should acknowledge this factual and legal difference. Withdrawal of the rules will establish such a two-tiered regulatory approach. This is what the Legislature had in mind and it is what the record supports.

II. The Proposed Bill Formatting Rule is not lawful and should not be adopted.

The Commission is considering adopting a rule that purports to implement -- for ALECs and IXCs -- the italicized portion of this simple and straightforward and narrowly drawn statute:

> 1) ***Each billing party must clearly identify on its bill the name and toll-free number of the originating party; the telecommunications service or information service billed; and the specific charges, taxes, and fees associated with each telecommunications or information service. The originating party is responsible for providing the billing party with all required information.*** The toll-free number of the originating party or its agent must be answered by a customer service representative or a voice response unit. If the customer reaches a voice response unit, the originating party or its agent must initiate a response to a customer inquiry within 24 hours, excluding weekends and holidays. Each telecommunications carrier shall have until June 30, 1999, to comply with this subsection.

The chosen implementation vehicle is the following proposed rule:

> 2) Six months after the effective date of this rule, each billing party shall set forth on the bill all charges, fees, and taxes which are due and payable.
>
> (a) There shall be a heading for each originating party which is billing to that customer account for that billing period. The heading shall clearly and conspicuously indicate the originating party's name. If the originating party is a certificated telecommunications company, the certificated

name must be shown. If the originating party has more than one certificated name, the name appearing in the heading must be the name used to market the service.

(b) The toll-free customer service number for the service provider or its customer service agent must be conspicuously displayed in the heading, immediately below the heading, or immediately following the list of charges for the service provider. For purposes of this subparagraph, the service provider is defined as the company which provided the service to the end user. If the service provider has a customer service agent, the toll-free number must be that of the customer service agent and must be displayed with the service provider's heading or with the customer service agent's heading, if any. For purposes of this subparagraph, a customer service agent is a person or entity that acts for any originating party pursuant to the terms of a written agreement. The scope of such agency shall be limited to the terms of such written agreement.

(c) Each charge shall be described under the applicable originating party heading.

(d) 1. Taxes, fees, and surcharges related to an originating party heading shall be shown immediately below the charges described under that heading. The terminology for Federal Regulated Service Taxes, Fees, and Surcharges must be consistent with all FCC required terminology.

2. The billing party shall either:

a. Identify Florida taxes and fees applicable to charges on the customer's bill as (including but not limited to) "Florida gross receipts tax," "Franchise fees," "Municipal utility tax," and "Sales tax," and identify the assessment base and rate for each percentage based tax, fee, and surcharge, or

b.(i) Provide a plain language explanation of any line item and applicable tax, fee, and surcharge to any customer who contacts the billing party or customer service agent with a billing question and expresses difficulty in understanding the bill after discussion with a service representative.

(ii) If the customer requests or continues to express difficulty in understanding the explanation of the authority, assessment base or rate of any tax, fee or surcharge, the billing party shall provide an explanation of the state, federal, or local authority for each tax, fee, and surcharge; the line items which comprise the assessment base for each percentage based tax, fee, and surcharge; or the rate of each state, federal, or local tax, fee, and surcharge consistent with the customer's concern. The billing party or customer service agent shall provide this information to the customer in writing upon the customer's request.

(e) If each recurring charge due and payable is not itemized, each bill shall show the delinquent date, set forth a clear listing of all charges due and payable, and contain the following statement:

"Further written itemization of local billing available upon request."

Sprint submits that the proposal is an invalid exercise of delegated legislative authority since, by imposing formatting requirements, the rules would exceed the legislative grant of authority, and would enlarge, modify and contravene the specific statute being implemented and impose costs which could be reduced by adoption of a less costly alternative.

During the hearing, Staff witness Simmons testified that the proposed rule was a "content" rule and not a formatting rule. [TR. 53]. This assertion was contradicted by AT&T witness Dewey (and others) when he pointed out that the rule does impose formatting requirements that may thwart competitive offerings. [TR. 201-02]. In addition, Chairman Deason sought clarification on the purpose behind any formatting aspect of the rule. Staff agreed with the Chairman that the purpose was to inform customers of charges "if there is third-party billing." [TR.186-7]. As can be clearly seen from the extent of the rule proposal, the rule language is inconsistent with the stated intent and exceeds and, indeed, enlarges

the statutory language that has three simple requirements relative to what must appear on the bill:

(1) Name and toll-free number;
(2) Identification of the service provided; and
(3) The specific charges, taxes, and fees associated with the service.

Sprint also notes that subsection (2)(d)2 of the proposed rule also would require impermissible formatting and billing detail (taxing base) not contemplated in the statute. Obviously, the relevant portion of the statute deals with identification. Nowhere does the implemented statute grant the Commission authority to mandate the location on the bill of the toll-free number, the creation of separate headings or the identification of each and every base upon which a tax or fee may be assessed. Notwithstanding the lack of such a legislative mandate and contrary to the Staff's stated intent, a formatting rule is proposed for CLECs and IXCs.

The applicable provision of the Administrative Procedures Act for determining when an agency may lawfully act to adopt rules is Section 120.52(8), Florida Statutes (2000) which reads:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Section 120.536(1) contains language identical to the last paragraph in Section 120.52(8).

This docket was established on July 30, 1999. However, the rulemaking process was actually begun through a series of public hearings in 1998 and 1999. Prior to June 18, 1999 the First District Court of Appeal held that "A rule is a valid

exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented." *St. Johns River Water Management District v. Consolidated – Tomoka Land Co.*, 717 So2d 72, 80 (Fla. 1st DCA 1998). Even under that holding, extension of the plain and unequivocal statutory content provisions of Section 364.604(1) to a formatting rule fails this test. Section 364.604(1) is not a statute pertaining to the general operating or regulatory functions of the Commission, but rather is narrowly tailored to restrict the Commission's exercise of authority within a limited range – i.e. bill content. Any notion that the *Consolidated – Tomoka* holding would give the Commission leeway to interpret the statute to allow these rules had already vanished by the time the Commission voted to propose these rules. The 1999 Legislature amended Sections 120.52(8) and 120.536(1) to expressly reject the "class of powers" analysis used in *Consolidated – Tomoka.* Chapter 99-379, Laws of Florida. (Attachment 1).

In light of the lack of delegated authority, the preferable course of action would be to adopt no formatting rule with respect to ALECs and IXCs, but instead to allow these competitive carriers to allow the plain language of the statute to guide them. This has worked well since June 1999 when the statute became effective. In light of the lack of an effective cost identification process, the competitive harm identified by Sprint, AT&T, and WorldCom witnesses and the fact that the rule exceeds the plain limitations of the statute, Sprint urges that the Commission withdraw this rule and allow the statute to guide the parties. The legislature clearly contemplated such a result when it provided in Section 364.604(5):

> Pursuant to s. 120.536, the commission <u>may</u> adopt rules to implement this section.

[Emphasis added]. Obviously, the legislature felt that the statute was plain on its face and would provide sufficient guidance to competitive carriers. Clearly, no

rule is needed. The Commission should exercise the discretion allowed in the statute and refrain from acting.

III. A Bill Blocking Option Requirement is not lawful and should not be adopted.

Sprint urges the Commission to withdraw the proposal to require competitive carriers to offer a BBO to customers.

The Commission lacks legislative authorization for such a requirement. Furthermore, the record abundantly demonstrates that the Commission should refrain from requiring a BBO for ALECs and IXCs. Even where the Commission nevertheless remains convinced that a reviewing court would find that such authority for the rule exists, the factual and policy bases do not come close to supporting such a requirement.

As noted above, Section 120.536(1) mandates that an agency may only adopt rules that implement or interpret specific powers and duties granted by the enabling statute. Section 120.54(3)(a)1 further requires that, prior to hearing, the agency give notice containing "a reference to the section or subsection of the Florida Statutes...being implemented..." Any agency action to require a BBO for competitive carriers lacks authorization from the legislature, since there is no language even remotely suggesting a grant of authority. Even in the unlikely event that the Commission concluded that it possesses authority, it still lacks authority to require that the BBO be offered to business customers. Also, as drafted, the BBO cannot be applied to even residential customers since the proposal purports to require blocking of charges that cannot be classified as either "telecommunications" or "information" services.

On March 10, 2000, the Commission issued a notice of rulemaking, pursuant to Section 120.54(3)(a)1, and identified Sections 364.602 and 364.604 as the specific statute being implemented. Order No. PSC-00-0525-NOR-TP, issued March 10, 2000. Staff testified at hearing that the statute that they relied on for the BBO is subsection 2 of Section 364.604. [TR. 100]. That subsection reads:

> (2) A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer.

Furthermore, the term "customer is a defined term in Part III of Chapter 364. The relevant provisions are as follows:

> 364.602 Definitions.-- For purposes of this part:
>
> ***
>
> (3) "Customer" means any residential subscriber to services provided by a telecommunications company.

Section 364.604(2) cannot reasonably be read to authorize a bill block option. If anything the statutory provision is the antithesis of authorization for a BBO. The presumption behind the statute is that the Commission's authority is triggered only when the affected (residential) customer has ordered and been billed for a service. The law only creates a right in such a customer to refuse to pay for such services once billed. If the legislature had intended to give the customer a right to not be billed, it could have said so.[2] The Commission has already

[2] In fact, as Sprint stated at the hearing [Tr. 160] the legislature had such a chance when (based on Sprint's information and belief) at the request of a legislator the Commission staff drafted an amendment to address slamming and cramming. The amendment was dated February 3, 1998, and was for the consideration of the House Utilities and Telecommunications Committee. (See, attachment 1.) This amendment would have specifically required LECs to offer a BBO. The BBO requirement portion of the amendment was deleted before consideration by the Committee. The remainder of the amendment formed the basis for what is now Part III of Chapter 364. This "amendment" does not constitute authoritative legislative history in the strict sense, but is instructive that the BBO was not what was intended by the Legislature in creating Part III.

exercised whatever authority it had by implementing this section in Rules 25-4.110(18) and 25-24.490(1) and 25-24.845(1) which apply the following provision to ILECs, IXCs and ALECs, respectively:

> (18) If a customer notifies a billing party that they did not order an item appearing on their bill or that they were not provided a service appearing on their bill, the billing party shall promptly provide the customer a credit for the item and remove the item from the customer's bill, with the exception of the following:
>
> (a) Charges that originate from:
>
> 1. Billing party or its affiliates;
> 2. A governmental agency;
> 3. A customer's presubscribed intraLATA or interLATA interexchange carrier; and
>
> (b) Charges associated with the following types of calls:
>
> 1. Collect calls;
> 2. Third party calls;
> 3. Customer dialed calls; and
> 4. Calls using a 10-10-xxx calling pattern.

Obviously this (automatic removal) rule directly implements the plain intent of the statute.[3] Only charges that have been billed are covered by the rule. This tracks the statute since a charge (especially for a service not ordered) has to be billed before it can pose a liability.

By attempting to rely on Section 364.604(2) as authority for the BBO, the Commission would be undertaking an invalid exercise of delegated legislative authority in violation of Sections 120.52(8) and 120.536(1). The wellspring of

[3] Some discussion at hearing was devoted to exploring the legality of the requirement that credit be given for any "item " that the customer did not order or receive. It is likely that this provision exceeds the authority delegated to it by the statute in that the removal requirement is not limited to telecommunications or information services. That legal infirmity was not raised in the adoption of those rules. The same infirmity exists with the proposed BBO. Sprint does not waive this objection in this phase of the rulemaking.

authority dried up when the automatic removal rule was adopted. The statute which clearly requires (and authorizes the Commission to require) an automatic removal of charges cannot be reasonably read to also authorize the up-front blocking of charges for services even before it can possibly be determined whether a customer (1) intended to order said services or, (2) having ordered them, ever received them. The failure of a customer to order or receive a service is the predicate for the Commission to take action under Section 364.604(2). When that predicate does not exist, no Commission rulemaking is authorized under that statute. Imposition of a BBO requirement would constitute an invalid exercise of delegated legislative authority.

A. The Commission has failed to adequately consider the costs of requiring a BBO.

Section 120.54(1)(d) provides that:

> In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Failure to follow this requirement constitutes an invalid exercise of delegated legislative authority. Section 120.52(8)g. While the Commission undertook to perform a Statement of Economic and Regulatory Costs (SERC), the scope of the effort was inadequate for the Commission to reasonably apprise itself of the cost of implementation. As discussed below, the cost determination process was inadequate in this case. While development of a SERC is not mandatory (see, Section 120.54(3)(b)1), the Commission's failure to adequately conduct one here makes it impossible to properly perform the comparative cost analysis required for a lawful exercise of delegated legislative authority. Staff witness Hewitt

testified that the SERC cost-gathering process did not directly target any IXCs (other than those who were also ALECs) and only 27 [Exhibit No. 2]. out of approximately 350 ALECs[4]. [TR. 21,23]. As a threshold matter, the SERC was inadequate in that it does not constitute a good faith estimate of the transactional costs to approximately 1000 companies who would have to comply with the BBO rule.

Aside from the inadequate data gathering, the Staff also included some questionable assumptions about the sample that was selected for data gathering. With respect to the sample that was chosen, Staff assumed that the handful of CLECs was representative of the CLEC industry. Part of this assumption appears rooted in the belief that the cost to implement a BBO is directly proportional to the number of customers [TR. 24]. Nothing in the record supports such an assumption.

Even if there was a nexus between customer base and billing system modification costs, the Staff did not indicate that there was any effort to select by customer base. At one point the selection was described as "every fifth." [TR. 28]. There is no evidence of a systematic and knowing selection of representative companies. Logic dictates instead that a significant portion of the cost of a general billing system modification would be fixed. No basis exists in the record one way or the other for the Commission to make a conclusion about ALEC costs. Without such a basis, the Commission cannot compare the costs of the proposal to the cost of the less costly alternatives that accomplish the statutory objectives (i.e. adopt no rule [TR.38] and allow the competitive marketplace to prevent unauthorized charges.)

[4] At hearing the Staff identified about 200 ALECs. [TR 21]. According to the Commission's website, the number is closer to 350.

B. Section 364.0252 does not authorize a BBO.

It was suggested very late in the hearing that Section 364.0252 might provide authority to impose a BBO. This approach is flawed for several reasons. First, no notice was timely given that this section would be relied upon as authority. Second, on its face the statute only grants the Commission authority to provide information to customers, not to order the blocking of charges. Third, this statute was not a source of authority for implementation of the BBO for ILECs. These points will be addressed briefly.

Section 120.54(3)(a)1 requires that notice be given identifying the statute which is the source of authority. It is undisputed that this did not occur. This failure also would constitute an invalid exercise of delegated legislative authority if the Commission proceeds to act to implement under this statute. Section 120.52(8)(a)&(b). *Post hoc* reliance on this statute will also undermine the integrity of the rulemaking process by creating the appearance that the Commission did not set out to implement any affirmative grant of authority, but instead sought to legislate first and identify authority later. Such an approach disserves the process and prejudices the parties who had participated in this docket in good faith all the way up to the final ten minutes of the hearing before this issue was raised by Staff.

At the risk of stating the obvious, Sprint respectfully submits that a reviewing court could not (and would not) defer to a Commission assertion that Section 364.0252 authorizes a BBO. While important, the statute is nothing other than authorization to expand the process of informing customers. The Commission is directed to assist customers with billing and service disputes that they are unable to resolve directly with the company. It is an impossible stretch to suggest that legislative direction to do what the Commission is already doing constitutes independent authorization for a rule that directs what charges may appear on a

bill. Clearly reliance on this section would be an invalid exercise of delegated legislative authority.

Finally, it is curious that Section 364.0252 could be a source of authority for a BBO for ALECs and IXCs but not ILECs, in the face of a claim that Section 364.604(2) is inadequate authority. Reliance on this provision in this rulemaking could open the door for a challenge by ILECs that the Commission has acknowledged that the rule was passed under faulty authority.

For the above reasons, Sprint urges that the Commission not attempt to rely on a provision that was never intended or envisioned as authorization for requiring a BBO. Sprint urges adherence to Chairman Deason's admonition that the Commission should not try to interject a new statutory source of authority in this rulemaking. [Tr. 213.].

C. The BBO requirement lacks a factual and policy basis.

Putting aside the legal defects, the factual record in this case supports rejection of applying the BBO to ALECs and IXCs. No complaints have been received regarding CLECs billing for third parties. In fact no evidence exists that CLECs are billing for third parties. [TR. 109]. Staff conceded that competitive providers may have a greater ability to avoid billing for undesirable parties or parties with whom customers have clearly chosen to do business. [TR.106,118]. The costs that were identified by WorldCom are substantial [$4-6 million per company [WorldCom comments, August 16, 2000]. Even the Staff conceded that the BBO would be very costly to implement. [TR.35]. All companies but BellSouth demonstrated that the effect on competition would be significant.

Commissioner Jaber summed up the state of the case nicely when she asked:

> If we are not clear on the costs associated with implementing the block option, and we are not sure from a technological standpoint on how to do it, and we don't have complaints from customers getting service from ALECs, then how can we be so sure that the block option should apply to ALECs?

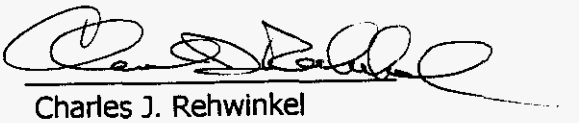
[TR 118].

Staff's only response to this question was that they had a desire to be proactive and they also asserted that the rule was moot until a company "open[ed] up the billing system." [Id.]. However the Staff admitted elsewhere that the BBO requirement could impact introduction of services that customers desired, if such services were bundled with third parties not affiliated with the ALEC or IXC. [TR. 107]. A better approach will be to let rule 25-4.110(18) work. The trend of cramming complaints was down dramatically even prior to the June 2000 effective date of that rule. Furthermore, competitive carriers will have every incentive to avoid upsetting their customers by denying access to service and product providers who do not have an established relationship with the carrier's customers.

IV. Conclusion.

For the above stated reasons, Sprint urges the Commission to withdraw the proposed rules. The existing statutory framework was written with sufficient specificity to allow the Commission to refrain from acting.

Respectfully submitted this 13th Day of September 2000.



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ATTACHMENT 1

CHAPTER 99-379

Committee Substitute for House Bill No. 107

An act relating to the Administrative Procedure Act; providing legislative intent; amending s. 120.52, F.S.; removing entities described in ch. 298, F.S., relating to water control districts, from the definition of "agency"; redefining the term "agency"; providing additional restrictions with respect to an agency's rulemaking authority; amending s. 120.536, F.S.; providing additional restrictions with respect to an agency's rulemaking authority; requiring agencies to provide the Administrative Procedures Committee with a list of existing rules which exceed such rulemaking authority and providing for legislative consideration of such rules; requiring agencies to initiate proceedings to repeal such rules for which authorizing legislation is not adopted; requiring a report to the Legislature; providing that the committee or a substantially affected person may petition for repeal of such rules after a specified date; restricting challenge of such rules before that date; amending s. 120.54, F.S.; specifying when rules may take effect; restricting adoption of retroactive rules; amending s. 120.56, F.S.; revising an agency's responsibilities in response to a challenge to a proposed rule and specifying the petitioner's responsibility of going forward; amending s. 120.57, F.S., relating to hearings involving disputed issues of material fact; revising an agency's authority with respect to rejection or modification of conclusions of law in its final order; providing for agency statement as to the reasonableness of its substituted finding of law or interpretation of administrative rule; amending s. 120.81, F.S.; providing that district school boards may adopt rules notwithstanding the rulemaking standards found in chapter 120, F.S.; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It is the intent of the Legislature that modifications contained in sections 2 and 3 of this act which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

Section 2. Subsections (1) and (8) of section 120.52, Florida Statutes, 1998 Supplement, are amended to read:

120.52 Definitions.—As used in this act:

(1) "Agency" means:

(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

(b) Each:

1. State officer and state department, and each departmental unit described in s. 20.04.~~,~~

2. Authority, including a regional water supply authority.

3. Board.

4. Commission, including the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency.~~, board,~~

6. Multicounty special district with a majority of its governing board comprised of nonelected persons.~~, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature,~~

7. Educational units.~~, and those entities~~

8. Entity described in chapters 163, ~~298,~~ 373, 380, and 582 and s. 186.504~~, except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection~~.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or, interpret the, ~~or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific ~~the particular~~ powers and duties conferred by the same statute.

Section 3. Section 120.536, Florida Statutes, is amended to read:

120.536 Rulemaking authority; listing of rules exceeding authority; repeal; challenge.—

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or, interpret the, ~~or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific ~~the particular~~ powers and duties conferred by the same statute.

(2)(a) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules,

or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 1999, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 1999, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(b) By October 1, 1999, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before the effective date of the bill, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 2000 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 2001, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 2001, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 2001, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(3) All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than that permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before October 1,

1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before the effective date of the bill, and included on a list submitted by an agency in accordance with subsection (2)(b) may not be challenged before July 1, 2001, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

(4) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

Section 4. Paragraph (f) of subsection (1) of section 120.54, Florida Statutes, 1998 Supplement, is amended to read:

120.54 Rulemaking.—

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective ~~enforced~~ until the statute upon which they are based is effective. An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.

Section 5. Paragraph (a) of subsection (2) of section 120.56, Florida Statutes, is amended to read:

120.56 Challenges to rules.—

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

Section 6. Paragraph (l) of subsection (1) of section 120.57, Florida Statutes, 1998 Supplement, is amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law <u>over which it has substantive jurisdiction</u> and interpretation of administrative rules over which it has substantive jurisdiction. <u>When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.</u> Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

Section 7. Present paragraphs (a) through (j) of subsection (1) of section 120.81, Florida Statutes, are redesignated as paragraphs (b) through (k), respectively, and a new paragraph (a) is added to that subsection, to read:

120.81 Exceptions and special requirements; general areas.—

(1) EDUCATIONAL UNITS.—

<u>(a) Notwithstanding s. 120.536(1) and the flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 230.22.</u>

Section 8. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1999.

Filed in Office Secretary of State June 18, 1999.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

ATTACHMENT 2

Amendment No. 1 (for drafter's use only)

COMMITTEE ACTION

ADOPTED		Y	N	FAILED TO ADOPT		Y	N
ADOPTED AS AMENDED		Y	N	WITHDRAWN			
ADOPTED w/o OBJECTION				OTHER			

Committee hearing bill: Utilities & Communications

Representative(s) _____

offered the following amendment to amendment:

Amendment to Amendment

On page , of the amendment

insert:

Section 1. Section 364.045 , Florida Statutes, is created to read:

364.045 Billing and Consumer Information.--

(1) Local exchange and alternative local exchange companies must resolve billing inquiries regarding charges or other items appearing on or included with bills. Companies must answer inquiries verbally and, if requested, must also answer in writing. Answers to inquiries must be provided in a timely manner. For each portion of its bill, a company must clearly identify a telephone number to call for billing inquiries. Calls to a billing number must be responded to in a timely manner during normal business hours. The personnel responding to a billing inquiry must directly answer the customer's questions without referring the customer to any other entity and, if requested, must provide a mailing address for written inquiries.

(2) A local exchange company or alternative local

exchange company may arrange for another entity to perform billing functions and directly to resolve inquiries provided such arrangements conform with the requirements of this section.

(3) If requested by a customer, a local exchange or alternative local exchange company must not, in the bill for its service, bill that customer for the products or services of any entity other than itself and the customer's presubscribed intraLATA and interLATA interexchange service providers. A company shall advise its customers of this billing option at the time local service is ordered, and annually thereafter. There shall be no charge to the customer for choosing to this billing option.

(4) If a telecommunications company bills a customer on behalf of an interexchange company as though the customer were presubscribed to that interexchange company, and it is determined that the customer did not choose the company as a presubscribed interexchange company, the customer is not responsible for payment of such charges.

(5) Telecommunications companies shall clearly identify the provider of each service or product appearing on a bill and shall specify the charge, taxes, and fees associated with each service or product. The Commission shall adopt rules for bill format and bill content in order to assist the consumer in understanding the bill. Such rules shall require that charges are clearly segregated for each type of service and each provider, shall define how a company separates the telecommunications charges from the nontelecommunications charges, shall indicate how the company issuing the bill makes clear to the customer which charges must be paid in order to maintain which services, and shall

Amendment No. 1 (for drafter's use only)

describe how partial payments of a bill are to be treated.

(6) A local exchange or alternative local exchange company shall not disconnect a customer's local service if the charges, taxes, and fees applicable to local service are paid. Any payment made shall first be applied to local service charges, taxes and fees.

(7) A company must offer service under the conditions described above. However, as an additional option, a company may offer to bill a customer in a manner other than specified above. If the customer agrees in writing to receive service under that option, that written agrement shall control the procedures under which the customer receives service. Such written agreement shall be a separate document which, as its sole purpose, provides a description of billing and disconnection procedures.

(8) The Commission may by rule specify procedures to implement this section.

CERTIFICATE OF SERVICE

Docket No. 990994-TP

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail transmission, U. S. Mail, or hand delivery (*) this 13th day of September, 2000, to the following:

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