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October 27, 2003

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


**Re: Docket No. 030869-TP: Petition by BellSouth Telecommunications,  
Inc. to Reduce its Network Access Charges Applicable to Intrastate  
Long Distance in a Revenue-Neutral manner**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to AARP's Motion to Dismiss Petitions of BellSouth, Verizon and Sprint for Failure to Join Indispensable Parties.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

  
Nancy B. White (ns)

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey

DOCUMENT NUMBER-DATE

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**CERTIFICATE OF SERVICE  
Docket No. 030869-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, (#) Federal Express and U.S. Mail this 27<sup>th</sup> day of October, 2003 to the following:

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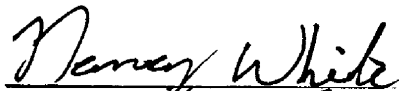
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition by Verizon Florida Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes.

DOCKET NO. 030867-TL

In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes.

DOCKET NO. 030868-TL

In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.

DOCKET NO. 030869-TL

FILED: October 27, 2003

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO  
AARP'S MOTION TO DISMISS PETITIONS OF BELLSOUTH, VERIZON AND  
SPRINT FOR FAILURE TO JOIN INDISPENSABLE PARTIES**

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Response in Opposition to AARP's Motion to Dismiss Petitions of BellSouth, Verizon and Sprint for Failure to Join Indispensable Parties and states:

1. AARP's motion should be denied because: (1) The procedural statutes and rules applicable to this proceeding do not contemplate joinder of "indispensable parties," and the Rule of Civil Procedure relied on by AARP is inapplicable to Public Service Commission ("Commission") proceedings, (2) the motion is nothing more than a second attempt by AARP to have this Commission expand the scope of the proceeding beyond that authorized by the Florida Legislature, and (3) the interexchange telecommunications carriers are not indispensable parties.

2. Neither Chapter 120, Florida Statutes (the Administrative Procedure Act nor "APA"), the Uniform Rules of Procedure governing Chapter 120 proceedings, nor the procedural rules of the Commission require so-called "indispensable parties" to be joined in an

administrative proceeding. As the Florida Supreme Court has noted, “procedure within administrative agencies is subject to statutory regulation.” *Gator Freightways, Inc. v. Mayo*, 328 So. 2d 444, 446 (Fla. 1976); *see also Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc.*, 683 So. 2d 609, 612 (Fla. 1st DCA 1996).

3. The above-styled consolidated proceeding is governed by section 364.164(1), Florida Statutes, the APA, the Uniform Rules of Procedure, and any relevant procedural rules of the Commission in chapter 25-22 of the Florida Administrative Code. *See Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So. 2d 982 n.9 (Fla. 1996) (APA is applicable to the Commission except as specifically provided otherwise); § 120.54(5)(a), Fla. Stat. (“The uniform rules shall establish procedures that comply with the requirements of this chapter. . . . [T]he uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.”).<sup>1</sup>

4. Moreover, Florida Rule of Civil Procedure 1.140(b)(7), upon which AARP relies for its motion, has not been made applicable to proceedings before the Commission by statute or rule, and “it is well recognized that the powers of all administrative agencies are measured and limited by the statutes or acts expressly granting the agencies their powers, or by those powers implicitly conferred.” *Department of Professional Regulation v. Marrero*, 536 So. 2d 1094, 1096 (Fla. 1st DCA 1998).<sup>2</sup>

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<sup>1</sup> The Commission’s exceptions to the Uniform Rules of Procedure are listed in rule 25-40.002, Florida Administrative Code. The Commission’s exceptions to the APA are listed in section 120.80(13), Florida Statutes.

<sup>2</sup> The court in *Marrero* declined to apply Florida Rule of Civil Procedure 1.420, relating to voluntary dismissal of a civil claim, to an administrative proceeding, noting that the rule “is not made expressly applicable to administrative proceedings by Chapter 120, Florida Statutes . . . .” *See also Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc.*, 645 So. 2d 374 (Fla. 1994) (civil voluntary dismissal rule not applicable in an administrative proceeding); *Holmes Regional Medical Center, Inc. v. Agency for Health Care Administration*, 737 So. 2d 608, 608 (Fla. 1<sup>st</sup>

5. Section 120.52(12), Florida Statutes, defines “party” in relevant part as follows:

(12) “Party” means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(Emphasis supplied). A large body of case law interprets the phrase “substantial interests” and whether a person or entity seeking to become a “party” has administrative standing. The seminal case is *Agrico Chem. Co. v. Dep’t of Env. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981), which provides that “before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of significant immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.” *Id.* at 482. The first prong of the *Agrico* test concerns the degree of injury, and the second prong concerns the nature of the injury. *Id.* Both prongs must be satisfied for a party to have standing. *See Ybor III, Ltd. v. Florida Housing Finance Corporation*, 843 So. 2d 344, 346 (Fla. 1st DCA 2003).

6. Two provisions of the Uniform Rules of Procedure govern parties to a proceeding. Rule 28-106.109, governing notice to interested parties, provides:

If it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are

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DCA 1999) (“Moreover, a voluntary dismissal is an especially dubious remedy where, as here, the agency has adopted no administrative rule that authorizes this remedy or that incorporates the Florida Rules of Civil Procedure into its proceedings.”).

While the AARP has authority to file a Motion to Dismiss pursuant to rule 28-106.204 of the Uniform Rules of Procedure, it may not file a motion based on rule 1.140(b), Fla. R. Civ. P. and cite grounds that may be appropriate in a civil context but not in an administrative proceeding.

not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

(Emphasis supplied). Thus, if the substantial interests of a nonparty could be determined in a proceeding, the presiding officer would have the discretion to enter an Order notifying those persons of the proceeding and advising them of the opportunity to be joined. The presiding officer also has the authority to obtain information from non-parties utilizing either the Commission's subpoena power or the Commission's authority to obtain information from the utilities it regulates. However, nothing in Rule 28-106.109 requires joinder of anyone.

7. Uniform Rule 28-106.206 governs intervention into proceedings determining substantial interests. The Commission has an approved exception to the Uniform Rule on intervention, which provides:

Persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petition for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Uniform Rule 28-106.201(2) and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

R. 25-22.039, Fla. Admin. Code (emphasis supplied). Pursuant to this rule, a person whose substantial interests will be determined or affected may petition to intervene if that person desires to become a party.

8. As these statutory and rule provisions make clear, the concept of "indispensable parties" is foreign to the APA and proceedings that govern it. BellSouth and the other petitioners not only had no obligation to join other parties, they had no authority to do so under the relevant procedural requirements. Moreover, absent a statutory or rule provision authorizing the

Commission to compel joinder of interexchange telecommunication carriers, such an action would be contrary to law. Agencies cannot expand their statutory authority by relying on judicial rules of procedure adopted by the Florida Supreme Court. *See, e.g., S.T. v. School Board of Seminole County*, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001) (“Unless created by the constitution, an administrative agency has no common law powers, and has only such powers as the Legislature chooses to confer upon it by statute.”); *Mathis v. Florida Department of Corrections*, 726 So. 2d 389 (Fla. 1st DCA 1999) (administrative agencies have no inherent power to sanction parties by dismissing their claims); *Gator Freightways*, 328 So. 2d 444, 446 (“While procedure within administrative agencies is subject to statutory regulation, procedure in all Florida courts is governed by such rules of procedure as have been adopted by this Court.”)<sup>3</sup>

9. AARP’s motion is really just an attempt to revisit the issues identified as relevant to this docket that have been articulated by the Prehearing Officer, and to impermissibly expand the scope of the Commission’s statutory authority under section 364.164, Florida Statutes.

10. As the Prehearing Officer’s order noted, the Commission’s responsibilities with respect to BellSouth’s Verizon’s and Sprint’s (local exchange companies’ or ILECs’) petitions for a reduction in switched access charges and a corresponding, revenue-neutral increase in basic

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<sup>3</sup> The Legislature has made specific provisions of the Rules of Civil Procedure applicable to specific administrative proceedings. *See, e.g.,* § 364.183(2), Fla. Stat. (“Discovery in any docket or proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure.”); § 120.569(2)(f), Fla. Stat. (“The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure” . . . ). Based on this latter authority, the Uniform Rules of Procedure also provide that discovery in administrative proceedings may be obtained “through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure.” R. 28-106.206, Fla. Admin. Code. Absent specific authority to apply judicially adopted rules, however, an administrative agency is bound by the procedural rules authorized by the Legislature. *Gator Freightways*.



local rates is outlined in section 364.164(1). In determining whether to grant or deny a petition, the Commission is required to

“ . . . consider whether granting the petition will:

- (a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers.
- (b) Induce enhanced market entry.
- (c) Require intrastate switched network access rate reductions to parity over a period of not less than 2 years or more than 4 years.
- (d) Be revenue neutral as defined in subsection (7) within the revenue category defined in subsection (2).

11. In deciding a dispute over the wording of a proposed issue, the Prehearing Officer made it clear that the scope of this Commission’s inquiry was as outlined in the above statutory section.<sup>4</sup> Nonetheless, the AARP is again arguing for an interpretation of the statute that goes beyond the plain language and intent of the Legislature. The Legislature has already determined that it is the Commission’s job to consider whether it “prevents the creation of a more attractive competitive local exchange market for the benefit of residential customers.” The Commission’s task is to determine whether the requested rebalancing in fact removes that support.

12. Further, section 364.164 does not authorize the Commission to consider to what levels the interexchange carriers will reduce their specific instate toll rates, which is the basis for AARP’s argument that the interexchange carriers are indispensable parties. Curiously, AARP acknowledges this fact:

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<sup>4</sup> At the Issues Identification Meeting, AARP, advocated the following wording for an issue related to the scope of Commission inquiry: “Will the ILECs’ rebalancing proposals result in net overall benefits for residential consumers? If so, what are those benefits?” The Prehearing Officer declined to adopt the suggested wording, framing the issue instead, by reference to the statute: “Will the ILEC’s rebalancing proposals benefit residential consumers as contemplated by section 364.164, Florida Statutes? If so, how?” See Order on Issues for Hearing, Docket Nos. 030867-TL, 030868-TL, 030869-TL, Order No. PSC-03-1061-TL (issued September 23, 2003).

“Section 364.163(2), Florida Statutes, clearly leaves the decision on how to apportion these reductions among business and residential calling plans or programs in the sole discretion of the IXC’s, so long as each class gets some of the reductions.”

AARP Motion to Dismiss at Page 7.

13. Section 364.164 defines the scope of issues to be considered in granting a petition to rebalance rates. It does not include an evaluation of “how, or to what levels, the IXC’s will reduce their intrastate toll rates.” AARP Motion at Page 7. Rather, the Legislature, in section 364.163(2), provides the how and to what levels. That section requires the interexchange carriers to reduce their long distance revenues by the amount their switched access charges have been reduced; reduce intrastate rates in a manner benefiting both residential and business customers; and by July 1, 2006, eliminate any in-state connection fee. Section 364.163(3) gives the Commission continuing regulatory oversight over the IXC’s implementation of long distance rate decreases. The Commission has opened Docket No. 030961-TI – *Flow-Through of LEC Switch Access Reductions by IXC’s, Pursuant to Section 364.163(2), Florida Statutes*, to carry out that oversight responsibility.

14. Finally, the interexchange carriers are not indispensable parties. Their participation is not essential to Commission consideration of and decision on the ILEC’s petitions. See *Hertz Corporation v. Piccalo*, 453 So.2d 12 n. 3 (Fla. 1984).

15. The essence of AARP’s argument is that the ILECs will be unable to present evidence to enable the Commission to consider those factors it must in deciding whether to grant or deny the ILECs’ petitions.<sup>5</sup> The notion of an indispensable party relates to having a necessary

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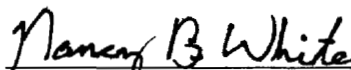
<sup>5</sup> Of course, this Commission has the authority to obtain evidence from non-parties and if the Commission desires to seek information from interexchange carriers in this docket it can do so. The AARP can also seek information from non-parties pursuant to this authority. While it would obviously be easier for the AARP to issue discovery to IXC’s if the IXC’s were parties to this proceeding, no such requirement exists and the AARP’s motion should be dismissed.

party participate in a proceeding such that a final decision can be effected, not whether a petitioner or party can present the necessary evidence to prevail in the matter.

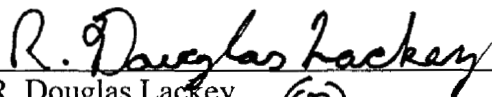
For the reasons expressed, BellSouth respectfully requests that AARP's Motion to Dismiss Petitions of BellSouth, Verizon and Sprint for Failure to Join Indispensable Parties be DENIED.

Respectfully submitted this 27<sup>th</sup> day of October, 2003.

**BELLSOUTH TELECOMMUNICATIONS, INC.**



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