

AUSLEY & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(904) 224-9115 FAX (904) 222-7560

November 4, 1996

BY HAND DELIVERY

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

Re: Docket No. 960407-TC

Dear Ms. Bayo:

Enclosed for filing in the above-styled docket are the original and fifteen (15) copies of ALLTEL Memorandum in Opposition to Motion to Dismiss Petitions on Proposed Agency Action.

We are also submitting the Memorandum on a 3.5" high-density diskette generated on a DOS computer in WordPerfect 5.1 format.

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

Thank you for your assistance in this matter.

Sincerely,


J. Jeffrey Wahlen

Enclosures
all\960407.tyo

ACK _____
AFA _____
AFP _____
OS _____
CIT _____
C _____
I _____
5 _____
I _____
W _____
OS _____

DOCUMENT # 11799 NOV-4 1996
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of)
rules and policies to permit)
provision of 0+ local and 0+)
intraLATA utilizing store and)
forward technology at pay)
correctional institutions and)
other confinement facilities,)
by Invision Telecom, Inc.)
_____)

Docket No. 960407-TC

Filed: 11-04-96

**ALLTEL'S MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS PETITIONS ON
PROPOSED AGENCY ACTION**

Pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, ALLTEL Florida, Inc. ("ALLTEL") files this Memorandum in Opposition to the Motion to Dismiss Petitions on Proposed Agency Action filed by Global Tel*Link Corporation ("Global") and Invision Telecom, Inc. ("Invision") on October 23, 1996 ("Motion"). The Motion should be denied for the following reasons:

I. ALLTEL's Substantial Intents are Affected by the PAA Order

1. While the Motion correctly quotes the Agrico rule on standing, the movants misapplied that rule to the facts of this case, and consequently, reached the wrong conclusion. ALLTEL has standing under Florida law to protest the proposed waiver because it will suffer an "injury in fact" and because that injury is of a type which this proceeding is designed to protect.

2. Injury in Fact. Movants' economic harm argument might have merit if the FPSC was not immersed in the economic regulation of the telecommunications industry; however, that is not the case. One of the FPSC's primary functions is to regulate and adjust the

economic relationship between telecommunication competitors; therefore, the notion that economic harm is not sufficient as an injury in fact is wrong.

3. A close look at the cases cited by movants supports this conclusion. The Agrico case involved the Department of Environmental Regulation ("DER"). The stated purpose of that agency was to protect Florida's environmental resources, not to regulate the economic relationship between competitors in the chemical industry. For that reason, the Court concluded that a claim of economic harm by a competitor could not serve as the basis for standing. Likewise, in the Optometry case, the purpose of the Board of Optometry was to protect the public health, not to regulate the economic relationships between competing eye doctors. Consistent with Agrico, the Court held that a claim of economic harm by a competitor could not serve as the basis for standing in that case.

4. While those cases are well reasoned and logical on their own facts, they have no application to an agency like the FPSC that for the last hundred years has regulated the economic relationships and amount of competition in the telecommunications industry. Under state law, the FPSC still retains plenary regulatory control over almost all aspects of ALLTEL's economic existence, and also has substantial responsibility to regulate the types and level of competition in the telecommunications industry. For the movants to argue that economic harm is not the type of injury the FPSC is authorized to address ignores several of the basic functions of the Commission.

5. Importantly, Florida law allows small LECs like ALLTEL to remain on rate of return regulation and given the FPSC specific authority to enforce all regulations necessary for rate base, rate of return regulation. Fla. Stat. § 364.052(2). The 0+ intraLATA and 0+ local restrictions for which movants seek a waiver were adopted years ago in a rate of return environment in a Section 120.57 hearing as a regulation necessary to, among other things, protect LEC revenues. The potential loss of revenue was a sufficient "injury in fact" to form the basis for standing and a 120.57 hearing when the restrictions were adopted and, because rate of return regulation continues for certain small LECs, still remains a valid basis today.

6. While ALLTEL has not alleged that the likely loss of revenue will cause it to earn outside of its authorized range of rate of return, the absence of that allegation is not relevant or dispositive. This proceeding is not a general rate case, nor does it involve a request for interim rate relief in which ALLTEL is asking to be "made whole" up to the bottom of its authorized range of rate of return.

7. The key in this proceeding is the potential loss of revenue and the upward pressure on local rates that the loss will cause, not whether that loss will immediately cause an underearning condition. If ALLTEL can only protest individual regulatory actions that produce a revenue loss sufficient to create an immediate underearning condition, it will be powerless to protest a series of small revenue losses that together could cause an

underearnings condition and eventually drive the need for a local rate increase. ALLTEL needs the ability to point out potential revenues losses to the Commission as they occur so that the future need for local rate relief can be deferred or eliminated. The Commission should ignore movant's "earnings" argument and deny the motion to dismiss.

8. Redressibility. The argument that this proceeding is not designed to protect ALLTEL from substantial injury is also without merit. As noted above, the 0+ intralATA and 0+ local call calling restrictions were adopted, among other things, to protect LEC revenues. Since they were adopted in a 120.57 proceeding concerned with protecting LEC revenues, they should only be taken away in a similar proceeding.

9. Moreover, the possibility that the Commission could hold a rate case to increase local rates in an amount sufficient to compensate ALLTEL for its lost revenues completely misses the point.¹ ALLTEL's goal is to avoid the injury (i.e., revenue loss) so that a rate case is not necessary. In a time when more and more revenue streams are placed at risk each day by competitive or regulatory actions, ALLTEL should not be left with a rate case as its sole recourse. Rather, it should be allowed to fight against regulatory action that will reduce its revenues in the first

¹As a point of clarification, ALLTEL is not seeking a local rate increase in this case. Rather, it hopes to avoid the revenue loss associated with the requested waiver. Doing so should help mitigate the need for rate relief in the future.

instance, thereby hopefully mitigating or deferring the need for local rate relief in the future.

10. Conclusion on Standing. ALLTEL remains on rate of return regulation. Taken together, a series of small revenue losses can develop into an underearnings condition and the need for a local rate increase. The FPSC continues to have plenary economic regulatory authority over ALLTEL for the purpose of ensuring that ALLTEL can continue to provide basic local exchange service at reasonable rates to the customers in its service area. The loss of revenue that will occur if the requested waiver is granted constitutes an "injury in fact" to ALLTEL's substantial interests and is the type of injury that this type of proceeding is designed to protect against. The fact that the FPSC could raise ALLTEL's basic local service rates to make up the lost revenues in a separate rate case proceeding does not mean that ALLTEL will not be affected by this proceeding and should not prevent ALLTEL from fighting the waiver question in this proceeding before the revenue loss occurs. Movants' arguments on standing have no merit and the motion to dismiss for lack of standing should be denied.

II. Telecommunications Act of 1996 Does Not Compel Grant of Waiver

11. Movants have suggested that the FPSC is powerless to deny the requested waiver as a result of the Telecommunications Act of 1996. In support of this position, Movants cite the FCC's recent payphone order issued on September 20, 1996. While the FCC's payphone order is relatively clear on the preemption issue, ALLTEL


notes that various states have requested reconsideration of the payphone order and that the payphone order may be appealed and/or stayed. That being the case, the FPSC should not take any action in this docket based on the FCC's payphone order until it determines that the payphone order will go into effect without relevant changes.

Conclusion

12. ALLTEL's ability to continue providing basic local service at reasonable rates is dependent on, among other things, its continuing ability to obtain sufficient revenues from a wide variety of sources. Many of those sources are at risk of going away. Protecting the revenues of a small LEC on rate of return regulation is not one of the Commission's primary goals, but rather is a means to an end, i.e., maintaining low basic local service rates for ALLTEL's customers.

13. One of the revenue sources historically available to ALLTEL is at risk in this proceeding. If it goes away, ALLTEL and its customers will be harmed. For the reasons explained in the memorandum, ALLTEL respectfully requests that the Motion be denied.

DATED this 4th of November, 1996.



LEE L. WILLIAMS and
J. JEFFRY WAHLEN of
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

ATTORNEYS FOR ALLTEL FLORIDA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail or hand delivery (*) this 4th day of November, 1996, to the following:

Staff Counsel *
Division of Legal Services
Florida Public Service
Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy H. Sims
BellSouth Telecommunications,
Inc.
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

InVision Telecom, Inc.
1150 Northmeadow Parkway
Suite 118
Roswell, GA 30076

Floyd R. Self
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302-1876

David B. Erwin
Young Law Firm
P.O. Drawer 1170
Tallahassee, FL 32302



Attorney