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January 6, 1997

Ms. Blanca Bayo, Director
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2540 Shumard Oak Boulevard
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via Hand Delivery

Re: Investigation into Temporary Local Telephone Number Portability Solution to Implement Competition in Local Exchange Telephone Markets
Docket No. 950737-TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies of Time Warner AxS of Florida, L.P. and Digital Media Partners' Posthearing Brief; a diskette in Word Perfect 5.1 format; and a copy of this letter. Please date-stamp the copy of this letter to indicate that the original was filed and return to me.

If you have any questions regarding this matter, please feel free to contact me.

Respectfully,

PENNINGTON, CULPEPPER, MOORE, WILKINSON, DUNBAR & DUNLAP, P.A.

Peter M. Dunbar

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into Temporary Local Telephone Number Portability Solution to Implement Competition in Local Exchange Telephone Markets

Docket No. 950737-TP
Filed: January 6, 1997

POSTHEARING BRIEF OF TIME WARNER AxS OF FLORIDA, L.P. AND DIGITAL MEDIA PARTNERS

Time Warner AxS of Florida, L.P., and Digital Media Partners (collectively, "Time Warner"), pursuant to Florida Administrative Code Rule 25-22.056, respectfully submits the following Posthearing Brief in the above-captioned docket to the Florida Public Service Commission ("FPSC" or "Commission").

I. TIME WARNER'S BASIC POSITION

This Commission has recognized the benefits of competition to all consumers, even to those who do not use the services of a competitor. Furthermore, in Order No. PSC-95-1604-FOF-TP, it recognized the critical nature of number portability to the development of local competition. This has not changed. What has changed is the passage of the Federal Telecommunications Act of 1996 ("Act"), and the Federal Communications Commission's ("FCC's") issuance of its July 2, 1996 First Report and Order and Further Notice of Proposed Rulemaking ("Order"). This Commission's decision in this docket was reached a year ago without the benefit of the guidance provided by the Act and the FCC's subsequent Order. Time Warner recommends that the FPSC should revise the cost recovery mechanism for temporary or interim number portability ("INP") to incorporate the sharing concept embodied in those

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mandates. A guiding principle for such cost recovery is the principle of competitive neutrality. Section 251(e)(2) of the Act states that the costs of number portability are to be "borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." For the most part, the incumbent local exchange companies ("ILECs") already have the capability to offer the current methods of providing number portability, such as remote call forwarding and direct inward dialing. Given this capability, the only costs that should be considered by this Commission are the incremental costs incurred to use these existing methods. Because of the limited time these methods will be used, the appropriate cost standard is short run incremental costs. Time Warner recommends that the simplest, most competitively neutral method of cost recovery is one in which each telecommunications provider involved in the temporary porting of numbers absorbs its own routing costs. This method of cost recovery is competitively neutral. This method also meets the requirements of Chapter 364.16(4) if the cost is properly considered on a cost-per-customer basis. In the alternative, costs should be recovered on the basis of working telephone numbers.

II. TIME WARNER'S SPECIFIC POSITIONS

ISSUE 1: Is Order No. PSC-95-1604-FOF-TP inconsistent with the Federal Communications Commission's First Report and Order and Further Notice of Proposed Rulemaking in The Matter of Telephone Number Portability in CC Docket No. 95-116?

** Yes. The FCC's Order requires that the costs of temporary number portability be shared among all telecommunications providers. The FPSC's order places all costs on new entrants. **

The FCC implicitly recognized that a lack of number portability is a barrier to entry. INP is only required for new entrants and results directly from the existing institutional framework for the delivery of telecommunications services in the United States today. ILECS historically and currently maintain monopoly control of the existing numbering administration and telephone numbers. (Exhibit 11, page 14) INP as a necessary element in the provisioning of telecommunications services is not as important an issue for the ILECS as it is for new entrants. INP is not required by any carrier for the provision of telecommunications services over the long term. (Guedel TR 71) INP is required by new entrants to bridge the gap between incipient competition and the transfer of number administration and ownership to a neutral third party.

Section 251(e)(2) of the Act requires the costs of "number portability to be borne by all telecommunications providers on a competitively neutral basis as determined by the Commission." In its Order the FCC concluded that this standard applies to the costs of currently available number portability measures, that is, INP solutions which are at issue in this proceeding. As discussed by Time Warner witness McDaniel, the FCC at paragraph 127 of the Order permitted states flexibility in adopting different approaches for

the recovery of INP costs provided <u>they are consistent with the statutory mandate.</u> (TR 365)

This Commission, when it set prices for remote call forwarding in December 1995, acted based on the information it had at the time, without the guidance offered by the Act and the subsequent FCC Order. (McDaniel TR 353) The result was that INP prices in Florida placed all of the costs on new entrants. Now, armed with the mandate of the Act, the Commission should revise its previous decision in this case and order a method of cost recovery which meets the standards laid out by the Act and the FCC's Order. All of the new entrants agree that the existing FPSC order is inconsistent with the Act and the FCC's Order (Gianella TR 21; Guedel TR 31; Kistner TR 193; Devine TR 275; McDaniel TR 353). AT&T Wireless witness Gianella argues that the FCC Order (at paragraph 138) does not <u>permit</u> a cost recovery mechanism which imposes all of the costs on the carrier who needs a number ported to it. (TR 21) Even BellSouth witness Varner agrees that the FPSC order is inconsistent with the FCC's Order. (TR 106)

The ILEC witnesses provide various reasons why this Commission should not change its existing order. Witness Varner notes that the FCC misinterpreted the Act, and that the FCC has no authority over cost recovery for INP--only for long term number portability (TR 107) He states that the FCC's cost recovery decision does not permit ILECs to fully recover costs of intrastate services. GTEFL witness Menard agrees, saying that the FCC Order is based on Section 251(e)(2) of the Act, but 251(e)(2) does not apply to INP

because there is no word distinction between INP and long term number portability made through the use and the language in the Act. (TR 157)

Time Warner disagrees. Time Warner witness McDaniel rebutted these arguments testifying that the Act's lack of distinction between the words "interim" and "permanent" number portability using the term "number portability" indicates that Congress did not intend to make such a distinction. Congress apparently understood, as does the FCC, how necessary number portability is for the development of local competition. The fact that temporarily number portability must be provided in a technologically deficient manner does not change the appropriate cost recovery method. (TR 366) In addition, as noted by MCI witness Kistner, the fact that the BellSouth and GTEFL witnesses disagree with the FCC Order does not change the Order's effect. The Order is in effect and has not been stayed. Today it is the rule. (TR 208)

The meaning of the term "competitive neutrality" was the subject of significant debate among the witnesses. Generally, experts for the new entrants supported the language from the FCC Order at paragraphs 132 and 135, which defined competitive neutrality as meeting two criteria: First, a competitively neutral cost recovery mechanism "should not give one service provider an appreciable incremental cost advantage over another service provider, when competing for a specific subscriber. Second, it should not have a disparate effect on the ability of competing

service providers to earn normal returns on their investment. (McDaniel TR 354)

GTEFL witness Menard believes that an ILEC is competitively disadvantaged if it has to provide INP without covering costs (costs a new entrant does not have).(TR 158) Sprint witness Poag believes that "competitively neutral" means a 45/55 sharing of the costs regardless of the market share of respective providers. In deposition, Witness McDaniel showed how splitting the costs 50/50, spread over the respective customer base, had detrimental impact on the overall return which could be earned by the new entrant relative to the ILEC. (Exhibit 11, page 10)

There was very little debate about which party incurred the most absolute costs in the provision of INP. The ILEC incurs the majority of costs on an absolute basis even though those costs are de minimus from a cost of service perspective. (Exhibit 11, page 13; Guedel TR 47; Kistner TR 218). The issue is how to best recover those costs in compliance with the Act and the FCC Order-- on a competitively neutral basis.

Time Warner agrees that the Commission's earlier decision is inconsistent with the recent FCC Order. The ILEC arguments about inconsistencies in the FCC Order are not persuasive and should be ignored.

<u>ISSUE 2:</u> What is the appropriate cost recovery mechanism for temporary number portability?

** The appropriate cost recovery mechanism is for each LEC to absorb its own INP costs. Alternatively, costs should be recovered

based on the percentage of working telephone numbers each local service provider has. **

Time Warner, FCTA, MCI, and AT&T have all proposed that each local exchange carrier simply absorb its own costs of interim number portability. The facilities required to provide INP are in place in Florida today and the ILEC's will incur little or no incremental cost associated with the provision of service. More importantly, when these incremental costs are compared to the size of each ILEC's customer base, it becomes apparent that no two carriers will be placed at an economic disadvantage in competing for specific customers. This fact was clearly understood by the FCC when, in summarizing examples of competitively neutral cost recovery mechanisms, it stated in its Order at paragraph 136 "Finally, we believe that a mechanism that requires each carrier to pay its own costs of currently available number portability measures would also be permissible." Allowing each carrier to recover its own cost of INP has the further advantage of administrative simplicity. (Guedel TR 75) It eliminates the need to establish reporting, auditing, and billing requirements associated with other competitively neutral cost recovery mechanisms.

The guiding principle for determining an appropriate cost recovery mechanism is that of competitive neutrality, which is required by the Act. The proposals presented by BellSouth witness Varner, GTE witness Menard, and Sprint witness Poag do not satisfy this principle.

The only effective way to foster competition and allow two equally efficient providers to compete on a customer-by-customer basis is to spread the costs of INP among all carriers. On a per customer basis, the costs for the increased network routing resulting from the provision of INP will not be perceptible in terms of the overall costs of service. (Exhibit 11, page 13) The FCC identified various methods which would satisfy the criteria that no competitor be placed at an economic disadvantage. These methods are (1) to allocate the costs among carriers based upon net revenues; (2) to allocate the costs based upon working telephone numbers or access lines; or (3) to let each carrier absorb its own costs of INP. (Guedel TR 33) All of the methods identified by the FCC place most of the costs of INP <u>on a total cost of service basis</u> on the incumbent local exchange carriers. This is because the ILECS have the largest local exchange market share and will continue to do so for the foreseeable future. However, <u>on a per customer basis</u>, the impact of these temporary expenses spread over the entire customer base will be de minimis. As such no one carrier, particularly the new entrant, will face an economic cost disadvantage in competing for individual customers. Further, since providing INP will not be a profit center for the ILECs, such a provision will motivate the ILECs to implement long term number portability sooner universally.

Some ILEC attorneys attempted to make the point in cross examination of new entrant witnesses, that because the new entrants agreed to a stipulation which had them paying the costs of INP,

there is no reason to change the existing prices for INP. This is inappropriate reasoning on at least two counts. First, at the time of the stipulation, the Act had not yet been passed. Second, the extent to which competition develops is a matter of degree. New entrants will enter a market to the extent the cost inputs versus revenue justifies this. Entry is limited by the amount of capital a new entrant can expend. If the cost of an input decreases, the new entrant can, using the same amount of capital, enter more markets, thus bringing the benefits of competition to more consumers. If the cost of INP, an essential element for local competition, decreases, more consumers will benefit from competition.

Competition benefits all consumers, even those who do not buy service from a competitor, and INP makes competition possible for new entrants. The Commission has been promoting competition, as required by Chapter 364(01)(4), Florida Statutes. The notion that new entrants should pay ILECs for their cost of provisioning INP is premised on the incorrect assumption that those costs are caused by the new entrant. This is an inappropriate way of viewing those costs. INP is necessary in order to have local competition; therefore the costs of INP are more appropriately attributed to the advent of competition, not to the new entrants. It is appropriate for all beneficiaries of competition to share in the cost recovery.

If the Commission wishes to allow for the specific recovery of any incremental costs associated with INP, then Time Warner proposes that such costs be spread on the basis of working

telephone numbers. This methodology would be administratively simple over the near term minimizing data collection requirements (McDaniel TR 378). This mechanism also satisfies the FCC's guidelines regarding competitive neutrality.

The question was raised whether such cost allocation and recovery should occur on a statewide basis or company-by-company. Time Warner believes a statewide basis is appropriate. Spreading the costs across all local exchange carriers on a statewide basis (Exhibit 11, page 20) results in a uniform charge per working telephone number, which would take away INP prices' ability to influence the new entrant's choice of location.

The New Entrants' Proposal Meets the Requirement of Section 364.16(4) F.S.

Section 364.16(4), F.S. states, "The prices and rates (for INP) shall not be set below cost." The ILEC's have interpreted the term "cost" in the statute to imply the use of a Total Element Long Run Incremental Cost ("TELRIC") or Long Run Incremental Cost ("LRIC") standard. Time Warner suggests that this is not an appropriate standard to be used in this proceeding. It must be remembered that the cost concepts designed to reflect the long run economic cost for the provision of network elements or services were used to examine those costs necessarily required over the long term for the provision of service. In this way, proper signals were sent to market participants with respect to the amount of resources which should be deployed in the long run to satisfy market demand. INP is not a necessary function required for the

long term provision of local telephone service by monopoly providers. This framework was changed by the passage of the Telecommunications Act of 1996 from that of monopoly to a competitive framework. A necessary condition, as recognized by Congress and the FCC, for the transition to competition is to transfer ownership and administration of telephone numbers to a neutral third party. In the interim, INP must be used to allow customers the ability to retain their telephone number when changing providers. Consequently, INP costs should not be evaluated in the context of long run resource allocation as is assumed when measuring costs using a TSLRIC or LRIC standard.

When evaluating a functionality such as INP, which is short term in nature and not necessary for the long term provision of telephone service, a short run incremental cost standard should be used. This is the standard the FCC employed when it stated in the Order at paragraph 122 "the capability to provide number portability through currently available methods, such as RCF and DID, already exists in most of today's networks, and no additional network upgrades are necessary." The short run incremental cost of providing INP is at or close to zero. The cost recovery mechanism proposed by Time Warner does meet the standard of the Florida statute since a price at zero exceeds nonexistent incremental cost, and thus, its proposal is not confiscatory as claimed by GTEFL. The appropriate measure of cost, in order to meet the competitively neutral criterion of the Act, is <u>cost per customer</u>, where customers

include all end users of all local service providers, whether the customers are using INP or not.

In the alternative, recovery of costs based upon working telephone numbers is also in compliance with the Florida statute. Once the incremental costs, if any, have been determined, the price is established by simply dividing these costs by working telephone numbers and is assessed to local exchange carriers based upon each carrier's respective share of working telephone numbers.

Witnesses Menard and Varner allege that the proposal of the new entrants is confiscatory (TR 159; TR 117) Time Warner disagrees. As stated by MCI witness Kistner, the FCC recognized that INP is not a service, but is a network function required for a carrier to compete. (TR 191) Consistent with this, Time Warner witness McDaniel proposes that carriers treat this as a network routing function. (TR 358) Costs exist and change every day without the attempt to try and account for and recover each one. (Kistner TR 233) Since the new entrants' recommendation meets the provisions of Chapter 364.16(4), F.S., there is no issue of compensation.

The BellSouth and GTEFL Proposals Should be Rejected

BellSouth and GTE Florida both propose as their primary recommendations to maintain the existing tariff structure for INP approved in Order No. PSC-95-1604-FOF-TP. These INP rates were based upon the incremental cost of providing INP. This approach was explicitly rejected by the FCC. (Kistner TR 206) The Order at paragraph 134 states "a cost recovery mechanism that imposes the

entire incremental cost of currently available number portability on a facilities-based new entrant would violate this criterion." Moreover, the Order at paragraph 138 states "incremental cost based charges would not meet the first criterion for "competitive neutrality" because a new facilities based carrier would be placed at an appreciable, incremental cost disadvantage relative to another service provider, when competing for the same customer." If new entrants were required to pay the incremental cost of INP, they would be placed at an economic cost disadvantage in competing for specific customers. The incremental cost includes both recurring and nonrecurring charges. Depending on the rate of customer turnover or "churn", nonrecurring charges restated on a monthly incremental cost equivalent may result in a economic cost disadvantage more stringent than that imposed by the incremental recurring cost itself. The FCC's guidelines which require that new entrants not be placed at an economic cost disadvantage applies to both recurring and nonrecurring costs.

BellSouth witness Varner agreed that the current tariffs are not in compliance with the Order (TR 140). GTE Florida witness Ms. Menard also agreed that continuation of the existing tariffs would not comply with the Order. (TR 172-173) Consequently, the Commission must reject the proposals by BellSouth and GTE Florida.

The alternative proposal by GTEFL--a pooling mechanism which requires a count of all calls, with a mandatory end user charge to all end users--is a complicated effort for a function that will only be used for less than 24 months. (Kistner TR 209) Further, an

end user charge which the ILECs will be able to attribute to competition is anticompetitive and anti-customer. (Kistner TR 210)

The Sprint Proposal Does Not Meet the Guidelines of the Act and the FCC Order

Sprint's plan, which is to charge 45% of the costs to the new entrant, is not competitively neutral. As stated by witness Poag, Sprint United proposes to discount INP rates 55 percent from the incremental cost. Sprint United maintains that this approach results in a competitively neutral cost sharing because new entrants will only have to pay 45 percent of the cost. It should be noted that Sprint United proposes that new entrants pay 100 percent of nonrecurring charges (Poag TR 331). Consequently, Sprint United is proposing that new entrants pay 45 percent of the recurring costs plus 100 percent of the nonrecurring costs which may or may not exceed 50 percent of the total incremental costs of providing INP.

More importantly, the Sprint United proposal does not comply with the FCC's guidelines. (Kistner TR 210) The Order at paragraph 135 states "If, for example, the total costs of currently available number portability are to be divided equally among four competing local exchange carriers, including both incumbent LEC and three new entrants, within a specific service area, the new entrant's share of the cost may be so large, relative to its expected profits, that the entrant would decide not to enter the market. In contrast, recovering the cost of INP from all carriers based on each local exchange carriers relative number of active telephone numbers would

not violate this criterion, since the amount recovered from each carrier would increase with the carrier's size, measured in terms of active telephone numbers or some other measure of carrier size." The FCC has explicitly rejected the Sprint United proposal as a method which satisfies the standard of competitive neutrality. Moreover, the Sprint United proposal also places the new entrant at an incremental cost disadvantage and thus violates the FCC's guidelines (TR 375-376). Sprint United witness Poag agrees that his proposal does not meet the requirements of paragraph 135 of the Order (TR 336). The Commission should also reject Sprint's recommendation.

Therefore, the costs should be treated as network routing costs, the method adopted by the Texas Public Utilities Commission in its order in dockets 1689, 16196, 16226, 16285, and 16290, or divided by the number of working telephone numbers.

ISSUE 3: Should there be any retroactive application of the Commission's decision in this proceeding, if so, what should be the effective date?

** An appropriate effective date could be the date of the FCC Order. If retroactive ratemaking is of concern, the date of the final order in this case is reasonable. **

Because this case was undertaken under the mandate of the Act and the FCC Order, the date of the FCC Order is appropriate (Kistner TR 200; McDaniel TR 371). However, there was no evidence that any of the new entrants have any local customers using INP at

this time (Guedel TR 52, Kistner TR 229), so the date of the final order in this case is reasonable, and has the advantage of removing any concerns about retroactive ratemaking. (Cresse TR 384)

III. CONCLUSION

The Commission's Order No. PSC-95-1604-FOF-TP is inconsistent with the FCC's Order and the method of cost recovery for INP should be revised. The appropriate cost recovery method is for each carrier to absorb its own INP costs. If the Commission believes a specific cost recovery mechanism is appropriate, such costs should be spread on the basis of working telephone numbers. These are the best methods of encouraging competition while maintaining administrative simplicity.

RESPECTFULLY SUBMITTED this 6th day of January, 1997.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the Posthearing Brief of Time Warner AxS of Florida, L.P. and Digital Media Partners has been served by U.S. Mail on this 6th day of January, 1997, to the following parties of record:

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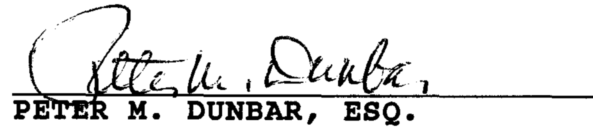

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