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December 12, 1997

VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971056-TX - In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.

Dear Ms. Bayó:

Enclosed are the original and 15 copies of FCCA's Response to BellSouth BSE's Motion to Dismiss to be filed in the above docket.

I have enclosed an extra copy of the above documents for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

Sincerely,

Joe McGlothlin

Joseph A. McGlothlin

JAM/jg

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.	))))	Docket No. 971056-TX Filed: December 12, 1997

FCCA'S RESPONSE TO
BELLSOUTH BSE'S MOTION TO DISMISS

Pursuant to Rule 25-22.037, Florida Administrative Code, the Florida Competitive Carriers Association ("FCCA") submits its response in opposition to the Motion to Dismiss FCCA's Petition on Proposed Agency Action filed by BellSouth BSE, Inc. ("BellSouth BSE") on December 5, 1997, and states:

Background.

1. BellSouth BSE is a subsidiary of BellSouth Telecommunications, Inc. (BellSouth). BellSouth is the source of BellSouth BSE's name, capital, and management. BellSouth BSE applied for statewide authority to operate as an ALEC. The Commission proposed to grant the application in Order No. PSC-97-1347-FOF-TX. FCCA filed a Petition on Proposed Agency Action directed to the order. In its petition, FCCA did not object to a grant of ALEC authority to BellSouth BSE in those areas of the state outside of BellSouth's ILEC service area. However, FCCA protested the PAA order to the extent it would purport to authorize BellSouth BSE to provide "alternative" local exchange service in the geographical area in which BellSouth is the incumbent provider of local service. FCCA alleged that authorizing BellSouth BSE to operate as an ALEC in BellSouth's ILEC service area would circumvent the relationships, rights and obligations between BellSouth and FCCA members created by the

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Telecommunications Act of 1996 (Act) and subject FCCA's members to anticompetitive practices.

2. On December 5, 1997, BellSouth BSE moved to dismiss FCCA's petition.

3. In its motion, BellSouth BSE sets forth the standing test articulated in Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). The first prong of the Agrico test is the requirement that the party show an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. The second is whether the injury is of the type the proceeding is designed to protest. BellSouth BSE contends that FCCA does not meet the Agrico standard in its petition. BellSouth BSE is mistaken.

The Commission Should Reject BellSouth BSE's Attempt to Portray the Protested Portion of the PAA as Designed to Introduce Competition in the Local Market.

4. To begin with, BellSouth BSE's argument that FCCA has no standing because the purpose of Section 364.337(1) and (2), Florida Statutes, is to "put competition in the local exchange telecommunications market" (BellSouth BSE motion, at p. 4) is absurd. As it relates to FCCA's narrow petition, the statement brims with irony. FCCA, not BellSouth BSE, is participating out of a concern for promoting competition. With respect to precisely those areas of the state in which granting ALEC authority to BellSouth BSE would introduce an additional competitor in the local exchange market, FCCA has consented to the PAA. However, allowing BellSouth BSE to "compete" with BellSouth where BellSouth is the ILEC would not introduce competition, because -- as the Commission recognized for other purposes -- BellSouth

BSE is BellSouth. Its name, capital, and management are drawn from BellSouth. Its customers will perceive it to be BellSouth. To accurately describe its situation with respect to BellSouth's ILEC territory, BellSouth BSE can paraphrase Pogo: "We have met the competition, and he is us."[1]

The Commission Has Already Acknowledged That the Proper Implementation of the Act Bears On Its Consideration of BellSouth BSE's Application.

5. In assessing whether FCCA has alleged an injury, it is necessary to take into account the interplay between BellSouth BSE's application and the Act. In that connection, Section 120.80(13)(d), Florida Statutes, specifically provides:

> Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with that Act.

6. To implement the Act, the Commission must ensure that the action taken in BellSouth BSE's application proceeding does not conflict with the Act. Fundamentally, those upon whom the Act confers rights have standing to participate in the certification proceeding to oppose the diminution or alteration of those rights.

7. In fact, the Commission explicitly recognized the relationship between the proper implementation of the Act and the Commission's consideration of BellSouth BSE's application in the very PAA order that is the subject of FCCA's protest:

---

[1] This point is reinforced by the fact that BellSouth has filed a Petition to Intervene in this case in which it contends that the Commission's decision on BellSouth BSE's request for authority to operate as an ALEC in BellSouth's service area would affect BellSouth's substantial interests. Since those interests legitimately associated with an ALEC application belong to BellSouth BSE, one can only surmise that BellSouth is also interested in the ramifications of BellSouth BSE's application on the Act.

We note that BellSouth BellSouth (sic) BSE has not applied for a certificate to provide interexchange telecommunications (IXC) services in Florida; and therefore, granting BellSouth BellSouth (sic) BSE authority to provide alternative local exchange service in Florida will not circumvent the proceeding currently before the Commission in Docket No. 960786-TL, In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996.

Order No. PSC-97-1347-FOF-TX at 2.

8. Similarly, in the PAA which is the subject of FCCA's protest, the Commission also recited that BellSouth Long Distance, Inc. did not request "regular interLATA authority." In other words, the Commission saw the need to address, in the context of its application for an IXC certificate, whether granting BellSouth Long Distance, Inc.'s application would conflict with the proper implementation of the Act -- even though Section 364.337(3), Florida Statutes, which governs IXC applications, enumerates the same "technical, financial, and managerial" criteria which BellSouth BSE touts in this case.

9. If the Commission were limited to a consideration of BellSouth BSE's technical, financial and managerial capability in its consideration of BellSouth BSE's application, as BellSouth BSE contends, there would have been no occasion for the Commission to consider the impact of BellSouth BSE's application on Docket No. 960786-TL in Order No. PSC-97-1347-FOF-TX, or to restrict the IXC authority of BellSouth Long Distance, Inc. to exclude "regular interLATA" traffic. Obviously, however, in considering the applications the Commission saw the need to and the propriety of taking these aspects of the Act into account. The point of FCCA's

petition is that the Commission's consideration of the relatior hip between the application of BellSouth BSE and the federal Act was insufficient. The Commission analyzed the impact of the application on the Act's provisions relating to restrictions on interLATA activities, but did not recognize or address the impact on the provisions of the Act which prescribe certain relationships between BellSouth and its local market competitors. FCCA alleged in its petition that FCCA's members are affected by the proposed action because it bears on the implementation of the Act in a manner that diminishes their rights under the Act. Accordingly, FCCA has standing to challenge the Commission's insufficient and incomplete analysis of the impact of the PAA on the Act and to demand an opportunity to demonstrate that the specific action protested by FCCA would conflict with the proper implementation of the Act, to the prejudice of FCCA's members.[2]

FCCA Has Sufficiently Identified an Injury in Fact.

10. In its petition, FCCA asserted that granting the statewide authority sought by BellSouth BSE would subvert relationships (obligations of BellSouth, an incumbent LEC, vis-à-vis competing ALECs) created by the Act, and that the Commission could no more do so without affecting FCCA's substantial interests than

[2] In its motion, BellSouth BSE observed that FCCA is an association, not a carrier, and stated that FCCA did not allege that it is injured. Motion at 2. In its petition, FCCA alleged its members would be injured by the diminution of their rights under the Act and would be subjected to anticompetitive conduct. The ability of an association to represent its members with respect to issues that affect them has been confirmed numerous times. Florida Medical is an example of such a case. See also, City of Lynn Haven v. Bay County Council of Registered Architects, 528 So. 2d 1244 (Fla. 1st DCA 1988).

it could attempt to exempt BellSouth from the requirements of the Act without affecting those interests. Prior to the issuance of the certificate, FCCA's members would relate to BellSouth in the manner established by the Act; subsequent to the grant of authority, because BellSouth BSE is BellSouth's alter ego (as the Commission recognized in the PAA order), the relationship created by the Act will have changed to their detriment. FCCA used the example of the wholesale discount prescribed by the Act -- which governs BellSouth but would be inapplicable to BellSouth's alter ego -- to illustrate the point. FCCA's assertion that the obligation created and benefits conferred by the Act would be circumvented by the PAA, which is the essence of FCCA's petition, is an "injury in fact," every bit as much as a purported grant of authority to engage in conduct prohibited by the Act would be an "injury in fact." Again, as the Commission implicitly (and properly) recognized in its order, BellSouth BSE is BellSouth in another form. Therefore, to purport to authorize BellSouth BSE to avoid obligations that the Act imposes on BellSouth is, in and of itself, an injury in fact. Therefore, it is not necessary to wait for evidence that BellSouth BSE has acted to exploit the purported alteration of the benefits afforded by the Act and complain on an instance-by-instance basis to demonstrate the injury. And, as in Boca Raton Mausoleum, Inc. v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 5th DCA 1987), the action of the agency would accomplish the injury; as there is no "contingency factor," the injury is of sufficient immediacy to warrant a hearing. Id. at 1063. Even if the Commission were to determine that standing requires more than the change in legal relationships described in FCCA's petition, FCCA's assertion that

the granting of authority would subject its members to anticompetitive practices shows an injury of sufficient immediacy to confer standing. (See Florida Medical, supra, in which the allegation of threatened injury was deemed sufficient to satisfy the "injury in fact" requirement).

11. The response of the Public Utility Commission of Texas to a similar situation is instructive. A subsidiary of GTE filed an application for authority to provide local service in competition with several incumbent LECs, including its parent, GTE. Recognizing that the "competition" between the two entities would be a faction, and the impact would thwart federal and state policies, the Texas Commission first severed the application into two portions. It allowed the application for non-GTE territory to proceed. It then noted that a Texas statute prohibits the same carrier entity from holding (Texas' equivalent of) both ILEC and ALEC authority. The Texas Commission determined that, for purposes of enforcing the statutory prohibition against a carrier holding both types of authority, it would regard the subsidiary as being the same entity as the parent. On this basis, the Texas agency denied the GTE subsidiary's request for authority to provide local service in its parent's service area. Docket No. 16495, Order of November 20, 1997.[3]

12. This Commission is no stranger to the complications presented by self-dealing between a parent LEC and its subsidiary. In 1988, United Telephone created a subsidiary that applied for an IXC certificate. On its own motion, the Commission

[3] The transcript of the Texas agency's decision conference and the order of severance were attached to FCCA's petition. The order denying the request for a certificate to operate in the parent's service area is attached as Attachment A.

set the matter for hearing, and ultimately imposed restrictions on the subsidiary, including a requirement that it pay royalties to its parent. In th t case - decided long after the Agrico decision - the Commission allowed IXCs to in rvene as full parties. See, Order No. 18939, issued in Docket No. 870285-TI on March 2, 1988.

The Injury Alleged by FCCA is of the Type the Proceeding is Designed to Protect.

13. In its motion to dismiss, BellSouth BSE argues that FCCA has failed to demonstrate an injury of the type the proceeding is designed to protect. The argument rests on the erroneous assumption that in establishing its standing, FCCA is limited to the statutory subsection under which BellSouth BSE filed its application. The erroneous assumption that the standing test is so confined is a fundamental flaw in BellSouth BSE's motion. In Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983), the court stated:

> Neither Shared Services . . . nor Agrico Chemical . . . is authority for the proposition that the basis for standing must be found within the particular statute being implemented by agency.

Id. at 1117-18.

14. In Florida Medical, an association of physicians sought to challenge a rule that would allow optometrists to prescribe drugs. The hearing officer had denied standing. He concluded that the association had failed to show that the interest they asserted was within the zone of interests protected by the statute being implemented. The court reversed on the basis that the association properly invoked other statutes which gave its members the exclusive right to prescribe the drugs. In Florida Medical,

the court placed emphasis on the fact that in the association attempted to show that the rule they challenged would purport to authorize optometrists to perform an unlawful act. Similarly, in this case, FCCA bases its standing -- not on Section 364.337 alone -- but on the Act, and Section 120.80(13)(d), and those provisions of Chapter 364 that empower the Commission to prevent anticompetitive activity and ensure fair treatment for all providers of telecommunications services. Significantly, in its petition FCCA asserted that the PAA would purport to allow BellSouth to circumvent the requirements of the Act through the conduct of its "alter ego," BellSouth BSE. As was the case in Florida Medical, the injury identified by FCCA is of the type the proceeding is designed to protect.

15. Again, the "zone" is not defined by the criteria of section 364.337, as BellSouth BSE argues. FCCA invoked its right to fair treatment and protection against anticompetitive behavior -- which is the ongoing responsibility of the Commission. The "protection" of telecommunications providers' right to fair treatment and freedom from anticompetitive behavior is the legitimate purpose of any Commission proceeding in which such concerns are presented. Section 364.01(4)(g), Florida Statutes. In addition, FCCA seeks to implement properly the provisions of the Act that foster the development of more competition. That, too, is the type of interest the proceeding is designed to protect. BellSouth BSE attempts to characterize these inappropriately as "economic interests," in the hope that the Commission will view them as less than legitimate concerns. It won't work. The second prong of the well-known Agrico standard was developed to prevent parties from seeking to protect their economic

interests in proceedings brought for purposes unrelated to those economic interests. However, the very task of the Commission is the economic regulation of those over which it has jurisdiction. It considers legitimate economic interests every day. They are appropriately considered here. See, Florida Medical, supra.

CONCLUSION

The intent of the Act is to develop competition in the local market. FCCA's objective in this proceeding is to prevent BellSouth's "BSE stratagem" from interfering with the realization of Congress' intent. In short, it is FCCA's participation -- not BellSouth BSE's -- that is in keeping with the purposes and objectives of both state and federal law. The FCCA has demonstrated that the portion of Order No. PSC-97-1347-FOF-TX protested by FCCA would interfere with rights and obligations created by the Act, and would thereby cause an injury in fact of sufficient immediacy to warrant a hearing. The injury is of the type the proceeding is designed to protect. Indeed, the Commission saw the need to guard against a related injury involving the implementation of the Act, but simply failed to recognize or protect against the specific injury identified by FCCA in the petition. FCCA has standing to protest and seek to cure this failure.

WHEREFORE, BellSouth BSE's motion to dismiss sh ld be denied.

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301
(904) 222-2525

Attorneys for
Florida Competitive Carriers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the FCCA's foregoing **Response to BellSouth BSE's Motion to Dismiss** has been furnished by United States mail or hand delivery(*) this **12th** day of **December, 1997,** to the following:

Martha Carter Brown*
Division of Legal Services
Florida Public Service Commission
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Joseph A. McGlothlin

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FILING CLERK

APPLICATION OF GTE COMMUNICATIONS CORPORATION FOR A CERTIFICATE OF OPERATING AUTHORITY	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER

This Order denies GTE Communication Corporation's (GTE-CC) application for a certificate of operating authority (COA) in territory currently served with local telephone service by GTE Southwest, Inc. (GTE-SW).[1] The Public Utility Commission of Texas (Commission) denies this application for a COA in GTE-SW service territory because PURA precludes the issuance of a COA as a matter of law.[2]

The ALJ's Proposal for Decision (PFD) containing findings of fact (FOFs) and conclusions of law (COLs), is adopted and incorporated into this Order, except to the extent specified by this Order or inconsistent with the Order. Specifically, the Commission declines to adopt sections IV.A.4, IV.B.4, IV.C.4, and IV.D.4 as they pertain to granting the COA in GTE-SW's service territory. Furthermore, it modifies several FOFs and COLs, as enumerated in Section II of this Order.

ATTACHMENT A

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[1] The portion of GTE-CC's COA application concerning the territories currently served with local telephone service by Southwestern Bell Telephone Company (SWBT), Sprint Communications Company L.P./United Telephone Company (Sprint/United) and Central Telephone Company (Centel) were severed from this docket on October 30, 1997. *See Application of GTE Communications Corporation for a Certificate of Operating Authority in SWBT, Sprint/United and Centel Service Territories (Re: Docket No. 16495)*, Docket Nos. 16495 and 18146, Severance Order (Oct. 30, 1997).

[2] The Commission recognizes that it did not reach the same legal conclusion in Docket No. 16800, *Application of Sprint Communications Company L.P. for a Certificate of Operating Authority*. *See* Docket No. 16800, *Final Order* (April 2, 1997). It concludes, however, that Docket No. 16800 was wrongly decided. If the Commission were to decide that case today, it would do so differently, consistent with the rationale articulated in this Order.

I. A COA Can Only Be Obtained in Lieu of a Certificate of Convenience and Necessity

A. Applicable Rules of Statutory Construction

For purposes of statutory construction, the ordinary meaning of words will be applied if the Legislature does not define particular terms.[3] In this regard, the Commission must attempt to "discern the fair, objective meaning of text at the time of its enactment."[4] An exception to the rule of ordinary meaning applies where a literal interpretation of the statute would lead to an absurd result.[5] In such an instance, the Commission's construction of "one provision of the statute should not be given a meaning out of harmony or inconsistent with other provisions, although that provision might be susceptible to such a construction if standing alone."[6]

B. Literal Construction of PURA[7] § 54.102(a)

Under the applicable rules of statutory construction, the Commission must ascertain the literal meaning of the statutory provision. Where that meaning can be unambiguously determined, the Commission must apply that interpretation unless it would lead to an absurd result or a result out of harmony with the statute as a whole.

PURA § 54.102(a) states:

> *In lieu of* applying for a certificate of convenience and necessity, a person may apply for a certificate of operating authority (emphasis added).

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[3] *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997); *Smith v. Clary Corp.*, 917 S.W.2d 796, 799 (Tex. 1996); *Tijerina v. City of Tyler*, 846 S.W.2d 825, 827 (Tex. 1992); *Hopkins v. Spring Independent School Dist.*, 736 S.W.2d 617, 619 (1987).

[4] *Rodriguez v. State*, 939 S.W.2d 211, 221 (Tex. App.– Austin 1997, no writ)

[5] *Tigner v. State*, 928 S.W.2d 540, 542 (Tex. Crim. App. 1996); *see also State v. Mauritz-Wells Co.*, 141 Tex. 634 175 S.W.2d 238, 242 (1943) (stating that a court will not attribute to the Legislature an intention to work an injustice.)

[6] *Application of Southwestern Bell Telephone Company for a New Intrastate Pricing Flexibility Plan Tariff*, Docket No 16542, Order Addressing Motion for Clarification at 2 (May 2, 1997) (citing *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978)).

[7] Public Utility Regulatory Act, 75th Leg., R.S. ch. 166, § 1, 1997 Tex. Sess. Law Serv. 735 (Vernon) (to be codified at TEX. UTIL. CODE ANN.).

At least one court has defined the phrase "in lieu of" as "instead of; in place of; in substitution of."[8] The same court also noted that the phrase "in lieu of" "does not mean 'in addition to'."[9] The Texas Supreme Court addressed a similar issue when faced with a dispute concerning a type of oil and gas contract that created "a lieu royalty" for proceeds on oil produced and sold.[10] There, the court held that "a lieu royalty" was a substitute for actual production.[11]

Furthermore, PURA § 54.102(a) refers to a "person" applying for a COA. The definition of "person" in PURA is "an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation."[12] For purposes of identifying the "person" (that is, the corporation) applying for a COA, the Commission must look beyond the entity in whose name the certificate is sought and apply a "control test." The Commission has applied this test in concluding that the term "holder", as used in PURA § 54.152, must be interpreted broadly enough to include both the entity whose name is on a certificate and any entity who is effectively a "holder" by virtue of its ability to control the entity whose name is on the certificate.[13] The Commission's application of a "control test" pursuant to PURA § 54.152 should similarly apply to PURA § 54.102 in identifying both the applicant seeking the COA and the holder of a CCN in the service area in which the COA is sought.

C. Construction of PURA § 54.102(a) in the Context of PURA as a Whole

A number of PURA provisions refer to the receipt or provision of service pursuant to a "certificate of public convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority."[14] Other provisions distinguish between a "certificate of

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[8] *Glassman Const. Co. v. Baltimore Brick Co.*, 246 Md. 478, 481, 228 A.2d 472, 474 (1967).

[9] *Id.*

[10] *Andrews v. Weir*, 415 S.W.2d 638, 639 (Tex. 1967).

[11] *Id.*

[12] PURA § 11.003(13).

[13] *Application of Time Warner Connect of San Antonio for a Service Provider Certificate of Operating Authority*, Docket No. 16666, Severance and Remand Order (Feb. 13, 1997).

[14] *See, e.g.*, PURA § 54.002.

convenience and necessity or a certificate of operating authority."[15] The general rule of statutory construction is that the words "and" and "or" are not interchangeable. Instead the word "or" is construed to be disjunctive, and the word "and" is construed to be conjunctive.[16] Applying this general rule to the "CCN, COA, or SPCOA" language in PURA, the Legislature appears to have anticipated that a telecommunication provider would only have one of those certificates for a specific service territory.

Other statutory provisions in PURA demonstrate that an absurd result would occur if the Commission did not likewise interpret PURA § 54.102 in the same manner. For example, CCN holders are dominant carriers and COA holders are nondominant carriers under PURA.[17] If one entity can control a CCN and a COA in the same territory, that entity would be both a dominant carrier and a nondominant carrier in the same location. The Legislature could not have intended such an absurd result.

D. Determination of the Meaning of PURA § 54.102(a)

The preceding legal analysis leads to four conclusions. First, a literal reading of PURA § 54.102(a) indicates the "in lieu of" language in the provision means that an entity cannot possess a CCN and a COA for the same territory. Second, in applying the "control test" to PURA § 54.102(a), GTE Corporation, Inc. (GTE), the parent company of GTE-CC and GTE-SW, is both the applicant seeking the COA in this docket and the holder of the CCN in the service territory in which the COA is sought. Third, the provisions in PURA that disjunctively list the certificates that a telecommunications provider may obtain indicate that the Legislature assumed that an entity can control only one of those certificates in a particular service territory. Finally, adoption of a contrary interpretation of PURA § 54.102(a) would lead to an absurd result. Because the literal reading of PURA § 54.102(a) leads to a rational result that is consistent with the statutory framework, the literal reading must be adopted. Consequently, the Commission holds that one entity cannot control both a CCN and a COA for the

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[15] *See e.g.*, PURA § 51.002(4).

[16] *Bryce Pipeline Corp. v. Railroad Commission*, 568 S.W.2d 122, 125 (Tex. 1978).

[17] *See* PURA § 51.002(2).

same territory. Therefore, to grant GTE-CC a COA in the service areas in which its parent company, GTE, holds a CCN through its subsidiary GTE-SW, would violate PURA as a matter of law.

II. Modifications and Deletions to the Proposed Findings of Fact and Conclusions of Law

The following modifications and deletions have been made to the PFD's proposed FOFs and COLs:

- Delete FOFs 25 through 46 as unnecessary to the resolution of this proceeding in light of the Commission's conclusion that GTE-CC can not obtain a COA in GTE-SW service territory as a matter of law.
- Add FOF 24a to explain that Docket No. 18146, concerning GTE-CC's application for a COA in the service territories of SWBT, Sprint/United, and Centel, was severed from this docket on October 30, 1997.
- Add FOF 24b to indicate that GTE Corporation, Inc. (GTE) is the parent corporation of both GTE-CC and GTE-SW, and therefore controls both GTE-CC and GTE-SW.
- Delete COLs 6 through 13 as unnecessary to the resolution of this proceeding in light of the Commission's conclusion that GTE-CC cannot obtain a COA in GTE-SW service territory as a matter of law.
- Add COL 5a to state that the "in lieu of" language in PURA § 54.102(a) means an entity cannot possess a CCN and a COA in the same territory.
- Add COL 5b to state that because GTE controls both GTE-CC and GTE-SW, GTE is in effect the applicant seeking the COA as well as the holder of the CCN in the service territory in which the application is sought.
- Add COL 5c to state that provisions in PURA that disjunctively list the certificates a telecommunications provider may obtain also indicate the legislative intent that an entity can control only one of those certificates in a particular service territory.

- Amend COL 14 to deny GTE-CC's application for a COA in GTE-SW service territory.
- Minor non-substantive changes, including the correction of citations to PURA and applicable Commission rules.

III. Findings of Fact

Procedural History

1. GTE-CC is a corporation duly authorized to do business in Texas and is a wholly-owned subsidiary of GTE Information Systems Incorporated, which in turn is a wholly-owned subsidiary of GTE. GTE-SW also is a wholly-owned subsidiary of GTE.

2. On October 2, 1996, GTE-CC filed an application with the Commission under P.U.C. SUBST. R. 23.38(c) and the PURA §§ 54.102-54.111 for approval of a facilities-based certificate of operating authority (COA) to provide a full range of telecommunications services in the areas of the state served by SWBT, Centel, Sprint/United, and GTE-SW.

3. On October 4, 1996, the Commission issued its Preliminary Order referring this docket to SOAH and finding good cause to extend the 60-day application-processing period under PURA § 54.103. The Preliminary Order identified the issues to be addressed by the parties to the proceeding.

4. On October 7, 1996, the ALJ issued Order No. 1 establishing the procedural schedule for this proceeding and requiring every contesting party to file a list of contested issues by October 16, 1996.

5. The Commission provided notice of GTE-CC's application in the *Texas Register* on October 11, 1996, and through posting on the Internet.

6. On October 14, 1996, SWBT filed a motion to intervene. No party objected to this intervention and the ALJ granted the motion on November 15, 1996.

7. On October 16, 1996, the TSTCI filed its motion to intervene. The ALJ granted that motion on November 15, 1996.

8. On October 16, 1996, the General Counsel filed a motion to abate the docket and extend the 60-day statutory deadline to allow time for the Commission to reach a final decision in Docket No. 15711, which involves similar issues. On the same date the ALJ issued Order No. 2 in this docket, granting the General Counsel's motion for good cause and canceling the hearing on the merits scheduled for October 21, 1996.

9. On October 23, 1996, GTE-CC and the General Counsel filed a joint motion requesting the ALJ to reconsider and modify Order No. 2, and requesting a prehearing conference to establish a new procedural schedule. On October 24, 1996, the ALJ granted the joint motion.

10. The prehearing conference convened on November 6, 1996, and on November 15, 1996, the ALJ issued an order adopting the revised schedule agreed to by the parties.

11. On November 25, 1996, AT&T filed a late motion to intervene in this proceeding. The ALJ issued Order No. 5 on December 6, 1996, denying AT&T's motion to intervene. AT&T appealed Order No. 5 on December 9, 1996. AT&T's appeal was denied by operation of law.

12. The first hearing on the merits convened on December 10, 1996, and concluded on the same day.

13. On January 9, 1997, SWBT filed a letter requesting that this case be consolidated with Docket No. 16658 and Docket No. 16744.

14. The ALJ denied the motion to consolidate on January 27, 1997.

15. On February 11, 1997, the ALJ abated this docket pending the resolution of certified questions in Docket No. 16658 and Docket No. 16744.

16. The Commission issued an order on issues certified to it in Docket Nos. 16658 and 16744 on March 14, 1997.

17. On April 1, 1997, the ALJ by order requested that the parties comment on the affiliate issue raised by AT&T in Docket No. 15711. On April 15, 1997, the General Counsel responded

by requesting that the ALJ abate this proceeding until the issuance of a final order in Docket No. 15711.

18. A prehearing conference convened on June 18, 1997. At the prehearing conference, AT&T re-urged its motion to intervene.

19. The ALJ granted AT&T's motion to intervene on June 27, 1997. In that order, the ALJ also requested the parties to respond to the issue of how to apply the Commission's ruling in Docket No. 15711 to this case. The Commission had issued its Order on Rehearing in PUC Docket No. 15711 on June 25, 1997.

20. On July 17, 1997, GTE-CS filed notice with the Texas Secretary of State's Office that the name of the company has changed to GTE Communications Corporation (GTE-CC).

21. On July 21, 1997, the ALJ issued Order No. 12 establishing a procedural schedule to address the following issues: (1) Should application be granted if adequate safeguards are in place to guard against anti-competitive practices? (2) If so, what safeguards are appropriate? (3) Is the Commission's determination in 15711 relevant to this proceeding? (4) If so, how should the ruling be implemented in this proceeding?

22. An additional hearing on the merits convened on August 11, 1997, and concluded August 12, 1997.

23. Briefs were filed on August 20, 1997, and August 27, 1997.

GTE-CC's Application

24. GTE-CC proposes to provide service within the geographic areas previously certificated under certificates of public convenience and necessity to SWBT, GTE-SW, Sprint/United and Centel in the State of Texas.

24a. On October 30, 1997, Docket No. 18146, *Application of GTE Communications Corporation for a Certificate of Operating Authority in SWBT, Sprint/United and Centel Service Territories (Re: Docket No. 16495)*, was created and severed from this docket. Docket No. 18146 concerns GTE-CC's application for a COA in SWBT, Sprint/United, and Centel service territories.

24b. GTE Corporation, Inc. (GTE) is the parent corporation of both GTE-CC and GTE-SW. Consequently, GTE controls both GTE-CC and GTE-SW.

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Competitive Safeguards/Affiliate Issues

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IV. Conclusions of Law

1. GTE-CC is a telecommunications provider as defined in PURA § 51.002.

2. The Commission has jurisdiction and authority over this proceeding pursuant to PURA §§ 14.001, 52.001, 54.001, and 54.102-54.111.

3. The Commission provided adequate notice of the application and proceeding in compliance with PURA § 54.005 and P.U.C. PROC. R. 22.54.

4. Good cause exists to extend the 60-day application-processing deadline specified by PURA § 54.103.

5. PURA §§ 54.102-54.110 and P.U.C. SUBST. R. 23.38(c) provide the criteria for determining whether a COA application should be granted.

5a. A literal reading of PURA § 54.102(a) indicates the "in lieu of" language in the provision means that an entity cannot possess a CCN and a COA in the same territory. To read PURA § 54.102(a) otherwise would lead to an absurd result.

5b. GTE is the parent company of GTE-CC and GTE-SW, and effectively is both the applicant seeking the COA in this docket and the holder of the CCN in the service territory in which the COA is sought.

5c. Provisions in PURA that disjunctively list the certificates a telecommunications provider may obtain also indicate the legislative intent that an entity can control only one of those certificates in a particular service territory.

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14. Based on the foregoing findings of fact and conclusions of law, GTE-CC's application for a COA in GTE-SW service territory is denied, having failed to satisfy such sections of PURA as 51.002, 54.001, and 54.102(a) prohibiting an entity's holding of a CCN and a COA in the same service territory.

V. Ordering Paragraphs

1. The application of GTE-CC for a COA in GTE-SW service territory is denied.

2. All other motions, requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are denied for want of merit.

SIGNED AT AUSTIN, TEXAS the 20th day of November 1997.

PUBLIC UTILITY COMMISSION OF TEXAS

PAT WOOD, III, CHAIRMAN

JUDY WALSH, COMMISSIONER