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January 16, 1997

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

Re: Docket No. [REDACTED]

Dear Ms. Bayo:

On behalf of BellSouth BSE, Inc. enclosed for filing in the above referenced docket are the original and fifteen (15) copies of the Motion to Dismiss Petition for Leave to Intervene filed by Teleport Communications Group and TCG South Florida. Also enclosed for your records is a diskette containing the above referenced documents formatted in Wordperfect 6.1.

If you have any questions please call me at (850) 222-3471. Thank you.

Sincerely,

E. Gary Early

- ACK _____
- AFA 1
- APP _____ EGE/mcd
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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: January 16, 1998

**MOTION TO DISMISS PETITION FOR LEAVE
TO INTERVENE FILED BY TELEPORT COMMUNICATIONS
GROUP, INC. and TCG SOUTH FLORIDA**

Pursuant to Rule 25-22.037(2) and Rule 28-106.204, Florida Administrative Code, BellSouth BSE, Inc. moves the Florida Public Service Commission (Commission) for an Order dismissing the Petition for Leave to Intervene filed by Teleport Communications Group, Inc. and TCG South Florida (collectively referred to as "TCG"). In support of this Motion, BellSouth BSE, Inc. states as follows:

1. On January 7, 1998, TCG filed a Petition for Leave to Intervene directed to Order No. PSC-97-1347-FOF-TX. That order granted to BellSouth BSE, Inc. alternative local exchange telecommunications service certificate no. 5261 subject to the terms and conditions set forth in that order.

2. Rule 25-22.039, Florida Administrative Code, provides that

[p]ersons, 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. Petitions for leave to intervene...must conform with Commission Rule 25-22.036(7)(a), 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.

3. In its petition, TCG alleges that, by granting BellSouth BSE, Inc.'s certificate, its substantial interests would be affected as follows:

Allowing BellSouth to provide local exchange services as an ALEC, through its affiliate BSE, in BellSouth's service territory, will affect TCG's substantial interests by: (a) undermining the legal relationships between ILECs and ALECs created under Chapter 364, F.S. and the Act; (b) allowing BellSouth to shed itself of the legal obligations imposed on ILECs, including BellSouth, under Chapter 364, F.S. and the Act; and (c) subjecting TCG to anticompetitive practices, unfair competition, unlawful cross-subsidization and/or predatory pricing by BellSouth/BSE. Specifically, TCG's ability to compete for and retain local exchange service customers and its substantial interests will be adversely affected if:

(a) BellSouth is able to evade its resale and provision of UNE obligations under Chapter 364 and the Act by providing local service in its service territory through BSE; and

(b) BellSouth, through BSE, is able to retain or capture high-use residential and commercial customers through discounted rates which are below and the rates TCG may offer after TCG incurs the cost for UNEs or the cost of BellSouth's wholesale rates.

TCG Petition for Leave to Intervene, pp. 5-6, ¶10. See also TCG Petition for Leave to Intervene p. 4, ¶7.

4. In determining whether TCG has standing to protest the certificate granted to BellSouth BSE, Inc., the following observation provides useful guidance:

[N]ot everyone having an interest in the outcome of a particular dispute over an agency's interpretation of the law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the public, is entitled to participate as a party in an administrative proceeding to resolve that dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's efforts to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling.

Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988).

5. TCG's standing, if any, in this licensing proceeding must be predicated upon a finding that its substantial interests will be affected in manner that differs from the interests of the public generally in seeing that all applicants are certified in accordance with statutory requirements. Florida Society of Ophthalmology v. State Board of Optometry, *supra* at 1285.

6. The applicable test for determining whether TCG's substantial interests are or will be affected was initially stated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 782 (Fla. 2nd DCA 1981), *rev. denied* 415 So.2d 1359 (Fla. 1982) and 415 So.2d 1361 (Fla. 1982), and has been consistently applied by the courts since that time. The "Agrico test" is as follows:

We believe 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 sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature the proceeding is designed to protect.

TCG has failed to satisfy both prongs of the Agrico test.

7. No injury in fact has been alleged by TCG. TCG alleges that the grant of the certification will subject TCG to "anticompetitive practices, unfair competition, unlawful cross-subsidization and/or predatory pricing by BellSouth BSE." TCG Petition for Leave to Intervene, p. 5, ¶10. The exclusive remedy for TCG's alleged injury has been provided by the Legislature in Chapter 364, Fla. Stat. By law, the Commission has "continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anti-competitive behavior and may investigate, upon complaint or its own motion, allegations of such practices." See, Section 364.3381(3), Fla.Stat.

Inasmuch as BellSouth BSE, Inc. has not commenced operation in Florida, TCG's allegations about anticompetitive and unfair activities are, at best, premature. If and when anticompetitive or unfair activities manifest themselves, a complaint alleging such activities should be filed with the Commission pursuant to Section 364.3381(3), Fla. Stat.

8. The second prong of the Agrico test is whether the type of injury pled is that which the applicable statute is intended to protect. The main thrust of TCG's Petition is the allegation that the grant of an alternative local exchange telecommunications service certificate is violative of the Federal Telecommunications Act.. See, TCG Petition for Leave to Intervene, pp. 2-5, ¶¶5-8.

9. In addition, TCG alleges that it will suffer purely economic damages by BellSouth BSE, Inc.'s entry into the market. TCG Petition for Leave to Intervene, pp. 2-4 ¶¶5-6.

10. The general rule in Florida with respect to alleged economic injury has been expressed as follows:

[I]n licensing or permitting proceedings a claim of standing by third parties based solely upon economic interest is not sufficient unless the permitting or licensing statute contemplates consideration of such interests.

Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112, 1118 (Fla. 1st DCA 1983). See also Agrico, *supra* at 482; Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So.2d 1292, 1294 (Fla. 1st DCA 1986) and Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060, 1064 (Fla. 1st DCA 1987).

11. Review of the statute authorizing the certification of alternative local exchange telecommunications companies demonstrates that the injuries alleged by TCG are not the type of injuries that this type of administrative proceeding was designed to protect.

12. Subsections (1) and (2) of Section 364.337, Fla. Stat., were intended to establish

competition in the local exchange telecommunications market. The Commission was directed to "grant a certificate of authority to provide alternative local exchange service upon showing that the applicant has sufficient technical, financial and managerial capability to provide such service in the geographic area proposed to be served." Section 364.337(1), Fla. Stat. TCG has not alleged that BellSouth BSE, Inc.'s application is deficient in any of the above respects.

13. As a consequence, TCG has failed to allege any injury of a type or nature that this type of administrative proceeding was designed to protect. As provided in Section 364.377(1), Fla. Stat.:

It is the intent of the Legislature that the Commission act expeditiously to grant certificates of authority under this Section and that the grant of certificates not be affected by application of any criteria other than that specifically enumerated in this subsection. (emphasis added).

14. TCG has stipulated to all the factors that an applicant must possess in order to receive a certificate of authority to provide alternative local exchange telecommunications service under Section 364.337(1) and (2), Fla. Stat. See, Section 120.80(13)(b), Fla. Stat.

THEREFORE, the Petition for Leave to Intervene filed by TCG in this docket should be DISMISSED.

15. In addition to the foregoing, it is axiomatic that an intervenor to an action "must accept the record and pleadings as he finds them and can not raise new issues, although he may argue the issues as they apply to him as a party, National Wildlife Federation, Inc. v. Glisson 531 So.2d 996, 998 (Fla 1st DCA 1983). That concept is reflected in the intervention rule of the Public Service Commission, Rule 25-22.039, F.A.C., which provides that "Intervenors take the case as they find it."

16. The Petition on Proposed Agency Action filed by the Florida Competitive Carriers Association (FCCA) provides that the FCCA "disputes...that the granting of statewide ALEC authority to BellSouth BSE, Inc. would not circumvent the proceeding designed to ensure that BellSouth complies with all obligations imposed on it by the Telecommunications Act of 1996." FCCA Petition, p. 6, ¶11. The thrust of the FCCA's allegations were based upon the effect of the certification of BellSouth BSE, Inc. on the resale of the BellSouth ILEC's network elements. FCCA Petition, pp.3-4, ¶¶6-7.

17. The Protest of Proposed Agency Action filed by MCI provides as its Issues of Material Fact that the grant of the ALEC certification to BSE would allow the BellSouth ILEC to circumvent its obligations as an ILEC under the Telecommunications Act of 1996, and would subject MCI to unfair competition and anti-competitive effects of price squeezes. MCI Protest, p.8, ¶16. As with the FCCA Petition, MCI's allegations were primarily based on the effect of the certification on the resale of the BellSouth ILEC's network elements. MCI Petition, pp.3-7, ¶¶6-14.

18. The Petition for Leave to Intervene filed by TCG lists 17 disputed issues, some of which add new issues to those raised by FCCA and MCI. Although many of the issues relate generally to customer confusion, the avoidance of ILEC responsibilities, unfair competition or anti-competitive effects, others have no such nexus. See e.g. pp.7-8, ¶¶k,m,o.

THEREFORE, to the extent TCG's Petition is not dismissed in its entirety, those allegations which exceed the scope of the proceeding as raised by FCCA or MCI should be dismissed.

Dated this 16th day of January, 1998.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by United States mail or hand delivery this 6th day of January, 1998:

By Hand Delivery to:

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