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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

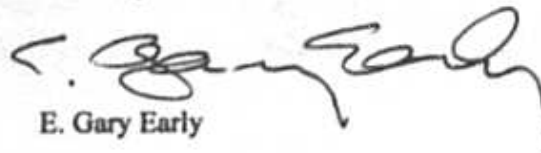
Re: Docket No. ~~97-1000-000~~

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 filed by Time Warner AXS of Florida, L.P. 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 _____
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FPC RECORDS/REPORTING

ORIGINAL

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 FILED BY
TIME WARNER AxS OF FLORIDA, L.P.**

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 Time Warner AxS of Florida, L.P. ("Time Warner"). In support of this Motion, BellSouth BSE, Inc. states as follows:

1. On January 12, 1998, Time Warner 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, Time Warner fails to make any allegation whatsoever as to the nature

or extent of the effect, if any, of the PSC's Proposed Agency Action on its substantial interests. As such, Time Warner has failed to demonstrate that its substantial interests have been affected or that it has standing to participate in this proceeding, and has failed to comply with the PSC's rules governing intervention.

4. Even if Time Warner had made allegations regarding its substantial interests, it would not have standing in this proceeding. In determining whether Time Warner 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. Time Warner'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 Time Warner's substantial interests are or will be affected was initially stated in Agrico Chemical Co. v. Department of Environmental Regulation, 405 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.

Time Warner has failed to satisfy both prongs of the Agrico test.

7. First, no injury in fact has been alleged by Time Warner. Second, Time Warner has not made any allegation as to whether the type of injury that it believes it will suffer is that which the applicable statute is intended to protect.

8. Time Warner has not alleged that the PSC failed to comply with the standards for granting an ALEC certificate. 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. Time Warner has not alleged that BellSouth BSE, Inc.'s application is deficient in any of the above respects.

9. As a consequence, Time Warner 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

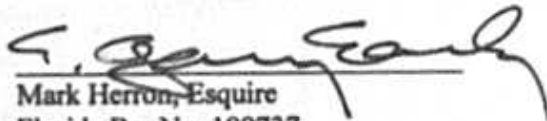
specifically enumerated in this subsection. (emphasis added).

10. Time Warner 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 Time Warner in this docket should be DISMISSED.

Dated this 16 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 16th day of January, 1998:

By Hand Delivery to:

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