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January 12, 1998

Ms. Blanco Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
Betty Easley Conference Center  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

via Hand Delivery

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

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies  
of the Response to Motion to Dismiss Petition Filed by Time Warner  
AxS of Florida, L.P. for the above-referenced docket. You will  
also find a copy of this letter enclosed. Please date-stamp this  
copy to indicate that the original was filed and return a copy to

ACK 1 me.

AFA 1

APP \_\_\_\_\_

CAF \_\_\_\_\_

CMU 1

CTR \_\_\_\_\_

EAG \_\_\_\_\_

LEG 2

LIN 5

OPC \_\_\_\_\_ BDA/kab

RCH \_\_\_\_\_ Enclosure: As noted

SEC 1

WAS \_\_\_\_\_ cc: All Parties of Record (w/enclosure)

OTH \_\_\_\_\_

If you have any questions regarding this matter, please feel  
free to contact me. Thank you for your assistance in processing  
this filing.

Respectfully,

Barbara D. Auger

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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 28, 1998

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**RESPONSE TO MOTION TO DISMISS PETITION  
FILED BY TIME WARNER A&S OF FLORIDA, L.P.**

Intervenor, TIME WARNER A&S OF FLORIDA, L.P., by and through undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Response to Applicant BELLSOUTH, BSE, INC.'s Motion to Dismiss and Supporting Memorandum of Law, and requests the same be DENIED. In support thereof, Intervenor states:

1. Intervenor's substantial interests are affected by the granting of a license to Bellsouth, BSE, Inc., in that:

(a) Granting Bellsouth an alternative local exchange carrier ("ALEC") license will reduce rather than increase competition among local exchange markets, contrary to the intent of both Chapter 364, Florida Statutes and the Telecommunications Act of 1996, 47 U.S.C. § 251, et. seq. (1996) (the "Act").

(b) The Act "provide[s] for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, (1996). If Bellsouth BSE is allowed to resell Bellsouth's services in Bellsouth's territory, not only would competitors be effectively locked out of the resale market, but the majority of consumers would be prevented

from benefitting from any lower prices that competition does bring. Under the statutory scheme created by the Act, as Bellsouth lowers its retail rate in response to competitive pressures, such as competition from ALEC's using their own facilities or unbundled network elements, all customers in the service category benefit from lowered rates. Having a Bellsouth ALEC, however, would relieve Bellsouth of any incentive to ever lower rates, contrary to the Act and chapter 364, Florida Statutes.

(c). The substantial interests of Intervenor are affected by any Commission action granting Bellsouth or its affiliates a certificate as an ALEC provider that allows Bellsouth to circumvent requirements of the Act. Intervenor is harmed by being denied the right to effectively compete by means of resale and is harmed by any action which allows Bellsouth to circumvent its obligations under the Act. Intervenor is harmed by being subject to competition from a Bellsouth affiliate providing service in Bellsouth territory but not required to comply with the obligations of an incumbent local exchange carrier under the Act.

2. Intervenor has standing to request a formal hearing under Fla. Stat. § 120.57 and Rule 25-22.039, Florida Administrative Code, as explained more fully in the Supporting Memorandum of Law, attached hereto.

## INTERVENOR'S SUPPORTING MEMORANDUM OF LAW

As a threshold matter, the question of whether Intervenor has standing to intervene in this action is governed by the bipartite standard set forth in Agrico Chemical Co. v. Dept. of Ent'l Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). Under Agrico, a person has standing to intervene in licensure proceedings if he can 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 which the proceeding is designed to protect.

Agrico Chemical Co., 406 So. 2d at 482. Intervenor meets the injury in fact requirement. By allowing Bellsouth to circumvent the requirements imposed upon incumbent local exchange carriers under the Act through the use of an affiliate as an "ALEC," competition among local exchange providers is substantially lessened. The effect of diminished competition in the local exchange market is to keep Bellsouth's market share high and reduce potential revenues to competing local exchange providers, such as Intervenor. Thus, Intervenor will suffer a very real economic harm by licensure of Bellsouth BSE.

The second part of the Agrico standing test requires that the injury complained of be "of a type or nature which the proceeding is designed to protect." Agrico Chemical Co., 406 So. 2d at 482. This test is not self-explanatory and requires further explanation. In a later case, Boca Raton Mausoleum, Inc. v. Dept. of Banking & Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987), the First District Court of Appeals elaborated upon the second requirement of the Agrico test:

in 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 itself contemplates consideration of such interests.

Boca Raton Mausoleum, Inc., 511 So. 2d at 1064. This is sometimes referred to as the "zone of

interest" test. See, e.g., Boca Raton Mausoleum, Inc., *supra*; Shared Services, Inc. v. Dept. of Health & Rehabilitative Svcs., 426 So. 2d 56, 58 (Fla. 1st DCA 1983). Under the zone of interest test, the party asserting standing must show that the licensing statute itself contemplates the consideration of competitive economic interests in the licensing determination.

In this case, the relevant statute, chapter 364, Fla. Stat., clearly contemplates the consideration of competitive interests in the determination whether to license ALEC's. The statute provides:

(4) The commission shall exercise its exclusive jurisdiction in order to:

• • •

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services . . .

(d) Promote competition by encouraging new entrants into telecommunications markets . . .

(f) Eliminate any rules and/or regulations which will delay or impair the transition to competition.

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

(h) Recognize the continuing emergence of a competitive telecommunications environment . . . .


Fla. Stat. § 364.01(4) (1997) (emphasis added). Thus, under chapter 364, clearly the Commission must consider competitive economic interests in deciding whether to license Bellsouth BSE as an ALEC. Furthermore, the Federal Telecommunications Act, *supra*, also contemplates the consideration of competitive interests in licensing determinations. Indeed, when it enacted the Act, Congress intended to increase competition as a whole in the telecommunications industry, see Western PCSII Corp. v. Extraterritorial Zoning Authority of City & County of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997), as well as to foster competition in the provision of local exchange services. See TE South, Inc. v. Morrison, 957 F. Supp. 800 (D. Va. 1997). Accord H.R. Rep. No.

104-458 (1996) (The Act "provide[s] for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."). The federal Act, coupled with chapter 364, clearly describe a zone of interest which is designed to protect competitors of Bellsouth and to foster competition among local exchange providers. To refuse to allow Intervenor to participate in this proceeding would have the untoward result of allowing Bellsouth to thwart the purposes of federal and state law without any meaningful opposition. Surely the legislature and Congress could not have intended such an anomalous result.

If the Commission is to make an informed and reasoned decision as to whether to grant Bellsouth BSE an ALEC certificate, all evidence which bears upon the continued provision of competitive local exchange service must be considered. Thus, Intervenor's participation in this proceeding is necessary to accomplish the legislature's and Congress' respective purposes in fostering competition among local exchange providers.

WHEREFORE, Intervenor requests that Bellsouth, BSE's Motion to Dismiss Petition Filed by Time Warner AxS of Florida, L.P., be DENIED.

RESPECTFULLY SUBMITTED, this 28 day of January, 1998,

  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been served by U.S.

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