

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of AGI Publishing, Inc.)
Against GTE Florida Incorporated,)
GTE Telephone Operating Companies for)
Violation of Section 364.08 and 364.10,)
Florida Statutes, and Request for Relief)
_____)

Docket No. 990132-TP
Filed: March 1, 1999

**GTE FLORIDA INCORPORATED'S OPPOSITION TO PETITION
OF AGI PUBLISHING, INC. D/B/A VALLEY YELLOW PAGES
FOR DECLARATORY STATEMENT**

GTE Florida Incorporated (GTE) asks the Commission to deny the Petition of AGI Publishing, Inc. d/b/a Valley Yellow Pages for Declaratory Statement (Petition). The Petition is procedurally improper and substantively meritless.

**I. Valley Can't Use Two Procedural
Vehicles to Seek the Same Relief.**

Valley's Petition asks the Commission to interpret Sections 364.08 and 364.10 of the Florida Statutes to find that GTE must provide billing and collection service to Valley for its directory advertising operation. This is exactly the same relief Valley asked for in its Complaint filed against GTE in this same docket four days before the Petition, and it is based on exactly the same factual situation that underlies the Complaint. (See Complaint of AGI Publishing, Inc. Against GTE Florida Inc., GTE Telephone Operating Companies for Violation of Sections 364.08 and 364.10, Florida Statutes, and Request for Relief, filed Feb. 5, 1999.)

Valley is entitled to only one procedural vehicle to bring its dispute with GTE before the Commission. As a matter of fairness, judicial economy, and plain common sense, a party cannot be permitted two chances at obtaining the same relief.

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The Commission's Rules support this conclusion. Rule 25-22.006, "Initiation of Formal Proceedings," subsection (2), states that: "The initial pleading shall be entitled as either an application, petition, complaint, order, or notice" [emphasis added]. The Rule does not contemplate initial pleadings, or simultaneous petitions and complaints, or other types of multiple, initial filings concerning the same matter.

Each option for initiating an action is associated with its own, particular timelines and procedures. For example, a complaint proceeding typically entails discovery, prefiled testimony, and a hearing, among other things. A petition, on the other hand, will not entitle a party to this full procedural complement, but will usually lead to a quicker resolution of the dispute.

In considering its options for bringing a dispute before the Commission, the moving party is responsible for carefully considering its ultimate objectives in light of all the attributes, both potentially positive and negative, of each initial filing alternative. A party must make a strategic litigation decision and stick with it. It cannot, as Valley has done, try to obtain all of the benefits of multiple procedural options, thereby avoiding all of the drawbacks associated with each of them. At the very least, this is unfair to the moving party's opponent and an unnecessary burden on the Commission's (and in this case, GTE's) resources. At the worst, it is an abuse of process. This is reason enough to deny Valley's Petition and to dismiss its Complaint.

II. Valley's Petition is Meritless.

As noted, Valley's Petition seeks the same relief as Valley's Complaint. Both ask the Commission to interpret Sections 364.08 and 364.10 to find that GTE must provide

billing services for yellow pages directory advertising. In its Motion to Dismiss Valley's Complaint, GTE explained that this Commission has never come close to reading the statutes in the way Valley urges. In fact, the extreme result Valley seeks—forcing GTE to provide a non-monopoly, non-telecommunications service to a non-telecommunications, non-regulated provider—is unprecedented in any state or federal law or regulation.

GTE has already responded once to Valley's arguments (in its Motion to Dismiss Valley's Complaint). However, it is forced to repeat much of that response here because Valley has filed essentially the same pleading twice.

Valley's Petition concerns billing for yellow pages advertising. Valley states that it publishes yellow pages directories throughout the nation and that GTE has provided billing and collection services to Valley under an agreement scheduled to terminate December 31, 2000. Valley states further that GTE has notified Valley that it intends to terminate the contract as of March 31, 1999. (Petition at 2.) This factual account is accurate, but incomplete. Valley has left out the most important detail. That is, the contract contains the following provision: "Either party may terminate this Agreement for any reason upon one hundred eighty (180) Calendar Days after written notice."

This provision entitled GTE to terminate Valley's contract. Valley knows full well about this provision, and agreed to it before the contract was executed. Indeed, Valley has not alleged that GTE violated the contract in any way.

Lacking any legitimate contract claim, Valley has turned to the Commission to seek reformation of its agreement with GTE. Valley wants the Commission to effectively change its contract with GTE to remove the provision allowing either party to terminate "for any

reason" (or perhaps just eliminate GTE's right to terminate; Valley would presumably not object to preserving its own right to end the contract). The Commission has no authority to grant this kind of relief.

The Commission does not have jurisdiction over the contract at issue, and so cannot alter that contract. The agreement concerns billing for Valley's customers' advertising in Valley's yellow pages directories. Yellow pages and yellow pages billing are neither regulated nor considered telecommunications services here in Florida or, to GTE's knowledge, anywhere else. There is no filing requirement here for yellow pages billing contracts, as there is for telecommunications contracts. (See Fla. Stat. Ch. 364.07.) No federal or state law or regulation—and certainly not Sections 364.08 or 364.10—requires GTE to offer billing to yellow pages providers or dictates the terms under which it may choose to do so.

Section 364.08 states:

(1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time. A telecommunications company may not refund or remit, directly or indirectly, any portion of the rate or charge so specified or extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. However, it shall be lawful for the commission to authorize employee concessions if in the public interest.

Section 364.10 states:

(1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(2) The prohibitions of subsection (1) notwithstanding, a telecommunications company serving as carrier of last resort shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff and a preferential rate to eligible facilities as provided for in part II.

Valley believes that these statutes "entitle Valley to the non-discriminatory provision of billing and collection services by a monopoly provider." (Petition at 3.) Accepting Valley's reading of Sections 364.08 and 364.10 would require GTE to provide billing and collections for yellow pages advertising, at tariffed rates, to all entities that want this service.

There is no legal or policy basis for this extreme outcome. Sections 364.08 and 364.10 embody the traditional, common law obligations that apply to communications common carriage in Florida (and, for that matter, everywhere in the United States). They pertain only to telecommunications services provided by telephone utilities. The Commission has never interpreted them more expansively, as Valley urges it to do, to extend beyond telecommunications common carriage to any non-telecommunications, non-regulated features or services a telephone company might provide. To the contrary, the Commission has made clear that its jurisdiction (and even more specifically, Section 364.08's nondiscrimination obligation) depends on "the critical issue" of whether the service or product at issue "constitutes telecommunications services for hire." Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief,

Regarding Intrastate Telecomm. Services Using the Internet, by America's Carriers Telecommunications Ass'n, 96 FPSC 12:385 (1996) (Commission refused to take jurisdiction over a dispute involving Internet telephony software).

Neither yellow pages advertising nor billing for such advertising is a "telecommunications service for hire." Yellow pages involves publishing and advertising, not telecommunications. By extension, there is no telecommunications component involved in billing for yellow pages advertisements. Billing services for non-telecommunications products and services are not subject to state or federal telecommunications regulation. GTE's billing service tariff in Florida applies to only telecommunications access service; Valley inaccurately implies that the Commission's alleged "current proposals regarding regulation of billing and collection activities" (Valley Petition at 3-4) evidence some Commission intent to expansively assert jurisdiction over billing and collection activities. GTE is unaware of any proposed rules concerning billing and collection; in any case, it is certain that the Commission is not considering any policy changes as drastic as Valley recommends. GTE guesses that Valley is referring to ongoing Commission discussions exploring anti-cramming measures. If so, Valley has undermined its own arguments. As GTE observes below, forcing GTE to reinstate billing for non-telecommunications services, as Valley proposes, can only increase cramming incidents.

At the federal level, all billing for even telecommunications services was detariffed by the FCC over 12 years ago. Detariffing of Billing and Collection Services, 102 F.C.C. 2d 1150, 1169 (1986). In doing so, the FCC held that billing and collections is not a

communications service and does not qualify as communications common carriage. The FCC found, rather, that it is an administrative service that was not part of the then-existing bottleneck monopoly since it could be done by a carrier itself or obtained from other sources. Given that billing for even communications services is not a communications service, it follows that billing for non-communications services is not a communications service.

Valley makes the mistake of assuming that every service a telecommunications company provides must necessarily be a telecommunications service. If that were true, the Commission's entire regulatory scheme would need to be overhauled. Many certificated "telecommunications companies" also engage in businesses that are not regulated or that are regulated differently than their telecommunications businesses. For instance, numerous alternative local exchange carriers, which are telecommunications companies, are also cable television companies. But the Commission has not attempted to impose common carrier-type obligations (such as those reflected in Sections 364.08 and 364.10) on their non-telecommunications, cable operations. It would be just as inappropriate to impose common carrier obligations on GTE's non-telecommunications, yellow pages billing operations.

Moreover, Valley's arguments cannot be reconciled with the language and purpose of Section 364.08. As the Commission has repeatedly recognized, that provision is, first and foremost, the source of the common carrier tariffing obligation—an obligation that does not apply to billing for yellow pages advertising.

In the Commission's own words, "Section 364.08, Florida Statutes, prohibits a company from charging any rate for a service that is not published and on file in that company's approved tariffs. This provision is designed to prohibit discrimination between customers and insure that all customers have notice of the Commission approved rates and services. As a result, a company is bound to the terms set forth in its tariffs and no company has the authority to unilaterally waive the provisions of its tariffs." (Request by Biz-Tel to Have Southern Bell's Minimum Period for Access Charges Waived, Order No. 18462, 87-11 FPSC 342 (1987). See also Petition for Declaratory Statement Concerning Potential Service to Dog Island by St. Joseph Tel. & Tel. Co., 95 FPSC 466 (1995) (Section 364.08 means that "St Joseph may not deviate from scheduled rates."); Initiation of Show Cause Proceedings Against Southnet Services, Inc. for Violation of Rule 25-24.485(1)(I), F.A.C., by Charging in Excess of Its Tariff, 93 FPSC 349 (1993) ("Section 364.08(1) prohibits telecommunications companies from charging rates inconsistent with their duly filed tariffs."))

Because there is no requirement to tariff billing for yellow pages advertising, there is no way to apply Section 364.08 to Valley's dispute with GTE. Indeed, the Biz-Tel decision once again makes clear that that section is only germane to "Commission approved rates and services." The Commission does not set rates for or approve yellow pages billing services.

Valley apparently would like to change this situation. Not only would it have the Commission oversee the rates and terms for yellow pages billing, but it would, more fundamentally, require the Commission to force GTE to provide yellow pages billing to any

directory publishing firm that wants it. This is an extraordinary suggestion, and one that the Commission lacks the authority to implement.

The Commission could entertain Valley's Petition only if billing for yellow pages advertising were a monopoly, telecommunications service and only if yellow pages were also a telecommunications service. These jurisdictional parameters are evident in the Commission's decision in Investigation into the Regulatory Safeguards Required to Prevent Cross-Subsidization by Telephone Companies, 93 FPSC 7:272 (1993). There, the Commission declined to find that a local exchange carrier had to offer even monopoly, telecommunications elements to non-affiliates if it made them available to affiliates. The Commission made clear that any future policy decisions "relating to the availability of monopoly services and inputs" would need to consider the Legislature's directive of "encouraging competition in the telecommunications industry where it is deemed to be in the public interest." Id. at 285.

Valley's Petition has nothing to do with either "the telecommunications industry" or "monopoly services and inputs." It concerns instead the directory publishing industry. Valley claims that withdrawal of GTE's billing services will result in a "significant economic detriment to Valley." (Petition at 3.) Even if that were true, this information is of no concern to the Commission. This Commission has no mandate to encourage competition in the directory publishing industry; indeed, it could not, as it has no jurisdiction over such non-telecommunications, non-regulated markets. It has no responsibility to ensure the financial well-being of any company, let alone a non-telecommunications company.

If the Commission interprets Sections 364.08 and 364.10 in the manner Valley suggests, GTE (and other ILECs) would have to provide its billing services to every company that might find them merely convenient or useful. As GTE recently told the Commission in the context of anti-cramming discussions, GTE has terminated third-party billing for all non-telecommunications services. If the Commission accepts Valley's arguments, GTE will have to change its current policy to offer billing for these non-telecommunications services (including, for example, psychic club fees, prescription club fees, and sports line chat fees). If this is to be the case, the Commission can expect a dramatic rise in the number of cramming complaints.

Valley's statutory reading would, moreover, require GTE to provide to non-GTE third parties every service or function it provides to its affiliates, including administrative, non-monopoly elements. This extreme outcome would be unprecedented in any federal or state regulatory scheme.

GTE has no monopoly over billing for directory advertising, as Valley itself seems to acknowledge. It does not allege that GTE's billing service is necessary or essential to its directory operations--merely that it is "the most cost-effective and efficient alternative." Even if this is true (which GTE doubts), this has never been and is not now the standard in Florida or anywhere else for forcing one company to provide services to another.

Valley has numerous billing alternatives to GTE. Because directory advertising is not a telecommunications service, billing for it does not require any recording, rating or other telecommunications-related functions. When Valley sells an advertisement, it obtains all the information necessary to bill for that advertisement; it needs nothing from

the billing agent. From the consumer's perspective, purchasing a yellow pages advertisement is no different from buying any other product. Its total price is known at the time of purchase and payment might be made at the time of sale or in installments.

Billing for directory advertising is thus a relatively simple matter. Valley could bill for its own advertisements or it could contract with any company that performs billing—not just the numerous companies that offer billing for telecommunications services. Yellow pages advertisements could, for example, be billed by Visa, Mastercard, American Express, Sears, or any other credit card company. There is no legitimate reason to force GTE to do it.

Indeed, Valley has apparently found other billing options. The billing contract with Valley included not just GTE Florida Incorporated, but GTE South Incorporated and Contel of the South, Inc., as well. Although Valley states that it publishes yellow pages directories "throughout the nation" (Complaint at 2), it used the contract at issue to bill only Florida directory advertising charges. Since it didn't need GTE's billing system in the other states covered by the contract—including Alabama, Kentucky, North Carolina, South Carolina, Virginia, Illinois, Georgia, Indiana, and Michigan--the only reasonable conclusion is that it's not a bottleneck facility.

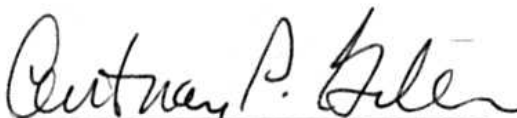
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Valley asks the Commission to find that Sections 364.08 and 364.10 require GTE to offer "non-discriminatory" billing and collection services for Valley's directory advertising. (Petition at 4.) Granting Valley's Petition would require the Commission to

apply Sections 364.08 and 364.10 to find that billing for yellow pages advertising is (1) regulated; (2) tariffed, and (3) a telecommunications service. Because it is none of these things, the Commission cannot issue the statement Valley seeks. Thus, its Petition must be denied.

Respectfully submitted on March 1, 1999.

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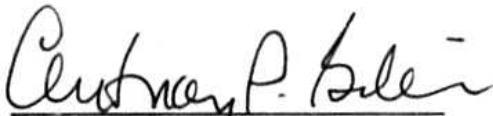
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Opposition to Petition of AGI Publishing, Inc. d/b/a Valley Yellow Pages for Declaratory Statement in Docket No. 990132-TP were sent via U.S. mail on March 1, 1999 to:

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