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April 29, 1999

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records and Reporting
2540 Shumard Oak Drive
Gerald L. Gunter Building
Tallahassee, Florida 32399-0850

Re: Docket No. 980253-TX

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and seven copies of the Florida Competitive Carriers Association's Responsive Comments in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pr
Enclosures

AFA
APP
CAF
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to initiate rulemaking, pursuant to Section 120.54(7), F.S., to incorporate "Fresh Look" requirements in all incumbent local exchange company contracts, by Time Warner AxS of Florida, L.P. d/b/a Time Warner Communications.	)	Docket No. 980253-TX Filed: April 29, 1999

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S
RESPONSIVE COMMENTS ON PROPOSED FRESH LOOK RULE

Pursuant to Order No. PSC-99-0547-PCO-TX, the Florida Competitive Carriers Association (FCCA)[1] files the following responsive comments in regard to the Commission's proposed Fresh Look rule.

Introduction

1. As the FCCA stated in its initial comments filed on April 23, 1999, the purpose of a Fresh Look rule is to allow captive customers a meaningful opportunity to opt out of contracts entered into during a time when there was little or no meaningful competition making the incumbent monopoly provider the only option for captive customers. This policy will foster competition in the state by helping to remove current barriers to competition.

2. Not surprisingly, because the proposed rule will provide customers with competitive choice, some of the incumbent local exchange companies (ILECs), most notably BellSouth Telecommunications, Inc. (BellSouth) and GTE Florida Incorporated (GTE),[2] have raised a host of objections to the proposed rule. However, such objections lack merit for legal

[1] The FCCA includes numerous individual competitive carriers as well as the Telecommunications Resellers Association.

[2] Sprint, with minor changes, supports the proposed rule.

and policy reasons and should be rejected by the Commission.

3. As a preliminary matter, the FCCA observes that BellSouth and GTE apparently miss the entire point of the proposed rule, which is to provide captive customers with competitive choice. While the proposed rule's purpose is to allow consumers who entered into contracts at a time when no competitive options existed the ability to avail themselves of such options today, BellSouth characterizes these contracts as executed by customers "despite the availability of competitive alternatives."[3] Similarly, GTE witness Robinson says the proposed rule would force the "ILECs to hand over their customers to competitors." [4] However, with the ILECs controlling 98.2% of the local market[5], it is readily apparent that competitive alternatives (even today) are limited, at best. As the Commission has recognized, the contracts at issue pursuant to the proposed rule were executed before competitive alternatives existed.

4. Further, a Fresh Look only provides customers with the opportunity to consider competitive alternatives. While such consideration includes the option to terminate an existing contract, that will only take place in the event an ILEC competitor offers a service with better characteristics (e.g., value, technology, customer support) than what is being provided under the existing contract. GTE's statement that such consideration of competitive alternatives is tantamount to handing over its customers to competitors speaks volumes as to its lack of familiarity with (and aversion to) competition in the local market. As any of the members of FCCA can attest, nothing is "handed over" in a competitive market.

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[3] BellSouth comments at 1.

[4] Robinson direct testimony at 6.

[5] Florida Public Service Commission's December 1998 Report on Competition in Telecommunications Markets in Florida, p. 46.

The Proposed Rule is Within the Commission's Authority

5. BellSouth[6] argues that somehow the proposed rule is beyond the Commission's authority.[7] However, as BellSouth recognizes, the Commission was given specific statutory authority to regulate telecommunications service contracts. Section 364.19, Florida Statutes, states:

> The commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.

Clearly, this statutory authority permits the Commission to take the action contemplated by the proposed rule. As the Commission noted in its Notice of Rulemaking, Order No. PSC-99-0539-NOR-TX, the proposed rule permits the termination of contracts "which were entered into prior to switch-based substitutes for local exchange telecommunications services." Such action is consistent with the regulation of telecommunications service contracts.

6. Additionally, the Commission has authority to "[e]ncourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services." § 364.01(4)(b). The Commission is also given authority to "[p]romote competition by encouraging new entrants into telecommunications markets. . . ." § 364.01(4)(d). These provisions provide additional authority for the Commission's action because

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[6] GTE makes the same claim in the testimony of witness Robinson with no support whatsoever.

[7] BellSouth also says the rule would "require massive intervention by the Commission into private contracts" and that the rule is "obtrusive." BellSouth comments at 2. Because the rule is primarily self-executing, little intervention, massive or otherwise, would be required by the Commission.

they make it obvious that the legislative mandate to the Commission is to make competitive alternatives available to consumers. The longer the monopoly contracts at issue remain in place, the longer it will be until the Commission fulfills its legislative mandate, both on a federal and state level.

7. This Commission has recognized the wisdom of a Fresh Look policy in the area of private line and special access services. In approving a Fresh Look window in *In re: Petition for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Company Central Offices by Intermedia Communications of Florida, Inc.*, Docket No. 921074-TP, Order No. PSC-94-0285-FOF-TP, the Commission said:

> [W]e find that introducing competition, or extending the scope of competition, provides end users of particular services with opportunities that were not available in the past. However, these opportunities are temporarily foreclosed to end users if they are not able to choose competitive alternatives because of substantial financial penalties for termination of existing contract arrangements. A Fresh Look proposal will enhance an end user's ability to exercise choice to best meet its telecommunications needs.

A similar rationale is applicable in this docket.

8. Further, Ohio,[8] New Hampshire[9] and Wisconsin[10] have adopted Fresh Look policies.

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[8] *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange and Other Competitive Issues*, Case No. 95-845-TP-COI (P.U.C.O. June 12, 1996).

[9] *In the Matter of the Petition of Freedom Ring Communications, L.L.C. Requesting that the Commission Require that Incumbent LECs Provide Customers with a Fresh Look Opportunity*, Docket No. DR96-420, Order 22,798 (N.H.P.U.C. Dec. 8, 1997).

[10] *Supplemental Findings of Fact, Conclusions of Law and Interim Order re Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, Docket No. 05-TI-138 (Wis. P.S.C. Sept. 19, 1996).

The Proposed Rule is Constitutional

9. BellSouth[11] also argues that the proposed rule would result in the "abrogation of contracts" and a "taking" and is therefore unconstitutional. These constitutional claims must be rejected outright. The Fresh Look rule would not work an abrogation of contracts. Rather, regulatory circumstances have changed dramatically since the contracts were entered into by captive customers and the proposed rule would allow consumers to participate in the competitive marketplace--a choice unavailable to them when the contracts in question were executed.

10. It is well-settled law that contracts with public utilities are subject to modification when such modification is in the public interest. *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U.S. 379 (1923). The Supreme Court of Florida, in affirming a decision of this Commission, has held:

> The Commission's decision [to modify a contract] was based upon the well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts.

H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979).

11. This Commission itself has stated:

> As a general principal of law. . ., all contracts with public utilities are subject to the police of the State to modify the contract in the public interest without constitutional impairment of contract.

In re: Application of South Palm Beach Utilities Corporation to Amend its Service Availability Rules and Main Extension Policy in Palm Beach County, Florida, Docket No. 750-W, Order No.

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[11] Again, GTE makes the same claims, with no support.

8058. Therefore, because the proposed rule is in the public interest, as evidenced by both state and federal legislation, there can be no unconstitutional abrogation of contracts.

12. Similarly, the proposed rule does not work a constitutional taking. The standard to determine a taking in the regulatory context is very similar to the public interest standard applicable to the ILECs' abrogation of contract claims discussed above. In *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977), relied upon by BellSouth, the Court stated:

> The states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired or even destroyed as a result . . . Legislation must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.

Accord, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).[12] The rule proposed by the Commission, as BellSouth appears to recognize, fosters the public purpose of encouraging competition. Therefore, its adoption would not result in an unconstitutional taking.

The Proposed Rule is Justified

13. Finally, BellSouth takes several "potshots" at the proposed rule by arguing that it is unnecessary because competition existed at the time the captive customers entered into their contracts with the ILECs. However, the Commission is well aware of the nascent state of local competition in the state. Any suggestion that competitive alternatives have flourished in years past must be rejected.

14. Similarly, the fact that competitors can resell CSAs held by the ILECs does not

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[12]The cases relied on by BellSouth, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), and *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470 (1986), do not deal with regulatory taking in the context of a contract. But note that *Hawaii Housing Auth.* and *Keystone* use the same public purpose standard as described in *U.S. Trust*.

obviate the need for a Fresh Look rule. Reselling an existing CSA still prohibits an end user from realizing the benefits of competition. Existing CSAs are based on services and the underlying technologies made available by the monopoly provider of telecommunications service. By providing a true "Fresh Look," in which customers can actually select a new provider of local service, such customers will be able to enjoy the innovation, advance technology, and competitive pricing made available by the introduction of competition.

Conclusion

15. The Commission has authority to enact the proposed Fresh Look rule and should do so expeditiously to encourage competition, as required by both state and federal law.

WHEREFORE, the Commission should either enact the proposed Commission rule with the changes suggested by the FCCA in its April 23 filing, or it should enact the rule proposed by the FCCA.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Comments of the Florida Competitive Carriers Association** has been furnished by U.S. Mail or Hand Delivery(*) this **29th** day of **April, 1999**, to the following:

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