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March 6, 2000

Ms. Ann Cole, Clerk
State of Florida
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

980253-TX

Re: GTE Florida Incorporated v. Florida Public Service Commission - Case No. 99-5368RP; BellSouth Telecommunications Inc. v. Florida Public Service Commission - Case No. 99-5369RP

Dear Ms. Cole:

Please find enclosed for filing an original and one copy of GTE Florida Incorporated's Response in Opposition to Time Warner Telecom of Florida, L.P.'s Motion for Reconsideration in the above matters.

Also enclosed for filing are an original and one copy of GTE Florida Incorporated's Response in Opposition to Time Warner Telecom of Florida, L.P.'s Motion for Leave to File Amended Petition for Leave to Intervene and Answer to Time Warner Telecom of Florida L.P.'s Amended Petition for Leave to Intervene.

Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2617.

Sincerely,

Kimberly Caswell

KC:tas
Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Response in Opposition to Time Warner Telecom of Florida, L.P.'s Motion for Reconsideration, GTE Florida Incorporated's Response in Opposition to Time Warner Telecom of Florida, L.P.'s Motion for Leave to File Amended Petition for Leave to Intervene and Answer to Time Warner Telecom of Florida L.P.'s Amended Petition for Leave to Intervene in Case Nos. 99-5368-RP and 99-5369-RP were sent via U.S. mail on March 6, 2000 to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INCORPORATED, Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5368RP
BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5369-RP

GTE FLORIDA INCORPORATED'S RESPONSE IN OPPOSITION TO TIME WARNER TELECOM OF FLORIDA, L.P.'S MOTION FOR RECONSIDERATION

In accordance with Rule 28-106.204(1), GTE Florida Incorporated (GTE) responds to Time Warner Telecom of Florida, L.P.'s (Time Warner) Motion for Reconsideration of the Judge's February 18, 2000 Order denying Time Warner's Petition to Intervene (Petition) in this proceeding. Time Warner asks the Judge to set aside that Order. As GTE explains below, Time Warner's request should be denied for a number of reasons.

Time Warner's Motion is somewhat difficult to decipher, but its argument appears to be that the Judge prematurely denied Time Warner's Petition to Intervene. This argument rests on the premise that GTE's and BellSouth's answers to Time Warner's Petition should have been considered motions to dismiss. If they were motions to dismiss,

Time Warner would have had 12 days, until February 20 (not February 21, as Time Warner indicates), to respond to them. Because the Judge issued her order on February 18, Time Warner apparently believes that she deprived Time Warner of its opportunity to respond to GTE's and BellSouth's "motions to dismiss."

This convoluted reasoning deserves no serious consideration. It is not, as Time Warner contends, "unclear whether the Answers were considered to be motions for dismissal or pleadings." (Time Warner Motion at 4.) They were clearly answers, as contemplated by Florida Administrative Code Rule 28-106.202. GTE labeled its filing an Answer. BellSouth's was called a Response. If GTE's and BellSouth's filings were intended to be motions to dismiss, they would have been called motions to dismiss.

It is also clear that the Judge did not consider GTE's and BellSouth's filings to be motions, because she did not treat them as motions. A motion, by its nature, seeks some ruling on the motion itself. GTE and BellSouth requested no rulings on their pleadings and, appropriately, the Judge issued none. There was never anything for the Judge to grant or deny but Time Warner's own Petition.

As Time Warner itself acknowledges, the Rules provide no opportunity for an answer to an answer: "The filing of a reply to an answer is not addressed in the Florida Administrative Code, therefore, any reply must be considered discretionary." (Time Warner Motion at 4.) Time Warner had no right to respond to GTE's and BellSouth's answers. Even if the Judge had the discretion to allow an answer to an answer, Time Warner never asked the Judge for leave to make such a filing.

In short, the Judge could not have compromised Time Warner's right to respond to GTE's and BellSouth's filings, because Time Warner had no such right.

In addition, Time Warner's Motion is, itself, procedurally ill-founded. Although it is termed a Motion for Reconsideration, it never alleges that the Order overlooked or failed to consider anything–as a motion for reconsideration must prove if it is to succeed. *See, e.g., Diamond Cab Co. of Miami et al. v. King,* 146 So. 2d 889, 891 (1962). Indeed, Time Warner doesn't seek reversal or revision of the underlying Order, which is the customary objective of a reconsideration request. Rather, it seeks to set aside the Order on procedural grounds.

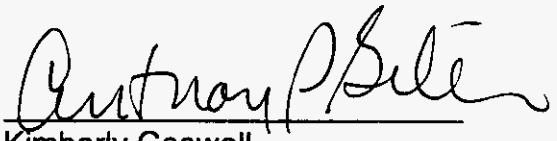
Moreover, it is not clear what would happen if the Motion did succeed. Even if the Judge agreed that GTE's and BellSouth's filings were motions to dismiss in disguise, the 12-day period for response has long since passed. Time Warner contends that it had until February 21 to respond to GTE's and BellSouth's filings, but proffered nothing on that date. If its Motion were granted, would it seek to respond to GTE's and BellSouth's answers at this late date?

Finally, Time Warner has asked for both reconsideration and amendment of its Petition. (Time Warner Telecom of Florida, L.P.'s Motion for Leave to File Amended Petition for Leave to Intervene, Feb. 22, 2000; and Time Warner Telecom of Florida, L.P.'s Amended Petition for Leave to Intervene, Feb. 22, 2000.) In other words, it is asking the Judge to act on two different versions of the Petition at the same time. Because its ultimate goal is the same (i.e., intervention), Time Warner should be required to choose only one procedural vehicle to obtain it.

In any event, Time Warner has, in effect, replied to GTE's and BellSouth's answers. It did so in the form of its Amended Petition for Leave to Intervene, filed the same day as the Motion for Reconsideration. That amended petition is plainly an attempt to respond to GTE's and BellSouth's answers to Time Warner's original petition. There is no need to give Time Warner yet another opportunity to do so.

In short, the Judge made no procedural or other error in issuing her Order, so Time Warner's Motion for Reconsideration should be denied.

Respectfully submitted on March 6, 2000.

By: 
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INCORPORATED, Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5368RP
BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5369RP

GTE FLORIDA INCORPORATED'S RESPONSE IN OPPOSITION TO TIME WARNER TELECOM OF FLORIDA, L.P.'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR LEAVE TO INTERVENE
AND
GTE FLORIDA INCORPORATED'S ANSWER TO TIME WARNER TELECOM OF FLORIDA L.P.'S AMENDED PETITION FOR LEAVE TO INTERVENE

With this filing, GTE Florida Incorporated (GTE) responds, in turn, to two Time Warner Telecom of Florida, L.P. (Time Warner) submissions, both made on February 22, 2000: (1) Time Warner's Motion for Leave to File Amended Petition for Leave to Intervene; and (2) Time Warner's Amended Petition for Leave to Intervene.

I. GTE'S OPPOSITION TO TIME WARNER'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR LEAVE TO INTERVENE

GTEFL opposes the Motion for Leave to File Amended Petition for Leave to Intervene (Motion). On February 18, 2000, the Judge denied Time Warner's original Petition for Leave to Intervene in this proceeding. Time Warner now asks the Judge to

allow it to amend its Petition; it correctly recognizes that amendment may only be made by designation of the presiding offer. (Rule 28-106.202, F.A.C.) Nevertheless, Time Warner argues that it *must* be given the opportunity to amend its petition. To this end, it cites Rule 28-106.201(4), which states:

> A petition shall be dismissed if it is not in substantial compliance with subsection (2) of this rule or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Time Warner cannot rely on this Rule to demand a chance to amend its Petition. While it is true that Time Warner's Petition substantially failed to comply with the pleading requirements in subsection (2), that was not its only deficiency. The cited Rule 28-106.201(4) only applies to instances of non-compliance with subsection (2). It does not permit amendment in an attempt to cure *substantive* defects. In this regard, GTE and BellSouth explained in their answers to Time Warner's Petition that Time Warner lacks standing to intervene in this proceeding. So, aside from Time Warner's failure to satisfy the procedural requirements, it cannot meet the more fundamental standing requirement. The Judge presumably considered the substance of Time Warner's Petition in denying that Petition, particularly because the Order notes that she "reviewed the record."

In any event, the lack of standing is a defect so plain and so basic that it cannot be cured, regardless of how many times Time Warner amends its Petition. As Time Warner's Amended Petition reveals—even more clearly than the original Petition--Time Warner cannot alter the fact-that it is not "injured" by any agency action. GTE explains this point in more detail, below, in its Answer to Time Warner's Amended Petition to

Intervene. That explanation underscores that there would be no point in accepting the Amended Petition Time Warner has submitted when it will only need to be denied once again.

Finally, if the Order were intended to be issued without prejudice to Time Warner's filing another Petition, the Judge would likely have said so.

For all these reasons, GTE asks the Judge to deny Time Warner's Petition for Leave to File Amended Petition for Leave to Intervene.

II. GTE'S ANSWER TO TIME WARNER'S AMENDED PETITION FOR LEAVE TO INTERVENE

Even if Time Warner is permitted to file its Amended Petition for Leave to Intervene, that Petition, like Time Warner's original intervention request, should be denied.

As noted above, Time Warner's Petition suffered from substantive, as well as procedural, defects. Time Warner has now attempted to comply with the pleading requirements, but it cannot cure the substantive problems with its intervention request. In fact, GTE does not believe the Rules provide any opportunity to present new or different allegations or arguments going to the substantive standing question. Rather, section 28-106.201(4)--which Time Warner claims as the basis for filing the Amended Petition--contemplates only attempts to cure pleading deficiencies.

In any event, Time Warner's Amended Petition recites, almost verbatim, the standing argument made in the original, unsuccessful Petition. Again, it asserts that "[t]he fact that a person's conduct will be regulated by proposed rules is sufficient to establish that their substantial interests will be affected." (Amended Petition at 5.)

As GTE pointed out in response to Time Warner's original petition, the proposed fresh look would not in any way "regulate" Time Warner's conduct; it would not require Time Warner to do anything differently than it does today. Adoption of the rule would not change at all the nature or degree of the Commission's existing oversight of alternative local exchange carriers like Time Warner. (GTE Answer at 2.)

The only new substantive material Time Warner adds to its Amended Petition is a discussion of the legal requirements for standing in an administrative proceeding. (Amended Petition at 6.) If anything, this discussion further highlights the weaknesses of Time Warner's position.

As Time Warner notes, Florida Statutes section 120.56(1)(e) allows "substantially affected persons" to join the proceeding as intervenors. Time Warner also correctly states that "[t]o demonstrate standing in an administrative proceeding, a petitioner must demonstrate that it will suffer injury in fact which is of sufficient immediacy to entitle petitioner to a hearing, and that Petitioner's substantial injury is of a type of nature which the proceeding is designed to protect." (Amended Petition at 5.)

This is commonly known in the case law as the *Agrico* two-prong standard, for the case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). Under the first, or "injury-in-fact," prong, the petitioner must show "either (1) that he had sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action." *Village Park Mobile Home Assn., Inc., et al. V. State of Florida, Dept. of Bus. Regulation, et al.*, 506 So. 2d 426 Fla. 1st DCA 1987). The second, or "zone-of-interest," prong requires the petitioner to allege how the injury

claimed is the type which the proceeding at the Commission was designed to protect against. *International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n*, et al., 561 So. 2d 1224 (1990).

Time Warner can satisfy neither prong of the standing test. As to injury in fact, Time Warner offers that "invalidation of the proposed rules may result in a significant financial impact on Time Warner," (Amended Petition at 7), and that Time Warner will be denied the opportunity to compete for certain ILEC contract customers, "thereby foregoing potential increases in revenues and market share." (Amended Petition at 8).

In other words, Time Warner alleges that it will be harmed by the status quo, which is the absence of a fresh look rule. The claimed injury thus would not occur "as a result of the challenged agency's action," but rather as a result of the DOAH's invalidation of the proposed fresh look rule.

GTE is unaware of any law indicating that maintenance of the status quo can be considered an "injury" at all. In fact, this concept makes no sense in terms of the standing law, which requires a real, direct, and immediate impact on the petitioner. The status quo cannot have any kind of "impact" on Time Warner because an impact, by definition, involves some kind of change. Nothing will change if the rule is not adopted.

Even if the continued absence of a fresh look rule could somehow be deemed an "injury," it is not the kind of effect that is real, direct, or immediate enough to ground standing. Time Warner is not complaining about a potential loss of any kind; rather, it claims that it may not obtain a potential future benefit (increased revenues or market share) if the rule is invalidated. Time Warner alleges that a fresh look rule will give it an opportunity to compete for existing customers of ILECs. Even if it were true that Time

Warner has not had such competitive opportunities (and it is most emphatically not), Time Warner's claimed injury could occur only under the assumptions that Time Warner would market its services to existing ILEC contract customers, that it would win those customers, and that it would make money on the resulting contracts thereby increasing its revenues and/or market share. Obviously, all of this is speculative; none of it is immediate or direct enough to satisfy the standing requirements.

Indeed, despite its assertions in support of intervention, Time Warner itself has stated that the fresh look rules will yield no benefits. After the Commission issued the final version of its fresh look rules, Time Warner called them "meaningless" and told the Commission that "customers of the Incumbent Local Exchange Companies ("ILECs") will be unable to avail themselves of competitive advantages provided by the 'fresh look' rules even if the Commission *prevails* in the administrative proceeding." (Time Warner's Petition to Initiate Rulemaking and Request for Withdrawal of Proposed Rules, at 2, Jan. 5, 2000 [emphasis in original].)

Aside from the absence of anything that might be called an injury, let alone an immediate, direct and real one, Time Warner has misstated the law on the injury-in-fact requirement. Time Warner contends that "[a]n allegation of economic injury is traditionally considered sufficient to satisfy the injury-in-fact requirement because it is easy to perceive an economic injury as "both real and immediate, not conjectural or hypothetical."" (Amended Petition, *citing Montgomery v. Dept. of Health and Rehabilitative Services*, 468 So. 2d 1014 (Fla. 1st DCA 1985).

Neither the *Montgomery* case nor any other case GTE has seen creates this kind of presumption that allegation of an economic injury is sufficient to ground standing. If

anything, the reverse is true--as the *Ameristeel* case cited by Time Warner itself indicates. In *AmeriSteel Corp. v. Clark*, 691 So. 2d 473 (1997), the Florida Supreme Court found that the claimed economic detriment was "not an injury in fact of sufficient immediacy to entitle Ameristeel to a 120.57 hearing." (*AmeriSteel* at 477-478.) The Court's decision rested on a number of other, similar holdings. *Id.*, *citing International Jai-Alai Players*, supra, at 1225-26 ("fact that change in playing dates might affect labor dispute, resulting in economic detriment to players, was too remote to establish standing"); *Florida Soc'y of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279, 1285 ("some degree of loss due to economic competition is not of sufficient 'immediacy' to establish standing"); *Village Park*, *supra*, at 434 ("speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process").

The Florida Public Service Commission has, likewise, relied on the case precedent to conclude that "economic damage alone does not constitute substantial interest." *Petition of Gainesville Regional Utilities for a Declaratory Statement Relating to Cogeneration Proposal to the University of Florida*, 88 FPSC 276 (1988), *citing Agrico*; *see also Petition to Resolve a Territorial Dispute with Florida Power & Light Co. in St. Johns County, by Jacksonville Elec. Authority*, 96 FPSC 177 (1996) ("conjecture about possible future economic detriment is too remote to establish standing"), *citing International Jai-Alai Players, supra.*

In this case, as explained, Time Warner is not even complaining about future economic detriment: it is complaining about the possible loss of future economic

benefits. Time Warner has not and cannot offer any law to support intervention on the basis of this novel and extreme rationale.

Because Time Warner has failed to establish a sufficiently real and immediate injury in fact (or, for that matter, any injury at all), it is not necessary to reach the zone-of-interest prong of the standing test. In any event, Time Warner's Amended Petition fails on this score, as well. It never even alleges—as it must to make its standing case--how the Commission proceeding was designed to protect the interests of Time Warner, so as to entitle it to a Section 120.57 hearing.

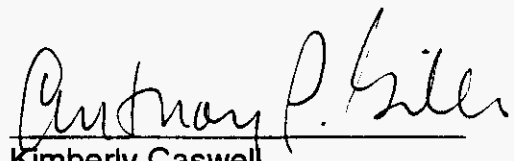
Indeed, Time Warner could not make such an allegation. "The nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope or nature of the proceeding." *See, e.g., International Jai-Alai Ass'n, supra*, at 1225; *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund and Dep't of Nature Resources*, 595 So. 2d 186, 189 (Fla. 1st DCA 1992).

In this case, the Commission claims fresh look implements sections 364.01 and 364.19. (GTE, of course, disagrees that these sections are a permissible basis for the fresh look rules.) Section 364.01 is the general legislative intent section. It expresses no intent for the Commission to protect the economic interests of any particular type of telecommunications company. Section 364.19, in its entirety, states that "[t]he Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." The fresh look rule, as GTE pointed out in its Answer to Time Warner's original Petition, regulates only the terms of the contracts between the ILECs, including GTE, and their customers.

It does not in any way regulate Time Warner's contracts. So it cannot justify any zone of interest allegation, even if Time Warner had made one.

For all the foregoing reasons, in the event the Judge allows Time Warner's Amended Petition for Leave to Intervene, GTE asks the Judge to deny that Petition.

Respectfully submitted on March 6, 2000.

By: 
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