BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission triennial UNE review: Local Circuit Switching for Mass Market Customers.	DOCKET NO. 030851-TP FILED: January 12, 2004

AARP MOTION FOR RECONSIDERATION OF ORDER DENYING INTERVENTION

Pursuant to Sections 120.569 and 120.57(1), Florida Statutes and Rules 25-22.0376, 25-22.060 and 28-106.204, Florida Administrative Code, the AARP, through its undersigned attorney, files its Motion for Reconsideration of Order No. PSC-04-0008-PCO-TP, Order Denying AARP's Petition to Intervene, issued January 2, 2004, and, in the alternative, files its Amended Petition to Intervene and in support thereof, states as follows:

1. In petitions filed in Dockets 03867-EI, 03868-EI and 030869-EI, BellSouth, Sprint and Verizon (the "Big ILECs") repeatedly asserted that their customers were the ultimate beneficiaries of the increased competition that might result from substantially raising residential basic local service rates – assertions this Commission clearly accepted when ordering the residential local rates increases. Now, to the contrary, the companies have made the argument that residential customers, in general, and AARP, which purports to represent the interests of its over 2.6 million members in Florida, specifically, do not have a substantial interest in the outcome of the proceedings in this docket. Secondly, the Big ILECs unfairly demand that AARP be held to a higher pleading standard than any of the many telecommunications companies granted party status in this case, a requirement that is not only unreasonable, but clearly unnecessary given what should be the obvious implications of this highly critical docket for residential local service competition, not only in Florida, but nationwide. The prehearing officer

erred as a matter of law in accepting the Big ILEC's arguments that AARP should not be granted intervenor status.

2. Local service telephone competition is not just for the benefit, or even primarily for the benefit, of the telecommunications companies seeking to either retain their existing customer base or to lure away the customers of others. Rather, the central justification for legislatively opening any telecommunications monopoly, including local service, has always been for the benefit of the jewel of the public interest, the telecommunications customer, or the consumer. For example, when opening Florida local service markets to competition, the Florida Legislature has made numerous statutory declarations regarding the central role of the consumer with respect to its intentions. For example, Section 364.01, F.S., dealing with the "Powers of commission, legislative intent," provides, in relevant part:

> (3) The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure. The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition, but nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws. . . .
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> (4) The commission shall exercise its exclusive jurisdiction in order to:
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> (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.
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> (b) Encourage 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.
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> * * *

(d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies.

* * *

(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 through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis.

(Emphasis supplied.)

3. As stated above, the statutory basis for raising residential basic local service rates, which this Commission has ordered done, was to increase competition for the benefit of residential customers. Thus, Section 364.164, F.S., states in relevant part:

364.164 (1) Each local exchange telecommunications company may, after July 1, 2003, petition the commission to reduce its intrastate switched network access rate in a revenue-neutral manner. The commission shall issue its final order granting or denying any petition filed pursuant to this section within 90 days. In reaching its decision, the commission shall consider whether granting the petition will:

(a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers.

(Emphasis supplied.) Without conceding that raising local service rates will either result in increased competition or benefit residential consumers, it should be abundantly clear that the Florida Legislature intended that more attractive competitive markets shall be for "the benefit of residential consumers."

4. It is not just the Florida Legislature that believes and states that competitive local telecommunications markets are intended to benefit residential customers. This docket was

opened as the result of a staff memorandum stating that it was necessitated by the Federal Communications Commission's ("FCC") Order No. FCC 03-36, released August 21, 2003, which is commonly referred to as the Triennial Review Order, or TRO. Interestingly, despite the ILEC objections to AARP's presence, the first sentence of the introduction to the lengthy TRO states as follows:

> 1. Seven years ago, Congress enacted the Telecommunications Act of 1996 (1996 Act) for the benefit of the American consumer. This watershed legislation was partially designed to remove the decades-old system of legal monopoly in the local exchange and open that market to competition. The 1996 Act did so by establishing broad interconnection, resale and network access requirements, designed to facilitate multiple modes of entry into the market by intermodal and intramodal service providers. The 1996 Act also sought to reduce the need for regulation in the presence of competition and provide for universal service mechanisms in order to foster the deployment of advanced telecommunications capabilities to all Americans.

TRO, at page 6. (Emphasis supplied.) The TRO is replete with assertions, which should not all have to be recounted for this Commission to recognize the consumer's interest in seeing that local service competition is fully and fairly developed and that the consumer is intended to be benefited by the "unbundling" of telecommunications services as intended by the U.S. Congress. These additional pronouncements, however, include:

> 5. . . . Third, this Order establishes a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers.
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> 6. . . . In the past, we have stated that "the 1996 Act set the stage for a new competitive paradigm in which carriers in previously segregated markets are able to compete in a dynamic and integrated telecommunications market that promises lower prices and more innovative services to consumers." . . . Accordingly, we believe that the certainty that we bring today will help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers.

TRO, beginning at page 7. (Emphasis supplied.) Lastly, at page 48 of the TRO, in paragraph 70,

while discussing "guidance from the [1996] Act and its history," the FCC states the following:

> 70. We note that other language in the 1996 Act provides some clues as to Congress's intent. First, we look to the Preamble of the 1996 Act, which calls it"[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." We believe that this language gives the best snapshot of Congress's overall intent in enacting the 1996. We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goals.

TRO, at page 48. (Emphasis supplied.)

5. Per the TRO, the issues in this docket, as raised by the procedural orders, filings and testimony of the companies, center on whether the ILECs, including the Big ILECs, should be required to offer unbundled service offerings, including UNE-P, to competitive companies desiring to purchase them. The competitive companies submit that such unbundled, UNE-P offerings are essential to their ability to offer competitive service to residential customers in most, if not all, markets in this state and that they would be "impaired" in providing such service without reasonably priced UNE-P availability. The Big ILECs, on the other hand, argue that there is little impairment in the state and, accordingly, there is little, if any, necessity that they be forced to offer UNE-Ps to their competitors. The Office of Public Counsel, on January 7, 2004, filed the testimony of Dr. Ben Johnson stating that the Commission should be careful not to examine impairment in too large a geographic context lest consumers in markets where there is clearly impairment be denied competition that can only result from the availability of UNE-P. The bottom line is that the competitive companies are stating, and providing expert testimony to the effect, that local service competition, which is not only presumed, but statutorily stated, to be in the interest of residential consumers, is unlikely to result without the widespread availability of UNE-Ps from the Big ILECs. Consequently, the Big ILECs are arguing that there

is little, if any, "impairment" in Florida with the desire of limiting their requirement of offering UNE-Ps, the availability of which seemingly all other parities acknowledge will result in more vibrant and more widespread residential local service competition.

6. Suggesting that the residential consumer, including those over 2.6 million represented by AARP, which organization has been granted party status on an associational basis to represent its members as recently as the rate increase dockets cited above, does not have a substantial interest in the outcome of this case and whether UNE-Ps are available to the competitive companies that might offer them service if such UNE-Ps are required, is both factually and legally incorrect and is contrary to even a fundamental understanding of legislative motives resulting in local telephone service being opened to competition. All residential, local service telephone customers have a substantial interest in the outcome of this docket and AARP, which represents the interests of over 2.6 million Floridians, does as well. Such interest, and the party status that flows from it, should be recognized without further delay.

7. The Big ILECs, failing to concede the clear and obvious interest of their customers in this docket, argue that AARP should be held to a law review standard of perfection in seeking to participate in this case despite the lack of specificity in any telecommunications companies' petition seeking party status. Furthermore, there has been no objection to any telephone company's participation and all have been welcomed by order of this Commission. For example, BellSouth, the largest of the Big ILECs, stated its substantial interest thusly:

> 3. Any decision made by the Commission in the context of this proceeding will necessarily affect the substantial interests of BellSouth and its business operations in the State of Florida.

BellSouth October 7, 2003 Petition for Leave to Intervene, at page 1. In a similar fashion, AT&T pled the following, which got it in as a party:

> 5. As a CLEC, AT&T purchases unbundled network elements ("UNEs") from incumbent local exchange companies ("ILECs") and exchanges traffic with ILECs and other CLECs in order to provide local exchange service. Accordingly, AT&T's substantial interests may or will be affected by any action that the Commission takes in this docket regarding the application of the Triennial Review Order.

AT&T September 30, 2003 Petition to Intervene, at page 2.

8. In all, there are in excess of a dozen incumbent and competitive telecommunications companies, whose petitions to intervene contained similar statements of interests and none were objected to. AARP, whose members' interests are equally obvious, should be treated the same.

9. The objections to AARP's participation made by the Big ILECs, and found by the prehearing officer in his order denying intervention, ignore the obvious interest of the consumer in this docket, as the focus of all the companies' competitive desires, as well as the threshold requirements for demonstrating standing, which were met.

10. As to meeting the requirements of Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981), AARP would submit that it met such requirements, especially if one gave AARP the same liberal pleading specificity enjoyed by the telecommunications companies. First, AARP stated the following as being its understanding of the Commission's purpose in this docket:

> 4. On February 20, 2003, the Federal Communications Commission (FCC) adopted new rules and reevaluated old rules regarding incumbent local exchange companies' (ILECs) obligations to unbundle certain network elements, so that these elements are made available to requesting competitive local exchange telecommunications companies (CLECs) at a price based on the ILEC's Total Element Long-Run Incremental Cost (TELRIC). On August 21, 2003, the FCC released the newly adopted rules in its Triennial Review Order ("TRO") with the intent of opening local exchange markets to competition, fostering the deployment of advanced services, and reducing regulation. Pursuant to the TRO, the Florida Public Service Commission ("Commission") has a fact finding role designed to ascertain whether impairment exists within the state and local markets. This Commission must complete its proceedings within nine months from the

TRO's effective date and has opened this docket and scheduled evidentiary hearings to that end. (Emphasis supplied.)

Next, AARP went on to allege its associational representative role, saying:

> 5. AARP (formerly known as the American Association of Retired Persons) is a nonprofit membership organization dedicated to addressing the needs and interests of persons 50 and older. AARP has staffed offices in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. AARP represents more than 35 million members in total, approximately 2.6 million of whom reside in the State of Florida. AARP's Florida members reside throughout the state and substantial numbers of them are retail residential or single-line business customers of each of the ILECs that will be reviewed in these proceedings. (Emphasis supplied.)

AARP then stated its members' substantial interests in these terms:

> 6. The question of whether the ILEC's are offering their unbundled network elements to CLECs at a price based on the ILEC's Total Element Long-Run Incremental Cost (TELRIC) and whether there are impairments to competition in state and local markets resulting from the ILEC's not doing so, will necessarily affect the substantial interests of all customers of both the ILECs and CLECs in this state, including the approximately 2.6 million Florida members of the AARP. (Emphasis supplied.)

11. Agrico requires (1) injury in fact of a sufficient immediacy to entitle a Section 120.57 hearing and (2) that the substantial injury is of a type which the proceeding is designed to protect. AARP has met these requirements.

12. As to the second prong of the above test, this case is about determining whether existing or potential competitors in the local telephone market can obtain UNE-P offerings from the ILECs serving the various local markets and at the price levels prescribed by the FCC. Every aspect of the TRO and virtually every industry filing, including the prefiled testimony of all participants, recognizes that more, or "enhanced" to use the phrase utilized in justifying the recent residential local service rate increases, competition will result than exists currently if UNE-Ps are offered in local service markets and at the TELRIC rates required by the FCC. As cited above, both the U.S. Congress and the Florida Legislature have legislated that competition

is in the interest of consumers and both the FCC and this Commission have repeatedly recognized the same. This case addresses questions that clearly impact the interests of residential customers.

13. As to the first prong addressing injury in fact of a sufficient immediacy to entitle a Section 120.57 hearing, AARP will note that this appears to be the only proceeding in which this Commission will be called upon to determine in which areas of the state impairment exists, and, thus, where UNE-Ps will be required, as well as whether the costs are properly based. Assuming that they stand after judicial review, the substantially increased local service rates recently approved by this Commission will be the supposed key to all local customers, including AARP's Florida members, obtaining enhanced local service competition. The reality, of course, is that whether that competition results, or even has a theoretical opportunity, will be determined in this docket. The Commission should recognize this reality and invite the participation of all consumers, not only because they clearly have a right to participate, but, importantly, because they may provide benefit to the Commission in its decision-making processes by supplying views not available otherwise.

14. Without refuting each, the cases cited by the Big ILECs in arguing against their customers participation in this case are inapplicable. This is especially true with respect to the Commission-based cases involving electric utilities and the desires of customers to be served by others. Simply stated, there is no legislatively allowed competition in local electric service monopoly areas, while competition in the local service telephone markets is not only allowed, but statutorily encouraged.

15. The prehearing officer was unnecessarily strict in the requirements placed on the AARP in pleading its standing in this docket, while also ignoring the clear and obvious interests

all customers have in the Commission's decision in this case.

WHEREFORE, AARP requests that this Commission reconsider the order denying AARP intervenor status in this case, find that such status is warranted and thereafter grant AARP intervenor status in this docket as a full party respondent on behalf of its approximately 2.6 million Florida members.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been provided by email and U.S. Mail this 12 day of January, 2004, to the following:

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