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GTE SERVICE CORPORATION

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May 7, 1999

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

990562-TL

Re: Docket No.
Petition for Expedited Order Granting a Variance to GTE, a Waiver of
Rulemaking Rules and/or a Finding that Variance/Waiver is Not Necessary With
Respect to Form CMU-41

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE Florida Incorporated's
Petition for filing in the above matter. Service has been made as indicated on the
Certificate of Service. If there are any questions regarding this filing, please contact
me at 813-483-2615.

Sincerely,

Anthony P. Gillman/dm
Anthony P. Gillman

- _____ AFA
 - _____ APP
 - _____ CAF
 - _____ CMU
 - _____ CTR
 - _____ EAG
 - _____ LEG
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Variance and/or Waiver)
or for Finding that Variance/Waiver is Not) Docket No.
Required with Respect to Form CMU-41) Filed: May 7, 1999
(4/1/93) Incorporated by Reference in)
Florida Public Service Commission)
Rule 25-4.080 F.A.C.)
_____)

**PETITION OF GTE FLORIDA INCORPORATED FOR EXPEDITED ORDER
GRANTING A VARIANCE TO GTE, A WAIVER OF RULEMAKING RULES
AND/OR A FINDING THAT VARIANCE/WAIVER IS NOT NECESSARY
WITH RESPECT TO FORM CMU-41**

GTE Florida Incorporated (GTE), pursuant to Florida Statutes §120.542, petitions the Florida Public Service Commission (Commission) to issue a Rule 25-4.080 variance and/or waive its rulemaking rules (Rules 25-22.011 *et seq.*) with respect to Form CMU-41 incorporated by reference in the rule. Alternatively, GTE is asking for a finding that neither a rule variance nor waiver is necessary. GTE is also seeking an expedited ruling on this matter. In support of this Petition, GTE states:

Rule 25-4.080 And Form CMU-41 (4/1/93)

1. Rule 25-4.080 authorizes the Commission to conduct service audits on local exchange carriers by utilizing a "weighted index system developed by the Public Utility Research Center." Rule 25-4.080, F.A.C. Under this system, a company meeting all Commission service standards on all criteria would receive an overall satisfactory rating of 75 points. Using indices assigned to each criterion, adjustments to the base of 75 would be made on all results that either exceed or fall below the standards. The criteria and indices are contained in "the

Weighted Index (Form CMU-41, 4/1/93), which is incorporated by reference into this rule." *Id.*

2. In this matter, GTE is seeking relief from Staff's current application of Section L of the Weighted Index Form CMU-41 incorporated by reference in Rule 25-4.080. Specifically, GTE is seeking a revision to weighting factors applied by the Commission Staff to 0+ calling card calls as if such calls were 50% of GTE's billed toll market. (See Section L of Weighted Index, "Toll Timing and Billing Accuracy"). As explained below, GTE's overall service audit score for 1998 was unreasonably and unfairly reduced as a result of a timing problem that affected the billing on a *de minimis* number of 0+ calls, which are in turn only a *de minimis* portion of GTE's billed toll.

3. The Commission Staff supports a change to their current evaluation and measurement of 0+ toll calls and has already developed revised toll weighting factors that lower the weighting on 0+ calling card calls while raising the factors for 1+ calls. Specifically, the Staff has recommended that the Weighted Index Form be revised and the following new and separate factors be applied in Section L to 0+ calling card calls:

0+ CALLING CARD INTRA-LATA +	0.1363
0+ CALLING CARD INTRA-LATA - (OVER)	0.7260

However, the Staff has not changed Form CMU-41 for the 1998 audit as recommended because Staff felt it was prohibited from doing so without a rule

change.¹

4. GTE understands that the Staff intends to open a rulemaking proceeding in which this and other proposed revisions will be made to the Weighted Index. Thus, the fact that the 0+ toll changes must be made is not being disputed by the Staff. However, the rulemaking contemplated by the Staff will not be completed until after GTE's 1998 audit results are presented to the Commission.

5. GTE seeks a variance to Form CMU-41 to incorporate the Staff's recommended 0+ toll weighting changes in GTE's 1998 service audit now, before the rulemaking is completed. Unless its 1998 audit evaluation is changed now, GTE will suffer substantial hardship in the market.

6. In the alternative, GTE petitions the Commission to waive its rulemaking rules in this instance to permit the Commission Staff to revise Section L of Form CMU-41 and utilize the revised weighting factors it developed for 0+ calling card calls in all 1998 service audits.

7. As a third alternative, GTE seeks a finding from the Commission that neither a rule variance nor waiver is necessary to authorize the Staff to utilize a weighting methodology that is consistent with the 1998 toll market in Florida. GTE requests the Commission to issue an order directing the Staff to

¹ Although the Staff has taken the position that a rule change is required to make the changes to Section L of the Weighted Index, changes to this same section of the Index have been made in the past without a rulemaking. Section L of the index was revised at some point (without a rulemaking) in late 1993 or 1994 to draw a distinction between timing of toll calls that resulted in overcharges to the customer and those that resulted in undercharges. Consistent with the intent behind the weighted index, Section L of the index was reallocated so that calls incorrectly timed or billed resulting in a lower charge to the customer would be weighted lower than call errors resulting in a customer overcharge. Changes have also apparently been made to other individual factors in past years without rulemakings.

utilize such a market-based weighting methodology in deriving GTE's composite score for the Toll Timing and Billing Accuracy criterion set forth on Section L of the Weighted Index.

8. The Staff-recommended changes to the weighting of 0+ calling card calls, under any of the alternatives noted above, would not have a negative impact on the score of other audited companies if the Commission found that such revisions should be applied to their 1998 audits as well. With the exception of Northeast Telephone Company (which will benefit from the change²), the recommended changes to the weighting of 0+ calling card calls would have little or no impact on other companies audited. This fact demonstrates that the weighting of 0+ calling card calls affects GTE uniquely.

GTE's 1998 Audit Results

9. GTE is faced with the situation of failing the 1998 service audit even though the Commission Staff agrees that the only significant driver behind GTE's failure is based upon a criterion in the audit that bears no relationship to the reality of today's marketplace. GTE's score was significantly reduced due to an overtiming problem that impacts a *de minimis* number of its 0+ calling card calls. GTE has identified the cause of this overtiming and has isolated it to a single TOPS switch. No timing problems were identified by the Staff with respect to 1+ direct dialed calls.

² It appears from the Commission's Annual Report that Northeast, like GTE, also scored low on Toll Timing and Billing criterion. As such, the recommended changes to the Weighted Index would likely benefit Northeast as well.

10. This problem alone accounted for a 15.74 point drop in GTE's overall score. This reduction was over 13 times greater than the next highest deduction (1.18 for answer time for repair service) and over 5 times greater than all GTE deductions combined (2.91).

11. The substantial negative impact on GTE's audit score caused by the timing problem on 0+ calling card calls bears no relationship to the realities of today's telecommunications marketplace. In fact, use of 0+ calling cards is quite limited. In today's marketplace, most customers using calling cards now dial an 800 toll-free number to access the carrier of their choice. The use of 0+ calling cards has decreased drastically over the years.

12. For example, in January of this year, the total number of customers billed for 0+ intraLATA calling card calls in GTE's territory in Florida was only 24,420. In contrast, GTE billed its Florida customers for over 2.7 million 1+ intraLATA calls made during that same month. The 0+ calling card calls constitute less than 0.9% of the toll calls billed to GTE customers in this state.

13. Moreover, an even smaller number of the 0+ calling card calls timed and billed had any impact on customer charges. In this same study month, only 625 calls were affected by the 0+ timing problem. Of the total intraLATA calls billed then, the timing error that caused a drop in GTE's score by nearly 21% (15.74 total points) affected only .02% of the toll calls made.

14. Despite the unquestioned marketplace disparity between 1+ and 0+ calling card calls, the Commission Staff evaluates the two types of toll calls separately but equally. Staff averages carrier scores on 0+ and 1+ calls before

applying the Section L toll weighting, as if 0+ and 1+ calls each constituted 50% of the toll market. Although utilized by the Staff in past audits, the Weighted Index (Form CMU-41) does not mandate an equal toll weighting, nor does Rule 25-4.080 or any other statute or Commission Rule.³

15. GTE understands the Staff agrees that, because of the large imbalance between the number of 1+ and 0+ calling card calls made by customers in 1998, equal treatment is no longer justified. The Staff acknowledged that errors made with respect to 0+ calls should not carry as much weight on toll timing measurement as 1+ calls. As such, Staff had recommended that revised weighting factors be utilized to distinguish such calls on the pending audit results. Despite its recommendations to revise the weighting factors, Staff auditors filed the GTE audit as final without applying the new evaluation factors because they have taken the position that the index must be changed and a rulemaking must be instituted to make the recommended revision to the Index.

16. If the Staff had implemented its recommendation to change the weighting factors for 0+ calling card calls and 1+ calls, GTE would have received an overall score of approximately 79.61. This score, in addition to being passing, would also be the highest in the industry this year, surpassing Sprint's score of 77.4.

³ The Commission's 97% timing accuracy requirement arises out of Commission Rule 25-4.077. This rule addresses timing accuracy in general and does not mandate any specific weighting for toll calls in general or 1+ or 0+ calls specifically. As demonstrated in paragraph 10, GTE's timing accuracy in general greatly exceeds the Commission standard and, even taking into account the billing impact of 0+ toll timing specifically (625 out of 24,420), GTE's actual 0+ timing is above the 97% requirement.

Standard for Granting Variances and Waivers

17. Section 120.542 of the Florida Statutes established the standards for the Commission to follow in considering requests for variances and waivers to the Commission's Rules. That statute provides:

Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

. . .

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

18. GTE is seeking a variance from the Staff's application of the Weighted Index because its use in its present form has created an "unreasonable, unfair, and unintended" result in GTE's audit. The underlying statutes authorizing the Commission to conduct service audits will not be compromised by GTE's requested variance and/or rule waiver. Indeed, if the variance and/or rule waiver are not granted, the Commission will fail in its obligation to "[e]nsure that all providers of telecommunications services are treated fairly." Fla. Stat. § 364.01(4)(g). Moreover, because of the manner in which 0+ calling card calls are weighted, GTE will suffer a substantial hardship in the marketplace—a hardship that will not be easily repaired (if at all) as

competition in the telecommunications market is expanding. Literal application of the Rule also violates all principles of fairness. GTE will be penalized in the marketplace because of a legal technicality—a Staff-supported change to the Weighted Index cannot be implemented because of the Commission's lengthy rulemaking process.

Substantial Hardship

19. Competition in the local exchange market continues to grow substantially in GTE's serving territory and throughout Florida. Numerous resale and facilities-based carriers are offering local exchange service in direct competition with GTE. With the introduction of new wireless pricing plans eliminating roaming charges, GTE is also facing competition from wireless carriers for customers' primary and secondary lines. Of the audited carriers, Sprint and BellSouth are actively marketing wireless services in GTE's local exchange market today and are certificated to provide full local service. Of course, toll service, which is the subject of this request for audit relief, is and has been a fully competitive service, in which Sprint and others compete fiercely for GTE's toll customers.

20. By failing GTE on the local service audit based on outdated weighting factors, the Commission will create a substantial hardship on GTE by identifying GTE as an inadequate service provider within the Florida marketplace for telecommunications services. As such, GTE will be damaged economically by losing customers or failing to obtain new ones. More importantly, GTE's reputation as a carrier providing superior service will be damaged—a reputation

that often overcomes the price-cutting tactics of GTE's competitors. Damage to GTE's reputation in the marketplace will be irreparable, taking potentially years to repair even a part of the harm caused.

21. The damage to GTE in the marketplace is exacerbated by the Commission's practice of comparing the audit results of competing carriers in its Annual Report. By making such comparisons, the Commission is essentially endorsing one carrier over the other. For example, in its Final 1998 Annual Report, the Commission Staff noted that "Sprint has shown much improvement and was the *only company evaluated* that met the minimum objective in 1998. See 1998 Annual Report, Bureau of Service Evaluation, at p. 7 (emphasis added). With respect to GTE, the Commission stated that "GTE dropped from the 76.2 points in 1997 to 67.7" in 1998. *Id.*

22. The comparison between GTE and Sprint is heavily skewed against GTE because of the 0+ calling card call problem. Of the 60 criteria evaluated, GTE matched Sprint on over one-half of them (31) and exceeded Sprint's score on another 11. Furthermore, if the Staff's proposed changes to the index would have been made, GTE would have received an overall score of 79.61. This score, in addition to being passing, would also be the highest in the industry this year, surpassing even Sprint's score of 77.4.

23. GTE is being scored under a weighting index that the Commission auditors themselves believe should be revised. GTE will suffer a substantial hardship in the marketplace for the sole reason that there is not enough time to implement a rule change to Form CMU-41 before the currently pending 1998

audit results are approved. Without a variance or rule waiver, the Commission will effectively delay correction of a recognized aberration in the Weighted Index results until the next service audit is conducted by the Commission, distort GTE's 1998 service results, and misinform the marketplace. Therefore, a variance and/or rule waiver are justified here because the Commission's application of the present weighted index, which the Staff agrees is outdated and should not be used, is causing an "unreasonable, unfair, and unintended result." Fla. Stat. §120.542(1).

Principles of Fairness

24. The Commission Staff feels prohibited from revising the index in the manner it considers is more indicative of the market in 1998 because Rule 25-4.080 provides that the Weighted Index is incorporated by reference. Literal reliance on this provision of the rule affects GTE in a manner significantly different from other carriers. GTE encountered a problem with a component part of one index measurement that is unquestionably weighted too heavily relative to the actual 1998 market for telecommunications services in Florida. The heavy weighting has uniquely harmed GTE by keeping it from passing the audit and by drawing an unfavorable comparison to one of its competitors.

25. Because the "principles of fairness" have been violated in this instance, GTE has demonstrated that the relief requested, including a rule variance and/or waiver, is justified.

No Variance or Waiver is Needed

26. Although the Commission Staff has taken the position that it cannot implement the recommended changes without a variance, waiver or rule change, GTE alternatively petitions the Commission, pursuant to Florida Statutes, § 120.565 and Commission Rule 25-22.020, to find that the Commission Staff has the discretion to make the recommended changes. If such a finding is made, neither a variance nor waiver is needed to evaluate GTE and other carriers fairly in the 1998 audit.

27. In determining GTE's score on Section L of the Weighted Index, the Staff weighted the 1+ and 0+ calling card calls equally. Such an equal weighting is not mandated by the Index or any Commission Rule or any Florida statute. As such, the Staff auditors, in the exercise of their discretion, decided to utilize a 50/50 treatment of 1+ and 0+ calling card calls. Because the Staff had the discretion to establish the equal weighting methodology in determining the composite score for intraLATA toll calls, then it also has the discretion to discard that methodology once it is shown to be arbitrary and adopt one that more closely resembles the Florida market.

28. In the Staff's recommended change to the Index, the Staff effectively proposes that timing and billing errors for 1+ calls should result in a scoring deduction of five times more than if the error occurred with respect to 0+ calling card calls. Specifically, Staff proposes that deductions for overtime and billing for 0+ calls should be set at a factor of 0.7260. The factor proposed for 1+ errors is five times greater, 3.6299. The Staff has the discretion to apply this

same logic to its analysis without revising the Index. It merely can use this or some other appropriate ratio in weighting the 1+ and 0+ calling card calls to derive the composite score for all intraLATA toll calls to be inserted on Section L of the Weighted Index.

29. In the alternative to seeking variance or rule waiver, GTE petitions the Commission to direct the Staff to revise its internal procedures to utilize a weighting methodology for 1+ and 0+ calling card calls that reflects the Florida market for such calls in 1998.

Expedited Treatment

30. GTE asks the Commission to expedite a ruling on this request. In order to avoid the substantial hardship demonstrated above, this request must be acted on before the audit results are presented to the Commission. Recognizing the Commission's desire to have these results become final, it is imperative that GTE's request be acted on as quickly as possible under the existing statutes and rules.

WHEREFORE, GTE asks the Commission for the following relief:

1. That the Commission grant a variance to GTE and approve GTE's final 1998 audit score using Staff's proposed new factors for measuring 0+ calling card calls under Section L of the Weighted Index (Form CMU-41):

0+ CALLING CARD INTRA-LATA +	0.1363
0+ CALLING CARD INTRA-LATA - (OVER)	0.7260

2. That in the alternative, the Commission waive its rulemaking rules (Rules 25-22.011, *et. seq.*) and permit the Commission Staff to revise Section L

of Form CMU-41 as shown above for use in the 1998 audit without a rulemaking;
or

3. That in the alternative, the Commission issue an order directing the Staff to: revise its internal procedures; desist from arbitrarily evaluating GTE's toll timing as if 0+ calls constituted 50% of calls billed in GTE's toll market; and utilize the current Section L Index weighting for toll timing and billing accuracy in GTE's 1998 audit, while evaluating 1+ and 0+ calling card calls in a ratio that better reflects the Florida market for such calls in 1998;

4. That GTE's 1998 service audit results be rescored to take into account the revised factors noted above;

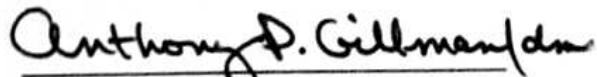
5. That the Commission revise its 1998 Annual Report to reflect GTE's new score;

6. That the Commission address this matter and issue an order on an expedited basis;

7. That the Commission provide all other relief to GTE as is appropriate under the circumstances.

Respectfully submitted on May 7, 1999.

By:



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Attorneys for GTE Florida Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition was hand delivered on
May 7, 1999 to:

Catherine Bedell, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Anthony P. Gillman/dm

Anthony P. Gillman