BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to Initiate Rulemaking Pursuant to Section 120.54(5), Florida Statutes to Incorporate "Fresh Look" Requirements to all Incumbent Local Exchange Company (ILEC) Contracts.	)	Docket No.980253-TX
	)	Filed: June 16, 1999

POSTHEARING BRIEF OF TIME WARNER AxS OF FLORIDA, L.P.

Time Warner AxS of Florida, L.P. d/b/a Time Warner Telecom, pursuant to Rule 25-22.056 of the Florida Administrative Code, respectfully submits the following Posthearing Brief in the above-captioned docket to the Florida Public Service Commission ("FPSC" or "Commission").

I. TIME WARNER'S BASIC POSITION

It is Time Warner's basic position that the proposed Fresh Look rule be adopted by this Commission. The purpose of the Fresh Look rule is to foster competition where it did not exist before by enabling customers to cancel their existing service contracts with ILECs and avoid exorbitant liabilities if they elect an ALEC provider offering competitive local communications services offered over the public switched network. It is important to note that the proposed rule does not require the ILEC's existing customers to terminate their contracts. It simply provides the consumer with a choice of providers not

available at the time they assumed their long term contractual obligation with the ILEC. Thus, the decision is placed in the hands of the consumers.

Additionally, the Fresh Look rule creates competition in an arena where it did not exist before, therefore furthering a great public interest. Many of the ILEC contracts were made effective prior to the existence of any viable competitive alternatives and/or in anticipation of competition. It is important to understand that the simple adoption of state and federal legislation allowing competition did not immediately create an effective competitive market.[1] To the contrary, consumer choice in the local exchange markets is only beginning to emerge. Therefore, without the adoption of this Fresh Look rule, the benefits of competition through lower prices and more innovative services would otherwise be delayed for several years for many customers.

II. TIME WARNER'S SPECIFIC POSITIONS

ISSUE 1: Should the Commission propose new Rules 25-4.300, F.A.C., Scope and Definition; 25-4.301, F.A.C., Applicability of Fresh Look; and 25-4.302, F.A.C., Termination of LEC Contracts?

[1] See Marek, Tr. at 14; see also Duke, Tr. at 30-31.

** Yes. The Commission should propose the new rules because it is in its authority to do so and further promotes competition. **

A. The Proposed Rule Is Within The Commission's Authority.

BellSouth[2] and GTE[3] suggest that the adoption of the proposed rule is beyond the Commission's authority. Statutory language shows that this is not true. In support of this assertion, BellSouth states that the Commission's powers are only those conferred expressly or implied by statute and that no such express or implied power is given.[4] However, section 364.19, Florida Statutes, expressly states:

> The Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.[5]

Thus, this statute gives the Commission the power and authority to adopt the proposed Fresh Look rule.

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[2] See BellSouth Comments at 1; see also Goggin, Tr. at 74-75.

[3] See Caswell, Tr. at 81.

[4] See BellSouth Comments at 2.
See Florida Bridge v. Bevis, 363 So. 2d 799 (Fla. 1978)

[5] See Caswell, Tr. at 93 and BellSouth Comments at 2 (acknowledging this statute).

Moreover, the Commission is given further statutory authorization to review all telecommunications contracts and "may disapprove any such contract if such contract is detrimental to the public interest."[6] The public interest in adopting the proposed Fresh Look rule is competition. In furtherance of this public interest, the Commission has the authority to "promote competition by encouraging new entrants into telecommunications markets. . ."[7] Additionally, the Commission has an affirmative duty to 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."[8] Therefore, to promote competition and meet its legislative demands, the Commission is further authorized to adopt the proposed Fresh Look rule.

In light of the legislative power and authorization to regulate telecommunications contracts for the good of the consumer, BellSouth cannot assert that the Commission now lacks

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[6] Section 364.07(2), Florida Statutes, (1997).

[7] Section 364.01 (4)(d), Florida Statutes, (1997).

[8] Section 364.01 (4)(b), Florida Statutes, (1997).

the authority to adopt this rule simply because it has entered into a private contract with a consumer.

B. Adoption of a Fresh Look Rule is a Proven Mechanism for Promoting Local Exchange Competition.

Contrary to what BellSouth[9] and GTE[10] may imply, Fresh Look is not a new concept being introduced into the telecommunications arena. In 1992, the FCC enacted a Fresh Look policy, stating:

> The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to "lock-up" the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements will be permitted to take a "fresh look" to determine if they wish to avail themselves of a competitive alternative.[11]

Moreover, the FCC has adopted other Fresh Look provisions and requirements for the purpose of creating competition and

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[9] See Johnston, Tr. at 87; Robinson, Rebuttal Testimony at 19.

[10] See Caswell, Tr. at 95.

[11] In re: Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369, 7463-64 (1992).

empowering customers with increased opportunity for innovative and cost-effective telecommunications services.[12]

In following the path of the FCC and in the name of promoting competition, this Commission has also adopted Fresh Look policy in the local exchange market.[13] In its adoption, the Commission reasoned:

> [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... A Fresh Look proposal will enhance an end user's ability to exercise choice to best meet its telecommunications needs.[14]

Furthermore, several other states have already adopted Fresh Look requirements in their efforts to open local exchange markets

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[12] See In re: Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677 (1992).

[13] See 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.

[14] Id.

to effective competition, including Ohio[15], Wisconsin[16] and New Hampshire.[17] In adopting its rule, the Ohio Commission reasoned:

> [T]he existence of certain long term-term arrangements raise potential anticompetitive concerns since these arrangements have the effect of locking out the competition for an extended period of time and prevent consumers from obtaining the benefits of this competitive local exchange environment.[18]

Additionally, numerous other states are in the process of ongoing investigations and proceedings considering the adoption of Fresh Look requirements.[19]

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[15] 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).

[16] 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 (Wic. P.S.C. Sept. 19, 1996).

[17] 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 No. 22,798 (N.H.P.U.C. Dec. 8, 1997).

[18] See supra.

[19] See Inquiry Into Whether Incumbent Local Exchange Carriers Should be Required to Provide Their Customers with an Opportunity to Terminate Special Contracts, Pursuant to Request for Rulemaking by Freedom Ring Limited Liability Company, Docket No. 96-699 (Me.

Therefore, the Commission should adopt the proposed Fresh Look rule in order to give customers the opportunity for innovative services that were not previously available when they entered into long term contracts with the ILECs.

C. The Proposed Rule is Constitutional.

1. The Proposed Rule Does Not Violate the Contracts Clause.

BellSouth[20] and GTE[21] assert that adoption of this Fresh Look rule is a violation of the Contracts Clause of the 5th and 14th Amendments by having the effect of impairing contract obligation. In making this claim, BellSouth and GTE have failed to acknowledge that the telecommunications industry and the competitors who participate in its realm are a highly regulated forum. Pursuant to statute, a telecommunications company may not operate without first obtaining the Commission's approval and at

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P.U.C. April 23, 1997)(Maine); see also Docket No. 25703, 25704, Order Establishing Rulemaking Proceeding (Ala. P.S.C. Feb. 11, 1998)(Alabama); Marek, Tr. page 16.

[20] See generally BellSouth Comments at 7-12.

[21] Caswell, Tr. at 80-81.

all times retains the power to modify any of its rates if it finds such rates are not consistent with the public interest.[22]

Finally, the Florida Supreme Court, in affirming a decision of this Commission to modify a private contract, 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.[23]

However, BellSouth continues to make this unconstitutional argument stating that the proposed rule acts as a substantial impairment without a significant and legitimate public purpose. In Energy Reserves Group, Inc. v. Kansas Power & Light, 459 U.S. 400, 103 S.Ct. 697 (1983), the U.S. Supreme Court, in rejecting the argument that the Contracts Clause prohibited regulatory action which affected contracts between public utilities and their customers, stated:

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[22] See Section 364.07, Florida Statutes, (1997); see also Arkansas Natural Gas Co. v. Arkansas Railroad Commission, 261 U.S. 379 (1923).

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

> Although the language of the Contracts Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of the people." . . . Total destruction of contractual expectation is not necessary for a finding of substantial impairment. . . . On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. . . . In determining the extent of impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. . . . The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."[24]

Therefore, the Court concluded that because the parties were well aware that their contracts were subject to future regulation by the entity which oversaw their activity, reasonable expectations had not been impaired.[25] Thus, because BellSouth and GTE are aware of the highly regulatory nature of this industry, especially in the context of contract formation, it cannot now hide behind a Contracts Clause violation argument.

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[24] Energy Reserves Group, 459 U.S. at 410-11. Note that this is the same case relied on by BellSouth in making its argument.

[25] See id. at 416.

Finally, section 364.19, Florida Statutes, stating that the Commission may regulate the terms of telecommunications service contracts between telecommunication companies and their patrons, must be considered again in this context. Moreover, the ILECs were aware of these provisions when they were entering into long term contracts, especially in light of the Commission's expanded interconnection decision.

It is clear that these statutory grants of power and respective case law alter the applicability of both of the Contracts Clauses of either the Florida or United States Constitution as it relates to regulated utilities. Therefore, because the Commission at all times retains power over telecommunications companies, their contracts and subsequent modifications, the adoption of the proposed Fresh Look rule is not an unconstitutional abrogation of contract as a matter of law because it is within the public interest of fostering competition.

2. The Proposed Rule is not an Unconstitutional Taking of Property.

BellSouth[26] and GTE[27] suggest that the adoption of the proposed Fresh Look rule will result in an unconstitutional taking of its property and the property of its contracted customers. Although contract rights have been held to be a form of property that may be subject to a taking, this is not the case under the present facts.[28] Under the proposed rule, the consumer is the only party who can make a choice as to which provider it wishes to retain services from. The rule is simply providing this opportunity which did not exist before. Furthermore, the ILEC will only lose the customer if it cannot provide competitive services and benefits to the consumer in this open market; there is nothing automatic about this rule. Therefore, it is clear that this consumer-oriented rule cannot be labeled as a destruction or deprivation of any contract interest.

Additionally, the "taking" of property is permissible if it is used to further a public purpose.[29] As stated, stimulating

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[26] BellSouth Comments at 12-15.

[27] Caswell, Tr. at 96.

[28] See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-1004; see also U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 19, fn. 16 (1977); BellSouth Comments at 13.

[29] See id. at 22; see also BellSouth Comments at 15.

competition in a market where it did not exist before is a valid public purpose. Moreover, this Commission, in Order No. PSC-94-0285-FOF-TP, adopting a Fresh Look policy in the area of private line and access services stated:

> We 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. ... A Fresh Look proposal will enhance an end user's ability to exercise choice to best meet its telecommunications needs.

D. The Proposed Rule is Needed to Extend the Scope of Competition to Areas Where it has been Virtually Non-Existent.

Contrary to the contentions of BellSouth[30] and GTE[31], the local exchange market is not operating in a competitive environment. With ILECs controlling 98.2% of this market[32] today, these companies cannot effectively make this argument, much less the argument that competition existed when these long term contracts were entered into.[33] Again, simply because legislation

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30 See Johnston, Tr. at 64, 66; see also Goggin, Tr. at 54, 55.

31 See Robinson, Tr. at 85.

32 FPSC Report on Competition in Telecommunications Markets in Florida, at 46 (December 1998).

33 See Goggin, Tr. at 53, 54, 58.

was enacted allowing competition at this time, ALECs could not and did not become operational overnight.[34] Actually, alternative providers are just now entering the market. Thus, because effective competition did not and still does not exist in this arena, the proposed Fresh Look rule is necessary in order to foster competition.

Another assertion made by BellSouth[35] and GTE[36] is that resale of existing CSAs is evidence of competitive alternatives. Although resale is an opportunity for ALECs to gain presence in the market, it cannot be mislabeled as equal facilities based competition. Both the ALEC and the customer are still bound by the same rates and terms that the ILEC was providing in the original contract. By being captive to the original ILEC contract conditions, there is no opportunity for the customer to take advantage of the ALEC's competitive prices and innovative technologies.[37] Moreover, the ILEC continues to receive revenues under the resale situation without having to provide services,

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[34] See Duke, Tr. at 30, 31; see also Robinson, Rebuttal Testimony at 2.

[35] See Goggin, Tr. at 59, 60.

[36] See Robinson, Rebuttal Testimony at 9.

[37] See Duke Tr. at 31.

thereby sustaining an interest in the contract. Therefore, the proposed Fresh Look rule is still needed in order to garner the benefits of facilities based competition through lower prices and innovative services.

ISSUE 2: Should the Commission close Docket No. 960932-TP, Investigation into Fresh Look Policy for Local Telecommunications Competition?

** Yes, this docket should be closed because it is unnecessary in light of a proposed rule. **

ISSUE 3: Should Docket No. 980253-TX be closed?

** Yes, this docket should be closed and the rules as proposed should be filed with the Secretary of State. **

III. Conclusion

In order to foster competition and to enable customers access to innovative and cost-effective products, the Commission should adopt the proposed Fresh Look rule and reject the unsupported assertions brought forth by BellSouth and GTE which have the very purpose of slowing competitive entry into the local market. This rule is appropriate and reasonable because it places the decision in the hands of the consumer and not the ILECs. It will allow customers access to innovative and cost effective products and services in a competitive environment -

something not presently available even with the implementation of resale of CSAs. It will allow customers to avoid potentially exorbitant termination liabilities.

The claims made by BellSouth and GTE that competition has existed in the local markets for years must be rejected. The fact that ILECs control close to 100% of the local market,[38] is evidence of this. The implementation of the Fresh Look rule is necessary in order to open this virtual monopoly. This rule furthers the public interest and the Commission's objectives by promoting facilities-based competition and empowering the consumer.

RESPECTFULLY SUBMITTED this 16th day of June, 1999.

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[38] See id.

CERTIFICATE OF SERVICE
Docket No. 980253-TX

I HEREBY CERTIFY that a true and correct copy of the Posthearing Brief on behalf of Time Warner AxS of Florida, L.P. has been served by U.S. Mail on this 16th day of June, 1999, to the following parties of record:

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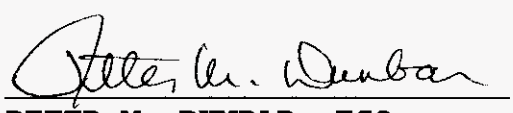

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