

BEFORE THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INCORPORATED,)
)
 Petitioner,)
)
 vs.)
)
 FLORIDA PUBLIC SERVICE)
 COMMISSION,)
)
 Respondent.)
 _____)

980253-TX

Case No. 99-5368RP

BELLSOUTH TELECOMMUNICATIONS,)
 INC.,)
)
 Petitioner,)
 vs.)
)
 FLORIDA PUBLIC SERVICE)
 COMMISSION,)
)
 Respondent.)
 _____)

Case No. 99-5369RP

**TIME WARNER TELECOM OF FLORIDA, L.P.'S
AMENDED PETITION FOR LEAVE TO INTERVENE**

Time Warner Telecom of Florida, L.P. ("Time Warner"), pursuant to §120.56(e), F.S. (1999) and Fla. Admin. Code R. 28-106.205, hereby submits this Amended Petition for Leave to Intervene.

In support thereof, Time Warner states:

PARTIES

1. The Florida Public Service Commission ("Commission") administers Chapter 364, Florida Statutes, and is the affected agency in this proceeding. The Commission is located at 2540

AFA _____
 APP _____
 CAF _____
 CMU _____
 CTR _____
 EAG _____
 LEG _____
 MAS _____
 OPC _____
 RRR _____
 SEC _____
 WAW _____
 OTH _____

Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. The rulemaking proceedings before the Commission were conducted in Docket No. 980253-TX.

2. The address and telephone number of Time Warner is as follows:

Time Warner Telecom of Florida, L.P.
c/o Carolyn Marek
233 Bramerton Court
Franklin, Tennessee 37069
(615) 376-6404
(615) 376-6405 (facsimile)

3. Time Warner is represented in this proceeding by the following counsel:

PETER M. DUNBAR, ESQ.
Florida Bar No. 146594
KAREN M. CAMECHIS, ESQ.
Florida Bar No. 0898104
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
Post Office Box 10095 (32302)
215 S. Monroe Street, 2nd Floor
Tallahassee, Florida 32301
(850) 222-3533
(850) 222-2126 (facsimile)

4. The Commission granted Time Warner a certificate of authority in Docket No. 95-0906 to provide services as an Alternative Local Exchange Company ("ALEC") in Florida. Time Warner is a facilities-based carrier presently providing exchange access and local exchange telecommunications services in Florida.

PROPOSED RULES AT ISSUE

5. Proposed Rules 25-4.300, 25.4.301, and 25-4.302 ("Fresh Look" rules) are the subject of this administrative rule challenge. The "Fresh Look" rules provide certain existing customers of incumbent local exchange companies ("ILECs") a one-time opportunity to avail

themselves of competitive alternatives offered by ALECs by allowing those customers to opt out of extended contracts entered into while a monopolistic environment existed.

DISPUTED ISSUES OF FACT OR LAW and ULTIMATE FACTS ALLEGED

6. The following issues are in dispute:

- a. By adopting the proposed rules, did the Commission exceed the powers, functions and duties delegated by the Legislature;
- b. Do the proposed rules improperly enlarge, modify or contravene the specific provisions of the laws being implemented;
- c. Are the proposed rules supported by competent and substantial evidence;
- d. Are the proposed rules arbitrary and capricious;
- e. Do the proposed rules represent the least cost regulatory alternative; and
- f. Were the proposed rules approved in a proceeding in which applicable rulemaking procedures were followed.

7. Time Warner asserts that the Commission did not exceed the powers, functions, and duties delegated to it by the Legislature; the proposed rules do not enlarge, modify or contravene specific provisions of the laws being implemented; the proposed rules are supported by competent and substantial evidence; the proposed rules are not arbitrary and capricious; the proposed rules represent the least cost regulatory alternative; and the proposed rules were approved in a proceeding in which applicable rulemaking procedures were followed. Accordingly, the proposed rules should be upheld.

PROCEDURAL HISTORY

8. On February 17, 1998, Time Warner filed a Petition to Initiate Rulemaking Pursuant to 120.54(5), F.S., by Time Warner AxS of Florida, Inc. In the petition, Time Warner requested that the Commission adopt rules providing for “fresh look” procedures. *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 (1998).*

9. The Commission held a workshop and hearing on the proposed rules providing interested persons opportunities to submit comments and testimony. As a result, the Commission issued several revisions of the proposed “Fresh Look” rules.

10. The Commission last addressed the “Fresh Look” rules during its November 16, 1999, Agenda Conference and voted to revise the rules once again. Representatives of Time Warner were present at the Agenda Conference and participated in the discussion of the revisions. The revised proposed rules were published in the *Florida Administrative Weekly* on December 3, 1999, pursuant to §120.54(3)(d), F.S.

11. On December 23, 1999, BellSouth Telecommunications, Inc. (“BellSouth”) filed a Petition for Administrative Determination of the Invalidity of Proposed “Fresh Look” Rules with the Florida Division of Administrative Hearings. BellSouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 99-5369RP.

12. On December 23, 1999, GTE Florida Incorporated (“GTE”) also filed a Petition for Administrative Determination of the Invalidity of Proposed “Fresh Look” Rules with the Florida Division of Administrative Hearings. GTE Florida, Incorporated v. Florida Public Service Commission, Case No. 99-5368RP.

13. On January 24, 2000, the Administrative Law Judge (“ALJ”) ordered consolidation of BellSouth’s and GTE’s administrative challenges of the proposed “Fresh Look” rules for purposes of hearing only and will proceed under Case No. 99-5368RP.

14. On January 27, 2000, Time Warner submitted a Petition for Leave to Intervene (“Petition”) asserting that its substantial interests will be affected by the outcome of this proceeding. Except for good cause shown, petitions for leave to intervene must be filed at least 20 days before the final hearing. Fla. Admin. Code R. 28-106.205. The hearing in this matter is scheduled to commence on April 25, 2000. Accordingly, Time Warner’s Petition for Leave to Intervene was timely filed.

15. On February 8, 2000, GTE filed an Answer Opposing Time Warner Telecom of Florida, L.P.’s Petition for Leave to Intervene (“GTE Answer”). In GTE’s Answer, GTE states that Time Warner’s Petition did not establish that Time Warner’s substantial interests would be affected by the decision in this proceeding, and that Time Warner’s Petition does not comply with the applicable rules. GTE requests denial of Time Warner’s Petition with prejudice. (GTE Answer at page 4)

16. Also on February 8, 2000, BellSouth filed a Response to Time Warner Telecom of Florida, L.P.’s Petition for Leave to Intervene (“BellSouth Answer”). In BellSouth’s Answer, BellSouth states that “Time Warner’s inability to demonstrate any direct and substantial effect on any substantial interest demonstrates the lack of any justification for permitting its intervention in this matter” and requests denial of Time Warner’s Petition. (BellSouth’s Answer at page 3)

**TIME WARNER'S SUBSTANTIAL INTERESTS WILL BE
DETERMINED IN THIS PROCEEDING**

17. In proceedings challenging the validity of a proposed rule, "substantially affected persons" may join the proceedings as interveners. §120.56(1)(e), F.S. (1999); Fla. Admin. Code R. 28-106.205. To demonstrate standing to intervene as an interested party 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 or nature which the proceeding is designed to protect. AmeriSteel Corp. v. Clark, 691 So.2d 473 (Fla. 1997). An 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." Montgomery v. Dept. of Health and Rehabilitative Services, 468 So.2d 1014 (Fla. 1st DCA 1985). The requirements for standing in rule challenges are substantially less stringent than those required for participation in a proceeding under §120.57, F.S., or to bring an action in court. Dept. of Professional Regulation, Board of Dentistry v. Florida v. Florida Board of Medicine, 612 So.2d 646 (Fla. 1st DCA 1993).

18. Commission staff summarized the purpose of the proposed "Fresh Look" rules as follows:

The purpose of the proposed fresh look rules is to allow customers to take advantage of competitive offers for service that were not available when they entered into their current contracts with the LECs. It would also encourage competition by enabling ALECs to compete for existing LEC customer contracts covering local telecommunications services offered over the public switched network.

Memorandum, F.P.S.C. Docket No. 98-0253TX, January 11, 2000.

Thus, if the proposed rules are determined to be invalid, Time Warner will be denied an opportunity to compete for certain existing customers of ILECs, including GTE and BellSouth. Consequently, invalidation of the proposed rules may result in a significant financial impact on Time Warner.

19. The fact that a person's conduct will be regulated by proposed rules is sufficient to establish that their substantial interests will be affected and there is no need for further factual elaboration of how that person will be personally affected. Coalition of Mental Health Professions v. Dep't of Bus. & Prof. Reg., 546 So.2d 27, 28 (1st DCA 1989). If the proposed rules are upheld, Time Warner, as well as other certificated ALECs, will have an opportunity to compete for existing customers of ILECs, subject to the requirements and limitations of the "Fresh Look" rules. Accordingly, Time Warner's conduct will be regulated by the proposed rules if they are upheld.

20. In its Petition for Administrative Determination of the Invalidity of Proposed "Fresh Look" Rules, BellSouth Telecommunications, Inc. ("BellSouth") argues that its substantial interests will be affected by the proposed "Fresh Look" rules for the following reason:

The proposed "Fresh Look" rules would give certain BellSouth customers the right to abrogate agreements they entered into with BellSouth without paying the full termination liability to which they freely agreed. BellSouth likely has more than 1,000 agreements with customers that would be subject to unilateral abrogation under the proposed rules. As a result, BellSouth risks millions of dollars of revenues it bargained for and won in the competitive arena.

BellSouth acknowledges that more than 1,000 of its customers will be entitled to abrogate contracts with BellSouth if the proposed "Fresh Look" rules are upheld.

21. In its Petition for Administrative Determination of the Invalidity of Proposed "Fresh Look" Rules, GTE asserts that the rule "allows GTE's customers to terminate their contracts and tariffed term plans" and "will cause GTE potentially substantial revenue and consumer losses." If upheld, the proposed rule will allow certain customers of GTE to terminate long-term contracts with

GTE while providing Time Warner and other ALECs the opportunity to compete for those customers in a competitive environment.

22. It follows, then, that Time Warner will have an opportunity to compete for those customers of ILEC's, including BellSouth and GTE, who are within Time Warner's service area if the proposed rules are upheld. Conversely, if the proposed rules are found to be invalid, Time Warner will be denied the opportunity to compete for those same customers, thereby foregoing potential increases in revenues and market share. Accordingly, Time Warner's substantial interests are affected by this proceeding.

WHEREFORE, for the reasons stated above, Time Warner requests the following relief:

1. Leave to intervene in this proceeding;
2. Entry of an order upholding the validity of the proposed rules; and
3. Such other relief as the ALJ deems appropriate.

RESPECTFULLY SUBMITTED this 22nd of February, 2000.

TIME WARNER TELECOM OF FLORIDA, L.P.



PETER M. DUNBAR, ESQ.

Florida Bar No. 146594

KAREN M. CAMECHIS, ESQ.

Florida Bar No. 0898104

PENNINGTON, MOORE, WILKINSON,

BELL & DUNBAR, P.A.

Post Office Box 10095 (32302)

215 S. Monroe Street, 2nd Floor

Tallahassee, Florida 32301

(850) 222-3533 (850) 222-2126 (facsimile)

CERTIFICATE OF SERVICE
DOAH CASE NO. 99-5368RP
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I HEREBY CERTIFY that a true and correct copy of Time Warner Telecom of Florida, L.P.'s Amended Petition for Leave to Intervene has been served by U.S. Mail this 22nd day of February, 2000, to the following parties of record:

Blanca Bayo, Director of Records
& Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
(850) 413-6770

Martha Brown, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
(850) 413-6187

Kimberly Caswell
GTE Florida, Inc.
FLTC0007
Post Office Box 110
Tampa, FL 33601
(813) 483-2617

Michael P Goggin, Esquire
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

John Rosner, Esquire
Joint Administrative
Procedures Committee
600 South Calhoun Street
Holland Building, Room 120
Tallahassee, FL 32399
(850) 488-9110

David E. Smith, Director of Appeals
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399


KAREN M. CAMECHIS, ESQ.