

MICHAEL P. GOGGIN  
General Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

April 10, 2000

**Via Hand Delivery**

Sharyn L. Smith, Chief Judge  
State of Florida  
Division of Administrative Hearings  
DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-3060

980253-

RECEIVED  
STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
00 APR 12 AM 8:35  
MAIL ROOM

**Re: Consolidated Case No. 99-5368RP (BST/GTE Fresh Look Appeal)**

Dear Ms. Smith:

Enclosed is an original and one copy of the Joint Pre-Hearing Stipulation of the Parties, which we ask that you file in the captioned case.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

*Michael P. Goggin/V.F.*  
Michael P. Goggin

cc: Judge E. J. Davis  
All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_  
EAG \_\_\_\_\_  
LEG \_\_\_\_\_  
MAS \_\_\_\_\_  
OPC \_\_\_\_\_  
RRR \_\_\_\_\_  
SEC   I    
WAW \_\_\_\_\_  
OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE  
**04467 APR 12 8**  
FPSC-RECORDS/REPORTING


**CERTIFICATE OF SERVICE**  
**Consolidated Case No. 99-5368RP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
U.S. Mail this 10th day of April, 2000 to the following:

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

***John Rosner, Staff Attorney***  
The Florida Legislature Joint  
Administrative Procedures Committee  
600 South Calhoun Street  
Room 120, Holland Building  
Tallahassee, FL 32399-1300

***Mary Anne Helton***  
Associate General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

  
Michael P. Goggin

***Catherine Bedell***  
General Counsel  
***Martha Carter Brown***  
Associate General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

***David E. Smith***  
Director of Appeals  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

***Kimberly Caswell***  
GTE Florida, Inc.  
P.O. Box 110, FLTC0007  
Tampa, FL 33601-0110  
Tel. No. (727) 360-3241  
Fax. No. (727) 360-0716



*Administrative Weekly.* The Fresh Look rules would give certain telecommunications customers who entered into agreements with incumbent local exchange companies ("ILECs") for certain local exchange services with terms of more than one year the right to terminate those contracts without paying the full termination liability required under the contract's terms. The stated purpose of the Fresh Look rules is to enable alternative local exchange companies ("ALECs") to compete for existing ILEC contracts "entered into prior to switch-based substitutes for local exchange telecommunications services." FAW, vol. 25, no. 13 (April 2, 1999).

The Petitioners in this matter, GTE and BellSouth, filed timely Petitions pursuant to Section 120.56(2), Fla. Stat., challenging the Fresh Look rules as an invalid exercise of delegated legislative authority. The Petitioners claim that the proposed rules: (i) would exceed the powers functions and duties delegated to the Commission by the Legislature (and would, indeed, violate the Florida and United States Constitutions); (ii) would enlarge, modify or contravene the specific portions of the law purported to be implemented; (iii) are not supported by competent substantial evidence; (iv) are arbitrary and capricious; (v) impose regulatory costs on ILECs that could be avoided by not adopting the rules, a result that would accomplish the same objectives; and (vi) result from a material failure by the Commission to follow applicable rulemaking procedures.

### **Statements of the Positions of the Parties**

#### ***Florida Public Service Commission***

The purpose of the proposed fresh look rules is to allow customers to take advantage of competitive offers for local telecommunications service, which did not exist

at the time the customers entered into long-term contracts with their monopoly local telecommunications providers. The rules respond to changes in the market for telecommunications brought about by major revisions to Chapter 364, Florida Statutes, and the enactment of the Federal Telecommunications Act of 1996, 47 U.S.C. § 251, et.seq. Both laws replace the existing monopoly service provided by companies like BellSouth and GTE with local telecommunications competition, and the Fresh Look Rules are designed to assist in the transition.

Prior to competition, the Commission permitted ILECs (Incumbent Local Exchange Companies - the existing monopolies) to enter into certain customer contracts covering local telecommunications services offered over the public switched network, usually in response to PBX-based competition. The Commission also permitted the ILECs to enter into *customer contracts covering dedicated services and long distance services* in response to threats of by-pass from competition from AAVs (Alternative Access Vendors) and IXC (Interexchange Carriers). With the revisions to Chapter 364, Florida Statutes, in 1995, and the enactment of the Telecommunications Act of 1996, competitive local telecommunications companies (called Alternative Local Exchange Companies - ALECs) are now offering switched-based substitutes for local service, where PBXs had previously been the only alternative.

The proposed "Fresh Look" Rules represent one of the Commission's many regulatory methods to fulfill its statutory directive to encourage competition in local telecommunications markets. The rules describe those limited circumstances under which a customer may terminate a Commission-approved ILEC contract service arrangement or tariffed term plan (collectively, contracts) subject to a termination liability less than that specified in the contract. The rules are a valid exercise of delegated legislative authority, and the Commission has specific statutory authority to adopt them; they are constitutional; they are reasonable and based on competent substantial evidence; they do not impose regulatory costs that could be avoided and still

accomplish the intended goals; and, the Commission did not materially fail to follow applicable rulemaking procedures. The rules should be approved.

***GTE Florida Incorporated***

The Commission has no authority to adopt the fresh look rule. The proposed rule would abrogate lawful contracts under which parties have already begun to perform. Contract abrogation is not within the class of powers the Legislature has granted to the Commission. The Commission's attempt to exercise such extreme authority must be particularly closely scrutinized because of its constitutional dimensions. In this regard, Florida Courts have tolerated almost no degree of contract impairment.

In addition, the rule contravenes statutory language expressly confirming the ILECs' ability to use individual contracts and volume discounts.

Even if the Commission did have the requisite authority to adopt the fresh look rule, it would still fail because it is arbitrary and capricious and not supported by competent and substantial evidence. The rule's stated purpose is to allow ALECs to compete for ILEC contracts that were entered prior to switch-based substitutes for local exchange services. But the undisputed evidence proves that there were competitive alternatives for the services at issue long before June 30, 1999. There is thus no basis for subjecting contracts up until that date to a fresh look opportunity.

Because the rule applies to already existing contracts, it is also impermissibly retroactive. This problem, as well as the constitutional issue of contract impairment, was raised in a letter from the Legislature's Joint Administrative Procedures Committee to the Commission before the rulemaking hearing. Despite the letter's pertinence to critical and intensely debated legal issues in this proceeding, it was never placed into the record and there is no indication that the Commission ever responded to it. These lapses constitute a material failure to follow applicable rulemaking procedures and requirements of the Florida Administrative Procedure Act.

For these reasons, the Judge should find the proposed fresh look rule to be invalid exercise of delegated legislative authority.

***BellSouth Telecommunications, Inc.***

BellSouth contends that proposed rules would exceed the powers functions and duties delegated to the Commission by the Legislature, would violate the Florida and United States Constitutions and would enlarge, modify or contravene the specific portions of the law purported to be implemented. The Commission lacks the statutory authority to authorize the abrogation of contracts between telecommunications carriers and their customers. The general grants of rulemaking authority relied upon by the Commission cannot be so broadly construed. The legislature has not granted any express authority that would authorize rules intended to permit the abrogation of contracts. Moreover, the legislature could not have granted such authority, for to do so would violated the United States and Florida Constitutions.

In addition, the factual assumptions upon which the Commission's decision to approve the rules appears to be based lack any foundation in fact. At the time that the contracts to be abrogated under the proposed rules were formed, the customers involved had competitive alternatives from which to choose. The Commission did not have any evidence in the record upon which it might have concluded to the contrary. In short, the Commission's decision to approve the proposed rules is not supported by competent substantial evidence and is arbitrary and capricious. For the same reasons, the proposed rules would impose regulatory costs on ILECs that could be avoided by a less costly alternative that would be equally effective--not adopting the rules.

Lastly, by failing to respond to the written objections of the Joint Administrative Procedures Committee (or even to make its objections part of the record) and by failing to make available the Statement of Estimated Regulatory Costs available consistent with Florida law, the Commission materially failed to follow applicable rulemaking

procedures. For all of these reasons, the proposed rules would be an invalid exercise of delegated legislative authority and should be rejected.

### Exhibits

#### ***Florida Public Service Commission***

- (a) Composite exhibit of documents on file in this matter at the Commission;
- (b) List of documents for Official Recognition;
- (c) Mr. Larsen's contracts.

#### ***GTE Florida Incorporated***

- (a) Exhibit showing the number of contracts and tariffed term plans that would be subject to the fresh look rule, if adopted.
- (b) PNR competitive data.
- (c) (GTE will also use the Commission Reports BellSouth has listed as exhibits; GTE understands that it does not also need to introduce these same exhibits.)

#### ***BellSouth Telecommunications, Inc.***

- (a) 4 Reports of the Commission entitled "Competition in Telecommunications Markets in Florida" dated 1996-1999.
- (b) A Composite Exhibit to show the number of contracts covered by the rule.

Each party reserves the right to offer additional exhibits at the hearing for purposes of rebuttal or impeachment, or in response to information disclosed through discovery prior to hearing.



**Witnesses**

***Florida Public Service Commission***

Kathy Lewis	(FPSC Staff)
Anne Marsh	(FPSC Staff)
Sally Simmons	(FPSC Staff)
Craig Hewitt	(FPSC Staff)
Carolyn Marek	(Time Warner)
Eric Larsen	(Internet Service Provider <u>Customer</u> )

(Each of the above witnesses may be contacted at the address and telephone number of the Commission counsel listed below.)

***GTE Florida Incorporated***

Beverly Menard	(GTE)
Amy Martin	(GTE)
Patty Tuttle	(GTE)

(GTE's witnesses may be contacted at the address and telephone number listed below for GTE's counsel.)

***BellSouth Telecommunications, Inc.***

Ned Johnston	(BellSouth Business Systems, Inc.)
--------------	------------------------------------

(BellSouth's witness may be contacted at the address and telephone number listed below for BellSouth's counsel.)

**Stipulated Issues of Fact**

None.

**Stipulated Issues of Law**

None.

**Disputed Issues of Fact**

1. Whether the Commission failed to follow applicable rulemaking procedures or requirements;
2. Whether the Commission received a letter from the Joint Administrative Procedures Committee regarding the proposed rule;

3. Whether the Commission responded to the letter from the Joint Administrative Procedures Committee;
4. Whether the Commission placed the letter from the Joint Administrative Procedures Committee into the record;
5. Whether (and if so how and when) the Commission made available the Statement of Estimated Regulatory Costs regarding the proposed rules;
6. Whether competition existed for the local telecommunications services at issue before June 30, 1999.

#### Disputed Issues of Law

1. Whether the Commission exceeded the powers functions and duties delegated to it by the Legislature by approving the proposed rules;
2. Whether the Commission, in approving the proposed rules, has exceeded its grant of rulemaking authority;
3. Whether the proposed rules would be unconstitutional (assuming the Division can decide constitutional disputes);
4. Whether the proposed rules would be an invalid exercise of delegated authority;
5. Whether the proposed rules would enlarge, modify or contravene the specific provisions of law implemented;
6. Whether the Commission's decision to adopt the proposed rules is supported by competent substantial evidence;
7. Whether the proposed rules are arbitrary or capricious;
8. Whether the proposed rules impose costs on ILECs which could be reduced by the adoption of a less costly alternative that would substantially accomplish the same objectives;
9. Whether the Commission materially failed to follow the applicable rulemaking procedures or requirements.

### **Disputed Issues of Evidence**

The Petitioners contend that, for purposes of determining whether the Commission's decision to approve the proposed rules was supported by competent substantial evidence, the Commission should not be permitted to introduce any evidence in this proceeding that was not part of the record before the Commission, upon which its decision was based. The Commission believes that the competent substantial evidence standard in this proceeding is to be based on all relevant evidence presented to the Administrative Law Judge, not the Commission, and the Commission is not limited in its presentation to the evidence in the rule hearing record. The Petitioners intend to file a timely motion in limine regarding this disputed issue.

### **Pending Motions**

As stated above, the Petitioners intend to file a motion in limine.

### ***Estimated Duration of Hearing***

The Parties estimate that the hearing in this matter, currently scheduled to begin on April 25, 2000, should not last more than three days.

Respectfully submitted this 10th day of April, 2000.

### **FLORIDA PUBLIC SERVICE COMMISSION**

  
Martha Brown, Staff Counsel  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

David E. Smith, Director of Appeals  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**GTE FLORIDA INCORPORATED**

*Kimberly Caswell/V.F.*

Kimberly Caswell  
P. O. Box 110, FLTC0007  
Tampa, Florida 33601-0110  
(813) 483-2617  
Florida Bar No. 0874310

**BELLSOUTH TELECOMMUNICATIONS, INC.**

*Nancy B. White/V.F.*

Nancy B. White  
Michael P. Goggin  
c/o Nancy H. Sims  
150 So. Monroe Street, Suite 400  
Tallahassee, FL 32301  
(305) 347-5558

*R. Douglas Lackey/V.F.*

R. Douglas Lackey  
Suite 4300  
675 W. Peachtree St., NE  
Atlanta, GA 30375  
(404) 335-0747

204881