

FLORIDA PUBLIC SERVICE COMMISSION
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February 26, 1998

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (CALDWELL) *PWC*
DIVISION OF COMMUNICATIONS (SIMMONS) *PS*
SAS *AW*

RE: DOCKET NO. 980253-TX - PETITION TO INITIATE RULEMAKING
PURSUANT TO SECTION 120.54(7), F.S., TO INCORPORATE
"FRESH LOOK" REQUIREMENTS TO ALL INCUMBENT LOCAL EXCHANGE
COMPANY CONTRACTS BY TIME WARNER AxS OF FLORIDA, INC.

AGENDA: MARCH 10, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: MARCH 18, 1998 - END OF 30-DAY STATUTORY
REQUIREMENT.

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\980253TX.RCM

CASE BACKGROUND

On February 17, 1998, Time Warner AxS of Florida, L. P., (Time Warner or Petitioner) filed a Petition to Initiate Rulemaking Pursuant to §120.54(5) [sic], Florida Statutes, to include "fresh look" requirements. "Fresh look" provides customers of incumbent local exchange companies (LECs) a one-time opportunity to opt out of existing contracts with LECs entered into in a monopoly environment so as to avail themselves of competitive alternatives now offered or to be offered in the future by alternative local exchange companies (ALECs). The Commission currently does not have any rules or established policy related to "fresh look".

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission initiate rulemaking to adopt "fresh look" requirements?

RECOMMENDATION: No. A docket is currently open for the purposes of investigating "Fresh Look" policies.

STAFF ANALYSIS: The Petitioners request the Commission to:

- (1) Request comments from LECs, ALECs, and other interested parties as to the proposed Fresh Look rules;
- (2) Hold an evidentiary hearing, if the Commission deems a hearing appropriate and necessary to consider Fresh Look Rules;
- (3) Develop rules to include Fresh Look requirements; and
- (4) Grant such other relief as it may deem just and proper.

In support of its Petition, Time Warner states that the Commission has the authority to promulgate these rules. In addition, Time Warner states that such rules would promote competition. Time Warner cites to the Federal Communications Commission and other states that have adopted rules or are in the process of adopting rules that address the "fresh look" policy. Finally, Time Warner offers language to be proposed as a rule.

Section 120.54(7)(a), Florida Statutes, provides:

any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall specify the proposed rule and action requested. Not less than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

Pursuant to this section, the Commission must decide whether to grant the Petitioner's request or deny it with specificity.

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As stated earlier, the Commission does not have rules relating to "fresh look." The Commission has only considered the issue in one limited instance as it related to expanded interconnection (Docket No. 921074-TP). The question before the Commission is whether or not it would be appropriate to initiate rulemaking to develop a "fresh look" policy.

A few historical comments on the origin of contract service arrangements (CSAs) may be useful for starters. LECs initially received CSA authority for those services which were susceptible to uneconomic bypass by competing providers. Uneconomic bypass was based on the notion that a competitor might be able to offer an alternative product or service at a price lower than the LEC's tariffed rates, but above the LEC's cost. Under rate-of-return regulation, there was concern that captive customers might have to pay higher rates to help compensate for this bypass.

Prior to the 1995 rewrite of Chapter 364, Florida Statutes, there were competitive alternatives for dedicated services (from Alternative Access Vendors) and Centrex services (from PBX vendors), and LECs frequently used CSAs in competitive bidding situations for large business and government accounts. The petitioner's statement that "(f)resh look should apply to portions of contracts involving basic local exchange service or to entire contracts where local termination liability is not severable from non-local services" seems to acknowledge that there have been competitive alternatives for dedicated services. The petitioner's request clearly focuses on "fresh look" for local switched services, where competitive alternatives have only emerged as a result of the 1995 rewrite of Chapter 364, Florida Statutes.

As mentioned above, LECs typically offer CSAs to large business and government customers, and these customers usually have knowledgeable telecommunications managers who are involved in the contract negotiations. For contracts entered into after the 1995 rewrite of Chapter 364, Florida Statutes, staff believes that it is reasonable to expect that these telecommunications managers would have considered the possibility of future alternatives for local switched services and would have considered this factor when agreeing to the term of the contract. Consequently, staff questions the basic premise that CSAs are a barrier to competition.

Staff would also point out that this Commission has required LECs to resell CSAs in the context of various arbitration requests. This affords ALECs another entry strategy which staff believes further mitigates the need for "fresh look."

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Based on the above, staff does not believe that there is a compelling reason to pursue development of a "fresh look" policy at this time. "Fresh look" may make sense in some limited cases, but the petitioner has not made a compelling showing of need. Staff already has an open docket (No. 960932-TP, Investigation into "Fresh Look" Policy for Local Telecommunications Competition) and is monitoring developments in this area (e.g., FCC Docket No. 95-184 regarding a "fresh look" policy for CATV contracts involving multi-dwelling units). Further, the petitioner is, to the best of staff's knowledge, only offering local switched services on a very limited basis at this time. In the absence a compelling need, we recommend that this petition to initiate rulemaking on "fresh look" requirements should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation to deny the petition, the docket should be closed.

STAFF ANALYSIS: If the Commission approves staff's recommendation, the docket should be closed after the order has been issued and the time for reconsideration and appeal has expired. However, if the Commission denies staff's recommendation, the docket should remain open for further development.