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

February 25, 1999

Re: Docket No. 990132-TP
Complaint of AGI Publishing, Inc. against GTE Florida Inc./GTE Telephone
Operating Companies for violation of Sections 364.08 and 364.10, Florida
Statutes, and request for relief

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE Florida Incorporated's
Motion to Dismiss and Opposition to Request for Expedited Treatment 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 813-483-2617.

Sincerely,

Anthony P. Gillman

Kimberly Caswell

KC:tas

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of AGI Publishing, Inc.)
Against GTE Florida Incorporated,) Docket No. 990132-TP
GTE Telephone Operating Companies for) Filed: February 25, 1999
Violation of Section 364.08 and 364.10,)
Florida Statutes, and Request for Relief)
_____)

**GTE FLORIDA INCORPORATED'S MOTION TO DISMISS
AND OPPOSITION TO REQUEST FOR EXPEDITED TREATMENT**

GTE Florida Incorporated (GTE) asks the Commission to dismiss the Complaint of AGI Publishing, Inc. d/b/a Valley Yellow Pages, filed on February 5, 1999. The Complaint does not state a claim for which the Commission can grant relief. In addition, GTE opposes Valley's Request for Expedited Treatment of its Complaint, which was filed on February 23. Valley has offered no reason for the Commission to entertain the Complaint at all, let alone to give it expedited treatment.

It is immediately apparent from the face of the Complaint that it has no legal basis. In the caption of the pleading and the introductory sentence, Valley Yellow Pages (Valley) states that GTE has violated Sections 364.08 and 364.10. But then these statutes are never mentioned again. Valley does not tell us what these statutes say or which subsections or aspects of them purportedly relate to its Complaint. Valley has made no attempt to link Sections 364.08 and 364.10 to GTE's behavior described in the Complaint. In fact, no such link is possible.¹

¹ Even Valley is not convinced that Sections 364.08 and 364.10 are legitimate grounds for its Complaint; otherwise, Valley would not have filed a petition for declaratory ruling asking about their applicability in this instance. GTE will respond to that petition by separate filing, explaining that it is procedurally improper and substantively unfounded.

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Valley's complaint concerns billing for yellow pages advertising. Valley states that it publishes yellow pages directories throughout the nation and that GTE has provided billing and collection services to Valley under an agreement scheduled to terminate December 31, 2000. Valley states further that GTE has notified Valley that it intends to terminate the contract as of March 31, 1999. This factual account is accurate, but incomplete. Valley has left out the most important detail. That is, the contract contains the following provision: "Either party may terminate this Agreement for any reason upon one hundred eighty (180) Calendar Days after written notice."

This provision entitled GTE to terminate Valley's contract. Valley knows full well about this provision, and agreed to it before the contract was executed. Indeed, Valley has not alleged that GTE violated the contract in any way.

Lacking any legitimate contract claim, Valley has turned to the Commission to seek reformation of its agreement with GTE. Valley wants the Commission to effectively change its contract with GTE to remove the provision allowing either party to terminate "for any reason" (or perhaps just eliminate GTE's right to terminate; Valley would presumably not object to preserving its own right to end the contract). The Commission has no authority to grant this kind of relief.

The Commission does not have jurisdiction over the contract at issue, and so cannot alter that contract. The agreement concerns billing for Valley's customers' advertising in Valley's yellow pages directories. Yellow pages and yellow pages billing are neither regulated nor considered telecommunications services here in Florida or, to GTE's knowledge, anywhere else. There is no filing requirement here for yellow pages billing

contracts, as there is for telecommunications contracts. (See Fla. Stat. Ch. 364.07.) No federal or state law or regulation—and certainly not Sections 364.08 or 364.10—requires GTE to offer billing to yellow pages providers or dictates the terms under which it may choose to do so.

Section 364.08 states:

(1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time. A telecommunications company may not refund or remit, directly or indirectly, any portion of the rate or charge so specified or extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. However, it shall be lawful for the commission to authorize employee concessions if in the public interest.

Section 364.10 states:

(1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(2) The prohibitions of subsection (1) notwithstanding, a telecommunications company serving as carrier of last resort shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff and a preferential rate to eligible facilities as provided for in part II.

Although Valley doesn't explain its interpretation of these statutory provisions, GTE guesses that Valley would contend that they require GTE to provide billing and collections for yellow pages advertising, at tariffed rates, to all entities that want this service.

Assuming this is Valley's position, it has no legal basis. Sections 364.08 and 364.10 embody the traditional, common law obligations that apply to communications common carriage in Florida (and, for that matter, everywhere in the United States). They pertain only to telecommunications services provided by telephone utilities. The Commission has never interpreted them more expansively, as Valley urges it to do, to extend beyond telecommunications common carriage to any non-telecommunications, non-regulated features or services a telephone company might provide. To the contrary, the Commission has made clear that its jurisdiction (and even more specifically, Section 364.08's nondiscrimination obligation) depends on "the critical issue" of whether the service or product at issue "constitutes 'telecommunications services for hire.'" Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecomm. Services Using the Internet, by America's Carriers Telecommunications Ass'n, 96 FPSC 12:385 (1996) (Commission refused to take jurisdiction over a dispute involving Internet telephony software).

Neither yellow pages advertising nor billing for such advertising is a "telecommunications service for hire." Yellow pages involves publishing and advertising, not telecommunications. By extension, there is no telecommunications component involved in billing for yellow pages advertisements. Billing services for non-telecommunications products and services are not subject to state or federal telecommunications regulation. GTE's billing service tariff in Florida applies to only telecommunications access service. At the federal level, all billing for even telecommunications services was detariffed by the FCC over 12 years ago. Detariffing of

Billing and Collection Services, 102 F.C.C. 2d 1150, 1169 (1986). In doing so, the FCC held that billing and collections is not a communications service and does not qualify as communications common carriage. The FCC found, rather, that it is an administrative service that is not part of the bottleneck monopoly since it can be done by a carrier itself or obtained from other sources. Given that billing for even communications services is not a communications service, it must follow that billing for non-communications services is not a communications service.

Valley makes the mistake of assuming that every service a telecommunications company provides must necessarily be a telecommunications service. If that were true, the Commission's entire regulatory scheme would need to be overhauled. Many certificated "telecommunications companies" also engage in businesses that are not regulated or that are regulated differently than their telecommunications businesses. For instance, numerous alternative local exchange carriers, which are telecommunications companies, are also cable television companies. But the Commission has not attempted to impose common carrier-type obligations (such as those reflected in Sections 364.08 and 364.10) on their non-telecommunications, cable operations. It would be just as inappropriate to impose common carrier obligations on GTE's non-telecommunications, yellow pages billing operations.

Moreover, Valley's arguments cannot be reconciled with the language and purpose of Section 364.08. As the Commission has repeatedly recognized, that provision is, first and foremost, the source of the common carrier tariffing obligation—an obligation that does not apply to billing for yellow pages advertising.

In the Commission's own words, "Section 364.08, Florida Statutes, prohibits a company from charging any rate for a service that is not published and on file in that company's approved tariffs. This provision is designed to prohibit discrimination between customers and insure that all customers have notice of the Commission approved rates and services. As a result, a company is bound to the terms set forth in its tariffs and no company has the authority to unilaterally waive the provisions of its tariffs." (Request by Biz-Tel to Have Southern Bell's Minimum Period for Access Charges Waived, Order No. 18462, 87-11 FPSC 342 (1987). See also Petition for Declaratory Statement Concerning Potential Service to Dog Island by St. Joseph Tel. & Tel. Co., 95 FPSC 466 (1995) (Section 364.08 means that "St Joseph may not deviate from scheduled rates."); Initiation of Show Cause Proceedings Against Southnet Services, Inc. for Violation of Rule 25-24.485(1)(I), F.A.C., by Charging in Excess of Its Tariff, 93 FPSC 349 (1993) ("Section 364.08(1) prohibits telecommunications companies from charging rates inconsistent with their duly filed tariffs."))

Because there is no requirement to tariff billing for yellow pages advertising, there is no way to force Valley's Complaint into the ambit of Section 364.08. Indeed, the Biz-Tel decision once again makes clear that that section is only germane to "Commission approved rates and services." The Commission does not set rates for or approve yellow pages billing services.

Valley apparently would like to change this situation. Not only would it have the Commission oversee the rates and terms for yellow pages billing, but it would, more fundamentally, require the Commission to force GTE to provide yellow pages billing to any

directory publishing firm that wants it. This is an extraordinary suggestion, and one that the Commission lacks the authority to implement.

The Commission could entertain Valley's Complaint only if billing for yellow pages advertising were a monopoly, telecommunications service and only if yellow pages were also a telecommunications service. These jurisdictional parameters are evident in the Commission's decision in Investigation into the Regulatory Safeguards Required to Prevent Cross-Subsidization by Telephone Companies, 93 FPSC 7:272 (1993). There, the Commission declined to find that a local exchange carrier had to offer even monopoly, telecommunications elements to non-affiliates if it made them available to affiliates. The Commission made clear that any future policy decisions "relating to the availability of monopoly services and inputs" would need to consider the Legislature's directive of "encouraging competition in the telecommunications industry where it is deemed to be in the public interest." Id. at 285.

Valley's Complaint has nothing to do with "the telecommunications industry." It concerns instead the directory publishing industry. Valley claims that withdrawal of GTE's billing services will "result in a significant economic detriment to Valley." (Valley Complaint at 3.) Even if that were true, this fact is of no concern to the Commission. This Commission has no mandate to encourage competition in the directory publishing industry; indeed, it could not, as it has no jurisdiction over such non-telecommunications, non-regulated markets. It has no responsibility to ensure the financial well-being of any company, let alone a non-telecommunications company.

If the Commission interprets Sections 364.08 and 364.10 in the manner Valley suggests, GTE (and other ILECs) would have to provide its billing services to every company that might find them merely convenient or useful. As GTE recently told the Commission in the context of anti-cramming discussions, GTE has terminated third-party billing for all non-telecommunications services. If the Commission accepts Valley's arguments, GTE will have to change its current policy to offer billing for these non-telecommunications services (including, for example, psychic club fees, prescription club fees, and sports line chat fees). If this is to be the case, the Commission can expect a dramatic rise in the number of cramming complaints.

Valley's statutory reading would, moreover, require GTE to provide to non-GTE third parties every service or function it provides to its affiliates, including administrative, non-monopoly elements. This extreme outcome would be unprecedented in any federal or state regulatory scheme.

Valley's allegations that GTE has a "virtual monopoly position" in both Yellow pages advertising and billing and collection services are irrelevant to this Motion to Dismiss. Even if the Commission takes these allegations to be true, there is no legal basis for the Commission to grant Valley's request to force GTE to provide it (and others) billing for yellow pages advertising. As noted, neither yellow pages advertising nor billing for such advertising are regulated or telecommunications services, so neither Section 364.08 or 364.10 provides any basis for relief.

Nevertheless, the Commission may be interested in knowing that Valley has numerous billing alternatives to GTE. Because directory advertising is not a

telecommunications service, billing for it does not require any recording, rating or other telecommunications-related functions. When Valley sells an advertisement, it obtains all the information needed to bill for that advertisement; it needs nothing from the billing agent. From the consumer's perspective, purchasing a yellow pages advertisement is no different from buying any other product. Its total price is known at the time of purchase and payment might be made at the time of sale or in installments.

Billing for directory advertising is thus a relatively simple matter. Valley could bill for its own advertisements or it could contract with any company that performs billing—not just the numerous companies that offer billing for telecommunications services. Yellow pages advertisements could, for example, be billed by Visa, Mastercard, American Express, Sears, or any other credit card company. It is plainly implausible to claim that GTE has a “virtual monopoly” over the means to bill for directory advertising.

Indeed, Valley has apparently found other billing options. The billing contract with Valley included not just GTE Florida Incorporated, but GTE South Incorporated and Contel of the South, Inc., as well. Although Valley states that it publishes yellow pages directories “throughout the nation” (Complaint at 2), it used the contract at issue to bill only Florida directory advertising charges. Since it didn't need GTE's billing system in the other states covered by the contract—including Alabama, Kentucky, North Carolina, South Carolina, Virginia, Illinois, Georgia, Indiana, and Michigan--the only reasonable conclusion is that it's not a bottleneck facility. Valley itself admits as much; it never alleges that GTE's billing service is necessary or essential to its directory operations—merely that it is “the most cost-effective and efficient alternative.” Even if this is true (which GTE doubts), this

has never been and is not now the standard in Florida or anywhere else for forcing one company to provide services to another.

* * *

Valley asks the Commission to "issue an order directing GTE to offer its billing and collection services for Yellow Pages advertising to Valley on a non-discriminatory basis." (Valley Complaint at 4.) Granting such relief would require the Commission to apply Sections 364.08 and 364.10 to find that billing for yellow pages advertising is (1) regulated; (2) tariffed, and (3) a telecommunications service. Because it is none of these things, the Commission cannot grant the relief Valley seeks. Thus, the Complaint must be dismissed as a matter of law.

The Commission should also deny Valley's Request for Expedited Treatment of its Complaint. Valley gives no reason, let alone a good one, as to why the Commission should take the extraordinary step of expediting its Complaint. If Valley wanted expedited treatment of the Complaint, it should have made that request in the Complaint itself. Instead, Valley waited over two weeks from the time the Complaint was filed until the time it sought expedited treatment. Given this delay, it is reasonable to conclude that expedited treatment is not really very important to Valley. Valley's request will become moot, in any case, if the Commission dismisses Valley's Complaint, as GTE has requested.

Respectfully submitted on February 25, 1999.

By:

Kimberly Caswell

or Kimberly Caswell

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Telephone: 813-483-2617

Attorney for GTE Florida Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Motion to Dismiss and Opposition to Request for Expedited Treatment in Docket No. 990132-TP were sent via U.S. mail on February 25, 1999 to:

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