BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Filed: April 29, 1999

COMMENTS OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC. ON PROPOSED FRESH LOOK RULE

AT&T Communications of the Southern States, Inc. ("AT&T") hereby submits its Comments regarding the Commission's proposed Fresh Look rule pursuant to Order No. PSC-99-0547-PCO-TX.

Introduction

1. AT&T commends the Commission for its initiative in proposing a Fresh Look rule and recognizing the importance of providing customers who are locked into contracts entered into in a monopoly environment a competitive choice.

2. The purpose of a Fresh Look rule is to allow captive customers a significant opportunity to opt out of contracts entered into during a time when there was little or no meaningful competition making the incumbent monopoly provider the only option for customers. This policy will foster competition in the state by helping to remove current barriers to competition.

The Commission's Proposed Rule

3. The Commission's proposed rule provides:

- the Fresh Look period will begin 60 days after the effective date of the rule;
- the Fresh Look period will end 2 years after it begins;

- customers are allowed to terminate contracts of six months or more by notifying the ILEC in writing during the Fresh Look period;
- the ILEC may assess a termination penalty limited to unrecovered, contract specific nonrecurring costs, in an amount which does not exceed the termination liability.

4. AT&T supports the proposed rule. AT&T believes that the positions of all parties were fully considered in the development of the proposed rule and the proposed rule balances the interests of the parties and consumers. This rule will foster competition in the local exchange market.

The Need for a Fresh Look Rule

5. Incumbent Local Exchange Companies (ILECs) have market power in the local exchange market and have the ability and incentive to lock customers into long term contracts. If customers are contractually obligated to the ILEC before effective competition exists, it will delay the creation of a competitive market. As Chairman Malone of the Tennessee Regulatory Authority stated: "the fact that if you don't have a competitive environment and the monopoly is -- or the historical monopoly is locking in a large segment of customers for potentially a crucial period of time, then any other competitors attempting to enter that market during that crucial period of time would be prohibited from doing so in a large segment of the available business customers in this regard."[1] "The potential anticompetitive effect of these CSA's remains regardless of the sophistication of the customer."[2] The implementation of Fresh Look does not require ILEC's existing customers to change, but will give them the opportunity to exercise choice, which is what

[1] Transcript 2/2/99 Tennessee Regulatory Authority Sunshine Meeting.
[2] Id.

the competitive environment is all about. Tying up customers through long term contracts before the implementation of effective competition only serves to prevent competition. As Director Malone also commented concerning CSAs: "it appears to me that every time the Authority acts to approve one of these, the Authority drives a nail into a competitive environment developing here".[3]

6. AT&T does not consider all long term contracts to be inherently anti-competitive. In a properly functioning competitive marketplace contracts can provide a useful mechanism for attracting customers and providing cost savings to customers in exchange for certain service commitments. AT&T recognizes regulators should not lightly revise contracts, but in this unique situation where a legal monopoly is opened to competition, a market opening step should be an ability of customers to change providers without incurring a penalty.

Conclusion

7. The Commission has authority to enact the proposed Fresh Look rule and should do so expeditiously to encourage competition, as required by both state and federal legislation.

WHEREFORE, the Commission should enact the proposed Commission rules.

[3] Transcript 4/20/99 Tennessee Regulatory Authority Sunshine Meeting.

Respectfully submitted,

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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: April 29, 1999

PETITIONER'S RESPONSE TO COMMENTS BY BELLSOUTH TELECOMMUNICATIONS, INC. AND IN SUPPORT OF THE PROPOSED RULES

TIME WARNER AxS OF FLORIDA, L.P. ("Time Warner"), by and through undersigned counsel, hereby files these Comments in response to Bellsouth Telecommunications, Inc., in support of the proposed rules in the above docket, stating:

1. The Proposed Rules, 25-4.300 and 25-4.301, Fla. Admin. Code, regarding the applicability of the "Fresh Look" requirement to existing contracts between incumbent local exchange carriers ("ILECS") and their customers, entered into prior to implementation of the Telecommunications Act of 1996, 47 U.S.C. §§ 251, *et. seq.* do not violate the Contracts clauses of the U.S. and Florida Constitutions, as shown below.

2. Adoption of the Proposed Rules would further the legislative intent of the Telecommunications Act, rather than frustrate that intent. As a matter of sound public policy, the Proposed Rules should be adopted.

I. The Proposed Rules do not Violate the Contracts Clauses

Bellsouth's claim that adoption of the Proposed Rules would violate the Contracts Clause of either the state or federal Constitutions ignores both the Commission's clear

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authority to modify existing telecommunications contracts, and the long line of precedents, both state and federal, which have upheld similar regulations on virtually identical facts.

As a threshold matter, it is of vital importance to remember that Bellsouth, as well as its new competitors, is a highly regulated utility. It exists entirely by the grace of the entity which regulates it, the Florida Public Service Commission. It may not operate without first obtaining PSC approval; nor may it increase its rates without approval by the PSC; and finally, the PSC at all times retains the power to modify any of its rates if it finds such rates are not consistent with the public interest. These bare facts radically alter the applicability of the Contracts Clauses of either Constitution to regulated utilities.

Consider, for example, the following provisions. Florida Statutes, § 364.07 (1997) provides in pertinent part:

> (1) Every telecommunications company shall file with the commission, as and when required by it, a copy of any contract, agreement or arrangement in writing with any other telecommunications company, or with any other corporation, association, or person relating in any way to the construction, maintenance, or use of a telecommunications facility or service, by, or rates and charges over and upon, any such telecommunications facility.
> (2) The commission is authorized to review contracts for joint provision of intrastate interexchange service and may disapprove any such contract if such contract is detrimental to the public interest (emphasis added). . . .

In addition, consider Florida Statutes, § 364.14 (1997), which states:

> (1) Whenever the commission finds, upon its own motion or upon complaint, that:
> (a) The rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telecommunications company for

> services subject to s. 364.03, or the rules, regulations, or practices of any telecommunications company affecting such rates, charges, tolls, rentals, or service, are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law;
> (b) Such rates, charges, tolls, or rentals are either insufficient to yield reasonable compensation for the service rendered; or
> (c) Such rates, charges, tolls, or rentals yield excessive compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order. In prescribing rates, the commission shall allow a fair and reasonable return on the telecommunications company's honest and prudent investment in property used and useful in the public service (emphasis added). . . .

Finally, consider Florida Statutes, § 364.19 (1997), which states:

> The commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons (emphasis added).

The foregoing statutes make abundantly clear two points: first, the PSC has overwhelming regulatory authority over all aspects of contractual relationships between telecommunications providers and anyone with whom they contract; and second, the contracts, once approved, are always subject to continuing oversight and modification by the PSC, either by complaint or on its own motion. See Fla. Stat. § 364.14, *supra*.

Bellsouth takes great pains to undertake an analysis of Contracts Clause jurisprudence without ever addressing the fact that it operates in a highly regulated environment. In 1983, the Supreme Court considered a case arising in just this context, rejecting any notion that the Contracts Clause prohibited regulatory action which affected

contracts between public utilities and their customers. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S.Ct. 697 (1983). In Energy Reserves Group, Kansas Power & Light Company (KPL) entered into two contracts for the supply of natural gas from a particular wellfield to a particular purchaser, the predecessor to Energy Reserves Group, Inc. Under the contract, which extended until the wellfield was no longer productive, the price for gas was fixed at a certain price, and subject to escalation provisions, which would adjust the price upward at regular intervals based on certain market forces. In response to the passage of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et. seq.*, the Kansas legislature imposed price control measures.[1]

ERG then challenged the Act, as violative of the Contracts Clause of the Constitution, which the Court rejected, stating:

> Although the language of the Contract 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 expectations 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."

Energy Reserves Group, 459 U.S. at 410-11, 103 S. Ct. at ___. The Court found of great

[1] Section 602 of the Natural Gas Policy Act allowed states to establish or enforce maximum natural gas prices under certain circumstances.

Energy Reserves Group, 459 U.S. at 410-11, 103 S. Ct. at ___. The Court found of great significance the fact that the parties "are operating in a heavily regulated industry." Thus, the Court concluded, the parties were well aware that their contracts were subject to future regulation by the entity which oversaw their activity, finding that "ERG's reasonable expectations [had] not been impaired by the Kansas Act." Id., 459 U.S. at 416, 103 S. Ct. at ___.

Energy Reserves Group directly controls this case. Here, Bellsouth, and its customers, entered into telecommunications contracts with full knowledge not only that Congress would deregulate the provision of telecommunications services, but that the PSC has and could at any time exercise substantial regulatory authority over these contracts. By attempting to characterize these contracts as purely private, Bellsouth attempts to evade the clear mandates of Chapter 364, Florida Statutes, and well-settled Contracts Clause jurisprudence.

Florida courts have long adhered to the rationale of the Court in Energy Reserves Group. For example, in Miami Bridge Co. v. Railroad Comm'n, 20 So. 2d 356 (Fla. 1944), the Florida supreme court considered a challenge to a Florida statute vesting regulatory authority over toll bridges in the Florida Railroad Commission. The owner of a toll bridge, built with private funds pursuant to a state law granting the owner a franchise and allowing it to fix tolls, challenged subsequent legislation which vested the power to set tolls in the Florida Railroad Commission, on the ground that this divestiture of toll authority was an invalid impairment of its contract. The court rejected the challenge, stating:

> The State as an attribute of sovereignty is endowed with inherent power to regulate the rates to be charged by a public utility for its products or service. Contracts by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provisions.

Miami Bridge Co., 20 So. 2d at 361. Later cases have unerringly adhered to this decision. See, e.g., United States Fidelity & Guaranty Co. v. Dept. of Insurance, 453 So. 2d 1355 (Fla. 1984)("Since section 627.066(13) allows insurers to keep their anticipated profits plus five percent, and since the insurers knew when they entered into these contracts that excess profits might have to be refunded, the statute does not operate as a substantial impairment of a contractual relationship").

In addition, to the Miami Bridge and Energy Reserve Group rationales, the Fresh Look rules would not violate the Contracts Clause, because, under Florida law, once the parties submit their contract to the PSC (as required by § 364.07), PSC approval merges the contract into the PSC order, thus converting the contract into a PSC order. See City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965)("Indeed, we agree with the North Carolina court that the practical effect of [PSC approval] is to make the approved contract an order of the commission, binding as such upon the parties.") This principle is well illustrated by the recent case of City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992), wherein Florida Power & Light entered into a territorial agreement with the City of Homestead for the provision of electric services. The parties then submitted their contract to the PSC for approval. Several years later, the City notified FPL that it was terminating

the contract, citing the lack of a definite duration in the contract. Because the City was not subject to PSC jurisdiction at the time of entry into the contract, the City contended that the contract was to be construed according to contract principles, not PSC orders. The supreme court disagreed, citing the City Gas case, *supra*, stating, "PSC approval of a territorial agreement, in effect, makes the approved contract an order of the PSC. Merely because the agreement is to be interpreted under the law of contracts does not mean we are to ignore the law surrounding PSC orders." Beard, 600 So. 2d at 453.

In sum, the contracts in question are simply not the type of private commercial contracts envisioned to be protected by the Contract Clause. Since telecommunications is a highly regulated industry, the participants enter into contracts with full knowledge that they are always subject to modification by order or rule of the PSC. Armed with this knowledge, and acting pursuant to that knowledge, Bellsouth cannot now seek the protection of the Contracts Clause in order to preserve its monopoly contracts made possible by the very entity it now seeks protection from.

II. The Fresh Look rules are Consonant with the Telecommunications Act

Bellsouth takes the surprising position that implementation of the Fresh Look rules will be contrary to the public interest. According to Bellsouth, the Fresh Look rules will operate as a "destruction" of its contracts to the benefit of the ALEC's who will of course get the contracts. This argument is curious in light of the history of the telecommunications industry. Prior to the Telecommunications Act, Bellsouth enjoyed a pure monopoly on provision of local phone service. As a result of the Act, Bellsouth is now required to

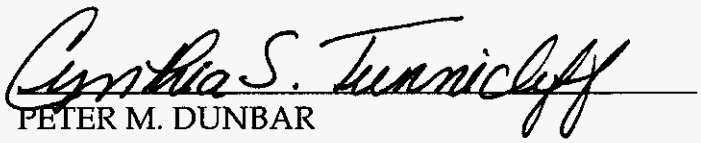
compete for business on an equal footing with the ALEC's. Bellsouth simply posits that all of its business will be taken away and given to the ALEC's without any acknowledgment of the reality of the situation. In reality, if Bellsouth can provide service at a rate its customers find competitive, it can keep all of its contracts. What it cannot do is continue to enjoy a pure monopoly, while seeking protection from competition under the guise of a Contract Clause challenge. The Telecommunications Act was intended to promote competition; that is exactly what the Fresh Look rules will do. This clearly stated policy is unarguably in the public's interest, contrary to Bellsouth's naked assertions to the contrary.

A recent Finding and Order of the Ohio Public Utilities Commission, which adopted the Fresh Look rules explains the public policy behind their adoption. According to the OPUC:

> Our primary motivation in adopting fresh look has been and continues to be our desire to spur the development of a competitive market in Ohio. Fresh look is intended to provide an incentive for new entrants to invest in a market which would otherwise be very difficult to enter given that the incumbent local telephone company holds 100 percent of the market share, and, in light of the fact that many of the most lucrative customers are locked into long-term contracts. Fresh look is also intended to give end use customers the opportunity to take advantage of competitive alternatives at the very inception of competition. Bringing competitive benefits to end user customers serves as the cornerstone for recent federal legislation [the Telecommunications Act] as well as certain legislative initiatives adopted by the Ohio General Assembly and related administrative policy determinations made by this Commission. . . .

In the Matter of the Commission Approval of Fresh Look Notification, No. 97-717-TP-UNC (Public Utilities Comm'n, Ohio, July 17, 1997). As the OPUC obviously recognized, Fresh Look levels the playing field and allows the ALEC's to compete not just for the individual residential and commercial customers, but for the larger, more lucrative customers who typically enter into long-term contracts. Bellsouth's cries must be recognized for what they are: an attempt to retain the status quo, in derogation of the clear intent of the Telecommunications Act.

Respectfully submitted,



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