Marceil Morrell*
Assistant Vice President &-
Associate General Counsel-East Area

Anthony P. Gillman*
Assistant General Counsel

Florida Region Counsel**
Kimberly Caswell
M. Eric Edgington
Ernesto Mayor, Jr.
Elizabeth Biemer Sanchez

* Certified in Florida as Authorized House Counsel
** Licensed in Florida

GTE

GTE SERVICE CORPORATION

One Tampa City Center
201 North Franklin Street (33602)
Post Office Box 110, FLTC0007
Tampa, Florida 33601-0110
813-483-2606
813-204-8870 (Facsimile)

August 26, 1999

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

991226-TL

Re: Docket No.
GTE Florida Incorporated's Petition for Declaratory Statement Before the Florida Public Service Commission, or, in the Alternative, Variance from Rules 25-24.516(3) and 25-24.630(2), Fla. Admin. Code

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of the above-referenced Petition. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,

Anthony P. Gillman

for Kimberly Caswell

KC:tas
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: GTE Florida Incorporated's Petition for Declaratory Statement Before the Florida Public Service Commission, or, in the Alternative, Variance from Rules 25-24.516(3) and 25-24.630(2), Fla. Admin. Code	Docket No. 991226-TL Filed: August 26, 1999

GTE FLORIDA INCORPORATED'S PETITION FOR DECLARATORY STATEMENT OR, IN THE ALTERNATIVE, PETITION FOR VARIANCE

GTE Florida Incorporated (GTE) files its Petition for Declaratory Statement in accordance with Florida Statutes, section 120.565 and Chapter 28-105 of the Uniform Rules. GTE's Petition for Variance is filed under section 120.542 of the Florida Statutes and Chapter 28-104 of the Uniform Rules.

GTE asks the Commission to determine that its set use fee rules do not prohibit GTE from compensating pay telephone service providers (PSPs) for 0- local calls under the FCC's per-call compensation scheme. If the Commission does not accept the legal interpretation underlying GTE's Petition for Declaratory Statement, then GTE seeks a variance from Commission Rules 25-516(3) and 25-24.630(2), thus allowing GTE to provide compensation for 0- local calls under the federal scheme.

Factual Background

The Telecommunications Act of 1996 (Act) directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." (Act sec. 276(b)(1)(A).) In accordance with this mandate, the FCC adopted and then refined a per-call compensation scheme for intrastate and interstate payphone calls in a series of

Orders issued in its Docket 96-128. (Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telcomms. Act of 1996, Report and Order, 11 FCC Rcd 20541 (1996); Order on Reconsideration, 11 FCC Rcd 21233 (1996); Second Report and Order, 13 FCC Rcd 1778 (1997); Third Report and Order, 14 FCC Rcd 2545 (1999).) The per-call compensation rate set by the FCC is $.24.

In September of 1997, this Commission, through its Docket number 951560-TP, undertook to conform its payphone call compensation rules to the FCC's. At the time, Commission rules allowed PSPs to charge the end user a set use fee for all 0+ and 0- calls. In recommending revision of the set use fee rules, the Staff noted the FCC's requirement for the states to remove rules which would provide double compensation to PSPs once the new federal scheme was in place. (Staff Rec. in Docket No. 951560-TP, July 23, 1998, at 2.) Consequently, this Commission eliminated its set use fee for all 0+ calls and for 0- intraLATA calls, but it maintained a set use fee for 0- local calls. This 0- set use fee is reflected in two places in the Commission's rules: section 25-24.516(3) in the PSP rules and section 25-24.630(2) in the operator services rules. These revised rules took effect on February 1, 1999. The fee is $.25, less a bad debt allowance. In GTE's case, the set use fee is currently $.242.

Before the Commission changed its set use fee rules, there was no need for GTE's billing system to distinguish among various types of 0- and 0+ calls, because the set use fee applied to all of them. The revised rules, however, seem to require GTE to separate out 0- local calls for the set use fee, while other 0- and 0+ calls are to be treated under the FCC's scheme. GTE's billing system is unable to distinguish 0- local calls from the other types of payphone calls. In other words, GTE has to bill set use fees for all 0- and 0+ calls or for none of these calls.[1]

GTE is currently compensating PSPs under the federal scheme for all 0+ and 0- PSP calls, including local 0- calls. Based on a July 19, 1999, letter from Commission Staff, the Staff believes GTE's $.24 per-call compensation under the federal rule does not meet this Commission's Rule 25-24.516 set use fee, which, as noted, works out to $.242 per call. (Letter from Ray E. Kennedy, Compliance Section, to Beverly Y. Menard, GTE, July 19, 1999.)

It would cost GTE about $75,000 to modify its system to charge the Commission's set use fee for 0- local calls. On the basis of existing calling data, GTE estimates that there will be about 40,248 0- local calls in 1999. The total set use fees associated with these calls would be $10,062. Based on market share data, about $5534 of this amount would be paid to independent PSPs (with the balance going to GTE's retail payphone operations). Given the $.002 differential between the state and federal compensation schemes, total annual compensation for the entire independent payphone industry will be about $45 lower under the FCC's scheme.

With this filing, GTE seeks the Commission's opinion as to whether its set use fee rules apply to 0- local calls completed by GTE. If the Commission decides its rules do apply in this situation, then GTE asks the Commission for a variance from those rules to

[1] GTE assessed the 0- local set use fee (along with the other types of set use fees) until the end of June 1999. From October of 1997, GTE also paid per-call compensation under the federal rules. As such, PSPs received a financial windfall for nearly two years.

permit GTE to continue to assess per-call compensation for 0- local calls under the FCC's rules.

Petition for Declaratory Statement

GTE asks the Commission to interpret its rules 25-24.516(3) and 25-24.630(2) such that they do not apply under the facts here because GTE is compensating PSPs an equivalent amount under the FCC's per-call compensation rules. These rules substantially affect GTE in its particular circumstances because, if they do apply, GTE will need to modify its billing system to distinguish 0- local payphone calls from other types of payphone calls. These modifications will cost approximately $75,000. They could not be completed until sometime next year, in view of the upcoming Y2K quiet period and associated Y2K considerations.

0- local calls are not a popular option for end users. Based on available 1999 statistics thus far, GTE estimates that there will only be about 40,248 such calls in 1999. Based on market share data, independent payphone providers (IPPs) would handle about 22,136 of these 0- local calls. (GTE retail payphone operations would handle the rest.) Given these figures, <u>the difference between charging the state set use fee and the federal per-call compensation for these calls would, at most, amount to only $45.00 for the entire year for the entire IPP industry in GTE's territory.</u> This amount is probably overstated because it incorrectly assumes that all IPPs send their 0- local calls to GTE's network.

Indeed, total annual compensation for 0- calls is likely to go even lower, as the payphone market becomes even more competitive. Most PSPs today use "smart" phones, which can be programmed to direct 0- traffic away from GTE's network to the operator services provider (OSP) of the PSP's choice–usually the OSP that will give the PSP the biggest commission payment on the calls. Given this situation, 0- calls over GTE's network–and the associated compensation to PSPs–will continue to decrease. Set use fee payments could, in addition, diminish if the bad debt percentage becomes higher (thus causing the set use fee amount to decrease). If this happens, set use fee payments would become lower on a per call basis–potentially lower than the FCC's per-call compensation payments.

GTE's interpretation of this Commission's set use fee regulations is reasonable in light of the FCC rules on the same subject. GTE believes the FCC scheme applies to all types of payphone calls. As noted above, the Act required the FCC to ensure that PSPs receive fair compensation for all calls. In accord with this broad mandate, the FCC's per-call compensation scheme applies to "each and every completed intrastate and interstate call originated by payphones." Report and Order at para. 20, para. 33.

As the Staff pointed out before the Commission revised its rules, the FCC intended for states to remove rules that could require double compensation for payphone calls. The Commission thus repealed the set use fee for 0+ and most 0- calls. It did so because maintenance of these state fees in light of the federal per-call compensation scheme would result in impermissible double compensation. However, it left the set use fees for 0- local calls intact–apparently because the 0- local calls would be completed by local exchange carriers, while 0+ and other 0- calls would be handed off to interexchange carriers (IXCs). (Staff Rec. at 2.) The Commission's rules thus seem to assume that the FCC's rules apply only to calls completed by IXCs, and that PSPs won't be compensated for 0- local calls absent the state set use scheme.

This assumption is unwarranted. As noted, the Act and the associated FCC rules make clear that the federal scheme governs "each and every" payphone call–interstate and intrastate. Thus, the Commission need not fear that PSPs will not be compensated for 0- local calls. In fact, GTE is already compensating them for such calls under the federal rate, which was established only after the FCC's thorough review of the costs PSPs incur for coinless calls, including input from LECs, IXCs, independent PSPs, paging companies, state agencies, and consumer interests. Indeed, the FCC used a "marginal payphone location" (where the payphone operator is just able to recover his costs, but make no payment to the location owner), rather than a potentially lower-cost average location. Thus, the FCC's rate was specifically designed not just to assure fair compensation to PSPs, but to safeguard against negative effects on payphone deployment. (Third Report and Order at paras. 139-41.)

GTE believes that its understanding of the reach of the FCC's rules is widely held in the industry. GTE's informal poll of Bell Operating Companies around the country revealed that they consider the FCC's per-call compensation scheme to apply to 0- local calls. Consistent with the industry view, the Alabama Public Service Commission recently eliminated all of its set use fees because they were inconsistent with the FCC's rules. Ala. Pub. Serv. Comm'n v. All Providers of Pay Tel. Service Imposing Set Use Fees, Docket 26996 (Aug. 11, 1999). The Commission concluded that such fees were no longer just, reasonable, and appropriate given the FCC scheme providing compensation for all payphone calls. It noted that the FCC had explicitly rejected set use fees as the means of ensuring PSPs adequate compensation, id. at 2, citing the Report and Order, and that such rejection of the set use fee compensation approach *'precludes a carrier from billing a particular government mandate fee for the use of payphones on behalf of PSP's."* (Id. at 2, citing Order on Recon. [emphasis in Ala. PSC Order].) The Commission observed that it appeared the FCC would preempt state-mandated compensation where it was inconsistent with the FCC's own scheme. (Id. at 3, citing Order on Reconsideration at para. 73.)

To this end, the FCC stated that "if any party believes that a specific state compensation rule conflicts with our rules, that party may file a petition for a declaratory ruling, and the Commission will evaluate the state compensation regulation at that time." (FCC Order on Recon. at para. 73.) While this approach remains an option for GTE, the Company felt it was best to seek a declaratory ruling first from this Commission. A declaratory ruling (or rule variance) here in Florida would apply only to GTE in its particular circumstances, while a declaratory ruling from the FCC would preempt Rules 25-24.516(3) and 25-24.630(2).

GTE therefore asks the Commission to find that these Rules do not apply to GTE because the Company is already compensating PSPs for 0- local and other payphone calls under the federal scheme, as intended by the Act and the FCC's rules.

Petition for Variance

If the Commission declines to issue the declaratory ruling GTE seeks, then the Company requests a permanent variance of Rules 25-24.516(3) and 25-24.630(2). This rule variance is necessary to prevent a substantial hardship to GTE and to avoid violating principles of fairness (although GTE needs only meet <u>either</u> the hardship <u>or</u> unfairness test under Uniform Rule 28-104.002(g).) GTE has met the purpose of the underlying statutes by alternate means.

As noted, billing system limitations prevent GTE from billing the set use fee for 0- local calls. If the Commission decides that GTE must compensate PSPs for these calls under the state, rather than federal, scheme, GTE will need to spend about $75,000 for system modifications to achieve a total compensation differential of about $45 a year for the IPP industry in GTE's territory. The total compensation for 0- local calls is quite likely to continue to decrease as smart payphones direct more and more calls to non-GTE OSPs. Furthermore, the necessary system modifications would be particularly troublesome and taxing on GTE's resources because of the need to accommodate ongoing Y2K preparations and associated activities. The modifications could probably not be made before midsummer of next year.

The considerable time, effort and expense associated with these system changes would present a substantial hardship to the Company, with no correlative benefits to PSPs or consumers. GTE is already adequately compensating PSPs for 0- local calls, as this Commission and the FCC both require. As explained above, the federal per-call compensation rate and the set use fee are almost exactly equivalent, and the total annual difference in compensation is nominal. So forcing GTE to comply with the state, rather than the federal, PSP compensation rule would change essentially nothing, except for the means of collection of the compensation. GTE does not believe PSPs will suffer meaningful financial harm if GTE continues to compensate them at the federal per-call rate of $.24, rather than this Commission's $.242 rate. Indeed, PSPs could suffer a net financial detriment if GTE must make the system changes necessary to charge the set use fee for 0- local calls.

When the Commission initially established the set use fee, it determined that the companies could recover the cost of associated system modifications from the PSPs. (Petition for Review of Rates and Charges Paid by PATS Providers to LECs, Order No. 25629 in Docket No. 860723-TP, at 3-4 (Jan. 22, 1992).) GTE expects that it will use the same kind of approach to recover any expenses associated with system changes necessary to bill the 0- local set use fee. The price tag for the modifications is expected to be about $75,000. Given the relatively low volume of 0- local calls, the surcharge would offset the set use fee to the extent that PSPs would see no net compensation for several years to come. Rather than bear the cost recovery for the system changes, it's likely that even more PSPs would program their phones to direct calls to non-GTE operators. Because the set use fee will then be a moot point, GTE will have made $75,000 worth of system modifications for no good reason–and without any ready means of recovering the $75,000. In any event, the intended beneficiaries of the set use fee rules–the PSPs–would not benefit at all from strict application of the rules in this instance. Indeed, denying this waiver could well result in hardship and unfairness to PSPs, as well as GTE.

Introduction of this hardship and unfairness is wholly unwarranted because GTE already meets the purpose of the underlying statutes at issue in this case. Rule 25-24.516 implements sections 364.03 and 364.3375(4) and (5) of the Florida Statutes. Rule

25-24.630 implements statutory sections 364.01 and 364.3376. There is no requirement for any particular method of compensation for PSPs in any of these statutory sections. Indeed, some the statutes cited as authority for the rules presumably relate to rule subsections other than those at issue here.

To this end, subsection (4) of Florida Statutes section 364.3375 states: "a pay telephone provider may charge, as a maximum rate for local coin calls, a rate equivalent to the local coin rate of the local exchange telecommunications company." Subsection (5) provides: "A pay telephone provider shall not obtain services from an operator service provider unless such operator service provider has obtained a certificate of public convenience and necessity from the commission pursuant to the provisions of s. 364.3376." The set use fee reflected in Commission Rule 25-24.516(3) does not relate in any way to certification of operator service providers and has no effect on the PSP's compliance with the maximum prescribed rate for local coin calls. That leaves only Florida Statutes section 364.03 as the possible basis for the Rule subsection at issue.

Section 364.03 is the general requirement that rates and regulations for telecommunications services and facilities must be reasonable. GTE's existing compensation approach complies with this principle. The FCC rate GTE is using is almost the same as the Commission's set use fee, and was established only after careful cost study review and input from all affected entities. As noted, if GTE is compelled to make the system modifications necessary to assess the set use fee for 0- local calls, it is likely that the surcharge associated with these modifications will exceed any compensation amounts for several years. Granting this waiver will thus prevent this outcome, which is at odds with the statutory requirement of reasonable compensation.

Turning to Rule 25-24.630, this provision implements Florida Statutes sections 364.01 and 364.3376. The latter provision, section 364.3376, lists requirements for operator services providers and directs the Commission to take certain regulatory actions with regard to operator services. Among other things, it directs the Commission to "establish maximum rates for all providers of such services within the state." (Sec. 364.3375(3).) The relevance of this provision to the set use fee is tangential, at best. To the extent that the set use fee is intended to implement this section, GTE's waiver request is consistent with the statute. Even if the Commission (rather than the FCC) may set the compensation for 0- PSP calls, the compensation GTE provides does not exceed the maximum of $.25 set by this Commission.

Section 364.01 is the general statement of the Commission's powers and legislative intent. It requires, in sum, fair treatment of all firms in the transition to an increasingly competitive telecommunications marketplace. It encourages "flexible regulatory treatment" for telecommunications providers and services (secs. 364.01)(4)(b) and (h)); requires elimination of rules and regulations that will delay or impair the transition to competition (sec. 364.01(4)(f)), and mandates fair treatment of telecommunications providers by, among other things, "eliminating unnecessary regulatory restraints" (sec. 364.01(4)(g)).

GTE's rule variance, if granted, will further these guiding principles. The Legislature has directed the Commission to flexibly apply its regulatory authority so that competition may flourish. This mandate dovetails with a key objective of the FCC's payphone rules–to ensure removal of regulatory restraints that might undermine the efficient operation of the competitive payphone market. In particular, the FCC cautioned against duplicative federal and state rules that might result in double compensation to PSPs. As noted, GTE is already compensating PSPs for 0- local calls under the federal guidelines. The level of compensation is almost exactly equivalent under the state and federal schemes. Compelling GTE to make expensive system modifications to switch to the state compensation method for just 0- calls would yield no net benefits to competition or consumers. In this case, GTE urges the Commission to focus on the end result–the fair compensation of PSPs for use of their instruments–rather than the means of reaching that result.

In sum, the statutes underlying the Rules at issue do not prevent the Commission from granting GTE's variance request. Nothing in the statutes specifically addresses or requires a specific level or type of compensation to PSPs. To the extent that the Commission's set use fee rules implement general statutory provisions, GTE believes the requested rule variance will further the objectives of those provisions. It would undermine rational regulation to require GTE to make expensive and time-consuming system modifications that will essentially achieve the same result as GTE obtains now through compensation of 0- calls under the FCC's scheme.

For all the foregoing reasons, GTE asks the Commission to grant its Petition for Declaratory Statement that GTE may continue to compensate PSPs for 0- local calls under the FCC's per-call compensation rules. If the Commission does not agree with GTE's interpretation of the FCC rules, then GTE asks it to grant its Petition for Variance from Rules 25-24.516(3) and 25-24.630(2).

Respectfully submitted on August 26, 1999.

By: ______________________________

Kimberly Caswell
Post Office Box 110, FLTC0007
Tampa, Florida 33601
Telephone: 813-483-2617
Facsimile: 813-204-8870

Attorney for GTE Florida Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Petition for Declaratory Statement Before the Florida Public Service Commission, or, in the Alternative, Variance from Rules 25-24.516(3) and 25-24.630(2), Fla. Admin. Code were sent via overnight delivery on August 25, 1999 to:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Joint Administrative Procedures Committee
The Holland Building, Room 120
Tallahassee, FL 32399-1300

Anthony P. Bilén

for Kimberly Caswell