BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.	DOCKET NO. 030851-TP ORDER NO. PSC-04-0008-PCO-TP ISSUED: January 2, 2004

Order Denying AARP's Petition to Intervene

I. Case Background

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. Unbundled network elements ("UNEs") are those portions of telephone networks that incumbent local exchange companies ("ILECs") must, under applicable federal law, make available to competitive local exchange companies ("CLECs"). In the TRO, as it relates to this docket, the FCC held that whether an ILEC must offer unbundled local circuit switching as a UNE depends upon whether a CLEC would, according to the guidelines established by the FCC, be impaired in the provision of its telecommunications services without such. The TRO does not address the issue of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement those provisions of the TRO concerning whether CLECs are impaired without access to unbundled local circuit switching.

On December 15, 2003, AARP (formerly known as American Association of Retired Persons) filed its petition to intervene in this docket. Shortly thereafter, Sprint Communications Limited Partnership and Sprint-Florida, Incorporated (collectively, "Sprint"), BellSouth Telecommunications, Inc. ("BellSouth"), and Verizon Florida, Inc. ("Verizon") each filed a separate response in opposition to AARP's petition on December 23, 2003.

II. Standard for Granting Intervention

Pursuant to Rule 25-22.039, Florida Administrative Code, persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petitions for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Uniform subsection 28-106.201(2), Florida Administrative Code, and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

"Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981). The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. den, 513 So.2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

III. AARP's Petition to Intervene

In its petition, AARP states that it is a non-profit membership organization dedicated to addressing the needs and interests of persons fifty years and older. In addressing its members' needs, AARP argues that its members will be affected by this proceeding in that "substantial numbers of them are retail residential or single-line business customers of each of the ILECs that will be reviewed in these proceedings." (AARP Petition at ¶5). Furthermore, AARP argues that the questions of whether ILECs are offering unbundled network elements to CLECs at a price based on the ILEC's Total Element Long-Run Incremental Cost (TELRIC) and of whether there are impairments to competition in state and local markets resulting from ILECs not doing so will necessarily affect all of AARP's members. (AARP Petition at ¶6) The AARP does not cite any case law or Florida Rules in support of its assertions.

IV. Responses in Opposition to AARP's Petition to Intervene

In their respective responses, Sprint, Verizon, and BellSouth contend that AARP lacks the requisite standing required by Rule 25-22.039, Florida Administrative Code, and the two-prong test in Agrico. Furthermore, they argue that under Florida Society of Ophthalmology, AARP must meet standing requirements for associations who intervene on behalf of their members and must demonstrate that the interests sought to be protected in this proceeding can be distinguished from the interests of the general public. Florida Society of Ophthalmology v. State of Florida Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988).

Sprint further argues that AARP's interests are "general" and "too speculative to constitute a substantial interest, and therefore, the first prong of the Agrico test has not been met." (Sprint Response at ¶7). In addition, Sprint asserts that AARP's interest is no different than a general interest in "the continued existence of competition in the local exchange market" and therefore does not meet the standing requirement of an association.

Verizon also asserts that AARP must show that it will suffer a direct injury as a result of Commission action in this proceeding and that the direct injury falls within the zone of interest of the statute being applied. (Verizon Response at ¶4). With respect to the first prong of Agrico, Verizon argues that AARP has the same "indirect economic interest" that "every Florida ratepayer has in the

outcome of the proceeding" (Verizon Response at ¶7-8) and that a claim of substantial interest based soley upon economic interests is not sufficient unless the relevant statute itself contemplates consideration of economic interests. Florida Society of Ophthalmology v. State of Florida Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988); Florida Medical Assn. v. Dep't of Professional Regulation, 426 So.2d 1112, 1118 (Fla. 1st DCA 1983). As for the second prong of Agrico, Verizon contends that this proceeding is not intended to address AARP's interests, because the TRO addresses whether CLECs are impaired without access to unbundled local circuit switching. (Verizon Response at ¶9). Lastly, Verizon argues that AARP's members are people fifty years and older and do not include ILECs or CLECs that have a direct interest in the outcome. (Verizon Response at ¶13).

Finally, BellSouth argues that even if "AARP were to assert that a finding of no impairment in this proceeding could lead to higher retail rates charged to AARP members . . . at some unknown time in the future, such conjecture is the type of remote, speculative abstract or indirect injuries that are insufficient to establish standing." (BellSouth Response at ¶7, citing, Docket No. 941173-EG, Order No. PSC-95-1346-S-EG, November 1, 1995; and Docket No. 981042-EM, Order No. PSC-99-0535-FOF-EM, March 22, 1999). BellSouth references a Commission order that expressed the Commission's holding that the loss of a competitor in the market, in itself, did not demonstrate harm to an association. (BellSouth Response at ¶8, citing, Docket No. 991799-TP, Order No. PSC-00-0421-PAA-TP, March 1, 2000).

V. Analysis

Having fully considered AARP's petition to intervene and the three responses filed in opposition to that petition, I find that AARP lacks the requisite standing to intervene in this docket. AARP fails to meet the two-prong test set forth in Agrico and the requirements in Rule 25-22.039, Florida Administrative Code.

Applying the two-prong test from Agrico, I find that AARP does not have a substantial interest in the outcome of this proceeding. First, AARP has not shown that its members will suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57, Florida Statutes. AARP's alleged interest is a general interest in competition in the local exchange market. AARP's asserted potential injury is not immediate or substantial but, rather, is remote and speculative in nature. AARP's alleged economic injury to its members is too remote and speculative to create standing in this proceeding. A claim of standing by third parties based solely upon general economic interests is not sufficient unless the statute itself contemplates consideration of such interests. Florida Society of Ophthalmology v. State of Florida Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988); Florida Medical Assn. v. Dep't of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983).

Second, even if AARP's petition satisfied the first prong of Agrico, which it does not, AARP has not shown that the injury which it asserts its members will suffer is the type of injury which this proceeding is designed to protect, so as to entitle it to a hearing under Section 120.57, Florida Statutes. Notably, the FCC did not speak to subscribers' economic interests in the TRO. The TRO does not contemplate rate increases for individual subscriber lines and is not focused on TELRIC or

other pricing of UNEs. Rather, the TRO addresses whether, and under what circumstances, CLECs may be impaired without access to unbundled local circuit switching. Therefore, the Commission's decision will directly impact both ILECs, as providers of the network elements at issue, and CLECs, as potential purchasers of those elements. Unlike the ILECs and the CLECs, AARP does not provide telecommunication services in Florida and will not be directly impacted by this proceeding. Further, the TRO sets forth parameters pursuant to which a finding of impairment or no impairment would be made. Any alleged economic impact realized by AARP as a consequence of the Commission's implementation of the TRO is not among the parameters set forth in the TRO and would, at best, be incidental and indirect. AARP's alleged economic interest will not be considered or addressed in this proceeding.

Lastly, standing cannot be conferred based on conjecture regarding a change in economic position within the telecommunications market. See Order No. PSC-02-0324-PCO-EI, issued March 13, 2002 ("I find that conjecture about an improved economic position in the natural gas market indirectly resulting from a retail electric rate proceeding is too speculative to meet the "immediacy" requirement of the injury-in-fact test of Agrico."); See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Bus. Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process); Ameristeel Corporation v. Clark, 691 So.2d 473, 477 (Fla. 1997) (where AmeriSteel maintained that because of the significant price differential between JEA and FPL for electrical service, the corporation has a substantial interest in the outcome of the proceeding between the latter. Notwithstanding AmeriSteel's claim that the higher rates it pays to FPL for electricity are one factor threatening the continued viability of its Jacksonville plant, the court concluded that such was not an injury in fact of sufficient immediacy to entitle AmeriSteel to a 120.57 hearing.)

VI. Conclusion

In light of the above, I find that AARP fails to meet the requirements of Rule 22-22.039, Florida Administrative Code, and of Agrico. AARP has not shown that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing. Further, the injury AARP asserts is not of a type or nature that this specific proceeding is designed to protect.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that AARP's Petition to Intervene in this docket is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 2nd day of January, 2004.

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

JLS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.