

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by AT&T Communications of the Southern States, Inc., for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc., concerning interconnection and resale under the Telecommunications Act of 1996.

Docket No. 960833-TP
Filed: January 15, 1998

TIME WARNER'S PETITION FOR RECONSIDERATION
OF MOTION FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE,
MOTION FOR INITIATION OF GENERIC DOCKET

Time Warner AxS of Florida, L.P. ("Time Warner"), by and through its undersigned counsel and pursuant to Rule 25-22.0376, F.A.C., hereby respectfully requests that the Commission reconsider its order dated January 2, 1998, insofar as that order prohibits Time Warner from participating in the above-captioned proceeding, and allowing Time Warner to intervene as a party to this proceeding or in the alternative allow pursuant to Rule 25-22.036(4), F.A.C., the establishment of a generic proceeding to establish permanent interconnection unbundled network elements (UNEs) and to consider the combination of UNEs. In support of this Petition, Time Warner

shows the following:

- 1. The correct name and address of Petitioner is as follows:

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OTH _____

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FPSC-RECORDS/REPORTING

2. The names and addresses of Time Warner's attorneys are:

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3. On December 9, 1997, Time Warner filed a motion to intervene in the above-styled docket asserting the impact of these proceedings on its substantial interests. On January 2, 1998, the Commission denied Time Warner's motion to intervene stating that "only the party requesting interconnection and the incumbent local exchange company may be parties to the arbitration proceedings." p. 2, Order No. PSC-98-0008-PCO-TP. The Commission's rationale rested upon the premise the Telecommunications Act of 1996 does not contemplate participation by other entities who are not parties to the negotiation or to the ultimate agreement since these parties are not bound by the results of the negotiation and are impacted in an "indirect way" by the negotiation. p. 3, Order No. PSC-98-0008-PCO-PP.

4. Rule 25-22.026, Florida Administrative Code, describes parties to a Commission proceeding to include intervenors. Rule 25-22.039, Florida Administrative Code, permits persons other than the original parties to a pending proceeding who have substantially affected interests and who desire to become a party to petition for leave to intervene. The grant of intervention requires a showing

that the substantial interests of the intervenor will be affected through the proceeding. The Florida Supreme Court has recently affirmed the rights of intervenors provided it is demonstrated that the interest in the proceeding is direct and immediate and that intervenor will gain or lose by the direct legal operation and effect of outcome of the proceeding. *Stefanos v. Rivera-Burios*, 673 So.2d 12, 13 (Fla. 1996).

5. Nothing could be more true of the outcome of this arbitration. If the parties thereto are permitted to negotiate the terms and conditions by which UNEs will be made available under the Eight Circuit's opinion of *Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401, including the establishment of permanent interconnection UNEs and to consider the combination of UNEs, facilities-based alternative local exchange companies such as Time Warner will be materially and adversely affected.

6. Because Time Warner provides, or will provide, facilities-based local exchange telecommunications services in Florida which require interconnection with and purchase of unbundled network elements from incumbent LECs, it has a real, direct, and substantial interest that will be affected by the outcome of the arbitration. Specifically, the cost model and pricing methodology offered by the parties and used by the Commission in this docket, as well as the prices approved, will dictate the terms under which Time Warner will be able to compete

with incumbent LECs. In order to protect its interest in the resolution of these matters, and in order to facilitate the resolution of these issues in an efficient and judicious manner, Time Warner should be allowed to intervene in this proceeding or institute a generic proceeding to consider these issues.

7. This arbitration is one in a series of proceedings which have been necessitated by the local competition provisions of the Telecommunications Act of 1996. Sections 251 and 252 of the Act, establish procedures whereby alternative local exchange companies of telecommunications services may interconnect with or purchase UNEs from incumbent LECs. Pursuant to Section 252, states are charged with mediating and arbitrating disputes over interconnection and purchase of UNEs, including setting the prices charged for interconnection and UNEs and the combination of UNEs. Section 252(d) requires that prices for interconnection and UNEs: "(A) shall be: (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit."

8. Pursuant to the FCC's Interconnection Order implementing Sections 251 and 252, interconnection and UNE prices are required to be priced using the same methodology. The FCC required, first, that rates be set at or above the incumbent LECs' forward-looking long run incremental cost, determined using the Total Element Long

Run Incremental Cost ("TELRIC") methodology. Second, states were permitted to include, in addition, to TELRIC, a reasonable allocation of forward-looking joint and common costs not captured in the TELRIC methodology.

9. The task has been made even more complicated by the decision of the United States Court of Appeals for the Eighth Circuit overturning, in part, the pricing provisions of the Local Competition Order. Specifically, the Eighth Circuit vacated, *inter alia*, the FCC's pricing rules regarding local competition (except as they apply to mobile wireless providers), holding that the Act grants state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act.

10. As a result of the Eighth Circuit's order, it will be expected that the LECs will argue that the Commission should reject the Commission TELRIC methodology and should base UNE prices on LEC pricing methodologies which ultimately allow the recovery of all joint and common costs and perhaps even sunk costs (or their proxy). It is also expected that the parties requesting interconnection will, in general, argue that the forward-looking methodology established by the FCC should be adopted and that the allowance of joint and common costs should be closely scrutinized. Thus far, the Commission has not ruled on the effect of the Eighth Circuit's decision on pending interconnection agreements.

Therefore, a threshold issue for the commission in this arbitration or in a separate docket to be established will be the specific methodology that is required, if any, by virtue of Section 252 of the Communications Act and the FCC's Interconnection Order.

11. Each of these threshold issues -- the impact of the Eighth Circuit's Order on the appropriate pricing methodology as well as the pricing methodology and cost model that should be adopted -- will affect all local providers seeking to interconnect with or purchase UNEs from incumbent LECs regardless of whether the particular LEC is a party to an arbitration proceeding. Each of these issues represent threshold legal or policy issues which will guide the Commission's adoption of permanent UNE prices. While it is expected that the specific prices adopted by the Commission will differ for each LEC, the resolution of these initial threshold legal issues will presumably apply to all LECs. That said, it would be unfair in the extreme to categorically exclude the voice of facilities-based alternative local exchange companies -- such as Time Warner -- from the resolution of these bedrock legal and policy issues and then hold that the excluded parties are bound by the competitive terms of Commission's rulings with respect to these issues. Conversely, it would be enormously inefficient to determine these global legal and policy issues on a case-by-case basis. The solution is to allow Time Warner to intervene in this proceeding so that its voice may be heard and its interests represented in the resolution of these threshold issues.

12. Participation by Time Warner in this proceeding will contribute to the efficient use of the Commission's resources. Participation in this proceeding by Time Warner, and perhaps other local competitors, could stave off the necessity for further arbitrations or further proceedings relative to the fundamental legal and policy issues which will be resolved in this docket.

13. Moreover, full participation by interested parties such as Time Warner will assist the Commission in adopting price methodologies and cost models which will apply fairly to all local providers. As a competitive provider, Time Warner has interests and concerns that will not be fully represented by the existing parties to the proceeding. Participation by Time Warner in this docket will aid the Commission in evaluating the methodologies and models put forth by other parties to this proceeding by bringing to light interests and concerns which would otherwise not be expressed.

14. Time Warner will cooperate to the extent possible with other alternative local exchange companies in this proceeding to promote judicial efficiency and economy.

15. Time Warner has shown that it has a real and direct interest in the subject matter of the above-captioned proceeding, in accordance with Rule 25-22.039, F.A.C. Denial of intervention in this proceeding not only contravenes the Commission's appropriately intervention policy but also runs afoul of the underlying intent of

the Telecommunications Act to encourage fair and diverse competition for telecommunication services.

16. Accordingly, Time Warner requests that the Commission reconsider its January 2, 1998 Order and that it be granted leave to intervene as a party of record in these proceedings. As an alternative, Time Warner requests the establishment of a generic docket to consider the issues which are common to all parties.

WHEREFORE, Time Warner respectfully request the Commission to enter an order granting the foregoing Petition for Reconsideration and allowing it leave to intervene in the above-captioned proceeding.

RESPECTFULLY SUBMITTED this 15th day of January, 1998.



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CERTIFICATE OF SERVICE
DOCKET NO. 960833-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on this 15th day of January, 1998, to the following parties of record:

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A handwritten signature in cursive script, reading "Peter M. Dunbar", written over a horizontal line.

PETER M. DUNBAR, ESQ.