

THE SUPREME COURT OF FLORIDA

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GENERAL, STATE OF FLORIDA,
Appellant,

Case No.: SC04-9

HOWARD MCLEAN, PUBLIC COUNSEL,
STATE OF FLORIDA, Appellant,

Case No.: SC04-10

AARP, Appellant,

Case No.: SC04-946

v.

LILA A. JABER, etc., et al., Appellees.

INITIAL BRIEF OF APPELLANT AARP

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PRELIMINARY STATEMENT

To reduce the workload of the Court on this appeal and husband its own resources, Appellant AARP is adopting in its entirety the Initial Brief of Appellant, Office of the Public Counsel, in the above-styled consolidated cases.

Contemporaneously with the filing of this brief, AARP is also filing in these consolidated cases its Motion To Relinquish Jurisdiction by which it moves this court to relinquish jurisdiction of the above-styled cases to the Public Service Commission (“PSC”) temporarily to consider AARP's "Motion for Evidentiary Hearing and Modification of Commission Orders on Basis of Significantly Changed Circumstances and Public Need," a copy of which is attached to the Motion To Relinquish Jurisdiction.

These pleadings urge the Court to effectively toll the appellate proceedings before it and rapidly return jurisdiction over these cases to the PSC so that it might hold an evidentiary hearing to consider the impact on its Final Order, if any, of recently changed circumstances and public need. The changed circumstances cited to the PSC are the relatively recent decision in United States Telecom Ass’n v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) (“USTA II”), which effectively precludes the continued leasing by competitive telecommunications companies of the incumbent telephone companies’ computer switching and local loop facilities at Federal Communications Commission

(“FCC”) ordered, low-cost wholesale rates. Additional changed circumstances cited are the very recently publicized decisions of AT&T Communications of the Southern States, MCI WorldCom Communications, Inc., and Sprint Communications Company Limited Partnership to either cease competing for local service customers throughout the United States or cease marketing their local service product offerings. The decisions of these competitive telephone companies to quit or retard their local service competitive efforts are either explicitly or implicitly tied to the USTA II decision and the failure of the FCC and U.S. Solicitor General to appeal that decision.

It is AARP’s position that the announced withdrawal of these companies (the three largest competitive companies in the PSC cases below) from local service competition, including within Florida, renders enhanced local service telephone competition highly improbable, if not impossible. Enhanced local service competition is the statutory quid pro quo for the historically high residential rate increases granted by the PSC’s Final Order and it is AARP’s position that the PSC should have the opportunity to reverse those rate increases in view of the significantly changed circumstances occurring after the entry of its Final Order.

The PSC has inherent authority to reopen a closed case when there is a change in circumstances or a demonstrated public need or interest. See, e.g.,

Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla.1966) and Mann v. Dep't of Professional Regulation, Bd. of Dentistry, 585 So.2d 1059 (Fla. 1st DCA 1991).

Thus, the PSC has inherent authority to consider the AARP's motion but for this pending appeal. Therefore, AARP is requesting that this court temporarily relinquish to the PSC authority to consider the motion and to hold such evidentiary hearing as may be deemed appropriate and proper.

AARP is aware the Attorney General is requesting similar relief for the changed circumstances within its Initial Brief as an alternative to an outright reversal of the PSC's orders, but is requesting that the Court remand to the PSC at the conclusion of these consolidated appeals for consideration of the changed circumstances. It is AARP's view that judicial economy will be best served if the Court allows the PSC to consider the impact of the changed circumstances prior to the filing of answer and reply briefs, oral arguments and a written opinion by the Court, as opposed to after expenditure of the time and expenses associated with those actions. Potentially the PSC could reverse the rate increases, thereby mooting any further review by this Court.

STATEMENT OF THE CASE AND FACTS

AARP has reviewed the Office of the Public Counsel's Statement of the Case and Facts contained in its Initial Brief and adopts it in its entirety.

ARGUMENT

AARP has reviewed the Office of Public Counsel's Argument and adopts it in its entirety.

CONCLUSION

For the forgoing reasons, and the reasons articulated in our brief in support of our Motion for Relinquishment of Jurisdiction, AARP requests that this Court grant our separately filed Motion for Relinquishment of Jurisdiction. In the alternative and pursuant to the Court's briefing schedule order, AARP joins the Public Counsel and the Attorney General and requests that this court reverse the PSC's Final Order.

AARP specifically adopts Public Counsel's Initial Brief and conclusion calling for reversal of the PSC's Final Order, with the caveat expressed above that AARP believes this Court's resources, specifically, and judicial economy, generally, would best be served by the Court tolling the proceedings in these consolidated appeals and rapidly relinquishing jurisdiction to the PSC for the purpose of it considering the AARP's Motion for Evidentiary Hearing and Modification of Commission Orders on Basis of Significantly Changed Circumstances and Public Need .

DATED this _____ day of September, 2004.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing AARP's Initial Brief has been prepared using Times New Roman 14-point font.

Michael B. Twomey

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished
by United States mail to the following on this ____ day of September, 2004:

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