

**IN THE SUPREME COURT OF FLORIDA**

**CHARLES J. CRIST JR.,  
Attorney General, State of Florida;  
HAROLD McLEAN,  
Public Counsel, State of Florida;  
and AARP,**

**Appellants,**

**v.**

**Consolidated Case Nos.  
SC04-9, SC04-10, SC04-946**

**LILA A. JABER, Chairman, et al.,  
constituting the FLORIDA PUBLIC  
SERVICE COMMISSION, an agency of  
the STATE OF FLORIDA; BELLSOUTH  
TELECOMMUNICATIONS, INC.;  
VERIZON FLORIDA INC.; and  
SPRINT-FLORIDA, INC., et al.,**

**Appellees.**

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**RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. AND  
BELLSOUTH LONG DISTANCE, INC. TO MOTION OF AARP TO  
RELINQUISH JURISDICTION**

Pursuant to rule 9.300, Florida Rules of Appellate Procedure, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (“BellSouth”) respond to the Motion of AARP to Relinquish Jurisdiction and state:

1. This Court should deny AARP’s request to relinquish jurisdiction because:

- The Public Service Commission (“PSC” or “Commission”), on Reconsideration of its original decision, has already considered the effect of the federal court case AARP identifies as a “changed circumstance” and determined that it “does not rise to the level that would necessitate that we reconsider our decision”;
- AARP overstates the significance of the subject matter of that federal court case -- unbundled network element-platform (“UNE-P”) rates -- to the Commission’s decision to grant the petitions by BellSouth, Verizon Florida, Inc., and Sprint-Florida, Inc. to rebalance rates;
- The potential effects of the court decision identified by AARP are speculative at best, as the case remains on appeal to the United States Supreme Court, and the Federal Communications Commission (“FCC”) is in the process of drafting new rules addressing the subject matter of the case;
- AARP has not met its burden of demonstrating the “exceptional” circumstances that would justify this Court – for the second time – relinquishing jurisdiction to the PSC to yet again reconsider its decision in the underlying dockets; and
- AARP has not demonstrated the “extraordinary circumstances” that would permit an exception to the doctrine of administrative finality and allow the

PSC to reopen the dockets below and revisit the Orders it entered on December 24, 2003, and May 4, 2004;

2. AARP, for the second time since this case has been on appeal, has asked this Court to relinquish jurisdiction to the PSC.<sup>1</sup> Unquestionably, AARP does not like the PSC's decision. But the doctrine of administrative finality compels that AARP accept that it has lost the case below and now concentrate its efforts on its appeal to this Court. Repeatedly asking for a "do-over" at the PSC wastes the resources of both the PSC and this Court and is unfair to the Appellees, who are entitled to resolution of these consolidated cases within a reasonable timeframe.

3. The circumstances under which this Court may relinquish jurisdiction to the lower tribunal are governed by rule 9.600(b), Florida Rule of Appellate Procedure. The rule provides:

If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.

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<sup>1</sup> This Court granted AARP's first motion to relinquish jurisdiction (along with a similar motion filed by the Attorney General) on March 3, 2004, "for the specific purpose of ruling on the January 8, 2004, motions for reconsideration." The PSC, after holding oral argument, duly reconsidered its Order, and on May 4, 2004, entered an Order denying the Motions for Reconsideration filed by AARP and the Attorney General. Both Orders are now before this Court on appeal.

Courts have interpreted the rule as an extraordinary remedy to be used only in exceptional circumstances. *See Lurie v. Auto-Owners Ins. Co.*, 605 So. 2d 1023, 1025 (Fla. 1<sup>st</sup> DCA 1992); *see also General Capital Corp. v. Tel Service Co., Inc.*, 212 So. 2d 369, 382 (Fla. 2d DCA 1968) (relinquishment must be for an “exceptional purpose”).

4. In this case, AARP cites “recently changed circumstances and public need” as the basis for its request that the Court relinquish jurisdiction. These alleged changed circumstances are identified as a federal court case that has already been addressed by the PSC on Reconsideration; an announcement by AT&T that it intends to change the way it competes in the telecommunications market; and press clippings suggesting that other telecommunications carriers may be revising their business practices. For reasons discussed later in this Response, none of these listed reasons constitutes changed circumstances or justifies this court relinquishing jurisdiction pursuant to rule 9.600(b).

5. AARP asks that the Court send the case back to the PSC so that the PSC can conduct a hearing to determine whether any of the issues it raises satisfies the standard for breaching the doctrine of administrative finality and reopening the case. Although AARP has cited a number of cases where a narrow exception to the rule of administrative finality is described, AARP has

cited no case -- nor have we found one -- where a court relinquished jurisdiction in order for an agency to hold a hearing and determine whether changed circumstances exist that would justify modifying an administrative order. Indeed, such a request contradicts the basic premise of the cases AARP relies on to support its request. *See Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966), where this Court stated:

The effect of these decisions is that orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

*See also Austin Tuppler Trucking, Inc. v. Hawkins*, 377 So. 2d 679 (Fla. 1979); *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 41 (Fla. 2001) (“[T]he doctrine of administrative finality *precludes* such readjudication as a matter of fairness to those who prevailed in the litigation of this issue previously.”).

6. The exception to the rule of administrative finality that would allow an agency to reopen a final order is extremely narrow and may only be exercised in “extraordinary circumstances.” *Russell v. Dep’t of Bus. & Prof. Regulation*, 645 So. 2d 117 (Fla. 1<sup>st</sup> DCA 1994). The alleged changed circumstances that AARP cites simply do not meet the requirement of “a significant change of

circumstances or a demonstrated public interest.” *Florida Power & Light Co. v. Beard*, 626 So. 2d 660, 662 (Fla. 1993).

7. First, AARP cites *United States Telecom Ass’n v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) as a significant changed circumstance because the court said, among other things, “that the FCC erred when it delegated to state commissions the authority to determine what network elements must be unbundled at discounted rates for use by competitive carriers.” AARP Motion for Evidentiary Hearing and Modification of Commission Orders Nos. PSC-03-1469-FOF-TL and PSC-04-0456-FOF-TL on the Basis of Significantly Changed Circumstances and Public Need at 25 (“AARP Motion for Evidentiary Hearing”). According to AARP, the rates that competitive local exchange companies (CLECs) pay to incumbent local exchange companies (ILECs) to lease local loops and computer switching facilities (called Unbundled Network Element – Platform or UNE-P rates) is the only significant factor in determining whether competition for local telephone services will occur. Because the court decision, which was issued in March of this year, changed the way those rates may be established, AARP argues that the entire basis for the PSC’s Orders on appeal has evaporated. AARP Motion for Evidentiary Hearing at 5. AARP overstates the significance of this issue.

8. The Attorney General (another Appellant in this case) raised the court's ruling in the *United States Telecom Association* case with PSC on Reconsideration. In determining that the case did not provide a basis to reconsider its decision, the PSC stated:

As for the Supplemental Authority offered by the Attorney General, we conclude that the D.C. Circuit's decision in *United States Telecom Ass'n v. Federal Communications Commission* does not rise to the level that would necessitate that we reconsider our decision. While the decision does muddy the waters as to the future of certain UNEs, it does not, by itself, automatically remove any UNEs from the national list. Furthermore, the D.C. Circuit's decision is currently stayed, and further appeals are possible. While we are concerned about the uncertain state of the FCC's unbundling rates, even if the D.C. Circuit's decision remains in place, and UNEs are removed from the list as a result, that process will likely take place over an extended period of time. Furthermore, even if the D.C. Circuit's decision remains in place, carriers that compete using their own facilities would not be directly affected. For all these reasons, we conclude that the D.C. Circuit's decision does not require a change to our conclusions in this case.

R.V.19, 3825-26 (Commission Order of Reconsideration at 8-9) (emphasis supplied).<sup>2</sup>

9. Although the federal court decision is no longer stayed, even AARP notes in its Motion for Evidentiary Hearing that the case is on appeal to the U.S.

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<sup>2</sup> It is noteworthy that the PSC, the agency with expertise concerning the effect of UNE-P rates on competition, has not asked this Court to relinquish jurisdiction because of any changed circumstances. Moreover, we have been advised that the PSC does not intend to accept AARP's offer on page 41 of its Motion for Evidentiary Hearing to join in AARP's request to this Court.

Supreme Court, that the FCC in July of 2004 approved a six-month extension of the current UNE-P rates, and that the FCC is attempting to draft new permanent rules. AARP Motion for Evidentiary Hearing at 27-28. Thus, any ultimate decision about how UNE-P rates are established appears to be many months, if not years, away.

10. Moreover, the record in this case demonstrates that factors other than UNE-P rates were considered important to increasing competition for local telephone service. The PSC determined that the petitions of BellSouth, Sprint, and Verizon would create a more attractive competitive local exchange market for the benefit of residential consumers and induce enhanced market entry. R.V.17, 3307 (Commission Order at 17).

11. The Commission's Order on Reconsideration also emphasizes the multiple benefits of rate rebalancing to customers, rejecting an argument by AARP that "the record does not show that increasing local rates will induce enhanced market entry." R.V.19, 3830 (Reconsideration Order at 13). The Commission stated:

As demonstrated by the discussion at pages 24-26 and 38-39 or our Order, we gave careful, thoughtful consideration to the record on these points. We considered testimony from experts on economic theory, as well as empirical evidence. Based on that evidence, we reached the well-reasoned conclusions that: . . . granting the petitions will remove an obstacle to market entry, providing opportunities for competitors to not only enter new

markets, but also to offer new products and services beyond those that they would otherwise be able to offer were the market to remain constrained by the pricing vestiges of the former regulatory regime. . . .

*Id.* at 3831 (Reconsideration Order at 14).

12. The record below also includes testimony noting that the cost of UNE-P is irrelevant to whether the rate rebalancing petitions should be granted, as well as testimony that it is just one of many factors in enhancing competition for local telecommunications services.<sup>3</sup>

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<sup>3</sup> For example, the rebuttal testimony of Dr. Kenneth Gordon, witness of Verizon, BellSouth and Sprint, includes the following exchange:

Q. Dr. Gabel (at 39-40) [witness for OPC] argues that the reason that Florida ranks lower than other states in local competition may have more to do with the pricing of UNES and UNE-P than retail rates. How do you respond?

A. Dr. Gabel has not conducted a study to demonstrate that the reduction of UNE-P or UNE-Ls has an impact on local competition or that it has a greater impact than establishing more efficient retail rate structure. The point is a red herring because even if it were to be shown that reductions in UNES favorably impact competitors that does not take away from the fact that a more efficient rate structure can also spur competition. The Legislature specifically identified the inefficient retail rate structure as a tool to use in enhancing market entry. It did not – although it was free to do so – identify the issues mentioned by Dr. Gabel. The issue of whether artificially low UNE-P has more or less of an impact on enhancing market entry is not relevant to the Commission’s decision. It is simply a red herring meant to distract from the issue at hand.

Moreover, relying too heavily on UNE-P to enhance market entry is bad public policy if one ever hopes to achieve facilities based competition.

13. AARP also points to announcements of certain CLECs regarding changes in marketing strategies as a reason for the Court to relinquish jurisdiction. However, these announcements relate to near-term marketing plans and certainly do not constitute “exceptional” circumstances that would justify this Court’s relinquishing jurisdiction to the PSC and allowing the PSC to conduct yet another evidentiary hearing. The fact remains that these CLECs will continue to provide service to residential customers, and rate rebalancing is needed to enhance further competitive entry into the local exchange market.

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TR.V.2, p. 182, lines 15-23; p. 183, lines 1-7 (emphasis supplied) (attached as Appendix 1).

AT&T’s witness Wayne Fonteix emphasized that reforming access charges, which was at issue in the rate-rebalancing docket, is a significant issue separate from the issue of UNE-P rates. He had the following exchange with Commissioner Davidson:

Commissioner Davidson:      Given AT&T’s view that UNE rates in Florida are not to the level that AT&T would like them, shouldn’t the Commission simply hold off on access charge reform until such time as the UNE rates are to AT&T’s liking in the state?

Fonteix:      No. The opportunity is long overdue in Florida, as I indicated, to begin to reform the access charge regime, as has been underway for a number of years in other states and at the federal level. . .

Tr.V.11, pp. 1304-1305, lines 23-25 and 1-7 (attached as Appendix 2).

For the reasons expressed, BellSouth respectfully requests that this Court deny AARP's Motion to Relinquish Jurisdiction.

Respectfully submitted this 23rd day of September, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.  
AND BELLSOUTH LONG DISTANCE, INC.

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