

**THE SUPREME COURT OF FLORIDA**

CHARLES J. CRIST, JR., ATTORNEY  
GENERAL, STATE OF FLORIDA,  
Appellant,

v.

Case No.: SC04-9

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

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

v.

Case No.: SC04-10

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

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Petition of Verizon Florida Inc. to  
Reform its Intrastate Network Access and  
Basic Local Telecommunications Rates in  
Accordance with Florida Statutes, Section  
364.164

AARP, Appellant,

v.

Case No.: SC04-946

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

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**AARP RESPONSE TO JOINT MOTION TO STRIKE  
AARP'S NOTICES OF SUPPLEMENTAL AUTHORITY**

Appellant, AARP, pursuant to Rule 9.300(a), Fla. R. App. P., files its response to the October 7, 2004 Joint Motion To Strike AARP's Notices Of Supplemental Authority filed by Appellees BellSouth Telecommunications, Inc.

and BellSouth Long Distance, Inc., Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership, Verizon Florida, Inc., AT&T Communications of the Southern States, LLC, and MCI WORLDCOM Communications, Inc. (the “Telephone Companies”) and says:

1. By their joint motion the Telephone Companies urge the Court to strike AARP’s notices of supplemental authority filed September 28, 2004 and on October 1, 2004 “in support of its pending Motion to Relinquish Jurisdiction” because they say the provided supplemental authorities are (1) not “significant” to the issues raised in the motion to relinquish, (2) not the type of document that should be considered “authority,” (3) improperly attach pleadings filed in another case, (4) constitute an unauthorized reply, (5) contain argument and (6) were filed so late in time as to arguably “ambush an opponent by deliberately withholding significant case citations until just before oral argument.”

2. AARP responds by stating it believes its notices of supplemental authority are (1) clearly entitled to “authority” status, especially as measured against the pleadings they seek to supplement, (2) clearly “significant” to the core issues of the relinquishment motion and Verizon’s response thereto, (3) do not improperly attach pleadings in another case, (4) do not constitute an “unauthorized reply,” (5) do not engage in “argument,” and (6) were timely filed in relation to their occurrence and discovery.

### AARP's Supplemental Authorities Were Timely Filed

3. Citing to *Ogden Allied Servs. v. Panesso*, 619 So. 2d 1023 (Fla. 1<sup>st</sup> DCA 1993) the Telephone Companies suggest to this Court AARP ambushed them in violation of Rule 9.225, Fla. R. App. P., because the Petition for Writ of Mandamus submitted with AARP's second notice of supplemental authority was filed with the Court of Appeals for the D.C. Circuit two weeks prior to the filing with this Court of AARP's Motion to Relinquish Jurisdiction. The two-week differential is correct, but the amount of time is inconsequential compared to the delays historically affirmed by Florida courts. More importantly, the undersigned counsel for AARP was unaware of the D.C. Circuit filing when preparing and filing the Motion to Relinquish Jurisdiction and did not become aware of the filing until after assertions for the preservation of the Federal Communications Commission's ("FCC") low-cost wholesale rates through the promulgation of new interim rules and the resulting expansion of local service competition were raised by Verizon in its response to AARP's Motion to Relinquish. Once discovered, Verizon's attack on the interim rules as being directly in violation of the D.C. Circuit's *United States Telecom Ass'n v. FCC*, 359 F3d 554 (D.C. Cir. 2004) ("USTA II") decision seemed relative and significant to, if not also inconsistent with, Verizon's suggestion to this Court that AARP was overstating the demise of the UNE-P rates and with them the probability of enhanced local service

competition.<sup>1</sup> Furthermore, one might ask why Verizon failed to inform this Court of its appellate challenge to the temporary FCC rules by its Petition for Writ of Mandamus, as well as through the subsequent Petition for Review of the interim rules filed by Verizon the same day it filed its Response to the AARP's Motion to Relinquish Jurisdiction with this Court.

4. AARP does not support the type of ambush proscribed by the First District in *Ogden Allied Servs. v. Panesso*, but would remind the Court that the abuse there was extreme and clearly indefensible. The facts in *Panesso*, as stated by the court at 1023, 1024, were:

On the afternoon preceding the day set for oral argument, appellee filed and served a notice of supplemental authority (his second). The notice had attached to it copies of twenty-two cases, totaling 125 pages. The cases are, at best, peripherally related to the issue presented on appeal. All of the cases had been decided before appellee's answer [footnote omitted] brief was filed. Appellee's notice of supplemental authority prompted appellants to respond with their own, on the morning of oral argument. When asked at oral argument why the "supplemental authorities" had not been cited in his briefs, counsel for appellee had no satisfactory explanation. Of late, this scenario has been occurring with disturbing frequency.

We believe such filings to be a misuse of Florida Rule of Appellate Procedure 9.210(g) and Florida Rule of Workers' Compensation Procedure 4.225. Those rules are intended to permit a litigant to bring to the court's attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because, through

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<sup>1</sup> It is difficult to reconcile a party touting the interim rules as beneficial to residential consumers while simultaneously engaging in a two-prong appellate assault on those same rules, which challenges are undisclosed to the Court.

inadvertence, they were not discovered earlier. They are not intended to permit a litigant to submit what amounts to an additional brief, under the guise of "supplemental authorities"; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.

Not surprisingly, the court, on its own motion, struck both the appellee's and the appellant's notices of supplemental authority. Clearly, in the instant case there was no intentional withholding of authorities by AARP and no "ambush," if for no other reason than there was no clear deadline pending such as the oral argument in *Panesso*. At worst, the undersigned failed through inadvertence to discover the two-week old pleadings sooner.

5. In any event, Florida courts have accommodated rather vintage documents as proper supplemental authorities under the rule, even when it was clear that they could have been discovered and cited much earlier. For example, in *Pignato v. Great Western Bank*, 664 So. 2d 1011 (Fla. 4<sup>th</sup> DCA 1995) the court accepted a 23-year-old Attorney General Opinion ("the bank has supplied as supplemental authority an opinion of the Attorney General of Florida from 1972 determining that the intangible tax was a 'recording tax.']"). (Justice Pariente concurring.) Earlier, in 1991, this Court in *Dugger v. Williams*, 593 So. 2d 180, 183, accepted as supplemental authority the apparently then six-year-old "new" Rules of Executive Clemency ("As supplemental authority, DOG has presented the new Rules of Executive Clemency that DOC's counsel stated were approved in

1985.”) The Court should find no error in AARP submitting documents as supplemental authority that were in existence as little as two weeks before they were provided.

#### AARP’s Supplemental Authorities Are Appropriately Considered

6. The Telephone Companies would apparently have the Court find that only reported case decisions are appropriate as supplemental “authorities.” Of course, the plain language of Rule 9.225, Fla. R. App. P, states the contrary:

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause.

(Emphasis supplied.) While the categories of “decisions, rules, statutes” are fairly straightforward, the “other authorities” are less so and the case law indicates they are typically considered on a case-by-case basis.

7. In addition to the vintage Attorney General Opinion and the Rules of Executive Clemency discussed in Paragraph 5 above and accepted as supplemental authority, the following “other authorities” have been allowed: (1) law review articles in *Peterson v. State*, 775 So. 2d 376, 379 (Fla. 4<sup>th</sup> DCA 2001) (article published in 1999) and in *Hall v. State*, 773 So. 2d 99 (Fla. 1<sup>st</sup> DCA 2000) (articles published in 1980 and 1999); (2) letters in *Smith v. State*, 551 So. 2d 462 (Fla. 1989) (“The letter filed in this Court on August 16, 1989, is treated as a notice of supplemental authority and the Clerk is directed to transmit said notice to the

District Court of Appeal, Fifth District.”) and in *Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A.*, 651 So. 2d 97, 103 (Fla 4<sup>th</sup> DCA 1994) (“In addition, the grievance committee of the Florida Bar . . . found no probable cause, as reflected in the May 25, 1994, letter from the Florida Bar to Taylor, filed without objection with this court as supplemental authority.”); (3) copy of an acquittal in *Morris v. State*, 727 So. 2d 975, 977 (Fla. 5<sup>th</sup> DCA 1999) (“As supplemental authority, Morris has submitted a copy of his acquittal on the battery charge arising out of this incident.”); and (4) scientific documents or scientific literature, not received, but which apparently would have been welcomed by the court in *Brim v. State*, 779 So. 2d 427, 429 (Fla. 2<sup>nd</sup> DCA 2000) (“The parties did not include in the record any of the existing scientific documents needed for this review, nor has either party filed any recent scientific literature as supplemental authority.”).

#### AARP Supplemental Authorities Not Improper Pleadings Filed In Another Case

8. AARP would submit to this Court that the cases cited by the Telephone Companies stand for the propositions that: (1) appellate courts may not take judicial notice of the records in unrelated cases, where those records were not entered into the record of the case on review, and (2) “disputed portions of the appendix (consisting of the record of an unrelated case below) are not “other authority” for purposes of supplemental authority. AARP is not asking this Court to take judicial notice of any documents, but, rather, is asking the Court to accept

as supplemental authority two Verizon pleadings demonstrating its view that the FCC's interim UNE rules must fail. There is no prohibition found in either *Hillsborough County Bd. Of County Comm'rs v. Public Employees Relations Com'n*, 424 So. 2d 132 (Fla. 1<sup>st</sup> DCA 1982) or *Atlas Land Corp. v. Norman*, 116 Fla. 800, 156 So. 885 (Fla. 1934) against this Court accepting Verizon's pleadings with the D.C. Circuit as supplemental authority, as opposed to judicially noticing those pleadings. Whether these pleadings are "significant" should be left to the determination of this Court and considered in light of what is being sought by AARP and opposed by the Telephone Companies.

AARP's Notices of Supplemental Authority Are "Significant"

9. Whether a supplemental authority is significant or not should be measured against what is being sought from the Court. Here, the Court should recall, AARP is not seeking to supplement the authorities with respect to the underlying appeal, but, rather, as to its Motion to Relinquish Jurisdiction. Simply put, AARP wants this Court to relinquish jurisdiction to the Public Service Commission ("PSC") so it might consider AARP's "Motion for Evidentiary Hearing and Modification of Commission Orders on Basis of Significantly Changed Circumstances and Public Need." The latter motion to the PSC is based on the proposition that the quid pro quo for the large residential local service rate increases -- namely enhanced local service competition -- ordered by the

Commission is now highly improbable, if not impossible, because of the relatively recent (1) reversal of the FCC's low-cost UNE-P wholesale leasing rates by a federal appellate court in USTA II, which low rates AARP maintains are the foundation for any enhanced local service competition, and (2) the announced decisions of the three major potential local service competitors in the PSC case below that they are either abandoning local service competition or ceasing to market it.

10. AARP would respectfully submit to this Court that "evidence" that the major potential competitors are abandoning their local service competitive efforts is "significant" to both the Motion to Relinquish and whether the PSC should modify its order now on appeal after taking additional evidence on the viability of new and enhanced competition. It should be understandable that news articles, press releases and slip opinions must be relied upon in a business and regulatory environment that is changing by the week and often by the day.<sup>2</sup> These

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<sup>2</sup> In another Notice of Supplemental Authority filed contemporaneously with this Response, AARP informs the Court that the United States Supreme Court on October 12, 2004 denied certiorari review in the three cases in which the National Association of Utility Regulators, AT&T Corp, and the State of California and others sought review of the USTA II decision, which puts to an end any revival of the FCC's initial low-cost wholesale rates. Also submitted as supplemental authority are one October 18 and two October 19, 2004 articles, one each from the Wall Street Journal, Dow Jones Newswires and the Washington Post, reporting that AT&T, MCI and Sprint have recently taken huge write-offs as a result of their loss at the FCC to the regional telephone companies, which, in turn, are resulting in losses in both local service customers and long distance revenues.

are changes which AARP believes will adversely affect any potential for enhanced local service competition. Additional record evidence can, of course, only be had if this Court returns the case to the PSC.

11. Hopefully, this Court will find the notices of supplemental authority to be helpful in its resolution of the Motion to Relinquish Jurisdiction. In as close an explanation for the purpose of supplemental authorities as AARP has been able to find, the First District said the following in *Cadle Co. v. Stamm*, 633 So. 2d 45 (Fla. 1<sup>st</sup> DCA 1994):

The purpose of Fla. R. App. P. 9.200(g), permitting the filing of notices of supplemental authority, is to give the parties a vehicle to inform the court of “decisions...discovered after the last brief served in the cause.” It is particularly important in a case such as this, in which the Court is being asked to address a question of first impression in this state on which the law is evolving across the country. While *White v. Moriarty* and *Lewis* were cited to this Court as supplemental authority, additional supplemental authorities would have been welcome and appropriate.

*Cadle Co. v. Stamm* at 46. (Emphasis supplied.) AARP would submit to this Court the rate increases in the annual amount of over \$344 million approved in the underlying case are the result of an unprecedented, “first impression” 2003 law and, further, that the legal, regulatory and business environments surrounding the enhanced local service competition promised to result from the increased rates are constantly evolving across the country. Hopefully, the Court will expect and welcome additional notices of supplemental authority, as significant events

relevant to the Motion to Relinquish Jurisdiction and the industry responses thereto occur.

#### Only Editorial Comment, If Any, Should Be Stricken

12. Rule 9.225(g), Fla. R. App. P. allows the notice to “identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument.” AARP attempted to identify for the Court the issues in Verizon’s Response for which the supplemental authorities were offered and to do so without providing argument. There may be a thin line between identifying issues and providing argument or editorial comment. To the extent the line was crossed, which AARP would suggest was not, the error was unintentional. In any event, the clear remedy for such a breach is to strike only the editorial material, not the entire supplemental authority. In *Florida Dep’t of Health & Rehabilitative Servs. v. Martin*, 563 So. 2d 1124 (Fla. 1<sup>st</sup> DCA 1990) and *Garcia v. Oldensmith*, 591 So. 2d 636 (Fla. 3<sup>rd</sup> DCA 1991), for example, the Court stated, in the latter: “Appellant’s motion to strike appellee’s notice of supplemental authority is denied. The argument part of the notice is hereby stricken.”

#### There Was No Unauthorized Reply

13. AARP would submit that merely providing the Court with notices of supplemental authority related to issues raised in Verizon’s response, and not disclosed by that party, should not be considered as a “reply.” To the extent

editorial comment is found to exist in the notices, striking just that portion should cure any suggestion that there was a reply or argument.

WHEREFORE, AARP would respectfully request that this Court deny the Telephone Companies' Motion to Strike for the reasons stated above.

DATED this \_\_\_\_\_ day of October, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished  
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