BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for expanded interconnection for alternative access vendors within local exchange company central offices by INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.	DOCKET NO. 921074-TP ORDER NO. PSC-95-0680-FOF-TP ISSUED: June 6, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JULIA L. JOHNSON

ORDER REGARDING CLARIFICATION AND RECONSIDERATION

BY THE COMMISSION:

By Order No. PSC-95-0034-FOF-TP, issued January 9, 1995, we decided various issues related to switched access interconnection and local transport. The parties have filed motions for reconsideration and responses to those motions regarding the final order in this docket.

I. STANDARD OF REVIEW

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla 1st DCA 1981). It is not an appropriate venue for rehashing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

II. ZONE-DENSITY PRICING

In Order No. PSC-95-0034-FOF-TP (Order), we approved the concept of zone density pricing for switched access interconnection, and ordered the local exchange companies (LECs) to file tariffs within 90 days of the issuance of the final order in

Phase II of this proceeding. Zone density pricing allows the LECs to base their switched access rates on the density of DS1s in a given central office. Thus, rates would vary from central office to central office; however, all interconnectors in a particular office would pay the same rates.

GTE Florida Incorporated (GTEFL) filed a Request for Clarification and Request for Extension, If Necessary, regarding the portion of Order No. PSC-95-0034-FOF-TL that requires the LECs to file zone density pricing plans. United Telephone Company and Central Telephone Company of Florida (United/Centel) filed a Motion for Reconsideration or In the Alternative Motion for Extension of Time regarding the same subject matter. Since United/Centel's motion was filed one day after the last day for reconsideration, we will treat United/Centel's motion as a request for extension of time to comply with the order.

Specifically, the paragraph in question states:

> Within 90 days following the issuance of this Order or the Order on reconsideration of this Order, whichever is later, the LECs shall be required to file their zone density pricing tariffs, including supporting incremental costs [sic] data. In addition, to the extent possible, each LEC shall identify the amount of any costs such as groups [sic] specific costs, that, while not directly attributable to one of these elements, is associated with this service. (Order, p. 45)

United/Centel states that it can support its proposed zone-specific rates with average incremental cost data within the specified period, but zone-specific cost data will require additional time. However, United/Centel states that if it is our intent that United/Centel's zone-density pricing tariffs be supported by zone-specific cost studies, it will require 180 days to prepare this data.

GTEFL has asked for clarification of the Order. The first request for clarification concerns zone density pricing tariffs. GTEFL points out that the Order approves zone density pricing for the local transport elements of switched access and directs the LECs to use the FCC's zone density pricing concept as a guide. If LECs wish to deviate from the FCC scheme, they must identify variations and justify them. (Order at 65.)

GTEFL argues that, at the federal level, LECs were generally not required to file cost studies to support their zone pricing filings. However, we have directed LECs to include supporting

on the zone-to-zone differences in the value of the key cost drivers.

The companies have requested an extension of time for filing if zone-specific cost studies are required. Since such studies have not been requested, we find that no extension of the 90-day filing date is necessary.

Further, the zone density pricing tariff may be filed as part of the LTR tariff. The rates are an integral part of the LTR tariff so it is not necessary to file a separate tariff. However, the cost data shall be clearly identified to support the zone density pricing portion of the tariff so that a separate analysis may be undertaken. This data does not need to be filed separately.

Accordingly, we find that the LECs shall be permitted to file average incremental cost data in support of their zone density pricing tariffs. To the extent that the proposed rates for each of the zones differ from the average incremental cost data provided, the LECs must provide information to reflect how the costs for each zone differ from the average. Such information shall include the key cost drivers, a description of the extent to which each key cost driver varies by zone, and an estimate of how the incremental cost would vary by zone based on the zone-to-zone differences in the value of the key cost drivers. Since zone-specific cost studies are not required, no extension of time is necessary. The zone density pricing tariffs and cost support shall be filed as part of the Local Transport Restructure tariffs no later than 90 days following the issuance of this Order. The cost support shall be clearly identified as to which portion pertains to zone density pricing.

III. DS3-DS1 CROSSOVER POINTS

Interexchange Access Coalition (IAC) filed a timely Motion for Partial Reconsideration stating that it generally supported the Order and the conclusions regarding local transport restructure. However, IAC seeks reconsideration of one element of the decision: the Order's statement on page 58 that a DS3-DS1 pricing ratio in the range of 14-21 would be presumed reasonable. IAC further states that a "14-21 ratio is not supported by the record in this proceeding and is inconsistent with the goals expressed by the Commission in the Final Order." In its motion, IAC reviewed and lauded the analysis and conclusions requiring incremental cost studies to be filed by the LECs and the guidelines we would apply to determine appropriate rates when filed. IAC then states that:

> Had the Commission stopped there, IAC believes that it would have clearly established the criteria to judge refiled tariffs and obligated the LECs to provide the information to do so. However, in a later section of the Final Order, the Commission effectively prejudges the result of this investigation...

Specifically, IAC is concerned with the following statement:

> We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. (Order, p. 58)

IAC argues that there is no testimony in the record supporting a DS3-DS1 cross-over range of 14-21 nor does the record support a fill factor of 50-75%. IAC cites to several instances during cross-examination where Sprint's witness', Mr. Rock's, proposed fill factor of 79% was discussed but was not attacked by either Southern Bell's witness or attorney. IAC concludes that "[a]s a result, the record of this proceeding contains unquestioned testimony that the current capacity utilization factor is 79 percent." (Motion, p. 6)

IAC argues that the 14-21 cross-over range used in the Order is inconsistent with the findings and policies of the Order, and that the record shows that the cross-over ratio should exceed 22:1 based on existing "network utilization factors." Citing a different cross-over ratio, IAC asserts, represents a "potential prejudgment of an important tariff review issue." IAC thus asks for reconsideration of "that portion of the Final Order which references cross-over ratios in the range of 14-21 to be acceptable. The Commission should modify the Final Order to remove the presumption of reasonableness of the 14-21 cross-over ratios and reserve judgment until it has reviewed the required cost data." (IAC Motion, p. 8)

United/Centel filed a joint Memorandum in Opposition to IAC's Motion for Partial Reconsideration, and Southern Bell also filed a response. United/Centel argues that the motion should be denied because it fails to show some point this Commission failed to consider or which it overlooked when it issued its order. United/Centel argues that IAC is attempting to reargue a point because it disagrees with the Order. United/Centel cites to Mr. Andreassi's testimony, Teleport's witness, that Teleport prices its DS3-DS1 services such that the cross-over points range between 3.17 and 7.8, arguing that this constitutes evidence supporting lower cross-over ratios than those advocated by IAC.

United/Centel also points out that IAC's motion fails to consider the full context of the goals expressed in the Order, citing to the following passage on page 58:

> ...we do not believe that a single criterion is sufficient by itself upon which to set a rate. Rather, all relevant factors should be considered in setting prices for Local Transport rate elements.

United/Centel therefore requests that we deny IAC's motion.

Southern Bell rebuts IAC's assertion that the statement on page 58 of the Order was a "presumption," stating that the Order calls the 14-21 range an "expectation" not a presumption. In contrast, Southern Bell cites to the FCC's declaration that a 9.6 DS3-DS1 ratio is appropriate, as more properly characterizing a "presumption" than our Order. Southern Bell also recited the support and analyses that this Order requires to be filed with the cost studies, noting that if the language is intended to be a presumption, such support would not have been required, and on that basis, IAC's motion is unfounded.

In addition, Southern Bell argues that there is ample record to support a 14-21 range had we determined it to be reasonable. Southern Bell takes issue with IAC's conclusions concerning the 79% percent fill factor. Southern Bell cites to Late-Filed Exhibit 30 and "cost data submitted by Southern Bell in the context of discovery" as containing utilization factors supported by Southern Bell in the record and unrebutted by any party. Southern Bell concludes that "the Commission's expectation as to the cross-over range was not intended to rise to the level of a presumption and therefore there is no need for reconsideration on this point," and that IAC's "petition" should be denied.

We are not obligated to approve LEC proposed rates simply because the calculated cross-over points fall between 14:1 and 21:1 ratios. The language in the Order was intended to be clarifying rather than directive. Because this language may have confused the issue, however, on our own motion, we shall strike this language, as indicated by the bold type below. The paragraph that contains the language that is the source of IAC's concern reads in full:

> We do not think it is appropriate to arbitrarily set a single cross-over point to be applied uniformly to all LECs for all transport services. However, LECs shall in their tariff filings make a showing that explains why the cross-over points achieved in their pricing proposals are appropriate for their network or for their competitive

> situation. **We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. We expect any proposals that substantially differed from that range to be thoroughly supported.** (Order, p. 58--language to be struck is in bold)

Southern Bell notes that the Order also requires cost support as well as several analyses justifying the LECs' proposed prices. We will review the required analyses and request any further data and support necessary to ensure that the tariffs comport with all the guidelines set forth in the Order. We will review information on existing as well as efficient fill factors on both DS1 and DS3 circuits. This will help us evaluate the contribution levels in the proposed rates.

IV. AAVs AND SWITCHED ACCESS INTERCONNECTION PROHIBITION

Teleport Communications Group, Inc. (Teleport) and Intermedia Communications of Florida, Inc. (Intermedia) have filed Motions for Reconsideration regarding the interpretation in Order No. PSC-95-0034-FOF-TP that alternate access vendors (AAVs) are prohibited by law from interconnecting with the local exchange company switch for the provision of switched access service. BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell) filed a Memorandum in Opposition to those motions.

Teleport and Intermedia challenge our interpretation of the controlling statutes. Specifically, Section 364.337(3)(a), Florida Statutes, states that

> 'alternate access vendor services' means the provision of private line service between an entity and its facilities at another location or dedicated access service between an end-user and an interexchange carrier by other than a local exchange telecommunications company. . .

In addition, private line service is defined in Section 364.335(3), Florida Statutes, as

> any point-to-point service dedicated to the exclusive use of the end-user for the transmission of any public telecommunications service.

We held that

> . . . switched access transport is not dedicated transport and does not meet the statutory requirements in Sections 364.335 and 364.337. To allow AAVs switched access interconnection would be adding a switch between an AAV and the end-user. The AAV's position is, in essence, a mere extension of the AAV's network into the switched services arena. (Order, p. 23)

Essentially, Intermedia and Teleport set forth two primary arguments in their motions. Specifically, they contend that local transport constitutes the provision of private line service and that an IXC is an end-user within the meaning of the statute. Other arguments that they set forth will also be addressed.

Southern Bell asserts that the motions should be denied because both failed to identify any error in our legal determination of the meaning of the statute. Both motions failed entirely to raise any matter that we have overlooked in reaching the decision that the plain language of Section 364.337 prohibits AAVs from carrying switched access traffic. Instead, Southern Bell states that both parties "embark upon a variety of abstruse attempts to establish points that, in the final analysis, are simply irrelevant to the core statutory interpretation of the Order." (Southern Bell Response Motion, p. 4)

A. LOCAL TRANSPORT

Teleport contends that local transport constitutes the provision of private line service between an entity and its facilities. In its reconsideration motion, Teleport reiterates this argument which it set forth starting on page 8 of its posthearing brief. We specifically rejected Teleport's contention that local transport constitutes provision of private line service on pages 22 and 23 of the Order.

Southern Bell notes that in its posthearing brief, Intermedia made the creative, albeit implausible, argument that the transport of traffic from a LEC central office, or end office, to an IXC should not be viewed as an access service, either special or switched, but rather as a private line service. We rejected this argument. Also, we focused upon the type of traffic that AAVs can legally carry.

The Order provides that switched access service consists of four major rate elements: Carrier Common Line, Local Switching, Local Transport and Busy Hour Minute of Capacity. (Order, p. 48)

Essentially, Intermedia and Teleport seek to isolate the local transport component from the definition of switched access service. Once separated, they seek to redefine this portion of access service as private line service. We rejected this notion and instead looked at the entire transmission path to determine whether there was private line or dedicated service.

> With expanded interconnection for switched access, the customer controls the destination of a transmission by way of the LEC's switch, in that it could be any local call or a long-distance call. Thus, the end-user is not being provided dedicated private line service or special access. Section 364.337 states that AAVs can provide only private line service or special access service between an end-user and an interexchange carrier. (Order, pp. 22 and 23)

Further, we reached the same conclusion upon analyzing Intermedia's position; specifically, that if the transmission passes from the end-user through the LEC's switch, it is a switched service which the AAV is prohibited from transporting. See Order, p. 26.

In its Motion for Reconsideration, Teleport reargues that an AAV can provide local transport services from an IXC's office to the "IXC's switched access facilities at a local exchange carrier's office," because an AAV would be providing private line service. First, this concept was rejected in the Order. Second, Teleport twists definitions. An IXC has a point of presence to which AAVs carry special access. AAVs are also permitted to provide private line service between two of an IXC's POPS. The IXC is prohibited from switching at the local exchange level. AAVs have always had the ability to transport switched traffic between a single IXC's points of presence. If an IXC interconnects at the LEC's central office, the IXC is not an end-user.

Another question raised by Teleport is whether the private line is connected to the IXC's facilities. Teleport states that switched access facilities, called Feature Groups, will be ordered by the IXC. Thus, Teleport asserts that the IXC must be the customer of record for these feature groups so that its presubscribed customers can reach it over those facilities. If the AAV were the customer of record then only customers presubscribed to the AAV would be completed to that facility. Thus, Teleport continues, the Feature Groups are facilities used by the IXC, and the AAV-provided private line connects to them as permitted by the rule.

We find that Teleport's assertion fails. There is no private line connected to the IXC's facilities as discussed above. Again, although the IXC may order services and be a customer in that sense, the IXC is not the end-user of the toll service; thus, it is not a private line service. Teleport admits to transporting switched traffic on the interstate level which is permitted; however, Teleport, like all AAVs, is prohibited from transporting switched traffic at the local exchange level.

Intermedia argues that we committed a fundamental error when we ruled that an AAV may not provide dedicated transport of switched access traffic from its point of collocation to an IXC's point of presence. Intermedia asserts that we confused legal interpretation with policy analysis and misconstrued our orders when we announced as a matter of law a definition of end-user not contemplated by the legislature and inconsistent with how we viewed that term in the past.

Intermedia asserts that we misapprehend the meaning of the two AAV orders, Orders No. 24877 and 25546. Intermedia contends that the orders clarify that in determining whether a service is dedicated, the key is what happens to the traffic once it enters the AAV's network. Intermedia states in its reconsideration motion that

> If an actual or virtual dedicated transmission path is guaranteed, then the AAV may provide it; if the AAV cannot guarantee that the dedicated path is invulnerable to alteration by the end-user of the path, then it is not a private line. (Intermedia Reconsideration Motion, pg 4)

Intermedia cites to language in the AAV order that states that AAVs are viewed to be prohibited from providing switched traffic from within their networks. We held that the AAVs' position is, in essence, a mere extension of the AAVs' network into the switched services arena. Although Intermedia believes we misconstrue our orders, Intermedia makes an interesting point. Indeed, it is precisely because an AAV cannot guarantee the path is invulnerable to alteration by the end-user that we held that the path is not dedicated. In construing the statutory provisions, we looked to the entire transmission path starting from the end-user, not solely from the point the AAV receives its portion to transport, to determine whether or not there is private line service or special access service.

In response to Intermedia's arguments, Southern Bell states that although the prospect of the Commission misconstruing its own orders is unlikely, even if Intermedia is correct, this point

ultimately does not matter. Southern Bell argues that because our interpretation of Sections 364.335 and 364.337 is correct, the portion of the Order construing past decisions is fundamentally impeachable. We believe that we have interpreted our orders and statute correctly.

Accordingly, Teleport and Intermedia have not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding local transport. Therefore, we find that Intermedia and Teleport's motions for reconsideration are denied as to this issue.

B. END-USER

Teleport also asserts that the definition of end-user for operator service providers should not be applied to access facilities. Teleport asserts that IXCs are end-users for access services. We believe that Teleport merely disagrees with our determination that an IXC is not the end-user for private line service.

Intermedia contends that we confused policy definitions with statutory interpretation in restricting the scope of the term "end-user." Specifically, Intermedia takes issue with our look at the definition of end-user referred to in the Operator Service Provider rules, because Intermedia asserts that the legislature had different objectives for regulating these entities. However, we merely looked to this provision for guidance, because the statute does not define end-user. Intermedia twists definitions of end-user, subscriber, and customer in attempting to persuade us that AAVs can transport a portion of switched traffic.

We agree with the logic set forth by Southern Bell. Southern Bell notes that common sense dictates that the end-user ultimately obtains a telecommunications service, not an entity that buys a portion of a service and then repackages it for resale. In this case, the IXC is the provider of a service to an end-user. Access is a component of the service that is purchased either from the LEC or AAV and then resold to the end-user. Southern Bell states that we defined end-user in the only logical manner.

Accordingly, Teleport and Intermedia have not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of our Order regarding the definition of end-user. Therefore, we find that Intermedia and Teleport's motions for reconsideration are denied as to this issue.

C. UNBUNDLING TRANSPORT

Intermedia asserts that our decision suffers from fundamental error because we unbundle transport from switching and then reject that unbundling in the interpretation of the statute. Although the Order approves expanded interconnection which would make it technically possible for a non-LEC to carry switched traffic without actually doing the switching, the Order does not change the clear statutory prohibition of any attempt by an AAV to carry this traffic. Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding transport. Therefore, we find that Intermedia's motion for reconsideration is denied as to this issue.

D. BYPASS RESTRICTION

Intermedia states that the bypass prohibition was driven by a desire to protect LEC switching from bypass, not transport. Again Intermedia takes too narrow of a view. The bypass restriction set forth in Order No. 16804 provides that "IXCs shall not be permitted to construct facilities to bypass the LECs unless it can be demonstrated that the LEC cannot offer the facilities at a competitive price and in a timely manner." The purpose of the bypass prohibition in Order No. 16804 was to protect local exchange switched access and local exchange special access from uneconomic facilities bypass.

Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding the bypass restriction. Therefore, we find that Intermedia's motion for reconsideration is denied as to this issue.

E. LEGISLATIVE INTENT

Intermedia argues that Chapter 364 has the overarching goal of fostering competition and then claims that our interpretation of Chapter 364.337 is anticompetitive and contrary to the statute in general. Intermedia is merely rearguing its position set forth on pages 18 and 26 of its posthearing brief, which we contemplated but nonetheless rejected by our ultimate holding. Further, it is a well-established rule of statutory construction that specific statutory provisions control over the more general provisions. Fletcher v. Fletcher, 573 So. 2d 941 (Fla. 1st DCA, 1991) The general policy of Chapter 364 of promoting competition cannot override the language of the statutory provision that directly and specifically applies.

Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider. Therefore, we find that Intermedia's motion for reconsideration is denied as to this issue.

F. CONFLICT WITH FCC

Teleport also contends that our Order may be in conflict with the FCC's switched access expanded interconnection policies. If the Order is not changed, Teleport is concerned that once a consumer places an intrastate long distance call two things could happen. First, if the only trunks available to complete those calls are Feature Groups provisioned from a collocation arrangement, the LEC may block those calls, which would not be consistent with public interest. Second, the LECs could require that all IXCs that use AAV facilities must have their intrastate switched access calls completed over separate connections which could only be purchased from the LEC. Teleport contends that this would create clear discrimination since the LEC's switched access customers would be permitted to combine their interstate and intrastate traffic on the same facility while the AAV's customers would not.

Initially, we note that there is no express order of preemption from the FCC of intrastate interconnection; thus, we are not bound by the FCC's expanded interconnection decision. We further note that our decision is essentially consistent as a whole with the FCC's decision. Finally, we are bound by Florida Statutes. Sections 364.335 and 364.337 specifically limit the services which an AAV can provide as discussed in the Order. Thus, Teleport's concerns fail because AAVs are prohibited by statute from providing these services.

Thus, we find that the Motions for Reconsideration by Teleport and Intermedia are denied. Neither motion raises a material and relevant point of fact or law which was overlooked or which we failed to consider when we rendered the Order in the first instance.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the local exchange companies are not required to file zone-specific cost information in support of their zone density pricing tariffs. They are allowed to file average incremental cost data to support the zone-density tariffs. It is further

ORDERED that to the extent that the proposed rates for each of the zones differ from the average incremental cost data provided, the local exchange companies must provide information to reflect how the costs for each zone differ from the average as discussed within the body of this Order. It is further

ORDERED that since zone-specific cost studies are not required, GTEFL's and United/Centel's requests for extension of time are denied as discussed within the body of this Order. It is further

ORDERED that the zone density pricing tariffs and cost support shall be filed as part of the Local Transport Restructure tariffs no later than 90 days following the issuance of this Order. The cost support shall be clearly noted as to which portion pertains to zone density pricing. It is further

ORDERED that IAC's Motion for Partial Reconsideration of Order No. PSC-95-0034-FOF-TP regarding DS3-DS1 cross-over points is hereby denied for the reasons set forth in the body of this Order. It is further

ORDERED that, on our own motion, the following language is hereby deleted from page 58 of Order No. PSC-95-0034-FOF-TP:

> We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. We expect any proposals that substantially differed from that range to be thoroughly supported.

It is further

ORDERED that the Motions for Reconsideration by Teleport and Intermedia regarding the interpretation that Sections 364.335 and 364.337, Florida Statutes, prohibit alternate access vendors from interconnecting with the LEC switch for the provision of switched access are hereby denied as discussed within the body of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 6th day of June, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.