Legal Department

NANCY B. WHITE
General Attorney

BellSouth Telecommunications, Inc.
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375-0001
(404) 335-0710

April 12, 1996

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

RE: Docket No. 950984-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration. Please file these documents in the above-captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (BW)

Nancy B. White

Enclosures

cc: All Parties of Record
R. G. Beatty
A. M. Lombardo
R. D. Lackey

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for resale involving local exchange companies and alternative local exchange companies pursuant to Section 364.161, Florida Statutes	)	Docket No. 950984-TP
	)	Filed: April 12, 1996

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth" or "Company"), files pursuant to Rule 25-22.038(2), Florida Administrative Code, its Motion for Reconsideration of Order No. PSC-96-0444-FOF-TP ("Order"), issued on March 29, 1996, by the Florida Public Service Commission ("Commission") in the above captioned docket. Reconsideration is required because the Order violates both Florida and federal law, overlooks key evidence, is based on speculation and conjecture and is not founded on competent and substantial evidence. In support of its Motion for Reconsideration, BellSouth states the following:

I. Procedural Background

This proceeding was initiated on August 30, 1995, when the Prehearing Officer issued the Order Establishing Procedure (Order No. PSC-95-1083-PCO-TP), which set forth the procedures that would apply to petitions filed requesting the Commission to set the rates for unbundling and resale. Petitions were subsequently filed on November 13, 1995 by Metropolitan Fiber Systems of Florida, Inc. ("MFS") and on November 14, 1995 by MCI Metro

Access Transmission Systems, Inc. ("MCI"). These petitions requested the Commission to establish "nondiscriminatory rates, terms, and conditions" for resale with BellSouth, as required by Section 364.162(3), Florida Statutes. Numerous parties intervened. The hearing was held on January 11, 1996.

On December 8, 1995, a comprehensive Stipulation and Agreement was filed in this docket. The Stipulation resolved various issues between BellSouth and the majority of the intervenors in this docket, including the Florida Cable Telecommunications Association, Inc. and its members, Continental Cablevision, Inc., Intermedia Communications of Florida, Inc., Sprint Metropolitan Network, Time Warner AxS of Florida L.P., Digital Media Partners, and Teleport Communications Group. The Stipulation was approved by this Commission by Order No. PSC-96-0082-AS-TP, issued on January 17, 1996.

The Commission issued its Order in this docket on March 29, 1996. The Commission ordered BellSouth to provide various loops and ports on an unbundled basis. Specifically, BellSouth was ordered to provide a 2-wire voice grade loop (non-special access line) at an interim rate of $17 per month and a 2-wire analog port at an interim rate of $2.00 per month. The Commission also ordered BellSouth to allow alternative local exchange companies ("ALECs") to collocate loop concentration equipment within BellSouth's central offices. Finally, BellSouth was ordered to permit any customer to convert its bundled service to an unbundled service and assign such to an ALEC, with no penalties,

rollover, termination, or conversion charges to the ALEC or the customer.[1]

The findings of the Commission rely upon speculation and conjecture. Moreover, this Order violates Florida law and federal law. Finally, the Commission's decision lacks the requisite foundation of competent and substantial evidence. Therefore the Commission, in reaching a decision on these issues overlooked and failed to consider the significance of certain evidence or the absence thereof in this docket and has misapplied the law to the evidence which was presented. Reconsideration in these circumstances is appropriate. See Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962).

Specifically, the Order sets interim rates for the 2-wire voice grade loop and 2-wire analog port that are below cost and/or contain no contribution to shared and common costs or to universal service. Further, the Order allows loop concentration equipment to be collocated by ALECs in BellSouth's central offices, in accord with Order No. PSC-94-0285-FOF-TP (the expanded interconnection order). Such a requirement violates the provisions of the Telecommunications Act of 1996. Finally,

---

[1] BellSouth was also ordered to offer various other elements on an unbundled basis (4-wire analog voice grade loops; 2-wire ISDN digital grade loops; 4-wire DS-1 digital grade loops; 4-wire analog line ports; 2-wire ISDN digital line ports; 2-wire analog DID trunk ports; 4-wire DS-1 digital DID trunk ports; and 4-wire ISDN DS-1 digital trunk ports); to adhere to industry standards for the provision and operation of each unbundled element; to file cost studies for the above elements; to resell loop concentration facilities; to file a proposal for sub-loop unbundling; and to file specific other operational arrangements.

BellSouth is required to permit customers to abrogate their contracts without penalty or termination charges. This constitutes an unlawful impairment of contract obligations and violates both the Florida and United States Constitutions.

The sections below examine each of these bases for reconsideration in turn, considering the specific evidence that exists in the record and in light of the applicable law.

II. The Interim Rates for the 2-Wire Loop and 2-Wire Analog Port Violate Florida Law and the Commission's Universal Service Order

Section 364.161(1), Florida Statutes, requires local exchange companies to unbundle network features, functions, and capabilities and offer them for resale "to the extent technically and economically feasible". This Section goes on to state that "in no event, however, shall the local exchange telecommunications company be required to offer such unbundled services, network features, functions or capabilities, or unbundled local loops at prices that are below cost".

BellSouth proposed to offer a voice grade local loop that is currently available in BellSouth's Access Services Special Access Tariff. Moreover, BellSouth proposed to offer an unbundled 2-wire voice grade exchange port for connection of an ALEC's end user loop to BellSouth's public switched network. (Tr. p. 273). BellSouth planned to price this port with a monthly rate and a usage rate. The usage rate would be the same as the usage rate for Shared Tenant Service, a comparable form of resale that

currently exists in BellSouth's tariff. (Tr. pp. 276-277). These rates all cover their costs.

BellSouth provided evidence that the unbundled loop would be provisioned and maintained in a manner analogous to a special access dedicated line, that it is more economical to integrate these loops directly into the central office switch via Subscriber Loop Carrier ("SLC") technology, and that pricing such loops at rates other than Special Access tariff rates would encourage tariff-shopping. (Tr. pp. 275-276). Treating the unbundled loop as a special access local channel would have assured that the full cost of the loop would be recovered in a single jurisdiction through a single charge. This Commission, however, held that "special access lines are not an appropriate substitute for an unbundled loop." (Order, p. 7).

It should be noted that to the extent the Commission's decision was an attempt to minimize the cost of unbundling loops, that purpose has not been achieved. An end user charge and a flat-rated carrier common line charge will be assessed to the competitive carrier that obtains the unbundled common line. The end user will no longer be BellSouth's customer, and BellSouth cannot bill the end user charge associated with the unbundled common line directly to the end user as the current rules of the Federal Communications Commission require. Further where BellSouth provides an unbundled common line to a competitive carrier, it will not be able to measure the originating or terminating access usage on that line and other arrangements must

be made to recover these monies. The end user charge would be the same class of charge--single or multi-line business or residence-as would apply if the end user were assessed directly. For the carrier common line charge, BellSouth would apply a flat rate charge based on the average use per line that BellSouth experiences on its common lines. The FCC has already approved a waiver for both of these charges for Rochester Telephone Company.[2] In the Rochester Order, the FCC recognized that its rules did not contemplate the unbundling of common lines. This new exigency warranted a waiver of its rules.

With regard to the prices authorized by the Commission for the line and port, BellSouth submitted cost studies to the Commission that showed the current cost of the unbundled loop to be more than $17.00, the interim rate set by the Commission in its Order. (Exhibit 16 - BellSouth has requested confidential classification of the cost study). The Commission, however set the interim rate for the unbundled loop below cost, a violation of Section 364.161(1) that requires the price to at least cover cost. The Commission did so even though it acknowledged that it did not "have the information necessary to determine the most

---

[2] In the Matter of Rochester Telephone Corporation, Petition for Waivers to Implement Its open Market Plan, FCC 95-96, released March 7, 1995 ("Rochester Order"). The FCC found in the Rochester Order that assessing end user charges and flat-rated common line charges on the carrier obtaining the unbundled common line was a reasonable and efficient way of recovering interstate costs. Thus, the price for a loop must include these elements. The resulting charge to the carrier will be substantially similar to the original rate proposed by BellSouth.

appropriate rate" and had not "properly evaluate[d] [BellSouth's] cost data". (Order, p. 15).

In essence, the Commission, in reaching an interim rate of $17.00 per month for the unbundled 2-wire voice grade loop, did not rely on evidence that was "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached". DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1st DCA 1957). See also Agrico Chem. Co. v. State of Fla. Dep't of Environmental Reg., 365 So.2d 759, 763 (Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So.2d 425, 426 (Fla. 3d DCA 1965). The evidence must "establish a substantial basis of fact from which the fact at issue can reasonably be inferred". Degroot, 95 So.2d at 916. The Commission should reject evidence that is devoid of elements giving it probative value. Atlantic Coast Line R.R. Co. v. King, 135 So.2d 201, 202 (1961). "The public service commission's determinative action cannot be based upon speculation or supposition." 1 Fla. Jur. 2d, § 174, citing Tamiami Trail Tours, Inc. v. Bevis, 299 So.2d 22, 24 (1974).

The Commission had no evidence upon which to rely to order an interim rate of $17 per month. BellSouth's cost study was uncontroverted. For this reason alone, the Order cannot stand. While other BellSouth cost figures were offered, it was clear that different services were involved or that there were other differences which made them inapplicable. The Commission itself noted that it had a clear obligation to "establish accurate

unbundled rate elements when requested." (Order, p. 15). This obligation was not fulfilled by the Commission. Although it was implied that BellSouth's cost study was not accurate, there was absolutely no analysis by the Commission supporting this contention. Moreover, the Commission contradicted itself by stating that it could not wait to set a rate until cost studies had been filed (ignoring the fact that BellSouth alone, out of all the other parties had filed such a cost study) and then acknowledging that "MFS and MCImetro will likely not be operational until late 1996". (Order, p. 16).

BellSouth's proposal to provide the unbundled loop as special access (at a rate of $21.15) not only had the advantage of covering costs, but of also providing some contribution to joint and common costs and to universal service. (Tr. p. 305). The Commission held that, "although it is true that BellSouth must recover its shared and common costs somewhere", BellSouth was not to be allowed to do so in connection with the price for an unbundled loop. (Order, p. 14). Although the Commission recognizes the need for recovery of these costs, it has thus far refused to allow BellSouth to recover same in connection with the local interconnection rate, and now the unbundled loop. (See Order No. PSC-96-0445-FOF-TP). It would be manifestly unjust to impose joint and common costs only on BellSouth's retail customers; yet this, by necessary implication, is the result this Commission requires.

Moreover, the Commission required the local exchange

companies in Order No. PSC-95-1592-FOF-TP, to continue to fund universal service through markups on services provided by the incumbent local exchange companies rather than through an explicit fund. BellSouth has repeatedly sought authorization to comply with this order, first with its interconnection rate and residual interconnection charge proposals in Docket 950985-TP, and then with BellSouth's proposed rates for the unbundled loop and port in this docket. Each time, BellSouth has been rebuffed by this Commission. The Commission's action continues to frustrate the implementation of its own order.

With regard to the unbundled port element, BellSouth also submitted a cost study. (Exhibit 16 - BellSouth has requested confidential classification of the cost study). While the Commission apparently found BellSouth's unbundled loop cost study lacking, it put the rate for the 2-wire analog port at a fraction above the cost shown in BellSouth's study, thereby allowing for a minute and grossly inadequate contribution to joint and common costs. The Commission again failed to provide a contribution to universal service in this element, as required by its own Order. (Order, p. 16).

Furthermore, the cost study reflected only the cost of the hardware (line termination equipment), and therefore did not contain all of the costs of the port. BellSouth had proposed to price the unbundled port on a measured basis, consisting of a monthly rate and a usage rate, to recover all of these costs. (Tr. p. 276). The usage rate, which covers the cost of switching

and transport, would be the same as the usage rate for Shared Tenant Service, as previously approved by this Commission, while the monthly rate would cover the cost of the port itself. (Tr. p. 318). Setting an interim rate of $2.00 for the port permits recovery of only a part of the costs. Therefore, this rate is also below cost and, as such, violates Section 364.161(1), Florida Statutes and cannot stand.

III. Required Collocation of Loop Concentration Equipment is Not Valid

The Commission also ordered BellSouth to allow ALECs to collocate loop concentration equipment in BellSouth's central offices. (Order, pp. 11 and 19). BellSouth objected to this request on the basis that the proper objective of collocation is to facilitate the interconnection of transmission facilities between a local exchange company and an interconnector. (Tr. p. 287). BellSouth asserted that loop concentration equipment did not meet this test and should not be allowed to be colocated in the central office because it provided a switching function (Order at page 10). The Commission rejected BellSouth's assertions.

In the intervening time since the record was closed in this proceeding, the Telecommunications Act of 1996 (Act) has been approved. The Act requires telecommunications carriers to provide physical collocation unless it is not practical for technical reasons or because of space limitations. Section

251(c)(6). More importantly, the Act requires telecommunications carriers to negotiate with other parties in order to fulfill certain duties, such as collocation. Section 251(c)(1). Because the law has changed, BellSouth should be allowed to negotiate collocation. With its Order, the Commission has given Bellsouth no opportunity to negotiate with regard to this issue. BellSouth requests reconsideration of the Order on this issue and requests the Commission hold any order on this issue in abeyance, thereby giving the parties an opportunity to resolve this issue by negotiation.

IV. The Order's Requirement That Existing Contracts Be Abrogated Violates the Contract Clause of the State and Federal Constitutions

The Order violates Article I, § 10 of the United States Constitution, as well as the Florida Constitution. The United States Constitution forbids a state from passing any law impairing the obligation of contracts, and this prohibition has been incorporated in Article I, § 10 of the Florida Constitution, which prohibits the passage of any law impairing the obligation of contracts. Under the Commission's Order, BellSouth is required to file an operational arrangement that will allow a customer to convert its bundled service to an unbundled service and assign such service to an ALEC, with no penalties or termination charges, either to the ALEC or the customer. (Order, pp. 16-17 and 19). Such a requirement allows the abrogation of

contracts that BellSouth has entered into with many of its larger customers, most notably for ESSX service. These contracts contain a termination charge, which becomes payable if the contract is terminated earlier than its stated term. The Commission's Order on this issue clearly is contrary to the state and federal constitutions.

In Arkansas Natural Gas Co. v. Arkansas Railroad Commission, 261 U.S. 379 (1923), the Supreme Court held that a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify a private contract in the absence of such public necessity constituted a violation of the impairment of contracts clause of the United States Constitution. (Id. at pp. 382-383). See also United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla. 1986).

The Florida Supreme Court has held that "virtually no degree of contract impairment is tolerable" within Florida. See Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 780 (Fla. 1979), the Court stated that:

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the

> parties' bargain to a degree greater than is necessary to achieve that objective.

The Commission undertook no analysis to weigh the interests involved in this specific finding, nor to determine whether there was a less burdensome alternative. Moreover, there was no analysis or claim as to what "evil" the Commission might be attempting to remedy. Indeed, the Commission could not have done so because there was no evidence that would support such a finding. Accordingly, the Commission's Order on this issue impairs existing contract obligations and violates the Impairment of Contracts Clauses of the state and federal constitutions.

V. Conclusion

For the reasons set forth above, the Commission must reconsider its decision in this docket and alter that decision in accordance with the arguments presented herein.

Respectfully submitted this 12th day of April, 1996.

BELLSOUTH TELECOMMUNICATIONS, INC.

ROBERT G. BEATTY
J. PHILLIP CARVER
c/o Nancy H. Sims
150 South Monroe Street, Room 400
Tallahassee, Florida 32301
(305)347-5555

R. DOUGLAS LACKEY
NANCY B. WHITE
675 West Peachtree St., Room 4300
Atlanta, Georgia 30375
(404)335-0710

CERTIFICATE OF SERVICE
Docket No. 950984-TP

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Federal Express this 12th day of April, 1996 to:

RICHARD H. BRASHEAR
ALLTELL FLORIDA, INC.
206 WHITE STREET
LIVE OAK, FL 32060
904-364-2517

F. B. POAG
CENTRAL TELEPHONE COMPANY
OF FLORIDA
555 LAKE BORDER DRIVE
APOPKA, FL 32703
407-889-6405

LAURIE A. MAFFETT
FRONTIER COMMUNICATIONS OF
THE SOUTH, INC.
180 SOUTH CLINTON AVENUE
ROCHESTER, NY 14646
716-777-5125

BEVERLY Y. MENARD
GTE FLORIDA, INC.
106 EAST COLLEGE AVENUE
SUITE 1440
TALLAHASSEE, FL 32301
813-224-4825

A. D. LANIER
GULF TELEPHONE COMPANY
115 W. DREW STREET
PERRY, FL 32347
904-584-0900

ROBERT M. POST, JR.
INDIANTOWN TELEPHONE
SYSTEM, INC.
16001 S.W. MARKET STREET
INDIANTOWN, FL 34956
407-597-3113

JOHN T. MCGLEW
N.E. FLORIDA TELEPHONE
COMPANY, INC.
130 N. 4TH STREET
MACCLENNY, FL 32063
904-259-2261

DANIEL V. GREGORY
QUINCY TELEPHONE COMPANY
107 W. FRANKLIN STREET
QUINCY, GL 32351
904-875-5214

JOHN H. VAUGHAN
ST. JOSEPH TELEPHONE AND
TELEGRAPH COMPANY
502 5TH STREET
PORT ST. JOE, FL 32456
904-229-7221

FERRIN SEAY
FLORALA TELEPHONE
COMPANY, INC.
522 N. 5TH STREET
FLORALA, AL 36442
334-858-3211

LYNN B. HALL
VISTA-UNITED
TELECOMMUNICATIONS
P.O. BOX 10180
LAKE BUENA VISTA, FL 32830
407-827-2210

JODIE DONOVAN
TCG SOUTH FLORIDA
1133 21ST STREET, NW
SUITE 400
WASHINGTON, DC 20036
202-739-0010

MICHAEL W. TYE
AT&T
101 NORTH MONROE STREET
SUITE 700
TALLAHASSEE, FL 32301
904-425-6360

ROBIN D. DUNSON, ESQ.
1200 PEACHTREE STREET, NE
PROMENADE I, ROOM 4038
ATLANTA, GEORGIA 30309
810-8689

RICHARD D. MELSON
HOPPING GREEN SAM & SMITH
123 S. CALHOUN STREET
TALLAHASSEE, FL 32301
904-222-7500

PATRICK K. WIGGINS
INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.
WIGGINS & VILLACORTA
501 EAST TENNESSEE STREET, #B
TALLAHASSEE, FL 32308
904-222-1534

FLOYD SELF
MCCAW COMMUNICATIONS
MESSER, VICKERS, CAPARELLO, MADSEN, LEWIS, GOLDMAN & METZ
215 S. CALHOUN STREET, #701
TALLAHASSEE, FL 32301
904-222-0720

BOB ELIAS
FLORIDA PUBLIC SERVICE COMMISSION
2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FL 32399
904-613-6189

RICHARD M. RINDLER
JAMES C. FALVEY
SWIDLER & BERLIN, CHARTERED
3000 K STREET, NW
SUITE 300
WASHINGTON, DC 20007
202-424-7500

KENNETH A. HOFFMAN, ESQ.
RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN
215 SOUTH MONROE STREET
SUITE 420
TALLAHASSEE, FL 32301-1841
904-681-6788

PAUL KOUROUPAS
DIRECTOR, REGULSTORY AFFAIRS
TELEPORT COMM. GROUP INC.
TWO TELEPORT DRIVE
SUITE 300
STATEN ISLAND, NY 10311
718-355-2634

MICHAEL J. HENRY
MCI TELECOMMUNICATIONS CORP.
780 JOHNSON FERRY ROAD
SUITE 700
ATLANTA, GEORGIA 30342
843-6373

PETER M. DUNBAR, ESQ.
CHARLES W. MURPHY, ESQ.
PENNINGTON & HABEN, P.A.
215 SOUTH MONROE STREET
2ND FLOOR
TALLAHASSEE, FL 32301
904-222-3533

JILL BUTLER
FLORIDA REGULATORY DIRECTOR
TIME WARNER COMMUNICATIONS
2773 RED MAPLE RIDGE
TALLAHASSEE, FL 32301
904-942-1181

LAURA L. WILSON, ESQ.
CHARLES F. DUDLEY, ESQ.
FLORIDA CABLE TELECOMMUNICATIONS ASSN.
310 N. MONROE STREET
TALLAHASSEE, FL 32301
904-681-1990

WILLIAM H. HIGGINS
AT&T WIRELESS SERVICES
SUITE 900
250 S. AUSTRALIAN AVENUE
WEST PALM BEACH, FL 33401
407-655-7447

ANTHONY P. GILLMAN
KIMBERLY CASWELL
GTE FLORIDA, INC.
c/o RICHARD M. FLETCHER
106 EAST COLLEGE AVENUE
SUITE 1440
TALLAHASSEE, FL 32301
813-228-3087

TIMOTHY DEVINE
MFS COMMUNICATIONS
250 WILLIAMS STREET
SUITE 2200
ATLANTA, GA 30303
404-224-6115

DONALD L. CROSBY
CONTINENTAL CABLEVISION
7800 BELFORT PARKWAY
SUITE 270
JACKSONVILLE, FL 32256
904-731-8810

A. R. SCHLEIDEN
CONTINENTAL FIBER
TECHNOLOGIES D/B/A ALTERNET
4455 BAYMEADOWS ROAD
JACKSONVILLE, FL 32217
904-448-3390

BILL WIGINTON
HYPERION TELECOMM.
BOYCE PLAZA III
2570 BOYCE PLAZA ROAD
PITTSBURGH, PA 15241
412-221-1888

SUE E. WEISKE
TIME WARNER COMM.
160 INVERNESS DRIVE WEST
ENGLEWOOD, CO 80112

Nancy B. White (sw)