BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Resolution of Petition(s) to establish nondiscriminatory rates, terms, and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to Section 364.162, Florida Statutes	)	**Docket No. 950985-TP**
	)	**Filed: April 24, 1996**

OPPOSITION OF METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION

Pursuant to Rule 25-22.060(b), Florida Administrative Code and Order No. PSC-95-0888-PCO-TP, Metropolitan Fiber Systems of Florida, Inc. ("MFS"), by its undersigned attorneys, hereby files this Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP ("Order"), issued on March 29, 1996. In order to prevail, BellSouth must show that the Commission either ignored, misinterpreted or misapplied the law applicable to the evidence in this proceeding, or overlooked and failed to consider the significance of certain evidence in this docket. *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). In fact, aside from a few "novel" theories that Bell now raises for the first time, the Commission has already thoroughly debated and considered both the legal and factual issues presented by BellSouth. BellSouth's effort to repeat and rephrase its arguments does not make them any more convincing today than they were three weeks ago when the Commission fully considered and rejected them.

Bell's lead argument in its ongoing attempt to delay competition, that bill and keep does not impose a "charge," fails even on its own formalistic terms. Bell's other arguments stem from

its deliberate mischaracterization of bill and keep as "free interconnection." The Commission considered at length whether bill and keep permits Bell to recover its costs, and correctly concluded that it in fact does, particularly when combined with the right to petition the Commission if traffic is not in balance. Bell's suggestion that bill and keep is an unconditional taking without just compensation -- never raised in testimony or hearings -- fails on two counts: bill and keep is hardly a permanent taking and, furthermore, Bell is more than justly compensated. Bell also makes the tortured argument that bill and keep, which is explicitly authorized by the Telecommunications Act of 1996 ("Act"), somehow violates the Act when imposed by the Commission.

Despite the recent passage of the Act, which creates distinct incentives for Bell to embrace competition, Bell's Motion indicates that it intends to maintain its stiff opposition to local competition or, at the very least, to competition from two principal local competitors, MFS and MCI. This is abundantly clear from its continuing opposition to bill and keep, despite the fact that: 1) BellSouth found bill and keep to be completely adequate for decades as between it and other incumbent LECs (Tr. at 456); 2) bill and keep is the consensual, most efficient, most effective interim solution among almost all the states that have considered the issue;[1/] and 3) bill and keep was explicitly permitted by the Act. 47 U.S.C. § 252(d)(2)(B)(i).

In the interest of creating local exchange competition, the Florida Legislature established a procedure whereby ALECs may initiate negotiations with incumbent LECs to establish mutually

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1/ The appropriateness interim bill and keep arrangement transitioning to an LRIC-based rate is attested to by the fact that the commissions in other states, including California, Texas, Connecticut, Michigan, Oregon, and Washington have adopted precisely this approach.

acceptable terms, conditions, and rates for interconnection. Fla. Stat. § 364.162. The statute permits ALECs to petition the Commission for interconnection arrangements should negotiations fail. Pursuant to the statute, MFS initiated negotiations with BellSouth last July, but was forced to petition the Commission for interconnection arrangements due to its inability to reach a comprehensive operational business agreement with BellSouth on interconnection that would permit MFS to become operational in Florida.[2/] Tr. at 154-155.

The Commission, in considering the appropriate rate for interconnection, properly considered the Legislature's goal, and its own goal, to implement competition with BellSouth and other incumbent LECs. The Commission properly considered that BellSouth and other incumbent LECs have a unique, bottleneck ubiquitous network which is the result of its historical monopoly franchise, with its attendant benefits of unique tax treatment, access to public rights of way, and sole control of the local market. In light of BellSouth's local bottleneck, and in the absence of adequate cost information, the Commission properly mandated an efficient and administratively simple method of interconnection compensation, bill and keep compensation, transitioning to cost-based rates if BellSouth could demonstrate that its costs are not covered under bill and keep. In its Motion, BellSouth has conveniently obscured the fact that its network has been paid for over the course of the century with ratepayer dollars poured into its network by virtue of its government-granted monopoly. BellSouth also fails to acknowledge that having selected

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[2/] MFS has signed detailed business agreements with LECs in other states, including Massachusetts, Connecticut, New York, and, most recently, California. (Exh. 5) (Staff's First Request for Production to MFS, Nos. 1-3). The form of agreement entered into in California which covers, among other issues, the technical and financial terms of interconnection, unbundling, and number portability, was offered to BellSouth. BellSouth declined to sign this agreement, as well as every other business agreement offered by MFS.

alternative regulation, BellSouth's earning potential from this network is virtually unlimited absent competition. Given the consistent profits BellSouth earned from this network as a rate of return carrier and the profits it continues to earn by virtue of its network created pursuant to its government franchise, it is perhaps not so surprising that it continues to attempt to fend off competition today. The Commission should deny BellSouth's motion and maintain the compensation system it ordered which, as the Commission has stated, will ensure that the Commission fulfills its obligation to foster competition. Order at 14.

II. THE COMMISSION CONSIDERED AND PROPERLY REJECTED BELLSOUTH'S ARGUMENT THAT BILL AND KEEP WITH AN OPPORTUNITY TO DEMONSTRATE THAT COSTS ARE NOT COVERED VIOLATES FLORIDA LAW

BellSouth argues that the Commission's adoption of a form of bill and keep as compensation for local call termination violates Florida law. A pure bill and keep system would not violate Florida law as discussed below because there is no question that BellSouth's costs will be covered under bill and keep. BellSouth neglects to mention, moreover, that the Commission did not even adopt a pure bill and keep system. The Commission adopted a modified bill and keep system whereby BellSouth can come back to the Commission at any time to demonstrate that, because traffic is not in balance, it is not recovering its costs under bill and keep:

> if traffic becomes imbalanced to a significant degree, a usage-based rate may be more appropriate. The companies will be the best judges of which method is least-cost, and they may request that the method be changed if traffic becomes imbalanced.

Order at 13. The Commission has therefore already addressed BellSouth's Motion by a provision in the Order that BellSouth simply ignores in its Motion.[3/]

A. Bill and Keep Constitutes Both a Charge and a Rate

Prior to addressing BellSouth's substantive arguments, the semantic maze BellSouth seeks to create needs to be navigated. Despite BellSouth's assertions to the contrary, bill and keep constitutes both a "charge" and a "rate," and is therefore in conformance with Section 364.162. Under Florida law, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. *Green v. State*, 604 So.2d 471, 473 (Fla. 1992); *Newberger v. State*, 641 So.2d 419, 420 (Fla. 2d DCA 1994). By reference to the dictionary, it is easily established that bill and keep, which is essentially barter, constitutes a "charge" or a "rate."

According to the dictionary, "charge" is defined as "To set or ask (a given amount) as ***a price.***" *The American Heritage Dictionary of the English Language*, at 226 (6th Ed., 1976) (emphasis added). "Price," in turn, is defined as "The sum of money ***or goods*** asked or given for something." *Id.* at 1038 (emphasis added). Accordingly, bill and keep is perfectly consistent with the Florida statute's requirement that a "charge" be established for interconnection.

[3/] BellSouth makes an argument in passing that bill and keep will undermine negotiations. Motion at 1 (citing to Garcia dissent). The suggestion appears to be that, once one party has signed a Stipulation, that Stipulation must be applied to all. This is entirely inconsistent with the framework of separate negotiations, agreements, and petitions for each ALEC explicitly established by Florida statute. § 364.162, Fla. Stat. Other parties looking at the bill and keep arrangements mandated in California, Michigan, Connecticut, Oregon, Washington, and elsewhere, and the incremental cost-based standard established by the Act, would have the same incentive to reject BellSouth's offer of 1.05 cents per minute, just as MFS and MCI did. Other parties will take into account these considerations regardless of the content of the Order. The fact that certain cable and other companies accepted that rate as part of a settlement package should have no bearing whatsoever on what the appropriate rate should be in a litigated context.

§ 364.162, Fla. Stat. As to "rate," the dictionary defines it as "A ***charge*** or payment calculated ***in relation to*** any particular sum or quantity." *Id.* at 1082.[4/] The charge in this case is that BellSouth must accept ***all of*** MFS' traffic for termination ***in relation to*** having ***all of*** its MFS-customer bound traffic terminated on MFS' network.[5/] In other words, the price (or "charge" or "rate") MFS pays to interconnect with BellSouth is that it must terminate all traffic BellSouth sends to it. This is quite different from what BellSouth repeatedly alleges (without explanation) is "free" interconnection. Motion at 5, 6, 7. Free interconnection would occur if MFS were permitted to terminate traffic on Bell's network, but did not have to do anything in return. In this case, MFS must undertake the obligation and the expense of terminating traffic sent to it by Bell. The reciprocal nature and simplicity of bill and keep is what has made it so attractive to Bell and other incumbent LECs as the most common method of local traffic exchange between incumbent LECs for decades. Tr. at 456. The Commission is therefore neither "reading words into" the statute, "steering the statute to a meaning," nor "supplying missing words." Motion at 12-13. Rather, the Commission has correctly interpreted the statute to include one of the oldest forms of compensation, barter, or, in this case, bill and keep.

Significantly, the U.S. Congress, in drafting the Act, concluded that bill and keep, or mutual traffic exchange ***can*** constitute a "charge." Section 252(d)(2) states that "Charges for

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[4/] A "charge," we have established, need not be an exchange of money.

[5/] Alternatively, the "rate" or "charge" for interconnection could be viewed as the rate charged by BellSouth to its end users under a bill and keep system, according to which BellSouth would bill its end users a rate and keep that entire rate or charge, despite the fact that it only carries the originating half of the call, and someone else carries the terminating half.

Transport and Termination of Traffic" shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Act, § 252(d)(2). Accordingly, BellSouth's attempt to read the possibility of bill and keep out of the Florida statute fails on its own terms, and is inconsistent with the contrary interpretation of the same language by the U.S. Congress.[6/]

B. The Commission's Modified Bill and Keep Covers the Cost of Interconnection

The Commission's bill and keep arrangement was deliberately structured by the Commission to ensure that it met the requirement of Section 364.162(4) that the charge for interconnection cover the cost of interconnection. The Commission specifically considered this portion of the statute in its decision:

> We disagree with BellSouth's argument that mutual traffic exchange violates Section 364.12(4), Florida Statutes. We are obligated to foster competition while ensuring that the charge set for interconnection covers BellSouth's cost. We agree with BellSouth that the statute must be construed as a whole so that absurd results are avoided. The intent of Section 364.162(4) is to ensure that interconnection rates are not set below BellSouth's costs. MCImetro asserts that mutual traffic exchange is akin to payment in kind as mentioned above. To construe the statutory language so narrowly to say that mutual traffic exchange would not be an adequate form of compensation would, in our opinion, yield an absurd result.

Order at 13-14. While the Commission was correctly convinced that bill and keep covers costs, the Commission adopted a fallback mechanism that would permit "any party who believes that traffic is imbalanced to the point that the party is not receiving the benefits equivalent to those it

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[6/] BellSouth's "analysis" of legislative intent adds nothing to its argument but merely repeats the fact that the Legislature, as we already knew, uses the word "charge." Motion at 12.

is providing through mutual traffic exchange may request the compensation mechanism be changed."[7/] Order at 14. If Bell is genuinely concerned about recovering its costs, the Commission has deliberately given it recourse to return to the Commission to demonstrate that bill and keep does not achieve this goal. In fact, MFS would not be opposed to the Commission setting an interim per minute rate of $0.0025 (a rate that would permit substantial contribution), (*see* MFS Brief at 3, 12), not because it believes that bill and keep is any respect inadequate, but because it would reduce the expense of litigating the issue, as Bell seems intent on doing.

Bell disingenuously argues that bill and keep does not cover its costs because the Commission and other parties have not aptly demonstrated such cost recovery. Motion at 14-15. The fact is that BellSouth only offered cost information in this proceeding in response to discovery requests, and not in time to allow a full analysis of its costs. March 5, 1996, Agenda Mtg. Tr. at 3. If BellSouth were genuinely concerned with cost recovery, it could have prefiled direct testimony replete with cost information to permit the parties and the Commission to examine such cost information and establish cost-based rates. MFS, in fact, has testified that given appropriate costs it would prefer such a rate. *See* MFS Brief at 12. Bell did not do this, of course, because it prefers to play a shell game by seeking to shift the burden to the Commission to somehow prove based on perfunctory information obtained from Bell that rates are cost-based. It was this lack of cost information, in fact, that prompted at least one Commissioner to balk at the setting of cost-

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[7/] Bell nitpicks with the Commission's "receiving benefits equivalent to those it is providing" language which was, read in the context of the remainder of the Order, clearly meant to address the statute's requirement that Bell's cost be recovered. Motion at 14. In fact, logically, if Bell receives benefits equal to those it is providing, its costs must be covered. Order at 12 (quoting witness Cornell). This is the beauty of the concept of barter, a concept which Bell seems incapable of grasping.

based rates, even as a default rate.[8/] The Commission has appropriately placed the burden to show that bill and keep, with its long history of use by BellSouth and other incumbents in Florida, does *not* permit adequate cost recovery. As summarized in the Order, "BellSouth, the only one with the necessary cost information, presented no evidence of those costs." Order at 13. To obtain cost-based rates, it must do so.

BellSouth also argues that traffic must be in balance in order for it to recover its costs. Order at 14. This is simply not true. At the onset of this proceeding, Bell claimed that the appropriate *price* for terminating a local call was 4.5 cents per minute (Order at 7). Accordingly, Bell values the termination of a minute of local calling at 4.5 cents. Under Bell's approach, for every minute of Bell local calling that MFS terminates, it is effectively paying Bell 4.5 cents. The statute merely requires that Bell recover its cost of interconnection, and "cost" has been interpreted by several commissioners to be incremental cost, perhaps with some small amount of contribution.[9/] Therefore, if MFS terminates 100 minutes of traffic, MFS is effectively paying

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[8/] March 5, 1996 Transcript at 39, 46.

[9/] *See, e.g.*, Transcript of March 5, 1996 Agenda Meeting at 39, 46. Bell also argues that the preclusion of contribution by the adoption of bill and keep is somehow inconsistent with the Commission's universal service order. Motion at 7-8, n.4. The Commission's universal service order stated: "we believe that the LECs should continue to fund their US/COLR obligations as they currently do; that is, through markups on the services they offer. ***Although not the subject of this proceeding***, for ALECs, such markups ***could presumably extend*** to services such as local interconnection and number portability." Order No. PSC-95-1592-FOF-TP, at 28 (emphasis added). This language is permissive, stating that perhaps such markups would be permitted. This language is also prefaced by the statement that such markups would be addressed in a separate (*i.e.*, interconnection) proceeding. Bell states that "there is nothing in the record that justifies such a refusal." Motion at 8, n.4. In fact, there is evidence in the record in the form of the legislative history of Section 364 which makes it clear that such markups on interconnection charges would be completely inconsistent with Florida Statute (Ex. 1 (Meeting (continued...)

BellSouth $4.50. If the appropriate incremental cost-based rate is 0.25 cents per minute, as suggested by Staff,[10/] $4.50 is enough money to cover 1800 minutes of traffic terminated on Bell's network at Staff's "incremental cost plus" rate of 0.25 cents per minute.[11/] Therefore, despite an 18:1 imbalance of traffic, and utilizing Bell's own valuation of the termination of a minute of local traffic, Bell would cover its incremental cost of local call termination even with a significant imbalance of traffic.[12/]

Even accepting that traffic must be in balance to permit cost recovery, Bell states that "the only evidence concerning traffic balance was presented by MFS's witness and that clearly showed that traffic was not in balance." Motion at 15. Bell omits to note that the "only evidence" also demonstrated that the incumbent would come out ahead under bill and keep because more calls were terminated on the MFS network, yet Bell would not have to pay for that extra call termination under bill and keep. *See* Order at 9-10. As the Commission concluded, "there was no evidence in the record that suggested" that traffic would be out of balance ***to the detriment*** of

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[9/](...continued)
of the House of Representatives Committee on Utilities and Telecommunications, Transcript at 25 (April 12, 1995)); Devine, Tr. at 54-55), and bill and keep is therefore entirely appropriate.

[10/] Transcript of March 5, 1996 Agenda Meeting at 33.

[11/] Taking into account Bell's valuation of a minute of call termination also undermines Bell's argument that bill and keep assumes that Bell's costs are equal to those of an ALEC. Motion at 17-18. Bell's costs are clearly covered, given its current price for call termination, regardless of whether ALEC's costs are more, the same, or less than Bell's.

[12/] Even if one were to adjust 4.5 cents to take away the Carrier Common Line charge, which is associated with Bell's alleged "universal service obligation," and the Residual Interconnection Charge, which Bell claims only incumbent's are entitled to, you could still have a 10:1 traffic imbalance and full incremental cost plus recovery by Bell.

Bell. *Id.* Bell also neglected to note the record evidence of several expert witnesses who testified that, in the long run, traffic would be in balance. Order at 9. The Commission's decision cannot therefore be said to be arbitrary. Motion at 16. In fact, it was based on the only record evidence on this issue, again, none of which was presented by Bell. Bell's "sit back during the hearing, and ambush afterwards" approach should not be countenanced by the Commission.

C. Bill and Keep is Not a Taking; If it Were, Bill and Keep Represents Just Compensation

BellSouth's argument that "bill and keep" violates the Takings Clauses of the federal and Florida constitutions is simply without merit. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("[o]f course, the Clause prohibits only uncompensated takings"). Takings cases generally fall into two distinct patterns. In the first, the government authorizes a physical occupation of property (or takes title). In such a case, at least for ***permanent physical invasions***, the Takings Clause requires compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In the second, the government merely regulates the use of property. Whether and how much compensation is required to compensate for the regulated use is subject to a fact-specific inquiry. *Yee*, 503 U.S. at 522-23. A constitutional analysis is entirely inapplicable in this case as "bill and keep"represents neither a physical invasion of BellSouth's network in a takings sense, nor a use of the network which lacks just compensation.

For the first time, BellSouth argues in its motion for reconsideration that the ALECs' use of BellSouth's network will deprive it of the ability to serve other customers. There is simply no evidence in the record to support this argument. BellSouth adduced no evidence that other carriers' terminating traffic would occupy the BellSouth network to the exclusion of other users. While BellSouth's network is not infinite, it can accommodate substantial traffic. If the demand for BellSouth's services exceeds its capacity, it can add more capacity profitably to meet demand of customers. Telephone networks are entirely distinguishable from the paradigmatic real property taking where space is limited. Telephone networks can be expanded to accommodate additional customers.[13/]

Carriage of ALEC traffic is also distinguishable from a real estate taking in that the use of BellSouth's network is transient. Even while ALECs interconnect with BellSouth's network, BellSouth never cedes its ability to dedicate its network to customer use, nor to profit from that use. One minute of traffic is simply being replaced by another minute of traffic. BellSouth's business judgment, not the Constitution, should determine whether and how BellSouth will meet its demand.

Selectively quoting *Lucas*, BellSouth states that the mere fact of an "intrusion" into private property is a "*per se*" taking. *Lucas*, 505 U.S. at 1015. Even if ALEC use of the network was an intrusion -- which we maintain it is not -- the intrusion is not a *per se* taking. *Lucas* actually holds that when government regulations compel a property owner to suffer a "permanent

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13/ There is considerable irony in an argument by BellSouth that competition will *increase* the demand for its services. Rather than eroding BellSouth's ability to provide universal service because of the loss of business, BellSouth now argues that it will not be compensated for costs associated with increased business.

[physical] invasion . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Any intrusion which may occur on BellSouth's network is transient and justly compensated. Moreover, *Lucas* did not concern regulations imposed by a regulatory agency on a public utility that the agency was authorized to regulate and in furtherance of the statutory scheme.

BellSouth similarly strains *Bell Atlantic* to say that any compelled use of its network is an unconstitutional taking. *Bell Atlantic* dealt with the potential permanent physical occupation or "actual collocation" of LEC central offices by competitive access providers. The court found that the FCC had no statutory authority to order actual collocation and specifically declined to pass on the constitutional question. *Bell Atlantic*, 24 F.3d at 1447. There is simply no doubt that compelled interconnection of a monopoly public utility to other public utilities is permissible. *See, e.g., Otter Tail Power Co. V. United States*, 410 U.S. 366, 375 (1973) (Federal Power Commission may require interconnection for purpose of transmitting wholesale electricity); *Chicago, Milwaukee, & St. Paul Ry. v. Iowa*, 233 U.S. 334, 344-45 (1914) (upholding requirement that railroad transport loaded cars owned by competing carriers). That is the issue here.

D. Bill and Keep is Expressly Permitted by The Telecommunications Act of 1996

BellSouth argues that the Commission's Order requiring the use of bill and keep is inconsistent with the Telecommunications Act of 1996, and therefore unlawful. As a threshold matter, as BellSouth admits (Motion at 22), the Commission has not relied upon the Telecommunications Act of 1996 ("Act") in reaching its decision in this matter. The Commission has acted in accordance with its obligation to foster competition and to rule on the MFS and MCI

petitions filed under Section 364.162. It is significant, however, that the Commission's authority to implement bill and keep, in the context of a Commission ordered resolution of an issue the parties were unable to resolve by negotiation, is in fact fully supported by the Act:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

Act § 261(b). The Commission is merely enforcing its statutory mandate to order interconnection compensation arrangements in a situation in which the parties have not reached agreement.

Moreover, the Commission's action is completely consistent with the provisions of the Act. The Telecommunications Act of 1996 states plainly on its face that bill and keep is permitted as a reciprocal compensation mechanism. Only by the application of BellSouth's doublespeak (Motion at 22-25) could the Act -- which explicitly states that bill and keep is ***not*** precluded -- be interpreted to preclude bill and keep.

While BellSouth argues that bill and keep is only allowed if mutually agreed to by the parties, there is no support for this in the Act. Section 252(d)(2) states that the language setting the standard for "Charges for Transport and Termination of Traffic" ***"shall not be construed--(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations***, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Act § 252(d)(2)(B) (emphasis added).

There is no question that the language expressly permitting bill and keep applies to mandatory arbitration by the Commission in the event, as here, the parties fail to reach agreement.

Section 251 (b)(5) requires all carriers to establish reciprocal compensation arrangements for the transport and termination of traffic. Section 252(c) states:

> In resolving by arbitration . . . any open issues ***and imposing conditions upon the parties to the agreement***, a State commission shall --
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> (1) ***ensure that such resolution and conditions meet the requirements of Section 251***, including the regulations prescribed by the Commission pursuant to section 251.
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> (2) ***establish any rates for interconnection, services, or network elements according to subsection (d)***; and
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> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Act § 252(c) (emphasis added). Thus, it is perfectly clear that this Commission, if it were acting under the Act, could order in an arbitration under the Act bill and keep as compensation for the termination of traffic. As such, there can be no doubt that, despite BellSouth's legal gymnastics, this Commission can continue to act under Florida Statutes, Section 364, by ordering a bill and keep compensation arrangement. Such a decision is entirely consistent with the mandatory imposition of bill and keep in an arbitration context under the federal Act. Act §§ 252(c), 252(d)(2)(B).[14/]

[14/] The adoption of a specific cost-based rate would obviously alleviate all BellSouth arguments. While MFS has indicated its support for such a rate, the record here provides no support for Bell's proposed rate. BellSouth also states that "The Commission appeared to be swayed [in adopting bill and keep] by the suggestion by Staff that the negotiated interconnection rate of $0.0105 would be the highest interconnection rate in the country." Motion at 6 (*citing* March 5 Agenda Conference). Nowhere in the Commission's Order does this alleged basis for the decision appear. The Commission in fact finds that BellSouth's proposed switched access charges would create a price squeeze (Order at 9), and that the rate of $0.01052/minute contained in the Stipulation was too high, based simply on "the cost information in the record." Order at 10. *See also* March 5 Agenda Conference Transcript at 39. The record also indicates that the Commission was, in fact, quite wary of comparisons to other states, since each state order must be viewed in the context of the entire set of arrangements ordered by the Commission. *Id.* at 36. In another misstatement of the Commission's position, Bell states that "a finding by this (continued...)

III. THE COMMISSION HAS ALREADY FULLY CONSIDERED AND REJECTED BELL'S ARGUMENT THAT IT SHOULD RECEIVE THE RIC

As in the case of reciprocal compensation, BellSouth previously claimed that it is the proper recipient of the Residual Interconnection Charge ("RIC") in those situations in which an interexchange carrier will be charged switched access for terminating traffic even though the traffic terminates at an ALEC's end office. The Commission has carefully considered this argument, and rejected it. BellSouth adds no new legal argument or factual point in its Motion. As such, it cannot meet the standard for a motion to reconsider, and its Motion should be denied.

The Commission's Order reflects careful consideration of this issue, including BellSouth's position as restated in its Motion. Order at 18-19. The Commission concluded:

> We disagree with BellSouth's arguments. The collection of the RIC is no longer a revenue requirement issue. BellSouth is no longer rate base regulated; it is price regulated. Revenue requirements are a concept only applicable under rate base regulation; they are neither consistent with nor relevant to price regulation.
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> Accordingly, we find that carriers providing tandem switching or other intermediary functions shall collect only those access charges that apply to the functions they perform. . . . To ensure fairness to all carriers, the RIC shall be billed and collected by the carrier terminating the call.

Order at 19. As BellSouth itself states "the RIC was to be collected by the LEC who owned the final end office used to complete the call to the end user." In this case, that "LEC" is MFS or MCI, and the Commission has correctly concluded that the ALEC terminating the call should receive the RIC.

Commission that a minute of use rate is somehow a barrier to competition is totally unjustified." Motino at 9 & n.5. The Commission, in fact, found that full switched access rates of 4.5 cents per minute, not *any* usage-based rate, would constitute a barrier to competition. Order at 9. BellSouth's distortion of the Commission's decision is totally inappropriate.

BellSouth should not collect the RIC, which in current arrangements between BellSouth and independents, is remitted to the end office provider, in this case, MFS. BellSouth elsewhere in this proceeding readily admitted that independents, as the end office provider, collect the RIC: "the LEC providing transport and switching collects its charges and ***the LEC terminating the call collects the RIC. This is the most practical way to handle this situation and has an element of fairness***." Scheye, Tr. at 503. Yet, apparently BellSouth's concept of fairness depends on the parties involved. When an ALEC owns the terminating end office, BellSouth no longer believes that this system is practical and fair. The excuse that BellSouth gives is that ALECs do not have a revenue requirement associated with a RIC charge. Scheye, Tr. at 504. As the Commission clearly stated, however, neither does BellSouth since it elected alternative regulation. Order at 19. Of course, ALECs, even if not rate of return regulated, will provide the service, call termination, that even BellSouth admits has always been associated with the RIC. MFS agrees with the Commission that BellSouth should not collect this windfall revenue for a service that is provided by the ALEC. Devine, Tr. at 62; Guedel, Tr. at 435.

The BellSouth proposal is also completely inconsistent with arrangements between LECs and arrangements established with competitive carriers in other states, including New York, Massachusetts, California, Illinois and Maryland. This experience in other states supports MFS' position that the carrier providing the end office switching (*i.e.*, MFS) should receive the RIC. The Commission should accordingly again reject BellSouth's restated argument on this point.

IV. THE COMMISSION DID NOT ESTABLISH A CHARGE FOR THE INTERMEDIARY FUNCTION

The only valid point made by BellSouth in its Motion is that the Commission, apparently by oversight, did not set a rate for the intermediary function of connecting two ALECs that are connected to BellSouth but not to one another. Consistent with its decision regarding GTE and Sprint, the Commission should set the rate at the LRIC of BellSouth's tandem switching function. This is the sole change the Commission should make to its order in this docket resulting from BellSouth's Motion.

V. CONCLUSION

The Commission carefully considered and properly resolved the issue of reciprocal compensation, as well as other issues in this proceeding. It determined that under the circumstances in this case bill and keep is the most efficient, administratively simple means of providing interconnection compensation while encouraging the development of competition in Florida consistent with the Commission's obligation. Order at 13-14. Bill and keep ensures that both carriers' costs are recovered, and guarantees a reciprocal interconnection compensation arrangement. Bill and keep is consistent with Florida Statute, including the requirement that interconnection compensation recover the cost of interconnection. The Commission even included a provision that would permit BellSouth to come back to the Commission with a showing that its costs are not covered. Ultimately, BellSouth must make the showing that its costs are or are not being covered. BellSouth has avoided providing sufficient cost information in this docket, and therefore cannot be heard to complain that its costs are not covered until it makes such a demonstration to the Commission.

The Commission's Order is also contemplated by and entirely consistent with the federal Act, which explicitly permits bill and keep arrangements. The Order is not an unconstitutional taking and, even if it were a taking, it is accompanied by just compensation. Like BellSouth's compensation arguments, Bell's argument that it should retain the RIC has been heard and rejected by the Commission. Bell adds nothing here. The Commission, consistent with its obligation to encourage competition, should reject Bell's Motion (with the exception of setting a rate for the intermediary function), and thereby permit MFS and MCI to compete with BellSouth in the marketplace, rather than in the regulatory arena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James C. Falvey, hereby certify that on this 23rd day of April, 1996 a copy of the foregoing **Opposition of Metropolitan Fiber Systems of Florida, Inc., to BellSouth Telecommunications, Inc.'s Motion for Reconsideration,** Docket No. 950985-TP, was served, via First Class Mail, postage prepaid, to each of the following parties:

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