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April 24, 1996

BY HAND DELIVERY

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 950985-TP (Local Interconnection)

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Metro Access Transmission Services, Inc. (MCImetro) in the above referenced docket are the original and 15 copies of MCImetro's Response to Motion for Reconsideration.

By copy of this letter this document has been provided to the parties on the attached service list.

Very truly yours,

Richard D. Melson

RDM/cc
Enclosures
cc: Parties of Record

ACK ✓
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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

MCI METRO ACCESS TRANSMISSION SERVICES, INC.'S RESPONSE TO MOTIONS FOR RECONSIDERATION

MCI Metro Access Transmission Services, Inc. (MCImetro) hereby submits its response to the Motions for Reconsideration filed by BellSouth Telecommunications, Inc. ("BellSouth"), the Florida Cable Telecommunications Association ("FCTA"), and Time Warner AxS of Florida, L.P. ("Time Warner"). Except at set forth in Part VI of this response, each of those motions should be denied for the reasons set forth below.

I. The Commission's Order Did Not Overlook or Fail to Consider any Relevant Evidence or Legal Principles

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). As the court in State v. Green, 106 So. 2d 817, 818 (Fla. 1st DCA 1958) said with reference to petitions for rehearing:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent, or rule of law

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> which the court has overlooked in rendering its decision. . . .
>
> It is not a compliment to the intelligence, the competence or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.

When measured against these standards, the various Motions for Reconsideration should be denied.

II. Mutual Traffic Exchange Does Not Violate Florida Law

BellSouth contends that the Commission's approval of mutual traffic exchange violates Section 364.162, Florida Statutes, in that the Commission has failed to establish an actual "rate" or "charge" for interconnection. (BS Motion at 7) BellSouth says "it is clear that the legislature expected a monetary amount . . . to be set as payment for the termination of calls between local telecommunications companies." (BS Motion at 8) To support these contentions, BellSouth analyzes the "plain language" of the statute. It concludes that the dictionary definitions of rate or charge, which are two of the three terms used in the statute, "requires that the Commission set a price for interconnection." (BS Motion at 10, emphasis added)[1]

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[1] BellSouth made these same arguments in its post-hearing brief, and they were specifically analyzed and rejected in the Commission's final order. (Order PSC-96-0445-FOF-TP at 12-13). Under the Diamond Cab standard, BellSouth should not be permitted to reargue a point of law simply because its legal conclusion differs from that reached by the Commission after full consideration.

BellSouth's analysis misses the mark. Section 364.162 uses three terms interchangeably to refer to the compensation mechanism for local interconnection -- price, rate, and charge. BellSouth's dictionary analysis focuses on "rate" and "charge," each of which is defined as a "price." BellSouth then asserts that in-kind compensation is inconsistent with the notion of a price or charge and the Commission's approval of mutual traffic exchange is therefore contrary to Florida law.

BellSouth stopped its dictionary analysis too soon. The term "price," which is used in the statute as well as in the dictionary definitions of both "rate" and "charge," is defined as "the quantity of one thing that is demanded in barter or sale for another." Webster's Ninth New Collegiate Dictionary, 933 (9th ed. 1991) While the "thing" demanded in "barter" may be money, it does not have to be. Black's similarly defines price to be "[t]he consideration given for the purchase of a thing." Black's Law Dictionary, 1188 (7th ed. 1990) Again, this consideration is not necessarily expressed in monetary terms. Thus nothing in Chapter 364 expressly or impliedly precludes the Commission from establishing "in-kind" compensation, in the form of mutual traffic exchange, as the mechanism for charging for local interconnection.

Contrary to BellSouth's assertion, the use of mutual traffic exchange does enable BellSouth to recover its cost of providing local interconnection. Dr. Cornell testified that mutual traffic exchange provides compensation "in kind" which is sufficient in economic terms to cover BellSouth's cost of providing

interconnection. (T 402) The Commission appropriately relied on this economic testimony in its final order, where it concluded that "by mutual traffic exchange, each company avoids the cost of the rates it pays to the other company, and therefore receives benefits equal to the benefits it provides." (Order at 12)

BellSouth says that the Commission's analysis is in error because the statute requires a charge to "recover costs, not to insure the equality of benefits." (BS Motion at 14) BellSouth's argument ignores that fact that BellSouth is avoiding the payment of cash compensation, and those avoided cash payments remain with BellSouth to cover its costs of providing interconnection. In economic terms, BellSouth covers its costs of interconnection just as surely through mutual traffic exchange as it would through its preferred alternative of mutual cash exchange.

BellSouth also argues that the evidence does not support the Commission's implicit finding that traffic will be sufficiently in balance for mutual traffic exchange to ensure that each carrier recovers its cost of providing interconnection. This is nothing but an argument about the weight of the evidence. Since there is not yet any experience with local interconnection in Florida, it is impossible to say with certainty whether or not traffic will be in balance. In this case, the Commission weighed the competing testimony and evidence and concluded that it was likely traffic would be sufficiently balanced to justify using mutual traffic exchange, particularly when the other advantages of mutual traffic

exchange were factored into the consideration.[2] BellSouth obviously differs with the Commission about the weight to be given to the competing testimony. A disagreement with the finder of fact's evaluation of the evidence, however, is not grounds for reconsideration.

Recognizing the difficulty of predicting future traffic patterns, the Commission established a "safety valve" which allows any carrier to request that the compensation mechanism be changed upon a showing that traffic in fact is imbalanced to the point that mutual traffic exchange precludes it from recovering its costs. (Order at 14) With this safety valve in place, BellSouth cannot complain that it is at risk of failing to recover its cost of providing interconnection.[3]

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[2] For example, BellSouth ignores the fact that any compensation mechanism other than mutual traffic exchange imposes additional measurement and billing costs which are a dead-weight loss if traffic is, as expected, substantially in balance.

Further, BellSouth claims that the Commission erred in determining that its proposed rates would create a barrier to entry. BellSouth says in footnote 9 of its Motion that the Commission "failed to consider" that BellSouth proposed an imputation test to eliminate the effect of a price squeeze. BellSouth neglects to point out that even Dr. Banerjee's imputation test would require local rates to increase to $36.65 per month in order to avoid a price squeeze -- an increase which is precluded by the price cap provisions in Chapter 364. (See MCI Post-Hearing Brief at 18) Therefore nothing in BellSouth's proposal eliminates the barrier to entry that its high per minute charges would create.

[3] BellSouth's argument that it cannot recover costs is particularly startling when one considers that BellSouth put forward no affirmative evidence of the interconnection costs which it says must be recovered through a cash rate. The only evidence in the record of BellSouth's costs was entered by the staff, which attempted to build a record on this issue with the best information available to it through the discovery process.

III. Mutual Traffic Exchange Does not Violate the Takings Clauses of the State or Federal Constitutions

BellSouth's takings argument hinges on its assertions that "BellSouth is obligated to utilize its facilities to provide transport and termination of calls without receiving any compensation for allowing these calls to transit its network" and that BellSouth "receives not one penny in compensation for terminating ALEC originated traffic." (BS Motion at 19, 21)

Those basic assertions are incorrect. BellSouth **does** receive compensation under the Commission's order for terminating ALEC originated traffic. That compensation is in the form of the ALECs' "in-kind" obligation to terminate BellSouth's traffic, a service which BellSouth requires in order to continue to provide ubiquitous telephone service to its own customers. BellSouth cites no case which holds that "just compensation" must be in the form of a cash payment, rather than an in-kind payment. Without such authority, BellSouth's taking arguments must fail.

Further, BellSouth's takings claim is predicated on its assertion that the Commission's order involves a "physical intrusion" onto BellSouth's property. (BS Motion at 20) This is important, because a taking per se occurs only when such a physical intrusion is present. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868 (1982).[4] In Loretto, the Court was

[4] When there is something less than an actual physical intrusion, the analysis must proceed under the standards in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631 (1978) and its progeny, which involve an ad hoc inquiry into the impact of the regulation in order to determine if a taking has

dealing with a state statute which required private landlords to allow a cable television company to place its cable on their private property. In holding that such a statute constituted a taking, the Court stated:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. . . .We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.

Id. at 441, emphasis in original.

An close examination of BellSouth's position belies the fact that any "physical intrusion" is present in this case. Nothing in the order gives an ALEC a right to physically enter BellSouth's property. Instead, the order involves only the "use" of BellSouth's network, in common with all of BellSouth's other customers, to terminate traffic originated from the ALEC. The absurdity of BellSouth's position can be seen by substituting the term "business customer" for "ALEC" in BellSouth's description of how its property is subject to "physical intrusion" by an ALEC's traffic (see BS Motion at 20):

> When traffic is offered by a *business customer* for termination on BellSouth's network, BellSouth is obligated to devote measurable network capacity to the carriage of this traffic. As a result, property in BellSouth's switching offices and transport network is measurably occupied by the *business customer*-originated traffic, and BellSouth is denied the use of this property to serve others for the duration of the *business customer*-

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occured. See, Loretto at 432.

> originated calls. Because BellSouth has and will invest in physical plant in order to terminate *business customer*-originated traffic as well as all other types of traffic, this plant is measurably occupied when traffic occurs, and BellSouth is denied the ability to use this physical plant for any other purpose, a taking clearly occurs. See Bell Atlantic Telephone Companies v. FCC, 24 F. 3d 1441, 1444 (D.C. Cir. 1994).[5]

Under BellSouth's theory, a taking would thus occur by "physical intrusion" whenever any customer used its network to terminate traffic. That simply is not what the case law says.

Where an alleged taking results from the price established by a regulatory body for a public utility service, rather than by a phycical invasion of its property, the seminal cases of Federal Power Commission v. Hope, 320 U.S. 591 (1944) and Bluefield Water Works v. Public Service Commission of West Virginia, 262 U.S. 679 (1923) teach that a public utility's property is not taken by regulation so long as the rates established by the regulatory authority allow the utility to earn a reasonable return on its investment. BellSouth has not argued that the Commission's action in this case deprives it of the opportunity to earn a fair return on its overall utility operations. The establishment for one service of "in-kind" rates that cover BellSouth's TSLRIC cost of

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[5] The Bell Atlantic case was not a takings case. That case involved review of the FCC's order on physical colocation, and concluded that the FCC lacked the statutory authority to order such colocation. As the court specifically stated in footnote 1, it lacked the power to determine whether the physical colocation requirement, if upheld, inflicted a "taking." BellSouth's reliance on this decision is thus seriously misplaced.

providing the service -- including its cost of capital -- is perfectly valid under both the state and federal constitutions.

IV. Commission-Mandated Mutual Traffic Exchange is Not Prohibited by the Telecommunications Act of 1996

Section 251(b)(5) of the Telecommunications Act of 1996 (Act) obligates all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Section 252(d)(2)(A) provides the general rule that governs state commission approval of reciprocal compensation arrangements. The general rule in paragraph (2)(A) applies regardless of whether the arrangements have been established by the parties through a voluntary agreement under Section 252(a) or through action by a state commission under Section 252(b). In either event, the reciprocal compensation arrangements must provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of calls.

Section 252(d)(2)(B) then sets out the rules of construction for all of paragraph 252(d)(2). Under these rules, section 252(d)(2):

> 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); . . .

While this subparagraph does not **require** a state commission to adopt mutual traffic exchange, it clearly authorizes it to do so. The Act expressly recognizes that the offsetting of reciprocal obligations, whether through bill and keep, mutual traffic exchange, or some other similar arrangement, is a permissible method of cost recovery. Nothing in the Act states that the rules of construction under Section 252(d)(2)(B) apply only to voluntarily negotiated compensation mechanisms, as opposed to Commission-prescribed mechanisms, and nothing suggests that the Commission has less latitude than the parties would have to establish an appropriate compensation policy. In short, Commission-mandated mutual traffic exchange is fully consistent with the Telecommunications Act of 1996.

V. The Commission's Order Regarding Collection of the Residual Interconnection Charge is Supported by Competent and Substantial Evidence

BellSouth argues that the Commission's ruling that the residual interconnection charge ("RIC") should be collected by the company terminating a toll call is not supported by competent and substantial evidence. BellSouth chooses to ignore (i) the evidence that an ALEC should compensate BellSouth for performing the intermediary function for toll traffic on the same basis that other LECs compensate BellSouth for this function today (T. 394); and (ii) the evidence which shows that when a toll call today is handled jointly by two local exchange companies, the RIC is charged by the company that terminates the call (T. 435). This is

sufficient evidence to support the Commission's ruling that access charges shall be split fairly according to the function that each carrier performs, and that the carrier performing the terminating function is entitled to the RIC. (Order at 19)

BellSouth's motion for reconsideration does not analyze the evidence on this issue. BellSouth simply renews the arguments made in its post-hearing filings that the RIC should be regarded purely as a revenue requirements issue, and that only BellSouth -- and not the ALECs -- have a RIC-related revenue requirement. This argument ignores the fact that BellSouth has elected to be governed by price regulation. It therefore flies in the face of the Commission's conclusion that the concept of revenue requirements is neither consistent with nor relevant to price regulation. (Order at 19)

VI. The Commission Should Establish a Charge for the Intermediary Function Equal to TSLRIC

MCImetro agrees with BellSouth that the Commission failed to set a charge for the intermediary function which is provided when BellSouth transports a call between two ALECs who are both interconnected with BellSouth, but not with each other.

MCImetro urges the Commission, on reconsideration, to set the charge for this intermediary function at TSLRIC. (T. 394) Although the cost figures provided by BellSouth are confidential, MCImetro notes that the price proposed by BellSouth -- tandem switching, transport, plus two-tenths of a cent per minute -- is substantially in excess of BellSouth's costs. It is also substantially in excess

of the rate of $.00075 that the Commission recently established for GTEFL.

VII. The Commission Should Reject BellSouth's Invitation To Engage in Retroactive Ratemaking

In a footnote to its Brief, BellSouth states that it will not seek a stay of the Commission's Order if an appeal is necessary, since "it has no desire to inhibit or delay the continuing development of competition in Florida."[6] If the Commission does not reverse its "mutual traffic exchange" decision on reconsideration, however, BellSouth asks the Commission to require in its order on reconsideration that all parties keep the records necessary to retroactively bill a "rate" or "charge" in the event that mutual traffic exchange is reversed on appeal. The Commission should reject this invitation by BellSouth to engage in retroactive ratemaking. If BellSouth wants the Commission's decision stayed pending appeal, let it ask. If BellSouth does not want the decision stayed pending appeal, let it live with the consequences of that decision.

VIII. The Commission's Decision to Require BellSouth to Offer and Tariff Mutual Traffic Exchange Does Not Unfairly Discriminate Against the Parties Who Previously Entered Agreements With BellSouth Regarding The Payment of Compensation

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[6] MCImetro submits that an equally plausible explanation for BellSouth's magnanimity in announcing its intention not to seek a stay is that it wants to be postured to argue that it has met the "checklist" requirements of Section 271 of the Telecommunications Act of 1996, notwithstanding such an appeal.

FCTA and Time Warner assert that the Commission's order departs from the essential requirements of law on various grounds -- due process, undue discrimination, creating barriers to competition, discouraging negotiation -- all of which are related to the Commission's decision to require BellSouth to tariff mutual traffic exchange after having approved negotiated agreements between BellSouth and other ALECs which provide for cash compensation for the termination of local traffic. These challenges should be rejected.

Section 364.162, Florida Statutes, establishes a two part procedure for establishing provisions for local interconnection. Under subsection (1), parties have 60 days to negotiate "mutually acceptable" prices, terms and conditions of interconnection. If negotiations fail, the parties have a right under subsection (2) to petition the Commission to establish "nondiscriminatory" rates, terms and conditions of interconnection. In either event -- negotiation or Commission action -- the prices, rates, terms and conditions must be filed with the Commission before their effective date.

FCTA argues in essence that once any party has negotiated a "mutually acceptable" interconnection agreement, the Commission cannot establish different prices, terms and conditions unless the petitioning party shows that it is situated differently from the

parties who were able to negotiate an agreement.[7] If the Commission were to accept this approach, a LEC would simply negotiate first with the "weakest" party to establish an agreement with the lowest common denominator by which all subsequent parties would be bound. Such an interpretation would do violence to the statutory scheme.

A more logical interpretation of the statute is that:

(1) the Commission should approve any "mutually acceptable" agreement negotiated by the parties, and should require it to be filed as a tariff so that any other party can take advantage of the same arrangement;

(2) upon petition, the Commission should establish "nondiscriminatory" arrangements based on the record before it, and should require those provisions to be filed as a tariff so that any other party can take advantage of the same arrangement; and

(3) in the event a party claims that the difference between the negotiated provisions and the Commission-ordered provisions results in undue discrimination, that claim should be resolved via a separate complaint proceeding.

Unlike the "first deal prevails" position taken by FCTA, this approach preserves both the right of parties to negotiate and the

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[7] FCTA conveniently overlooks the fact that agreement it negotiated with BellSouth was different than the earlier agreement negotiated by TCG. By FCTA's logic, the Commission would have erred when it approved the FCTA-BellSouth deal without first finding that FCTA and the other signatories were situated differently than TCG.

right of parties to petition the Commission to resolve their dispute if negotiations fail.

This is the approach the Commission has taken. The Commission, appropriately, did not critically review the agreement negotiated by FCTA and BellSouth. It relied on the fact that the parties had reached "mutually acceptable" prices, terms and conditions, and gave the parties the benefit of their bargain. In its order approving that agreement, the Commission noted that the FCTA-BellSouth Agreement contained provisions for both universal service and local number portability that differed from prior Commission orders on those subjects, and that it contained provisions that resolved issues scheduled for future hearings in the local interconnection and unbundling dockets.

In approving the negotiated agreement, the Commission acknowledged that a negotiation might produce a different regime than litigation, and reserved for a subsequent complaint proceeding any claim that the differences were unduly discriminatory:

> Approving the settlement as to those parties that signed creates the possibility that there may be two different regimes for local exchange competitors competing with BellSouth. Those entities that signed the agreement would have one set of rates, terms and conditions for Universal Service/Carrier of Last Resort, Number Portability, Interconnection, and Unbundling and Resale, while those that did not sign the agreement would receive the rates, terms and conditions set by the Commission after hearing.
>
> Two differing regimes of rates, terms and conditions for competitors raises the question of whether we would be endorsing discriminatory rates, terms and conditions

> that are contrary to the provisions for interconnection and resale. It is clear that the new statutory regime endorses negotiations to solve implementation controversies. It is also clear that if negotiations fail, the Commission is left to resolve the controversy. Any decision that we make resolving the controversy through litigation must be nondiscriminatory. However, where portions of the controversy are negotiated by some parties and not all, it is not clear that differing results based on negotiations versus litigation run afoul of the nondiscrimination provisions. Such differences do not appear at this point to be clearly unreasonably discriminatory. Moreover, we must also note that we will attempt to honor the negotiations to the extent permissible. If any affected party believes that such separate regimes are discriminatory, then such party can file a complaint and the question can be addressed in a factual context rather than in the abstract.
>
> Upon consideration, we find that the Agreement should be approved. Our approval of the agreement is only as to those parties that have signed the agreement or will sign the agreement in the future. Those parties that have not signed the agreement shall not be bound by the terms of the agreement. For those that have not signed, we have already dealt with US/COLR and number portability, and we are scheduled to address interconnection and resale/unbundling in early January.

FCTA did not seek reconsideration of the order approving its agreement, nor did it appeal that order. As a party to that proceeding, it is therefore bound by the Commission's determination, absent a showing of changed circumstances. Since the proceeding in which mutual traffic exchange was adopted was pending at the time, and was expressly referred to in the order, the existence of that proceeding is not a changed circumstance.

In the order now on reconsideration, the Commission ordered the implementation of mutual traffic exchange between BellSouth and MCImetro/MFS, and further ordered that "BellSouth shall tariff its interconnection rates and other arrangements as set forth in the body of this Order." (Order at 40)

Under ordinary principles of tariff interpretation, these "nondiscriminatory" rates, terms and conditions should be available to all comers -- including FCTA and Time Warner -- to the extent that (1) they are willing to take the entire Commission-structured "package" of interconnection rates, terms and conditions in lieu of the "package" contained in their private agreement, and (2) they have not, by contract, relinquished their right to take the Commission-structured package.

If FCTA or Time Warner needs relief from their Agreement in order to take the mutual traffic exchange package -- or if they claim the right to pick and choose between provisions of their agreement and provisions of the Commission's order -- that should be the subject of a separate complaint proceeding, not of a motion for reconsideration in this docket.

CONCLUSION

On reconsideration, the Commission should establish a rate for the "intermediary" function at the TSLRIC cost of providing such service, as set forth in Part VI of this response.

Except for this item, the Motions for Reconsideration filed by BellSouth. FCTA, and Time Warner should be denied for the reasons set forth above.

RESPECTFULLY SUBMITTED this 24th day of April, 1996.

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I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by U.S. Mail this 24th of April, 1996.

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