

HOPPING GREEN SAMS & SMITH

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS

123 SOUTH CALHOUN STREET

POST OFFICE BOX 6526

TALLAHASSEE, FLORIDA 32314

(904) 222-7500

FAX (904) 224-8551

FAX (904) 425-3415

JAMES S. ALVES
BRIAN H. BIBEAU
KATHLEEN BLIZZARD
ELIZABETH C. BOWMAN
RICHARD S. BRIGHTMAN
PETER C. CUNNINGHAM
RALPH A. DEMEO
THOMAS M. DeROSE
WILLIAM H. GREEN
WADE L. HOPPING
FRANK E. MATTHEWS
RICHARD D. MELSON
DAVID L. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPE
DOUGLAS S. ROBERTS
GARY P. SAMS
ROBERT P. SMITH
CHERYL G. STUART

GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
ROBERT A. MANNING
ANGELA R. MORRISON
GARY V. PERKO
KAREN M. PETERSON
MICHAEL P. PETROVICH
R. SCOTT RUTH
W. STEVE SYKES
T. KENT WETHERELL, II
OF COUNSEL
W. ROBERT FOKES

Writer's Direct Dial No.
(904) 425-2313

November 12, 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 MCI Metro's Response in Opposition to BellSouth's Motion for Stay.

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

Very truly yours,

Richard D. Melson

CK _____
FA _____
PP Smith - fy I
AF _____ RDM/cc
SMU _____ Enclosures
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FPSC-RECORDS/REPORTING

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, Fla. Stat.)
_____)

Docket No. 950985-TP
Filed: November 12, 1996

**MCI'S RESPONSE IN OPPOSITION TO
BELLSOUTH'S MOTION FOR STAY**

MCI Metro Access Transmission Services, Inc. (MCI) hereby responds to the Motion for Stay of Orders Pending Judicial Review filed by BellSouth Telecommunications, Inc. (BellSouth) in this proceeding on October 28, 1996. BellSouth has failed to establish that a stay is appropriate in this case, and its motion should therefore be denied. In support of this response, MCI states:

Standard for Commission Action

1. In considering whether to grant BellSouth's motion for stay pending judicial review, the Commission should consider whether BellSouth is likely to prevail on appeal; whether BellSouth has demonstrated that it is likely to suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest. Rule 25-22.061(2), Florida Administrative Code.

BellSouth Unlikely to Prevail on Appeal

2. BellSouth asserts that it is likely to prevail on appeal because "mandatory bill and keep is a violation of state

and federal law." (Motion ¶3) The Commission has twice resolved this legal issue against BellSouth, first in its final order implementing mutual traffic exchange, and again in its order denying BellSouth's motion for reconsideration. In a well reasoned analysis, the Commission concluded that the relevant statutes permit it to mandate mutual traffic exchange where there is no evidence that traffic flowing between the interconnecting carriers will be significantly imbalanced.

3. The Federal Communications Commission, in issuing rules to implement the Telecommunications Act of 1996, has reached the same conclusion as the Commission regarding the requirements of federal law. Section 51.713 of the FCC's Rules [47 C.F.R. §51.713] specifically provides that "a state commission may impose bill-and-keep arrangements" if certain findings regarding traffic balance are made.¹ In reaching the conclusion that bill-and-keep arrangements could be mandated by state commissions, the FCC concluded that Section 252(d)(2) would be superfluous if bill-and-keep arrangements were limited to negotiated agreements. FCC Order ¶1111.²

¹ While this section of the FCC Rules has been stayed by the Eighth Circuit Court of Appeals, that stay was based on a question as to the FCC's authority to establish pricing rules for intrastate traffic, not on the merits of the FCC's statutory interpretation.

² In the Matter of: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (released August 8, 1996).

4. In light of these consistent state and federal decisions, BellSouth has provided no basis to conclude that it is likely to prevail on appeal, particularly since the Commission's interpretation of the statutes which it is charged with administering will be given great deference by the appellate court. E.g. Florida Cable Television Association v. Deason, 635 So.2d 14 (Fla. 1994).

No Irreparable Harm to BellSouth Absent Stay

5. BellSouth advances two reasons that it will be irreparably harmed absent a stay. First, BellSouth claims that the Orders essentially mandate it to provide local interconnection for free. Thus, BellSouth says, if it prevails on appeal, it will not be able to recover the interconnection costs incurred during the pendency of the appeal. The contention that the Orders require BellSouth to provide local interconnection for free squarely contradicts the Commission's conclusion, supported by the record, that under a bill-and-keep arrangement BellSouth will receive compensation in kind -- the termination of its own traffic on the networks of the interconnecting carriers -- which is sufficient to fully compensate it for the reciprocal termination of traffic on its network.

6. Second, BellSouth refers to the "chilling effect" that bill-and-keep will have on continuing negotiations. (Motion ¶4) Yet on the same page, BellSouth shows that it has numerous interconnection agreements already in place and that decisions

will be made within the next few weeks in pending arbitration proceedings. Given this, it is not clear what negotiations exist to be "chilled." In any event, the effect on negotiations does not constitute irreparable harm, since BellSouth could protect itself by ordinary contract provisions against the possibility that the Commission's order is reversed on appeal, for example, by negotiating an interconnection rate that would apply in the event the Commission's order is reversed.

A Stay Would Be Contrary to the Public Interest

7. The primary effect of a stay would be to prevent BellSouth's tariff for mutual traffic exchange from going into effect during the pendency of the appeal. That stay would be contrary to the public interest. BellSouth argues that a stay will not delay the entry of competition because the "vast majority of ALECS" (i.e. those with whom it has negotiated interconnection agreements) have the ability to enter the market at this time. (Motion ¶8) Yet such a stay would deprive all ALECs of what the Commission has found to be the most cost-effective method of compensating for local interconnection. Further, a stay could prevent small ALECs, who may choose to rely on tariffed offerings by BellSouth in lieu of individually negotiated agreements, from entering the market at all during the pendency of the appeal.

**The Presence of Alleged Constitutional Issues
Does Not Require the Commission to Grant a Stay**

8. BellSouth argues that, because it intends to raise a constitutional taking issue on appeal, the Commission "is obliged to grant a stay" to avoid "impair[ing] judicial jurisdiction to determine constitutional disputes." (Motion ¶10) The best thing that can be said about this argument is that the cases cited by BellSouth are totally inapposite. None of them involves the question of a stay pending appeal. Instead, they each involve questions as to whether a circuit court can stay (enjoin) an on-going administrative proceeding in order to determine constitutional issues arising out of that proceeding, 19838 NW, Inc. v. Division of Alcoholic Beverages, 410 So.2d 967 (Fla. 4th DCA 1982), or questions as to whether, and in what circumstances, constitutional issues arising in administrative proceedings can be resolved in circuit court, rather than through appellate review of the agency's final order. Key Haven v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982); Department of Revenue v. Amrep Corporation, 358 So.2d 1343 (Fla, 1978); Department of Transportation v. Morehouse, 350 So.2d 529 (Fla. 3d DCA 1977). These are separation of power cases, not stay cases.

9. The premise of BellSouth's argument -- that a stay is obligatory whenever constitutional issues are raised on appeal -- is remarkable. If this were the case, surely the Rules of Appellate Procedure would make some special provision for stays in cases involving constitutional issues; they do not. See Rule 9.310, Fla.R.App.Pro.

Bond Requirement

10. As indicated above, BellSouth's request for a stay is without merit, and should be denied. If the Commission grants a stay, however, it should require BellSouth to post a bond sufficient to ensure a refund of all local interconnection charges collected from all interconnecting carriers during the pendency of the appeal.

11. BellSouth's assertion that a number of carriers have interconnection agreements with BellSouth and thus can enter the market during the pendency of the appeal is beside the point. If BellSouth files a tariff for mutual traffic exchange -- as it has been ordered by the Commission to do -- carriers will have the right to take the tariffed service in lieu of the service at the rates established in their respective interconnection agreements. MCI's interim interconnection agreement with BellSouth, for example, expressly provides that:

In the event that BellSouth provides interconnection . . . arrangements via tariff . . . upon MCI's request BellSouth will immediately offer MCI an agreement on the same material terms with effect from the date BellSouth first made such tariff effective

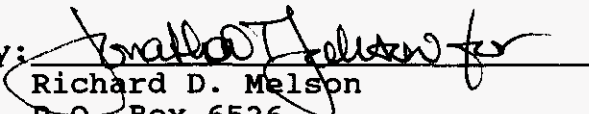
(Interim Agreement, Paragraph I.C)

When the Orders are affirmed on appeal, MCI's recourse against BellSouth for a refund of charges paid will be impaired unless BellSouth has been required to post an appropriate bond.

WHEREFORE, for the reasons stated above, BellSouth's motion for a stay pending judicial review should be denied.

RESPECTFULLY SUBMITTED this 12th day of November, 1996.

HOPPING GREEN SAMS & SMITH, P.A.

By: 
Richard D. Melson
P.O. Box 6526
Tallahassee, FL 32314
(904) 425-2313

and

MARTHA MCMILLIN
MCI Telecommunications Corporation
780 Johnson Ferry Road, Suite 700
Atlanta, GA 30342
(404) 843-6375

ATTORNEYS FOR MCI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by U.S. Mail this 12th of November, 1996.

Lee L. Willis
J. Jeffrey Wahlen
Macfarlane, Ausley, Ferguson &
McMullen
227 S. Calhoun Street
Tallahassee, FL 32301

Anthony P. Gillman
Kimberly Caswell
GTE Florida Incorporated
c/o Richard M. Fletcher
106 E. College Ave., Ste. 144
Tallahassee, FL 32301-7704

Leslie Carter
Digital Media Partners
1 Prestige Place, Ste. 255
Clearwater, FL 34619-1098

James C. Falvey
Swidler & Berlin, Chartered
3000 K Street, N.W., Ste. 300
Washington, DC 20007

David Erwin
Young van Assenderp & Varnadoe
225 S. Adams St., Suite 200
Tallahassee, FL 32301

Richard A. Gerstemeier
Time Warner AxS of Florida
2251 Lucien Way, Ste. 320
Maitland, FL 32751-7023

Patrick K. Wiggins
Wiggins & Villacorta
501 East Tennessee Street
Tallahassee, FL 32301

Andrew D. Lippman
Metropolitan Fiber Systems
One Tower Lane, Suite 1600
Oakbrook Terrace, IL 60181-4630

J. Phillip Carver
c/o Nancy H. Sims
Southern Bell Telephone
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Patricia Kurlin
Intermedia Communications
9280 Bay Plaza Blvd., Ste. 720
Tampa, FL 33619-4453

Kenneth A. Hoffman
Rutledge, Ecenia, Underwood,
Purnell & Hoffman
215 S. Monroe St., Suite 420
Tallahassee, FL 32301-1841

Jodie Donovan-May
Teleport Communications Group
1133 21st Street, N.W., Ste. 400
Washington, DC 20036

Michael W. Tye
101 North Monroe Street, Ste. 700
Tallahassee, FL 32301

Robin D. Dunson
1200 Peachtree St., N.E.
Pomenade I, Room 4038
Atlanta, GA 30309

Laura Wilson
Florida Cable
Telecommunications Assoc. Inc.
310 N. Monroe Street
Tallahassee, FL 32301

Floyd R. Self
Messer, Caparello, Madsen,
Goldman & Metz, P.A.
P.O. Box 1876
Tallahassee, FL 32302

William H. Higgins
AT&T Wireless Services
250 S. Australian Ave., Suite
900
West Palm Beach, FL 33401

Donna Canzano
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Jill Butler
Florida Regulation Director
Time Warner Communications
2773 Red Maple Ridge
Tallahassee, FL 32301

Brian Sulmonetti
LDDS Woldcom Communications
1515 S. Federal Hwy., Suite 400
Boca Raton, FL 33432

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs,
Odom & Ervin
305 S. Gadsden Street
Tallahassee, FL 32301

Benjamin Fincher
Sprint Communications Co.
Limited Partnership
3065 Cumberland Circle
Atlanta, GA 30339

Mark K. Logan
Bryant, Miller & Olive, P.A.
201 S. Monroe St., Suite 500
Tallahassee, FL 32301

Sue E. Weiske
Senior Counsel
Time Warner Communications
160 Inverness Drive West
Englewood, CO 80112

Peter M. Dunbar, Esq.
Pennington, Culpepper, Moore,
Wilkinson, Dunbar & Dunlap
215 S. Monroe Street, 2nd Floor
Tallahassee, FL 32301

Timothy Devine
MFS Communications Company, Inc.
Six Concourse Parkway, Ste. 2100
Atlanta, GA 30328

Richard M. Rindler
James C. Falvey
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Donald L. Crosby
Continental Cablevision, Inc.,
Southeastern Region
7800 Belfort Parkway, Ste. 270
Jacksonville, FL 32256-6925

A. R. Schleiden
Continental Fiber Technologies
d/b/a AlterNet
4455 Baymeadows Road
Jacksonville, FL 32217

Bill Wiginton
Hyperion Telecommunications, Inc.
Boyce Plaza III
2570 Boyce Plaza Road
Pittsburgh, PA 15241


Attorney