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November 12, 1996

Mrs. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Docket No. 950985-TP

Dear Mrs. Bayo:

Enclosed for filing in the above referenced docket are an original and fifteen (15) copies of AT&T's Response in Opposition to BellSouth's Motion for Stay of Order Pending Judicial Review.

Copies of the foregoing are being served on all parties of record in accordance with the attached Certificate of Service.

Yours truly,

Michael W. Tye
Michael W. Tye

- ACK _____
- AFA _____
- APP *Smith-Tye I*
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG *1*
- LIN *5*
- OPC _____
- RCH _____
- SEC *1*
- WAS _____
- OTH _____

Attachments

cc: Parties of Record

DOCUMENT NUMBER-DATE

12007 NOV 12 88

FPSC-RECORDS/REPORTING

FILE
NOV 1996

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s))
to establish nondiscriminatory) Docket No. 950985-TP
rates, terms, and conditions for)
interconnection involving local) Filed: November 12, 1996
exchange companies and alternative)
local exchange companies pursuant)
to Section 364.162, Florida)
Statutes)
_____)

AT&T COMMUNICATION OF THE SOUTHERN STATES, INC.'S RESPONSE
IN OPPOSITION TO BELL SOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR STAY OF ORDERS PENDING JUDICIAL REVIEW

AT&T Communications of the Southern States, Inc. (hereinafter "AT&T"), pursuant to Rule 25-22.037(3)(b), Florida Administrative Code, files this response in Opposition to BellSouth Telecommunications, Inc.'s (hereinafter BellSouth's) Motion for Stay of Orders pending Judicial Review. AT&T submits that BellSouth's motion is not supported by the Commission's rules and is contrary to the public interest, and therefore respectfully requests that such motion be denied. In support of its request, AT&T shows as follows:

1. By Order No. PSC-96-0445-FOF-TP the Commission determined that mutual traffic exchange¹ is the appropriate mechanism for compensation for termination of local traffic by a local exchange carrier that was originated by another competing local exchange

¹ Throughout its motion, BellSouth uses the term "Bill and Keep" to refer to the Commission's chosen interconnection compensation mechanism of mutual traffic exchange.

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FPSC-RECORDS/REPORTING

carrier. However, to the extent that any party believes that the exchange of local traffic between local carriers is not in balance, the Commission further determined that such carrier may request that the compensation mechanism be changed.

2. BellSouth sought reconsideration of Order No. 96-0445, raising four arguments against mutual traffic exchange: 1) the order failed to set a charge for local interconnection as required by Florida law; 2) the Order failed to set a local interconnection charge that is sufficient to cover the cost of providing local interconnection, 3) mandatory mutual traffic exchange constitutes a taking proscribed by the Florida and Federal Constitutions; and 4) mandatory mutual traffic exchange violates the Telecommunications Act of 1996.

3. By Order No. PSC-96-1231-FOF-TP, the Commission denied BellSouth's Motion for Reconsideration specifically and in great detail rejecting each of BellSouth's arguments.

4. On October 28, 1996, BellSouth filed a Notice of Appeal of Orders Nos. 96-0445 and 96-1231. In conjunction with its Notice of Appeal, BellSouth also filed the instant Motion for Stay Pending Judicial Review pursuant to Rule 25-22.061(2), Florida Administrative Code.

5. Rule 25-22.061(2) provides that in determining whether to grant a stay, the Commission may consider: (a) whether the petitioner is likely to prevail on appeal; (b) whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and (c) whether the delay will cause substantial harm or be contrary to the public interest.

BellSouth has failed to show that any of these standards (let alone all three) have been met in this case.

6. With respect to whether BellSouth is likely to prevail on appeal, the Company states simply that, as pointed out in its motion for reconsideration, mutual traffic exchange is a violation of state and federal law. The arguments set forth by BellSouth in its motion for reconsideration were addressed by the Commission at great length and rejected. Moreover, BellSouth's claims that mutual traffic exchange violated Florida law were expressly addressed and rejected by the Commission in its initial decision in Order No. 96-0445. BellSouth has simply repeated its previously rejected arguments. Such arguments are not made stronger or better by virtue of such repetition.

7. It is well settled that the Court will not second guess the Commission or reweigh the evidence:

We have spoken time and time again of the task for this Court on judicial review of Commission orders. Our task is not to reweigh the evidence. Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 311 (Fla. 1976); General Telephone Co. v. Carter, 115 So.2d 554, 557 (Fla. 1959).

Citizens v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983).

8. Further, the orders of the Commission go to the Court with the Presumption of validity. In affirming a Commission order, the Court said:

Orders of the Commission come before this Court clothed with the presumption of validity. On review this presumption of validity can only be overcome where the Commission's error either appears plainly on the face of the order or is

shown by clear and satisfactory evidence.
Citations omitted.

Citizens of State v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982). See also, General Telephone Co. of Fla. v. Carter, 115 So.2d 554, 556-557 (Fla. 1959). In view of the deference accorded the Commission by the Court, it is unlikely that BellSouth will prevail on appeal.

9. Regarding the issue of irreparable harm BellSouth argues that the "Commission has essentially mandated BellSouth to provide local interconnection for free, even though BellSouth will incur costs for providing local interconnection." This argument, like BellSouth's other arguments was scrutinized and rejected twice previously by the Commission. Moreover, BellSouth's assertions are incorrect. As the Commission noted, there is nothing "free" under mutual traffic exchange. The compensation for terminating traffic among local carriers is on an "in-kind" basis. BellSouth recovers its costs of termination from the revenues it does not pay to other local carriers for terminating traffic received from BellSouth. More importantly, in view of the Commission's interconnection decision, BellSouth cannot be harmed by mutual traffic exchange except through its own failure to act. If BellSouth terminates less traffic than other carriers, it is not harmed. If the traffic terminations are balanced between local carriers, BellSouth is not harmed. If BellSouth terminates more traffic than other local carriers, BellSouth may, like any other carrier, request that a rate be implemented. BellSouth can suffer harm under mutual traffic exchange only through its own failure to detect an

imbalance and to ask for a rate. As shown above BellSouth's claim of irreparable harm is specious and must be rejected.

10. With respect to whether the stay will be contrary to the public interest, BellSouth argues that competition will not be harmed because the vast majority of ALECs will be able to enter the market either through existing agreements or in the case of MCI and AT&T, through soon to be decided arbitration proceedings. The Commission has a legislative mandate to foster competition in the local market. The Commission has acted admirably in establishing procompetitive interconnection policies pursuant to Chapter 364. Competition and the public interest will be harmed simply by virtue of the fact that market entrants will be denied access to those interconnection provisions that the Commission has deemed appropriate pursuant to Chapter 364. Market entrants will be left instead to existing agreements that in many cases are more onerous than established by the Commission or are left to eke what they can from negotiations with BellSouth. Neither scenario is in the public interest. With respect to BellSouth's proffer of the imminent arbitration decisions as a salve to soothe the public interest, such comment presumes that BellSouth will acquiesce in whatever the Commission decides and will not continue to delay effective competition with yet another appeal and request for stay.

11. Regarding BellSouth's claim that Order No. 96-0445 will have a chilling effect on negotiations, any decision of the Commission has a chilling effect on any pending negotiations involving the same subject matter. A stay of Order No. 96-0445

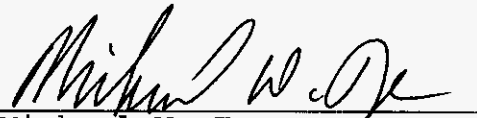
will simply bolster BellSouth's position in negotiations contrary to the policies already established by the Commission.

12. In addition to its request for a discretionary stay pursuant to Rule 25-22.061(2), BellSouth also argues that a stay must be granted to allow judicial determination of whether imposition of mutual traffic exchange constitutes a taking of BellSouth's property without compensation in violation of state and federal constitutions. In support of its claim to a mandatory stay based on constitutional allegations, BellSouth relies principally on 19839 NW, Inc. v. Div. of Alcoholic Bev. and Tobacco of the Dep't of Bus Reg., 410 So.2d 967, 968 (Fla. 4th DCA 1982) which states that "ordinarily, when a constitutional attack is made upon administrative proceedings, they should be stayed pending resolution of the validity of those proceedings." BellSouth's constitutional allegations were closely scrutinized by the Commission and the Commission was not persuaded. More importantly, the question of whether a party is entitled to an automatic stay based on the presence of allegations of constitutional violations by the Commission has been previously addressed by the Commission and the Commission determined that no such right exists. By Order No. PSC-95-0918-FOF-TP issued July 31, 1995, in Docket No. 930330-TP (1+ presubscription proceeding) the Commission rejected GTE Florida Incorporated's (GTEFL's) claim to an automatic stay premised on essentially the same constitutional allegations advanced here by BellSouth. BellSouth's arguments in the instant case are virtually identical to those rejected in Order No. 95-0918. As was noted in that Order, the purpose for granting a stay

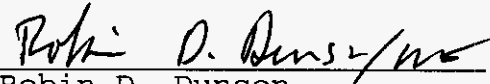
in 19838 NW, Inc. was to determine the validity of the proceedings before concluding. In the instant case, BellSouth has alleged constitutional violations after the conclusion of the administrative proceeding. Moreover, as was further noted in Order No. 95-0918, the Rules of Appellate Procedure and the Florida Administrative Code do not provide for an automatic stay based on a mere allegation of a constitutional violation. Accordingly, BellSouth's claim to an automatic stay should be rejected.

WHEREFORE, for all the reasons set forth above, AT&T respectfully requests that the Florida Public Service Commission deny BellSouth's Motion for Stay Pending Judicial Review.

Respectfully submitted, this 12th day of November, 1995.



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CERTIFICATE OF SERVICE

DOCKET NO. 950985-TP

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by next day express mail, U. S. Mail or hand-delivery to the following parties of record this 12th day of November, 1996.

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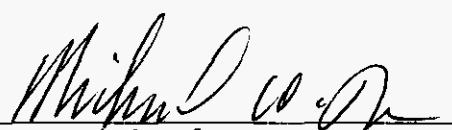
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