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AUGUST 11, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BARONE) *[Handwritten initials]*
DIVISION OF COMMUNICATIONS (GREER) *[Handwritten initials]*

RE: DOCKET NO. 960786-TL - CONSIDERATION OF BELL SOUTH
TELECOMMUNICATIONS, INC.'S ENTRY INTO INTERLATA SERVICES
PURSUANT TO SECTION 271 OF THE FEDERAL TELECOMMUNICATIONS
ACT OF 1996

AGENDA: AUGUST 18, 1997 - REGULAR AGENDA - ORAL ARGUMENT
REQUESTED - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960786M2.RCM

CASE BACKGROUND

Pursuant to 47 U.S.C. § 271(d)(3), the Federal Communications Commission (FCC) has ninety (90) days to issue a written determination approving or denying a Bell Operating Company's (BOC) application for interLATA authority. Further, the FCC is directed to consult with the applicable State commission before making a determination regarding the BOC's entry into the interLATA market. The Florida Public Service Commission (FPSC) opened this docket to fulfill its consultative role.

On July 25, 1997, Time Warner AxS of Florida, L.P. d/b/a/ Time Warner Communications and Digital Media Partners (Time Warner) filed its Motion to Dismiss or in the Alternative for Abatement of BellSouth Telecommunications' Application for InterLATA Relief. Time Warner requested oral argument on its Motion. BellSouth Telecommunications, Inc. timely filed its Response and Opposition to Time Warner's Motion on August, 1, 1997.

DOCUMENT NUMBER-DATE

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Time Warner's Request for Oral Argument?

RECOMMENDATION: Yes. The Commission should grant Time Warner's Request for Oral Argument. Staff recommends, however, that oral argument be limited to 5 minutes per side. (Barone)

STAFF ANALYSIS: As discussed in the Case Background, Time Warner filed a Motion to Dismiss and a request for oral argument on the Motion on July 25, 1997. Staff believes oral argument would assist the Commission in making its determination. Therefore, staff recommends that the Commission grant Time Warner's request. Staff recommends, however, that oral argument be limited to 5 minutes per side.

Issue 2: Should the Commission grant Time Warner's Motion to Dismiss or in the Alternative for Abatement of BellSouth Telecommunications' Application for InterLATA Relief.

RECOMMENDATION: No. The Commission should deny Time Warner's Motion in its entirety. (Barone)

STAFF ANALYSIS: On July 25, 1997, Time Warner filed its Motion to Dismiss or in the alternative to abate proceedings in this docket. Time Warner argues that this proceeding is premature and should be stopped immediately before additional FPSC and industry resources are wasted.

Time Warner asserts that BellSouth should not have filed its application for interLATA authority since it has full knowledge that it can not now supply something as fundamental as a Firm Order Commitment (FOC) with a facilities verification. Time Warner states that its interconnection agreement with BellSouth provides that BellSouth must give Time Warner an FOC and a Design Layout Record (DLR) within five business days upon receipt of an Access Service Request (ASR) for Local Interconnection Trunk Groups. Time Warner argues that in order to provide a DLR, BellSouth would have to provide a facilities verification. The provision at issue,

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according to Time Warner, is Section 11.02. That section provides:

All parties shall work cooperatively to manage the capacity of Local Interconnection Trunk Groups. Any Party may send another ASR to initiate changes to the Local Interconnection Trunk Groups that the ordering Party desires based on the ordering Party's capacity assessment. The receiving Party will issue a Firm Order Confirmation ("FOC") and a Design Layout Record ("DLR") to the ordering Party within 5 business days after receipt of the ASR upon review of and in response to the Ordering Party's ASR to begin the provisioning process.

Time Warner asserts that it has been trying to negotiate performance standards. During the negotiations, BellSouth asked whether Time Warner wanted a "good" FOC (one with a facilities verification) or a "fast" one (one within twenty-four hours, but without the facilities check. Time Warner argues that it sought to enforce Section 11.02 of its Interconnection Agreement, which requires both a "good" and "fast" FOC. Time Warner contends that BellSouth responded that it would not be able to comply with the Interconnection Agreement until the end of this year at the earliest. (Citing to Exhibit A to the Motion: letter from Susan M. Arrington, Manager-Interconnection Services\Pricing with BellSouth, to Carolyn Marek, of Time Warner Communications)

Time Warner also asserts that BellSouth has been lax in providing FOCs to it with respect to Local Service Requests (LSRs) for Interim Number Portability (INP). Finally, Time Warner asserts that BellSouth has been in default of the Interconnection Contract with Time Warner because BellSouth has not completed the disconnect and provision of RCF for INP within twenty-four hours of BellSouth's receipt of the service order under provision 6.17 of the Interconnection Agreement.

Time Warner concludes that this matter should be dismissed, held in abeyance, or the application should be withdrawn until the end of the year or until BellSouth is in compliance with these fundamental interconnection provisions in accordance with the checklist items. "The parties need not exhaust huge resources to examine whether BellSouth meets the checklist items when the facts of this non-compliance with Time Warner's Interconnection Agreement alone puts BellSouth out of compliance."

In response, BellSouth argues that Time Warner is essentially arguing its position in this docket through this Motion rather than

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through testimony given under oath. This according to BellSouth is inappropriate. BellSouth argues that the Commission can not grant Time Warner's Motion when the facts have not been heard. BellSouth concludes that the allegations in the Motion should be made under oath in testimony with the right of cross examination and the right of BellSouth's witnesses to address the allegations, not in a pleading.

As to the specific allegations, BellSouth argues that its agreement with Time Warner does not require the FOC to contain facilities verification. Also, BellSouth states, as noted in Exhibit A to the Motion, BellSouth does not provide facilities verification on any FOC with regard to BellSouth's own end users. BellSouth argues that according to the Eight Circuit's Opinion in Docket No. 96-3321, issued on July 18, 1997, the Telecommunications Act of 1996 (Act) does not require the incumbent LEC to provide its competitors with superior quality interconnection. Therefore, BellSouth concludes, BellSouth is not required to provide facilities verification with FOCs to Time Warner either under the agreement or the Act.

BellSouth asserts that it is not in violation of Section 11.02 of the Interconnection Agreement. BellSouth does not agree with Time Warner that this section requires BellSouth to provide both a "good" and "fast" FOC. The contract, BellSouth argues, simply states that BellSouth will provide a FOC and a DLR with five business days of the receipt of the ASR. There are no specifics on what type of information is to be included in the FOC.

According to BellSouth, it never told Time Warner that it would not be able to comply with the Agreement until the end of the year at the earliest. BellSouth told Time Warner that it was currently looking into providing facilities verifications for ASR FOCs, but that such information would not be available until the end of the year. BellSouth argues that as stated earlier, the Agreement does not specify that facilities verification must be included in the FOC, and therefore BellSouth is not in violation of the Agreement.

BellSouth concludes that since there are definitely factual issues in dispute between Time Warner and BellSouth, Time Warner's Motion should be rejected.

Staff's Recommendation

The standard of review to be applied in considering Time Warner's Motion to Dismiss is to review BellSouth's Petition in the

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light most favorable to BellSouth. As stated by the Court in Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action."

Staff does not believe BellSouth's Petition can be dismissed based on the allegations in Time Warner's Motion. It is clear based on a review of Time Warner's Motion and BellSouth's response that the facts alleged in Time Warner's Motion are in dispute. Therefore, viewing the facts in the light most favorable to BellSouth, staff believes that BellSouth has presented facts sufficient to proceed with the evidentiary hearing. Accordingly, staff recommends that the Commission deny Time Warner's Motion in its entirety.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the evidentiary hearing in this docket scheduled to begin on September 2, 1997. (Barone)

STAFF ANALYSIS: This docket should remain open pending the evidentiary hearing in this docket scheduled to begin on September 2, 1997.