

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by SOUTHERN BELL)	DOCKET NO. 900299-TP
TELEPHONE AND TELEGRAPH COMPANY)	
regarding provision of local exchange)	ORDER NO. 24675
service in Dade County by INTERMEDIA)	
COMMUNICATIONS OF FLORIDA, INC.)	ISSUED: 6/17/91
)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 J. TERRY DEASON
 BETTY EASLEY
 GERALD L. GUNTER
 MICHAEL MCK. WILSON

ORDER DISPOSING OF MOTION TO DISMISS
AND CLOSING INVESTIGATION

BY THE COMMISSION:

I. Background

On April 19, 1990, Southern Bell Telephone and Telegraph Company (Southern Bell) filed a complaint against Intermedia Communications of Florida, Inc. (Intermedia) alleging the possible provision of local private line service to Dade County by Intermedia. The complaint stems from the provisions of a "Non Exclusive Fiber Optic Cable Use Permit Agreement Between Intermedia Communications of Florida, Inc. and Dade County, Florida" (the Agreement).

The Agreement generally provides that Dade County will allow Intermedia to place fiber optic cable in Dade County's conduit and along the Metrorail, Metromover and other rights-of-way. In addition, Dade County will allow Intermedia to use four single mode fibers owned by the County. In return, Intermedia will, according to the Agreement, lease twelve of its single mode fibers to Dade County. Intermedia will also pay to the County \$12,000 per month for the first five years, the larger of three percent of gross revenues or \$12,000 per month during years six through ten, and the larger of five percent of gross revenues or the \$12,000 per month for the remaining five years. The Agreement expressly provides that:

6.01 Title. Title to the ICI [Intermedia] System and the County Building Cables shall be and remain with ICI during the term of this Agreement.

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ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 2

The Agreement also requires Intermedia to maintain the twelve fibers leased to Dade County.

Based on the Agreement, Southern alleges that "Intermedia has entered into an agreement that requires that Intermedia provide local exchange service in violation of: its certificate of public convenience and necessity; Commission Order No. 17401; Rule 25-24.471(4)(c), Florida Administrative Code; and Sections 364.33 and 364.35(2), Florida Statutes." The complaint asks that the Commission investigate this matter and take appropriate action.

On May 10, 1990, Intermedia filed a Motion to Dismiss asking the Commission to dismiss Southern Bell's complaint. In support of its Motion, Intermedia states that the Agreement as intended did not contemplate leasing fiber to Dade County and that Intermedia will actually sell the twelve fiber strands to Dade County, eliminating the possibility of any violation of Southern Bell's local monopoly. Intermedia argues that Southern Bell simply alleges that Intermedia intends to violate its charter and infringe on Southern Bell's franchise, that no wrong has been done that gives rise to a remedy and that the matter is not ripe for formal intervention by the Commission. (emphasis in original)

On May 22, 1990, Southern Bell filed a response to Intermedia's Motion to Dismiss, arguing that, contrary to Intermedia's claimed intent to sell the fiber to Dade County, the Agreement expressly provides that Intermedia will own and maintain the fiber optic facilities used by Dade County. Southern Bell further argues that Intermedia has or will immediately begin construction of its facilities in violation of Intermedia's certificate, Order No. 17401, and Sections 364.33 and 364.335(4). Finally, Southern Bell argues that, as a matter of law, the issue is ripe and that the rights of the parties should be adjudicated now so that any damages that Southern Bell might otherwise incur as a result of Intermedia's plans can be minimized.

On January 25, 1991, Intermedia filed a Notice of Position Under Revised Chapter 364 (the Revised Position). In the Revised Position Intermedia states that it is still the intent of the parties to the Agreement that Intermedia will sell the twelve fibers to Dade County. Notwithstanding this, Intermedia also states that with the revisions to Chapter 364, effective October 1, 1991, alternative access vendors (AAVs) such as Intermedia may provide local private line service if the Commission finds it in

ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 3

the public interest. Intermedia further states that it would be premature and wasteful to revise the Agreement before the Commission defines the operational parameters of AAVs. In addition, Intermedia adds that enactment of the revision to Section 364.335(3) that allows the provision of local private line by AAVs further demonstrates that Southern Bell's complaint was and is premature.

Southern Bell responded to the Revised Position on February 6, 1991. In its response, Southern Bell argues:

Despite Intermedia's argument that it intends to sell the cable to Dade County even though the Agreement expressly states otherwise, it is an undisputed fact that Intermedia presently owns the fiber cable in Dade County and that the Agreement states that Intermedia will provide local private line service in Dade County over that fiber cable.

With respect to Intermedia's AAV argument, Southern Bell states that Intermedia is incorrect for two reasons: (1) Intermedia constructed a fiber cable facility to provide private line service prior to the time Chapter 364 was revised; and (2) the revised Section 364.337(3)(a), Florida Statutes, allows AAVs to provide "interexchange services" but does not allow private line "local exchange service". Southern Bell's second point is premised on its argument that it would be unreasonable to read the revised statute [Section 364.337(3)(a)] as allowing an AAV to provide local exchange private line service because such an interpretation would allow every IXC to become certificated as an AAV and thereby provide local exchange private line services.

II. Intermedia's Motion to Dismiss

Essentially, Intermedia's motion, as well as its subsequent revised position, argues that it intends to sell the fiber, thereby avoiding any violation of any statute, rule or order and that it is not actually doing anything pursuant to the contract between it and Dade County. Therefore, Intermedia states that Southern Bell's complaint is premature and should be dismissed.

Intermedia's arguments as to its "intent" are misplaced. It is a general maxim of contract law that the intent of the parties is to be divined from the terms of the agreement in question. Only

ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 4

if the intent of the parties cannot be determined from the four corners of the agreement does one resort to the subjective intent of the parties to the agreement. The Agreement clearly spells out that Intermedia will own, maintain and lease 12 strands of fiber optic cable to Dade County. As described above, the Agreement expressly provides:

6.01 Title. Title to the ICI [Intermedia] System and the County Building Cables shall be and remain with ICI during the term of this Agreement.

To further reinforce the written intent of the parties, the Agreement also provides:

17.11 Entirety of Agreement. The parties hereto agree that this Agreement sets forth the entire agreement between the parties, and there are no promises or understandings other than those stated herein. None of the provisions, terms and conditions contained in this Agreement may be added to, modified, superseded or otherwise altered, except as may be specifically authorized herein or by written amendment executed by the parties hereto.

The other provisions of the agreement are rife with references to the fact that ICI will continue to own, operate and maintain the fiber provided to Dade County.

The only suggestion of an intent within the Agreement to sell the fiber cables to Dade County is found in the following provision to the Agreement:

6.02 Transfer of Title. Upon (a) expiration of the Term of the Agreement, including any extension thereof, (b) termination of this Agreement by reason of default by ICI pursuant to Article 13(D), or (c) termination of this Agreement pursuant to the provisions of Article 13(C) of this Agreement, title to the fiber optic cable installed as part of the ICI system shall be automatically transferred and remain with the County.

From these specific provisions and from the Agreement as a whole, it is clear that Intermedia has contracted with Dade County to install, maintain and lease to Dade County twelve fiber optic

ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 5

cables as well as connecting several Dade County buildings to the Intermedia/Dade County fiber system. The intent of the parties cannot be clearer and Intermedia's protestations of "intent" are contrary to the terms in the Agreement.

The intent here is for Intermedia to provide local private line to Dade County at some point in the future in violation of Sections 364.33 and 364.335. This fact alone supports Southern Bell's request for an investigation. Intermedia's seeming suggestion that no investigation is warranted until after there is evidence of an actual violation as compared to an intended violation is ill founded. To the extent that the Commission can discover and hopefully prevent any violations of Statutes, Rules or Orders, the public is better served.

With respect to Intermedia's Revised Position, Intermedia cannot rely on the revisions to Chapter 364 to rehabilitate its Motion to Dismiss. While the revisions to Section 364.335 contemplate the provision local private line by entities other than the serving LEC, that decision has yet to be made by the Commission. Intermedia presumes too much when it seeks to have Southern Bell's petition for an investigation dismissed upon the assumption that the Commission will in the future find that the provision of local private line is in the public interest. Intermedia cannot use the potential authority of AAVs to justify an intended course of conduct that is clearly in violation of current law, particularly since that intended course of conduct predates the revisions to Chapter 364 by approximately one year. For the same reasons discussed above, we find it appropriate to deny Intermedia's Motion to Dismiss Southern Bell's Complaint.

III. Request for Investigation

Southern Bell's prayer for relief in its complaint asks the Commission to investigate the Company's allegations discussed above and to take appropriate action. According to Intermedia, construction and installation of Intermedia's proposed fiber network is progressing but is not yet complete. None of the installed fiber has been activated. Based on this information, it does not appear that Intermedia has committed any actual violation of any statute, rule or order within the Commission's jurisdiction. Accordingly, it does not appear that further investigation is warranted. Since there is no indication of a current violation, there is no direct action for the Commission to take. Therefore,

ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 6

we decline to further investigate Intermedia's actions in Dade County at this time and we will take no further action in this docket. This disposes of Southern Bell's Complaint. We note that our pending AAV proceeding in Docket No. 890183-TL will establish the future parameters for the provision of private line service by other than the local exchange companies. For this reason, further investigation may be premature.

It should also be noted that the Agreement clearly contemplates the performance of a currently unlawful act. Intermedia is certainly on notice that, if it performs the actions contemplated in its Agreement with Dade County, it would be in violation of current law as discussed above and the Commission could further investigate and take appropriate action in light of any violations.


Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Intermedia Communications of Florida, Inc.'s Motion to Dismiss Southern Bell Telephone and Telegraph Company's Complaint is denied as set forth in the body of this Order. It is further

ORDERED that Southern Bell's complaint is disposed of as set forth in the body of this Order. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission, this 17th
day of JUNE, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

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ORDER NO. 24675
DOCKET NO. 900299-TP
PAGE 7

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.