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April 1, 1994

Mr. Steve Tribble, Director
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via Hand Delivery

**Re: Petition for Expanded Interconnection for Alternate
Access Vendors within Local Exchange Company
Central Offices by Intermedia Communications of
Florida, Inc.; Docket No. 921074-TP**

Dear Mr. Tribble:

Enclosed for filing please find an original and fifteen copies
of Time Warner AxS of Florida, L.P.'s Response to Florida Cable
Television Association's Motion for Reconsideration and/or
Clarification of Order No. PSC-94-0285-FOF-TP for the above-
referenced docket. You will also find a copy of this letter
enclosed. Please date-stamp this copy to indicate that the original
was filed and return to me.

If you have any questions regarding this matter, please feel
free to contact me. Thank you for your assistance in processing
this filing.

Respectfully,

PENNINGTON & HABEN, P.A.

David L. Swafford
David L. Swafford

DLS/tmz
Enclosures

cc: All parties of record (w/ enclosures)

RECEIVED

JD

DOCUMENT NUMBER-DATE

03074 APR-1 1994

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expanded) Docket No.: 921074-TP
Interconnection for Alternate) Filed: April 1, 1994
Access Vendors within Local)
Exchange Company Central)
Offices by Intermedia)
Communications of Florida, Inc.)
_____)

RESPONSE BY TIME WARNER AXS OF FLORIDA, L.P.
TO FLORIDA CABLE TELEVISION ASSOCIATION'S
MOTION FOR RECONSIDERATION AND/OR CLARIFICATION
OF ORDER NO. PSC-94-0285-FOF-TP

Time Warner AxS of Florida, L.P. ("Time Warner"), pursuant to Florida Administrative Code Rule 25-22.060(3)(c), respectfully submits the following Response to the pending Motion for Reconsideration by Florida Cable Television Association ("FCTA") in the above-captioned docket to the Florida Public Service Commission ("FPSC" or "Commission").

- I. **TIME WARNER SUPPORTS THE MOTION FOR RECONSIDERATION BY FCTA IN THAT THE FPSC'S ORDER ALLOWING PRICE FLEXIBILITY DOES NOT FOLLOW OR EVEN ADDRESS THE STATUTORY MANDATES OF CHAPTER 364 WHICH GOVERN THE RELAXATION OF RATES FOR MONOPOLY SERVICE.**

In evaluating the merits of the Motion for Reconsideration, an initial look must be given to the order and the parameters by which price flexibility may be authorized for monopoly services. Addressing the issue of uniform pricing for telecommunications services, the Florida Legislature has enacted two sections in particular which establish the regulatory tenor for monopoly service pricing.

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FPSC-REGULATORY REPORTING

Section 364.08, Florida Statutes (1993), states that:

A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time. A telecommunications company may not . . . extend to any person any advantage of contract or agreement . . . not regularly and uniformly extended to all persons under like circumstances for like and substantially similar service.

Section 364.09, Florida Statutes (1993), expands upon this point by stating further that:

A telecommunications company may not, directly or indirectly, or by any special rate, . . . collect or receive from any person a greater or lesser compensation for any service rendered or to be rendered with respect to communication by telephone or in connection therewith, except as authorized in this chapter . . .

As a result of these two statutory pronouncements, all proposals attempting to alter the uniform provisioning of monopoly service rates must be strictly scrutinized by the Commission pursuant to the parameters promulgated by the Florida Legislature.

In its most recent rewrite of Chapter 364, the Florida Legislature has allotted a single rule of law to be applied on price flexibility issues. In its pronouncement of its legislative intent surrounding monopoly pricing issues, the Legislature stated as follows:

It is the legislative intent, where the Commission finds a telecommunications service is effectively competitive, market conditions be allowed to set prices so long as predatory pricing is precluded, monopoly ratepayers be protected from paying excessive rates in

charges, and both ratepayers and competitors be protected from regulated telecommunications services subsidizing competitive telecommunications services.

Section 364.338(1), Florida Statutes (1993). The Legislature further enacted specific controlling provisions of Chapter 364 which govern the Commission's determination of specific situations in which flexible pricing may be appropriate. Section 364.338(3)(a) states that

If the Commission determines, after notice and opportunity to be heard, that a service provided by a local exchange telecommunications company is subject to effective competition, the Commission may . . . exempt the service from some of the requirements of this Chapter and prescribe different regulatory requirements than are otherwise prescribed for a monopoly service.

Section 364.338 (3)(a), Florida Statutes (1993). Presently, only Section 364.338 addresses the issue of pricing flexibility and provides parameters for the implementation of any alternative pricing structure.

In its Final Order No. PSC-94-0285-FOF-TP (Issued March 10, 1994), the Commission ordered that the LECs are granted "zone-pricing" flexibility on a conceptual basis under the guidelines established by the FCC in Order No. 92-440, CC Docket No. 91-141. The LECs were also ordered to submit zone-density pricing plans using FCC-approved (or pending) interstate zone-density plans and tariffs as a guide, with variations and justifications where appropriate. The LECs were further required to file the results of their efforts or plans to streamline the contract service arrangement ("CSA") process. These mandates included in this order

acknowledge past price flexibility practices and allot for further flexibility in monopoly service pricing without complying with section 364.338, Florida Statutes.

In each of these mandates, the Commission has failed to consider or address the effect of the price flexibility on the maintenance of basic local exchange telecommunications service; the ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions; the ability of competitive providers in relevant geographic or service markets to make functionally equivalent or substitute services available at competitive rates, terms, and conditions; the overall impact of the proposed regulatory change or price flexibility on the continued availability of existing services; whether the consumers of such service would receive an identifiable benefit from its provision on a competitive basis; or the degree of regulation necessary to prevent discrimination in the provisioning of such service pricing flexibility. By failing to consider these various issues, the Commission has expressly rejected the mandates of the Florida Legislature and ignored the prerequisite determination of "effective competition" required by section 364.338(2), Florida Statutes, before authorizing a flexible pricing structure.

In evaluating situations such as this where an administrative body has disregarded statutory mandates, courts have stated that:

the imposition of a clear, mandatory, legal duty to perform an official act only under particular circumstances implies an equally clear, mandatory legal duty to rescind on demand any attempted official action done otherwise than in conformity to the essential

requirements of the law as laid down in the statute under which the legal duty is derived.

West Flagler Amusement Company v. Rose, 165 So.2d 60, 62 (Fla. 1935). As in the *Rose* opinion, the Public Service Commission has not complied with the expressed statutory mandates for relaxed regulatory treatment of monopoly service. As such, the "misconception of the law on its part . . . should accordingly be recalled, rescinded, and vacated and a new order made by the Commission in conformity to the law [as pronounced by the Florida Legislature.]" *Id.* at 63.

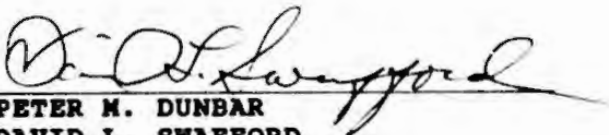
II. GIVEN THE COMMISSION'S DESIRE TO COMPLY WITH THE LEGISLATURE'S MANDATES IN CHAPTER 364, RECONSIDERATION IS THE APPROPRIATE REMEDY TO CORRECT THE MISTAKES IN ORDER NO. PSC-94-0285-POP-TP PERMITTING MONOPOLY SERVICE PRICE FLEXIBILITY.

Florida courts have stated that the purpose of a petition for reconsideration is bring to the attention of the administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance. *Hollywood, Inc. v. Clark*, 15 So.2d 175 (Fla. 1941). Numerous judicial opinions have set out that reconsideration is appropriate in situations involving an agency misinterpretation of the law so long as the matter is still within the inherent power of the administrative body to reopen or modify a final order after it has become final. *Peoples Gas System, Inc. v. Mason*, 187 So.2d 335, 338 (Fla. 1966); and *Stuart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315, 317 (Fla. 1974).

Within the context of the instant case, the FPSC has failed to address several statutory provisions which prohibit the relaxed pricing of monopoly services on an individual basis. The FPSC has also failed to comply with the statutory provisions through which monopoly price flexibility may be authorized. As such, the FPSC has promulgated an order based upon a mistaken interpretation of the law. Furthermore, as the final order continues to be within the inherent power of the Commission, reconsideration is the appropriate means for the reevaluation and correction of these mistakes.

As such, Time Warner supports the FCTA Motion for Reconsideration and further respectfully moves the Commission to reevaluate its Order No. PSC-94-0285-FOF-TP and clarify the issues related to price flexibility.

RESPECTFULLY SUBMITTED this 1st day of April, 1994.



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CERTIFICATE OF SERVICE
DOCKET NO. 921074-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on this 1st day of April, 1994, to the following parties of record:

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