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REPLY TO:
P.O. BOX 10095
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April 18, 1994

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
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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**

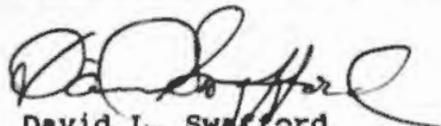
Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies of Time Warner AxS of Florida, L.P.'s Response to Southern Bell Telephone and Telegraph Company's Motion to Strike 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.

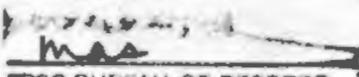
If you have any questions regarding this matter, please feel free to contact me. Thank you for your assistance in processing this filing.

Respectfully,

PENNINGTON & HABEN, P.A.


David L. Swafford
Special Consultant

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EPSC-BUREAU OF RECORDS

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cc: All parties of record (w/ enclosures)

DOCUMENT NUMBER-DATE
03588 APR 18 1994
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In 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
Filed: April 18, 1994

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**TIME WARNER AXS OF FLORIDA, L.P.'S
RESPONSE TO SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY'S MOTION TO STRIKE**

Time Warner AxS of Florida, L.P. ("Time Warner") hereby respectfully opposes Southern Bell Telephone and Telegraph Company's ("Southern Bell") Motion to Strike and requests the entry of an order by the Florida Public Service Commission ("FPSC") granting the Response filed by Time Warner to the Florida Cable Television Association's ("FCTA") Motion for Reconsideration of Order No. PSC-94-0285-FOF-TP.

THE FLORIDA ADMINISTRATIVE CODE DICTATES THAT THE RESPONSE FILED BY TIME WARNER IS GOVERNED BY RULE 25-22.060 AND AS SUCH SHOULD BE PERMITTED TO SUSTAIN AS A VALID FILING IN THIS DOCKET.

In its Motion to Strike, Southern Bell argues that the response filed by Time Warner should be governed by Rules of Civil Procedure and Rule 25-22.037(2)(b) of the Florida Administrative Code. As such, Southern Bell argues that Time Warner's response be excluded from consideration as these rules do not allow responses in support of a motion for reconsideration. A reading of the Florida Administrative Code dictates that these arguments are unfounded.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

To begin, Rule 25-22.037(2)(b) does not apply to the instant case. This section of the Florida Administrative Code states as follows:

25-22.037 Motions.

All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. ... Every written motion may be accompanied by, or included in, a written memorandum stating, the grounds upon which the motion is based. Other parties to a proceeding may, within seven (7) days of service of a written motion, file written memoranda in opposition.¹

Rule 25-22.037(2)(b), F.A.C. A plain reading of this section reveals that it addresses the general motion practice before the FPSC; however, this section does not specifically address motions for reconsideration.

Motions for Reconsideration pending before the FPSC are instead addressed by Rule 25-22.060 which states substantively as follows:

25-22.060 Motion for Reconsideration.

(1)(a) Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order.

¹ These provisions are identical to Rule 28-5.101 of the Model Rules enacted by the Administration Commission which shall apply "to all proceedings under section 120.57 ... to the extent that an agency has not adopted its own rules on procedure covering the subject matter." Rule 28-5.101, F.A.C. The Model Rule was newly promulgated on March 3, 1980, while its counterpart implemented by the FPSC followed on December 21, 1981. Given the exact language between the two, there is little doubt that the model rule served as the basis for the FPSC rule.

(b) A party may file a response to a motion for reconsideration...

(f) ... A party who fails to file a written response to a point on reconsideration is precluded from responding to that point during the oral argument.

(2) Contents. Any motion or response filed pursuant to this rule shall contain a concise statement of the grounds for reconsideration, and the signature of the counsel, if any.²

Rule 25-22.060, F.A.C. A plain reading of this rule reveals that responses may be filed any party. Unlike rule 25-22.037, the rule does not state that the responses must be limited to those "in opposition" to the Motion for Reconsideration. The numerous omissions of this language by the FPSC evidences that these responses need not be limited to those in opposition to the Motion for Reconsideration.

In such situations of the affirmative omission of language, case law dictates that the rule of "*expressio unius est exclusio alterius*", the mention of one thing implies the exclusion of all others. The United States Supreme Court has directly addressed this point in a case which originated in Florida. The court in *Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983), reasoned that "where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress

² Rule 25-22.060 was adopted by the FPSC on the same day as Rule 25-22.037, nearly two years following the original implementation of the Model Rule governing motion practice, Rule 28-5.204. As the Model Rules do not have specific rules addressing motions for reconsideration, this enactment was an affirmative break from past practices involving motions for reconsideration.

acts intentionally and purposely in the disparate inclusion or exclusion." This pronouncement has been followed by several Florida courts. See generally: *Devin v. City of Hollywood*, 351 So.2d 1022 (Fla. 1976); *Thayer v. State*, 335 So.2d 815 (Fla. 1976); *Graham v. Asar*, 204 So.2d 193 (Fla. 1967); and *D.A.O. v. Department of Health and Rehabilitative Services*, 561 So.2d 380 (Fla. 1st DCA 1990). Given this legal precedent, the omission of the "in opposition to" language dictates that the Time Warner response must be permitted as a valid response to the FCTA Motion for Reconsideration in accordance with Rule 25-22.060.

While Southern Bell failed to cite this provision of the Florida Administrative Code in its Motion to Strike, it does argue that the Rules of Florida Civil Procedure further prohibit the Time Warner response. A plain reading of the rules governing practice and procedure before the FPSC, however, dictate that the Rules of Florida Civil Procedure are not applicable to the instant case. Rule 25-22.035 directly addresses the applicability of the Florida Rules of Civil Procedure to matters before the FPSC. Rule 25-22.035 states that:

Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedure where conflict arises between the two.

As the Commission has addressed the procedures governing Motions for Reconsideration in Rule 25-22.060, Rule 25-22.035 dictates that the Florida Rules of Civil Procedure will not apply to these

matters. Consequently, Southern Bell's application of the Florida Rules of Civil Procedure to the Time Warner Response is misplaced.

In conclusion, Southern Bell's application of rule 25-22.037, F.A.C., and the Florida Rules of Civil Procedure are erroneously applied to the instant case. The Time Warner response must instead be evaluate within the context of Rule 25-22.060 which allows all parties to respond to Motions for Reconsideration. Pursuant to this rule, Time Warner respectfully requests the denial of Southern Bell's Motion to Strike.

RESPECTFULLY SUBMITTED this 18th 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 18th day of April, 1994, to the following parties of record:

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