FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

APRIL 20, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (REITH, MARSH, NORTON) WDH
DIVISION OF LEGAL SERVICES (CANZANO)

RE: DOCKET NO. 921074-TP - PETITION FOR EXPANDED INTERCONNECTION FOR ALTERNATIVE ACCESS VENDORS WITHIN LOCAL EXCHANGE COMPANY CENTRAL OFFICES BY INTERMEDIA COMMUNICATION OF FLORIDA, INC.

AGENDA: MAY 2, 1995 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\CMU\WP\921074TP.RCM

CASE BACKGROUND

By Order No. PSC-95-0034-FOF-TP, issued January 9, 1995, the Commission decided various issues related to switched access interconnection and local transport. The parties have filed motions for reconsideration and responses to those motions regarding the final order in this docket. This recommendation addresses the relevant motions under each applicable issue as set forth below.

STANDARD OF REVIEW

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla 1st DCA 1981). It is not an appropriate venue for rehashing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

DISCUSSION OF ISSUES

ISSUE 1: Should the LECs be required to file zone-specific cost information in support of their zone density pricing tariffs? If so, should a 90-day extension of the due date for filing tariffs be granted? [MARSH]

RECOMMENDATION: No. The LECs should be permitted to file average incremental cost data in support of their zone density pricing tariffs. To the extent that the proposed rates for each of the zones differ from the average incremental cost data provided, the LECs must provide information sufficient to reflect how the costs for each zone differ from the average. Such information should include the key cost drivers, a description of the extent to which each key cost driver varies by zone, and an estimate of how the incremental cost would vary by zone based on the zone-to-zone differences in the value of the key cost drivers. Since zone-specific cost studies are not required, no extension of time is necessary. The zone density pricing tariffs and cost support should be filed as part of the Local Transport Restructure tariffs no later than 90 days following the issuance of the order codifying this recommendation. The cost support should be clearly noted as to which portion pertains to zone density pricing.

STAFF ANALYSIS: In Order No. PSC-95-0034-FOF-TP, the Commission approved the concept of zone density pricing for switched access interconnection, and ordered the LECs to file tariffs within 90 days of the issuance of the final order in Phase II of this proceeding. Zone density pricing allows the LECs to base their switched access rates on the density of DS1s in a given central office. Thus, rates would vary from central office to central office. However, all interconnectors in a given office would pay the same rates.

GTE Florida Incorporated (GTEFL) filed a Request for Clarification and Request for Extension, If Necessary regarding the portion of Order No. PSC-95-0034-FOF-TL that requires the LECs to file zone density pricing plans. United Telephone Company and Central Telephone Company of Florida (United/Centel) filed a Motion for Reconsideration or In the Alternative Motion for Extension of Time regarding the same subject matter. Since United/Centel's motion was filed one day after the last day for reconsideration, staff will treat United/Centel's motion as a request for extension of time to comply with the order.

Specifically, the paragraph in question states:

> Within 90 days following the issuance of this Order or the Order on reconsideration of this Order, whichever is later, the LECs shall be required to file their zone density pricing tariffs, including supporting incremental costs [sic] data. In addition, to the extent possible, each LEC shall identify the amount of any costs such as groups [sic] specific costs, that, while not directly attributable to one of these elements, is associated with this service. (Order, p. 45)

United/Centel states that it can support its proposed zone-specific rates with average incremental cost data within the specified period (i.e., no later than 90 days following the issuance of the final order), but zone-specific cost data will require additional time. However, if it is the Commission's intent that United/Centel's zone-density pricing tariffs be supported by zone-specific cost studies, United/Centel will require six months to prepare this data, or 180 days.

GTEFL asked for clarification of the Commission's Order. The first request for clarification concerns zone density pricing tariffs. GTEFL points out that the Order approves zone density pricing for the local transport elements of switched access and directs the LECs to use the FCC's zone density pricing concept as a guide. If LECs wish to deviate from the FCC scheme, they must identify variations and justify them. (Order at 65.)

GTEFL argues that, at the federal level, LECs were generally not required to file cost studies to support their zone pricing filings. However, this Commission has directed LECs to include "supporting incremental cost data" with their zone density tariffs. Because this Commission mandate is itself a variation from the FCC concept, GTEFL states that it is unclear as to its effect. GTEFL assumes that it need only file one set of costs to support its zone filing, rather than zone-specific cost studies. GTEFL argues that it can discern no good reason for zone-specific studies. As the Company understands the Order, the Commission is primarily concerned with cost differentials between switched transport options, rather than between zones.

GTEFL also requests a 90-day extension if the Commission does expect zone-specific studies. The Company argues that if zone-specific studies are required for Florida, they will need to be developed from scratch. This is a very complex process that will take at least six months.

GTEFL has also requested clarification concerning the relationship between the local transport restructure (LTR) and zone density pricing filings. The Company states that the Order seems to contemplate two separate filings--one for LTR and one for zone pricing. However, in practical terms, it seems that only one filing would be necessary. This tariff filing would set forth each switched transport element in association with three different rates, according to the zone in which a customer is located. Before GTEFL begins to develop its tariff revisions, it would like to know whether one or two filings are required. If two are required, the Company asks the Commission to clarify the relationship that is supposed to exist between rates in the LTR filing and those in the zone pricing filing.

Staff agrees with the companies that average incremental cost studies should be filed with the zone density pricing plans. Staff cannot detect what portion of the Order leads the companies to believe it would be necessary to file zone-specific cost studies, and assumes the companies are acting in an abundance of caution in seeking clarification of this point. We do not intend this to be a burdensome process; however, we do wish to have an opportunity to review and analyze cost data in support of the rates, even though it may not have been provided at the federal level. The intent of the requirement to submit incremental cost data was to enable staff to determine to what extent the specific zones and associated rates were supported by underlying cost characteristics.

Our concern is that rates should be above incremental cost. We must caution the LECs that if any of the proposed zone rates, particularly zone 1 rates, are below the average incremental cost for all zones, the burden will be on the LECs to demonstrate how the costs for that zone differ from the average. Similarly, the LECs must be able to support that the rates for zone 3 are reasonable in relation to zone 1 and 2 rates. It will be sufficient to identify the key cost drivers, describe the extent to which each key cost driver varies by zone, and estimate how the incremental cost would vary by zone based on the zone-to-zone differences in the value of the key cost drivers.

The companies have requested an extension to file if zone-specific cost studies are required. Since such studies have not been requested, no extension of the 90-day filing date is necessary.

Additionally, the zone density pricing tariff may be filed as part of the LTR tariff. The rates are an integral part of the LTR tariff, so it would make no sense to file a separate tariff. However, staff does wish to see the cost data clearly identified as

being in support of the zone density pricing portion of the tariff, so that a separate analysis may be undertaken. This data does not need to be filed separately.

Staff recommends that the LECs should be permitted to file average incremental cost data in support of their zone density pricing tariffs. To the extent that the proposed rates for each of the zones differ from the average incremental cost data provided, the LECs must provide information sufficient to reflect how the costs for each zone differ from the average. Such information should include the key cost drivers, a description of the extent to which each key cost driver varies by zone, and an estimate of how the incremental cost would vary by zone based on the zone-to-zone differences in the value of the key cost drivers. Since zone-specific cost studies are not required, no extension is necessary. The zone density pricing tariffs and cost support should be filed as part of the Local Transport Restructure tariffs no later than 90 days following the issuance of the order codifying this recommendation. The cost support should be clearly noted as to which portion pertains to zone density pricing.

ISSUE 2: Should the Commission grant IAC's Motion for Partial Reconsideration of Order No. PSC-95-0034-FOF-TP regarding DS3-DS1 cross-over points? [NORTON]

RECOMMENDATION: No. Reconsideration is unnecessary because the Order does not presume that a DS3-DS1 pricing ratio in the range of 14-21 would be reasonable. Therefore no reconsideration is necessary. However, in an abundance of caution and given IAC's concern that the language in the order might be construed to "prejudge" rates or cross-over points, staff recommends deleting the language on page 58 of the order which reads: "We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. We expect any proposals that substantially differed from that range to be thoroughly supported."

STAFF ANALYSIS: IAC filed a timely motion for "partial reconsideration" stating that it generally supported the Final Order and its conclusions on local transport restructure. However, it seeks reconsideration of one element of the decision: the Final Order's statement at page 58 that a DS3-DS1 pricing ratio in the range of 14-21 would be presumed reasonable. IAC further states that a "14-21 ratio is not supported by the record in this proceeding and is inconsistent with the goals expressed by the Commission in the Final Order." In its motion, IAC reviewed and lauded the analysis and conclusions that led the Commission to require incremental cost studies to be filed by the LECs and the guidelines it would apply to determine appropriate rates when filed. IAC then goes on to say:

> Had the Commission stopped there, IAC believes that it would have clearly established the criteria to judge refiled tariffs and obligated the LECs to provide the information to do so. However, in a later section of the Final Order, the Commission effectively prejudges the result of this investigation...

IAC states that its concern rests with the following statement:

> We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. (Order, p. 58)

In support of its Motion, IAC argues that there is no testimony in the record supporting a DS3-DS1 cross-over range of 14-21, nor does the record support a fill factor of 50-75%. IAC

cites several instances during cross examination where Sprint witness Rock's proposed fill factor of 79% was discussed, but was not attacked by either the SBT witness or the SBT attorney. IAC concludes that "[a]s a result, the record of this proceeding contains unquestioned testimony that the current capacity utilization factor is 79 percent." (Motion, p. 6)

IAC argues that the 14-21 cross-over range used in the Final Order is inconsistent with the findings and policies of the order, and that the record shows that the cross-over ratio should exceed 22:1 based on existing "network utilization factors." Citing a different cross-over ratio therefore represents a "potential prejudgment of an important tariff review issue." IAC thus asks the Commission to "reconsider that portion of the Final Order which references cross-over ratios in the range of 14-21 to be acceptable. The Commission should modify the Final Order to remove the presumption of reasonableness of the 14-21 cross-over ratios and reserve judgment until it has reviewed the required cost data." (IAC Motion, p. 8)

United and Centel (UTF/CTF) filed a joint Memorandum in Opposition to IAC's Motion for Partial Reconsideration, and BellSouth (SBT) also filed a response. UTF/CTF argue that the Motion should be denied because it fails to show some point the Commission failed to consider, or which it overlooked when it issued its order. UTF/CTF argue that IAC is attempting to reargue a point because it disagrees with the order. UTF/CTF cites Teleport witness Andreassi's testimony that Teleport prices its DS3-DS1 services such that the cross-over points range between 3.17 and 7.8, arguing that this constitutes evidence supporting lower cross-over ratios than those advocated by IAC.

UTF/CTF also point out that IAC's Motion fails to consider the full context of the goals expressed in the order, citing the following passage from page 58 of the order:

> ...we do not believe that a single criterion is sufficient by itself upon which to set a rate. Rather, all relevant factors should be considered in setting prices for Local Transport rate elements.

UTF/CTF therefore request that the Commission deny IAC's Motion.

In its response, SBT rebuts IAC's assertion that the Commission's statement at page 58 of the order was a "presumption," stating that the order itself calls the 14-21 range an "expectation," not a presumption. By way of contrast, SBT cites

the FCC's declaration that a 9.6 DS3-DS1 ratio is appropriate, as more properly characterizing a "presumption" than this Commission's order. SBT also recited the support and analyses that this order required to be filed along with the cost studies, noting that if the language in the order was intended to be a presumption, such support would not have been required, and on that basis, IAC's Motion is unfounded.

In addition, SBT argues that there is ample record to support a 14-21 range had the Commission determined it to be reasonable. SBT takes issue with IAC's conclusions concerning the 79% percent fill factor testified to by witness Rock. SBT cites Late Filed Exhibit 30 and "cost data submitted by Southern Bell in the context of discovery" as containing utilization factors supported by SBT, in the record, and unrebutted by any party. SBT concludes that "the Commission's expectation as to the cross-over range was not intended to rise to the level of a presumption and therefore there is no need for reconsideration on this point," and that IAC's "petition" should be denied.

Staff does not believe that the Commission thought it was bound, nor should it be bound, to approve LEC proposed rates simply because the calculated cross-over points fall between 14:1 and 21:1 ratios. (A cross-over point of 14 in this instance means that rates for DS-1s and DS-3s are such that when a customer has 14 DS-1s it becomes economic to "cross over" to a DS-3. There are the equivalent of 28 DS-1s in a single DS-3 circuit.) The language in the order was intended to be clarifying rather than directive. In that this language may have confused the issue, however, staff recommends that this language be struck. The paragraph that contains the language that is the source of IAC's concern reads in full:

> We do not think it is appropriate to arbitrarily set a single cross-over point to be applied uniformly to all LECs for all transport services. However, LECs shall in their tariff filings make a showing that explains why the cross-over points achieved in their pricing proposals are appropriate for their network or for their competitive situation. **We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. We expect any proposals that substantially differed from that range to be thoroughly supported.** (Order, p. 58--language to be struck is in bold)

As noted by Southern Bell in its response, the order also requires cost support as well as several analyses justifying their

proposed prices. Staff will review the required analyses, and request any further data and support that we deem necessary to ensure that the tariffs comport with all the guidelines set forth in the Commission's order. We will review information on existing as well as efficient fill factors on both DS-1 and DS-3 circuits. This will help us evaluate the contribution levels in the proposed rates. If efficient cross-over points fall between 14 and 21, we will recommend such. If efficiency requires different rates such that cross-over points fall outside that range, staff will recommend that to the Commission.

Staff recommends that the Commission not grant reconsideration to IAC, because the original intent and decision by the Commission have not changed. However, in an abundance of caution so as not to mislead, the staff recommends that the Commission, on its own motion, strike the language on page 58 which reads, "We expect efficient cross-over points to fall in ranges between 14 and 21, which is approximately 50-75% capacity utilization at the economic cross-over point. We expect any proposals that substantially differed from that range to be thoroughly supported."

ISSUE 3: Should the Commission grant Teleport's and Intermedia's Motions for Reconsideration regarding its interpretation that Sections 364.335 and 364.337, Florida Statutes, prohibit alternate access vendors from interconnecting with the LEC switch for the provision of switched access? [CANZANO]

RECOMMENDATION: No. The Motions for Reconsideration by Teleport and Intermedia should be denied. Neither motion raises a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the order in the first instance.

STAFF ANALYSIS: Teleport Communications Group, Inc. (Teleport) and Intermedia Communications of Florida, Inc. (Intermedia) have filed Motions for Reconsideration regarding the Commission's interpretation in Order No. PSC-95-0034-FOF-TP that alternate access vendors (AAVs) are prohibited by law from interconnecting with the local exchange company switch for the provision of switched access service. BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell) filed a Memorandum in Opposition to those motions.

Intermedia states that the

> purpose of a motion for reconsideration is not to reargue the merits of the case, but to afford the Commission the opportunity to avoid fundamental error. In addressing fundamental error . . ., ICI will focus on why the Commission's decision is fundamentally flawed, not why previously advanced positions should have been embraced.

Intermedia is merely attempting to rehash matters simply because it disagrees with the Commission's decision. Sections 364.335 and 364.337, Florida Statutes, carve out a specific niche of telecommunications services in which an AAV can compete with the LECs. Staff believes that the AAVs are merely attempting to enlarge that niche.

Teleport and Intermedia challenge the Commission's interpretation of the controlling statutes. Specifically, Section 364.337(3)(a), Florida Statutes, states that

> 'alternate access vendor services' means the provision of private line service between an entity and its facilities at another location or dedicated access service between an end-user and an interexchange carrier by other than a local exchange telecommunications company. . .

In addition, private line service is defined in Section 364.335(3), Florida Statutes, as

> any point-to-point service dedicated to the exclusive use of the end-user for the transmission of any public telecommunications service.

The Commission held that

> . . . switched access transport is not dedicated transport and does not meet the statutory requirements in Sections 364.335 and 364.337. To allow AAVs switched access interconnection would be adding a switch between an AAV and the end-user. The AAV's position is, in essence, a mere extension of the AAV's network into the switched services arena. (Order, p. 23)

Essentially, Intermedia and Teleport set forth two primary arguments in their motions. Specifically, they contend that local transport constitutes the provision of private line service and that an IXC is an end-user within the meaning of the statute. Other arguments that they set forth will also be addressed.

Southern Bell asserts that the motions should be denied because both failed to identify any error in the Commission's legal determination of the meaning of the statute. Both motions failed entirely to raise any matter that the Commission has overlooked in reaching the decision that the plain language of Section 364.337 prohibits AAVs from carrying switched access traffic. Instead, Southern Bell states that both parties "embark upon a variety of abstruse attempts to establish points that, in the final analysis, are simply irrelevant to the core statutory interpretation of the Order." (Southern Bell Response Motion, p. 4)

I. LOCAL TRANSPORT

Teleport contends that local transport constitutes the provision of private line service between an entity and its facilities. In its reconsideration motion, Teleport reiterates this argument which it set forth starting on page 8 of its posthearing brief. The Commission specifically rejected Teleport's contention that local transport constitutes provision of private line service on pages 22 and 23 of the Order.

Southern Bell notes that in its posthearing brief, Intermedia made the creative, albeit implausible, argument that the transport of traffic from a LEC central office, or end office, to an IXC

should not be viewed as an access service, either special or switched, but rather as a private line service. The Commission rejected this argument in its Order. Further, the Commission focused upon the type of traffic that AAVs can legally carry.

The Order provides that switched access service consists of four major rate elements: Carrier Common Line, Local Switching, Local Transport and Busy Hour Minute of Capacity. (Order, p. 48) Essentially, Intermedia and Teleport seek to isolate the local transport component from the definition of switched access service. Once separated, they seek to redefine this portion of access service as private line service. The Commission rejected this notion and instead looked at the entire transmission path to determine whether there was private line or dedicated service.

> With expanded interconnection for switched access, the customer controls the destination of a transmission by way of the LEC's switch, in that it could be any local call or a long-distance call. Thus, the end-user is not being provided dedicated private line service or special access. Section 364.337 states that AAVs can provide only private line service or special access service between an end-user and an interexchange carrier. (Order, pp. 22 and 23)

Further, the Commission reached the same conclusion upon analyzing Intermedia's position, specifically that if the transmission passes from the end-user through the LEC's switch, it is a switched service which the AAV is prohibited from transporting. See Order, p. 26.

In its Motion for Reconsideration, Teleport reargues that an AAV can provide local transport services from an IXC's office to the "IXC's switched access facilities at a local exchange carrier's office," because an AAV would be providing private line service. First, this concept was rejected in the Order. Second, Teleport twists definitions. An IXC has a point of presence to which AAVs carry special access. AAVs are also permitted to provide private line service between two of an IXC's POPS. The IXC is prohibited from switching at the local exchange level. AAVs have always had the ability to transport switched traffic between a single IXC's points of presence. If an IXC interconnects at the LEC's central office, the IXC is not an end-user.

Another question raised by Teleport is whether the private line is connected to the IXC's facilities. Teleport states that

switched access facilities, called Feature Groups, will be ordered by the IXC. Thus, Teleport asserts that the IXC must be the customer of record for these feature groups so that its presubscribed customers can reach it over those facilities. If the AAV were the customer of record then only customers presubscribed to the AAV would be completed to that facility. Thus, Teleport continues, the Feature Groups are facilities used by the IXC, and the AAV-provided private line connects to them as permitted by the rule.

Staff believes that Teleport's assertion fails. There is no private line connected to the IXC's facilities as discussed above. Again, although the IXC may order services and be a customer in that sense, the IXC is not the end-user of the toll service; thus, it is not a private line service. Teleport admits to transporting switched traffic on the interstate level which is permitted; however, Teleport, like all AAVs, is prohibited from transporting switched traffic at the local exchange level.

Intermedia argues that the Commission committed a fundamental error when it ruled that an AAV may not provide dedicated transport of switched access traffic from its point of collocation to an IXC's point of presence. Intermedia asserts that the Commission confused legal interpretation with policy analysis and misconstrued its own orders when it announced as a matter of law a definition of end-user not contemplated by the legislature and inconsistent with how the Commission viewed that term in the past.

Intermedia asserts that the Commission misapprehends the meaning of the two AAV orders. (Order Nos. 24877 and 25546) Intermedia contends that the Orders clarify that in determining whether a service is dedicated, the key is what happens to the traffic once it enters the AAV's network. Intermedia states in its reconsideration motion that

> If an actual or virtual dedicated transmission path is guaranteed, then the AAV may provide it; if the AAV cannot guarantee that the dedicated path is invulnerable to alteration by the end-user of the path, then it is not a private line. (Intermedia Reconsideration Motion, pg 4)

Intermedia cites to language in the AAV order that states that AAVs are viewed to be prohibited from providing switched traffic from within their networks. As stated previously, the Commission held that the AAV's position is, in essence, a mere extension of the AAV's network into the switched services arena. Although

Intermedia believes the Commission misconstrues its own orders, Intermedia makes an interesting point. Indeed, it is precisely because an AAV cannot guarantee the path is invulnerable to alteration by the end-user that the Commission held that the path is not dedicated. In construing the statutory provisions, the Commission looked to the entire transmission path starting from the end-user, not solely from the point the AAV receives its portion to transport, to determine whether or not there is private line service or special access service.

In response to Intermedia's arguments, Southern Bell states that although the prospect of the Commission misconstruing it own orders is unlikely, even if Intermedia is correct, this point ultimately does not matter. Southern Bell argues that because the Commission's interpretation of Sections 364.335 and 364.337 is correct, the portion of the Order construing past decisions is fundamentally impeachable. Staff agrees with Southern Bell. Further, staff believes the Commission interpreted its own orders and the statute correctly.

Accordingly, Teleport and Intermedia have not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its Order regarding local transport. Therefore, staff recommends that Intermedia and Teleport's motions for reconsideration should be denied as to this issue.

II. END-USER

Teleport also asserts that the definition of end-user for operator service providers should not be applied to access facilities. Teleport asserts that IXCs are end-users for access services. Staff believes that Teleport merely disagrees with the Commission's determination that an IXC is not the end-user for private line service.

Intermedia contends that the Commission confused policy definitions with statutory interpretation in restricting the scope of the term "end-user." Specifically, Intermedia takes issue with the Commission's look at the definition of end-user referred to in the Operator Service Provider rules, because Intermedia asserts that the legislature had different objectives for regulating these entities. Staff believes that the Commission merely looked to this provision for guidance, because the statute does not define end-user. Staff asserts that Intermedia twists definitions of end-

user, subscriber, and customer in attempting to persuade the Commission that AAVs can transport a portion of switched traffic.[1]

Staff agrees with the logic set forth by Southern Bell. Southern Bell notes that common sense dictates that the end-user ultimately obtains a telecommunications service, not an entity that buys a portion of a service and then repackages it for resale. In this case, the IXC is the provider of a service to an end-user. Access is a component of the service that is purchased either from the LEC or AAV and then resold to the end-user. Southern Bell states that the Commission defined end-user in the only logical manner.

Accordingly, Teleport and Intermedia have not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its Order regarding its definition of end-user. Therefore, staff recommends that Intermedia and Teleport's motions for reconsideration should be denied as to this issue.

III. UNBUNDLING TRANSPORT

Intermedia asserts that the Commission's decision suffers from fundamental error because it unbundles transport from switching and then rejects that unbundling in its interpretation of the statute. Although the Commission's Order approves expanded interconnection which would make it technically possible for a non-LEC to carry switched traffic without actually doing the switching, the Order does not change the clear statutory prohibition of any attempt by an AAV to carry this traffic. Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its Order regarding transport. Therefore,

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[1] In fact, Intermedia uses a "Euclidean proof" in a footnote in its motion to persuade the Commission that a subscriber is an end-user. (If A=B, and B=C, therefore A=C; If subscriber = customer, and customer = end-user, therefore, subscriber = end-user) However, Intermedia's attempt fails. The transition theorem requires all parts to be equal and herein lies the problem. The Commission defines these terms differently than Intermedia. For example, a customer of a service is not always the end-user and for that matter, neither is the subscriber. The "proof" fails because all the parts of the equation are not equal. Thus, as the Commission has already determined, a subscriber of a service is not always an end-user of the service.

staff recommends that Intermedia's motion for reconsideration should be denied as to this issue.

IV. BYPASS RESTRICTION

Intermedia states that the bypass prohibition was driven by a desire to protect LEC switching from bypass, not transport. Again Intermedia takes too narrow of a view. The bypass restriction set forth in Order No. 16804 provides that "IXCs shall not be permitted to construct facilities to bypass the LECs unless it can be demonstrated that the LEC cannot offer the facilities at a competitive price and in a timely manner." The purpose of the bypass prohibition in Order No. 16804 was to protect local exchange switched access and local exchange special access from uneconomic facilities bypass.

Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its Order regarding the bypass restriction. Therefore, staff recommends that Intermedia's motion for reconsideration should be denied as to this issue.

V. LEGISLATIVE INTENT

Intermedia argues that Chapter 364 has the overarching goal of fostering competition and then claims that the Commission's interpretation of Chapter 364.337 is anticompetitive and contrary to the statute in general. Intermedia is merely rearguing its position set forth on pages 18 and 26 of its posthearing brief, which the Commission contemplated but nonetheless rejected by its ultimate holding. Further, it is a well-established rule of statutory construction that specific statutory provisions control over the more general provisions. Fletcher v. Fletcher, 573 So. 2d 941 (Fla. 1st DCA, 1991) Staff agrees with Southern Bell's statement that the general policy of Chapter 364 of promoting competition cannot override the language of the statutory provision that directly and specifically applies.

Accordingly, Intermedia has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider. Therefore, staff recommends that Intermedia's motion for reconsideration should be denied as to this issue.

V. CONFLICT WITH FCC

Teleport also contends that the Commission's order may be in conflict with the FCC's switched access expanded interconnection policies. If the Commission's Order is not changed, Teleport is concerned that once a consumer places an intrastate long distance call two things could happen. First, if the only trunks available to complete those calls are Feature Groups provisioned from a collocation arrangement, the LEC may block those calls, which would not be consistent with public interest. Second, the LECs could require that all IXCs that use AAV facilities must have their intrastate switched access calls completed over separate connections which could only be purchased from the LEC. Teleport contends that this would create clear discrimination since the LEC's switched access customers would be permitted to combine their interstate and intrastate traffic on the same facility while the AAV's customers would not.

Initially, staff notes that there is no express order of preemption from the FCC of intrastate interconnection. The Commission is not bound by the FCC's expanded interconnection decision. Staff further notes that the Commission's decision is essentially consistent as a whole with the FCC's decision. Finally, the Commission is bound by Florida Statutes. Sections 364.335 and 364.337 specifically limit the services which an AAV can provide, as discussed by the Commission in the Order. Thus, Teleport's concerns fail because AAVs are prohibited by statute from providing these services.

Thus, staff believes that the Motions for Reconsideration by Teleport and Intermedia should be denied. Neither motion raises a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the order in the first instance.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No.

STAFF ANALYSIS: This docket should remain open pending resolution of Phase I.