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December 4, 1995

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 920260-TL

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Opposition to FIXCA's Motion to Stay, which we ask that you file in the captioned docket.


A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

- ACK ✓
- AFA 3
- APP _____
- CAF _____
- 2 Enclosures
- CC: _____
- cc: All Parties of Record
- _____ R. G. Beatty
- _____ A. M. Lombardo
- _____ 5 R. Douglas Lackey
- _____ 1
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Sincerely,

J. Phillip Carver

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CERTIFICATE OF SERVICE

Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 4th day of Dec. 1995, 1995 to:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of)
revenue requirements and rate)
stabilization plan of Southern)
Bell.)

Docket No. 920260-TL

Filed: December 4, 1995

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MEMORANDUM IN OPPOSITION TO FIXCA'S MOTION TO STAY**

BellSouth Telecommunications, Inc., ("BellSouth", or "Company"), hereby files, pursuant to Rule 25-22.037, Florida Administrative Code, its Memorandum in Opposition to the Motion for Stay of the Florida Interexchange Carriers Association ("FIXCA") and states the following:

Under Rule 25-22.061(2), the Florida Public Service Commission ("Commission") should consider three questions in determining whether to grant a stay of a final Commission Order pending judicial review:

- (a) Whether the petitioner is likely to prevail on appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.¹

¹ Although Rule 25-22.061 lists these three items only as factors to be considered, in White Construction Co. v. Dept. of Transportation, 526 So.2d 998, 999 (Fla. 1st DCA 1988), the First District Court of Appeal sustained an administrative agency's denial of a motion to stay because the petitioner failed to sustain the burden of establishing these three items.

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FIXCA has failed entirely to establish any one of these three prerequisites to the granting of a motion for stay. This reason standing alone, requires that FIXCA's motion be denied. Moreover, a close examination of FIXCA's motion reveals that FIXCA is attempting to obtain a stay, not just to delay the implementation of BellSouth's ECS plan, but to prevent implementation of this plan altogether. Specifically, FIXCA contends that the Commission should stay implementation of the ECS plan and, instead, substitute for it the refund mechanism FIXCA advocated at the hearing, and which this Commission rejected. Thus, FIXCA seeks, by the filing of its motion, to effectively prevent the implementation of the plan that this Commission expressly found to best serve the public interest. This misuse of a procedural mechanism to contravene the result of a substantive decision by this Commission must not be allowed.

I.

FIXCA attempts to establish that it is likely to succeed on appeal by arguing that this Commission erred in its legal rulings that (1) the prior version of Chapter 364 applies, (2) that the ECS service in question is a non-basic service as defined by the revised Chapter 364; and that, therefore, (3) no imputation test is required. FIXCA has failed entirely, however, to demonstrate that this Commission has committed reversible error. As legal support for its contention that it is likely to prevail upon appeal, FIXCA cites to nothing more than a string of general

authority for the essentially uncontroversial proposition that a court will reverse an agency's interpretation of law when it is wrong. (FIXCA Motion, p. 4)

FIXCA, however, neglects to even mention the pertinent principles of statutory interpretation or the standard of review that applies to the Commission's application of these principles.² Instead, FIXCA simply quibbles with the results reached by the Commission by, in substantial part, rehashing arguments that it has previously made, and that the Commission rejected by the entry of the Final Order in this matter. Further, even if FIXCA's burden on appeal were to do nothing more than establish that its position is better taken than the Commission's, the arguments set forth in its motion fail to do even this.

The Final Order (Order No. PSC-95-1391-FOF-TL) premised the finding that the prior version of Chapter 364 applies largely upon the language of Section 364.385(2), a portion of the savings clause. Under this section, whether the prior or revised version of Chapter 364 applies depends upon whether a matter has proceeded to hearing by July 1, 1995. (Order at p. 6) Accordingly, this Commission determined that it was appropriate

² A Final Order of this Commission reaches the Appellate Court "clothed with a presumption of correctness and will not be disturbed in the absence of a positive showing that it is erroneous as a matter of law or constitutes an abuse at discretion." Clayton v. Clayton, 275 So.2d 588, 589 (Fla. 1st DCA 1973).

to apply the old law because "this proceeding (Docket 920260-TL) 'progressed to the stage of hearing' in January, 1994." (Order at p. 6) In its motion, FIXCA responds to this fact by pointing out that the implementation agreement contemplates that there would be hearings as to the disposition of each of the refunds identified in Paragraph 4 of that agreement. FIXCA then contends that because the hearing as to this particular refund happened to occur after July 1, 1995, the new law must necessarily apply.

In reaching this conclusion, FIXCA simply ignores the substance of the Commission's interpretation of the pertinent statutory provision. The Order stated expressly that this proceeding was set to be heard in January 1, 1994 and that the hearing did not occur then only because the parties reached a settlement, which the Commission approved. Obviously, this proceeding has gone through numerous stages with a number of operative dates for the various phases. Given this, the Commission has made the determination that the appropriate date to utilize for the purpose of applying the statute is the original hearing date, not the date of any given subsequent hearing that is contemplated under the settlement agreement. This choice obviously makes sense because using the original hearing date is the only way to make sure that the same law is applied to all aspects of the Commission-approved implementation agreement, a result clearly supported by the language of Section 364.385(3). Moreover, FIXCA has provided absolutely nothing to

support its conclusion that the Commission's choice of the original hearing date for this purpose is improper under the statute, or is otherwise legally impermissible.

FIXCA also argues that the Commission erred in its finding that the ECS plan proposed by BellSouth constitutes a basic service. FIXCA's argument in support of its contention, however, simply misses the point. Again, the Order states that Section 364.385(3) reserves "the Commission's authority with respect to Order No. PSC-94-0172-FOF-TL." (Order at p. 8) The Order notes that in two previous contexts the Commission has treated ECS as a basic service: "GTE Florida Incorporated's ECS plan approved by the Commission in Docket No. 910179-TL (Order at p. 7), and in Order No. PSC-94-0572-FOF-TL, which was issued May 16, 1994 in Docket No. 911034-TL as a result of an agreement between FIXCA and BellSouth. The Order then states that in the given context, the Commission "believe[s] the same treatment is appropriate for this proposal." (Order at p. 8) Accordingly, "[t]he authority granted by the legislature with respect to this docket permits the Commission to approve this proposal in a similar framework." (Order at p. 8)

FIXCA responds to this ruling by stating among other things, that "clearly, this agreement does not address the basic/non-basic classification since it was entered into long before the new statute was enacted and defined such terms." (FIXCA's Motion at p. 9) While this statement is certainly correct, it is also

entirely irrelevant. To the extent FIXCA is attempting to make the point that the settlement agreement between BellSouth and FIXCA is not a binding statement of what must be done in this case, BellSouth would have to agree. This is simply not what the Commission ruled, however. Instead, the Commission ruled that under the appropriate portion of the "savings clause", it has the authority to implement Order No. PSC-94-1072-FOF-TL, that it treated the ECS plan in a way that is consistent with its being a basic service in the past, and that it is appropriate to exercise the Commission's authority to do so in this case as well. FIXCA offers absolutely nothing to establish that this decision is an abuse of discretion, or a misuse of the Commission's clearly stated authority under Section 364.385(3) to apply and enforce the terms of Order No. PSC-94-1072-FOF-TL.³

FIXCA has failed to establish that it is likely to prevail on appeal. In fact, FIXCA has failed even to address the appropriate legal standard for an appeal much less show that, judged against this standard, the decision of the Commission is in error as a matter of law. Instead, FIXCA has done nothing more than disagree with the Commission's holding without setting

³ The Order also concludes that because the plan constitutes a basic service, no imputation test is required. Thus, the issue of whether BellSouth's plan would pass an imputation test (an issue upon which there was conflicting evidence at the hearing) was not reached. (Order, p. 8)

forth any legal basis to support its notion that the Order is in error.

II.

As to the second prerequisite to the granting of a motion to stay, FIXCA has provided no support for the contention that it will suffer irreparable harm in the absence of a stay. FIXCA makes the bald allegation that the implementation of BellSouth's ECS plan will result in the eradication of competition on the affected routes. FIXCA's support for this contention relates primarily to dialing patterns and the charges that its members pay for access -- factors that were addressed by the testimony of the parties, and fully before the Commission when it made its decision in this case. Against this background, this Commission specifically found that "there is no cognizable argument that this plan would, as a matter of law, remonopolize the intraLATA toll market." (Order at p. 14) FIXCA offers nothing to demonstrate that this finding is unsupported by substantial competent evidence or otherwise an abuse of discretion.

Instead, FIXCA simply takes as a given that, contrary to the Commission's finding, BellSouth's ECS plan will necessarily result in competitive damage to FIXCA's members. FIXCA then leaps to the far-fetched conclusion that any damage that might occur will necessarily be irreparable. FIXCA bases this contention on the wholly unsupported allegations that IXC's "would be shut out of the market", and that "once they leave the

market as result of the Commission's decision [they] will have a very difficult time returning to the position they were in prior to ECS implementation". (FIXCA Motion at p. 13) In this exceedingly cursory portion of its motion, however, FIXCA provides no factual or legal support whatsoever for its contention that its members will be driven from the market by the implementation of ECS or that they could not reenter the market at some subsequent time. Thus, while FIXCA has alleged irreparable harm, it has failed utterly to establish this necessary element.

III.

Finally, the Commission must consider whether the delay would be contrary to the public interest. FIXCA's motion should be summarily rejected because it is directly in conflict with the public interest. In both the testimony offered at the hearing, and later in its Brief, FIXCA contended that the Commission should reject BellSouth's ECS plan and, instead, require BellSouth to refund the \$25 million by way of a credit on customers' bills.⁴ The Commission, of course, rejected FIXCA's position along with all of the other proposals other than BellSouth's. In doing so, this Commission specifically stated that "we believe that it is in the public interest to approve BellSouth's ECS plan. All residential and business customers

⁴ See, FIXCA's Post-Hearing Brief, page 3.

making calls in the ECS routes will benefit by approximately \$48 million annually (unstimulated) from the approval." (Order, p. 15)


FIXCA now implausibly contends that the public interest will not be harmed by staying the implementation of the plan that the Commission has specifically found to be in the public interest. Moreover, the manner in which FIXCA makes this argument clearly reveals its true purpose in filing the Motion for Stay. FIXCA does not attempt to justify any delay in providing a refund to customers, or in implementing the plan. Instead, it states that "during the pendency of the stay, the ratepayers will not be harmed in any way because they will receive the benefit of the BellSouth settlement via a refund of the \$25 million as a credit to their bills as expressly provided for in the settlement." (FIXCA Motion at p. 14) Thus, FIXCA is not advocating merely that the Commission stay the implementation of BellSouth's ECS plan. FIXCA is, instead, advocating that the Commission effectively do away with the ECS plan entirely and replace it with the alternative that FIXCA advocated at the hearing, and which was rejected by this Commission. Thus, by filing its Motion for Stay, FIXCA is doing nothing less than attempting to misuse a procedural mechanism to obtain the effective reversal of the Commission's decision merely by filing a notice of appeal. If FIXCA is allowed to prevail by this tactic, the result will undeniably contravene what has expressly been determined in this

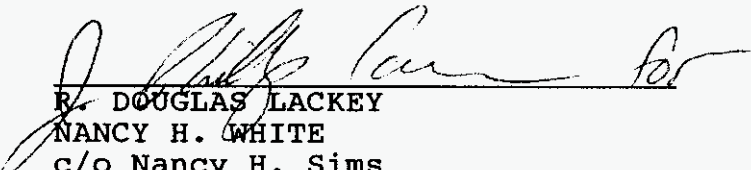
case to be in the public interest, i.e., the implementation of ECS.

In conclusion, FIXCA has failed utterly to demonstrate that it is likely to succeed on appeal, that, in the absence of a stay it will suffer irreparable harm, or that the granting of a stay is in the public interest. To the contrary, FIXCA's attempt to obtain a stay in this proceeding is nothing more than a transparent attempt not only to delay, but effectively to prevent, the implementation of the ECS plan, which this Commission specifically found to be in the public interest. For all of these reasons, FIXCA's Motion for Stay should be denied.

Respectfully submitted this 4th day of December, 1995.

BELLSOUTH TELECOMMUNICATIONS, INC.


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