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February 20, 1996

IN REPLY REFER TO:

Tallahassee

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

ORIGINAL
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Re: Resolution of Petition to Establish Non Discriminatory Rates, Terms, and Conditions for Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies pursuant to Section 364.162, Florida Statutes - Docket No. 950985-TP

Dear Ms. Bayo:

Enclosed for filing in the above-styled docket are the original and fifteen (15) copies of United/Centel's Motion on Issues and Parties. A copy of this document is included in WP 5.1 format on the accompanying disk.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

J. Jeffry Wahlen

JJW/csu
1 Enclosures
5 cc: All parties of record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of Petition to Establish Non Discriminatory Rates, Terms, and Conditions for Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies pursuant to Section 364.162, Florida Statutes	DOCKET NO. 950985-TP Filed: 02/20/96

UNITED TELEPHONE COMPANY OF FLORIDA AND
CENTRAL TELEPHONE COMPANY OF FLORIDA'S
MOTION ON ISSUES AND PARTIES

Pursuant to Commission Rule 25-22.037, Florida Administrative Code, UNITED TELEPHONE COMPANY OF FLORIDA and CENTRAL TELEPHONE COMPANY OF FLORIDA ("Sprint-United/Centel" or the "Companies") move the Prehearing Officer for an Order that modifies the issues in this case so that resolution of those issues will be binding on all entities who are actively participating in the docket (e.g., MCImetro, AT&T, FCTA, Time-Warner, Continental and MFS)[1]. If that motion is denied, the Companies alternatively move the Prehearing Officer for an order dismissing all non-petitioning entities who are actively participating in this docket (e.g., MCImetro, FCTA and AT&T) on grounds that the substantial interests of those entities will not be determined by the Final Order in the Sprint-

[1]To the extent necessary, this motion can be considered as a motion for reconsideration of Order No. PSC-96-0214-PCO-TP, issued on February 14, 1996, insofar as it requests the Commission to change that part of Order 96-0214 which limits the definition of "ALEC" to Continental, Time Warner and MFS. The Companies anticipate and request that the matters discussed in this motion be considered and ruled on by the Prehearing Officer at the prehearing conference in this docket.

United/Centel phase of this docket. If the first two motions are denied, the Companies request as a third alternative that the Prehearing Officer allow the addition of Sprint-United/Centel's proposed legal issue number 15, as set forth in section IV, below.

I. Background

1. As it relates to Sprint-United/Centel, this proceeding began on October 20, 1995, when Continental Cablevision, Inc. ("Continental") filed its amended petition seeking the establishment of interconnection arrangements that apply between Continental and Sprint-United/Centel. Continental's petition was followed by a petition from Time Warner AxS of Florida, L.P. ("Time Warner") seeking the same thing. Metropolitan Fiber Systems of Florida, Inc. ("MFS") filed its interconnection petition against Sprint-United/Centel on January 22, 1996. Continental, Time Warner and MFS (collectively, the "petitioners") are the only parties that have filed petitions directed to Sprint-United/Centel.

2. MCI Metro Access Services, Inc. ("MCImetro"), AT&T Communications of the Southern States, Inc. ("AT&T"), and the Florida Cable Television Association, Inc. ("FCTA") (collectively, the "non-petitioning entities") have not filed petitions directed to Sprint-United/Centel. On information and belief, these entities have not petitioned to intervene in the proceedings between Sprint-United/Centel and the petitioners. Nevertheless, MCImetro, AT&T and FCTA have each filed testimony as intervenors that purports to address the issues between the petitioners and Sprint-United/Centel. In addition, the non-petitioning companies have

filed prehearing statements and taken positions on the issues identified in the litigation between Sprint-United/Centel and the petitioners. Some of the non-petitioning entities have sent discovery requests to the Companies.

3. Order number PSC-96-0214-PCO-TP, issued February 14, 1996 ("Order No. 96-0214"), is a four page order that establishes a preliminary list of 14 issues. The order frames these issues as issues between Sprint-United/Centel and the petitioners by using the term "ALEC" and defining that term to mean Continental, Time Warner, and MFS, i.e., the petitioners. Thus, by implication, Order 96-0214 can be read to suggest that the decisions to be rendered by the Commission after the March 11-12 hearing in this docket will not bind[2] the non-petitioning entities, even though they will have fully participated in the case.

4. The force and effect of the final order establishing rates, terms and conditions for interconnection with Sprint-United/Centel to be issued by the Commission ("Final Order") was discussed at the workshop held on February 9, 1996. During that workshop, at least one of the non-petitioning entities took the preliminary position that it will not be bound by the rates, terms and conditions established in the Final Order in this proceeding, that it retains the right to later file a Petition to establish rates, terms and conditions for interconnection against Sprint-United/Centel, and that its participation in this proceeding would

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[2] i.e., whether the rates, terms and conditions for local interconnection set by the Commission in this docket will apply.

not bar a later petition to set interconnection rates by that entity.

II. The Issues Should Apply to and Bind All Entities Participating in this Proceeding.

5. Contrary to the way Order No. 96-0214 is worded, the issues in the proceedings between the petitioner and Sprint-United/Centel should be worded so that resolution of the issues in this docket is binding on all entities who are actively participating in the docket (i.e., MCImetro, AT&T, FCTA, Time-Warner, Continental and MFS). While it appears that the non-petitioning entities have not filed formal petitions to intervene in the litigation between the Companies and the petitioners, they have filed testimony as intervenors and apparently intend to be treated as such. If that is true, they should be bound by the rates, terms and conditions for interconnection set for Sprint-United/Centel in this docket.

6. On this point, Florida law is clear. As noted in Greenhut Construction Company v. Knott, 247 So.2d 517, 519-520 (Fla. 1st DCA 1971), "an intervenor is a party for all purposes and with the same rights and privileges of other parties to the cause. An intervenor is bound by the Court's judgement entered in the cause and may appeal any ruling adverse to him." (Emphasis added.)

7. That being the case, if the non-petitioning entities (MCImetro, FCTA, and AT&T) wish to continue acting as intervenors, they should be bound by the rates, terms and conditions for interconnection set by the Commission in this proceeding for Sprint-United/Centel, and the issues in this case should be changed

to so reflect. If they do not wish to be bound by the rates, terms and conditions for interconnection set for Sprint-United/Centel by the Commission in this proceeding, they should agree to withdraw their prefiled testimony and discovery requests, and to voluntarily dismiss themselves from the proceeding.

III. If the Non-Petitioning Entities Are Not Bound by the Rates, Terms and Conditions Set by the Commission for Sprint-United/Centel, and the Non-Petitioning Entities Do Not Agree to Voluntarily Dismiss Themselves, They Should Be Dismissed From the Proceeding by Order of the Prehearing Officer.

8. The non-petitioning entities cannot have it both ways. If the issues are not amended to reflect the fact that resolution of the issues in this docket binding on all entities who are actively participating in the docket (i.e., MCImetro, AT&T, FCTA, Time-Warner, Continental and MFS), the non-petitioning entities should be dismissed[3] from the proceeding on grounds that their substantial interests will not be affected in the proceeding, i.e., they do not have standing.

a. The Applicable Legal Standard

9. To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section

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[3]Whether the Prehearing Officer can "dismiss" entities that have not petitioned to intervene in the litigation between the petitioners and the Companies is not clear. If the Prehearing Officer finds that they have not properly intervened in the litigation between the petitioners and the Companies, an order so stating and precluding those entities from further participation in the proceeding would reach the same result.

120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect[4]." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id. Florida law is well developed on what it takes to satisfy each of these requirements.

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[4]This showing is usually introduced in a petition to intervene and supported by evidence on the record at the final hearing. The Commission's policy on intervention is addressed in Rule 25-22.039, F.A.C., which states as follows:

> **Intervention.** Persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petition for leave to intervene must be filed at leave [sic] five (5) days before the final hearing, must conform with Commission Rule 25-22.036(7)(a), and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it. (Emphasis supplied).

In the absence of petitions to intervene from MCImetro, AT&T and FCTA alleging how their substantial interests will be affected by the outcome of the litigation between the petitioners and the Companies, it is not clear how these entities feel their substantial interests will be affected.

b. Injury in Fact

10. Indirect, speculative, conjectural, hypothetical or remote injuries are not sufficient to meet the "injury in fact" prong of the Agrico standing test. There must be either an actual injury or an immediate danger of a direct injury to meet this test. If they are not bound by the rates, terms and conditions for interconnection set by the Commission for Sprint-United/Centel, the non-petitioning entities (MCImetro, AT&T, and FCTA) will not suffer an injury in fact of sufficient immediacy to entitle them to continue to participate as intervenors. Three frequently cited cases demonstrate the need for immediate, rather than speculative, injury.

11. In Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987), the residents of a mobile home park attempted to initiate a Section 120.57 proceeding to challenge an approval by the Department of Business Regulation of a mobile home park prospectus. The prospectus addressed, among other things, the circumstances and manner under which rents and other charges in the park may be raised. The residents alleged that approval of the prospectus immediately made the park less attractive, diminishing their property values, and that certain of the provisions in the prospectus may have a chilling effect on the resolution of grievances. The court found such allegations insufficient to demonstrate immediate injury in fact. It found the allegations to be "speculative" and, at best, an allegation of what "may" happen rather than an allegation that an injury has in fact occurred. Id.

12. On rehearing the court reinforced its reliance on the Agrico standing test and elaborated on the immediate injury in fact requirements. It stated that, "Agrico requires that a party show that he will suffer an immediate injury as a result of the agency action." 506 So.2d at 432. The court went on to state:

> [A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct. See O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) and Jerry, 353 So.2d at 1235. The court in Jerry therefore concluded that a petitioner's allegations must be of 'sufficient immediacy and reality' to confer standing.
>
> Accordingly, our construction of Agrico, Firefighters, and Jerry leads us to the conclusion that a petitioner can satisfy the injury-in-fact standard set forth in Agrico by demonstrating in his petition either: (1) that he has sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action.

506 So.2d at 433.

13. In Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989), several physician organizations, including the Society of Ophthalmology, requested a Section 120.57(1) formal proceeding with respect to the entitlement of certification of each and every optometrist the State Board of Optometry proposed to certify pursuant to a rule and an application form that had been adopted without a rule. The physician organizations argued that their substantial interests would be affected by each such

certification, specifically, that (1) the right of the physicians to practice medicine pursuant to Chapter 458 was encroached upon by the authorization of optometrists to use and prescribe medications, and they had been denied due process as to the diminution of this property right, (2) the quality of eye care would decline as optometrists were certified to use and prescribe medicine, presenting a danger to the public, including the physicians' patients, and (3) the public was uninformed as to the distinction between ophthalmologists and optometrists, and the certification of optometrists would further confuse the public, in turn causing the physicians to suffer economic injury. The Board of Optometry and the First District Court of Appeals found that these allegations did not establish standing to participate.

14. In its analysis, the court first found there was no statute specifically authorizing physicians to participate in the optometrists' certification proceedings. Id at 1285. Therefore, the court reasoned that the organization's standing was "necessarily predicated upon a finding that their substantial interests will be injuriously affected by the Board's action." It then observed that other than the potential economic impact on their practices, the interests of the physicians would not be affected any differently than the interests of the general public. Id. The court then concluded that the allegations failed to meet the first prong of the Agrico test:

> While appellants may well suffer some degree of loss due to economic competition from optometrists certified to perform services that appellants alone were previously permitted to perform, we fail to see how this

> potential injury satisfies the 'immediacy' requirement.

Id.

15. Similarly, in International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3d DCA 1990), the court found that an association of jai alai players had not alleged that its members would "suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57. . . ." 561 So.2d at 1225. There, the players association sought to challenge an application to change opening and closing playing dates, operating dates and makeup performance dates. The players argued that their substantial interests would be injured because the date changes would:

> aid the fronton owners in their labor dispute with the Association and thus will either break or prolong the ongoing strike of the Association to the economic detriment of its members.

The court found that this alleged interest was "far too remote and speculative in nature to qualify under the first prong of the Agrico standing test," and that the other injuries were "equally remote, speculative, or irrelevant." 561 So.2d at 1226.

c. "Zone of Interest"

16. The second prong of the Agrico standing test requires that, "the injury must be of the type or nature the proceeding is designed to protect." 406 So.2d at 482. This requirement is sometimes called the "zone of interest" test. See, Society of Ophthalmology, 532 So.2d at 1285.

17. Typically, when applying the "zone of interest" test, the agency or court examines the nature of the injury alleged in the

pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. If not, because the party is outside the zone of interest of the proceeding, the party lacks standing. For instance, in Suwannee River Area Council Boy Scouts of America v. State Department of Community Affairs, 348 So.2d 1369 (Fla. 1st DCA 1980), the Department of Community Affairs and the First District Court of Appeals held that an adjoining landowner did not have standing to request a formal hearing regarding the Department's issuance of a binding letter addressing whether a development constituted a Development of Regional Impact under Chapter 390:

> [w]e recognize it is not the purpose of chapter 380 to provide a forum for parties whose complaints focus on alleged detriment to activities they wish to conduct on adjoining land.

Similarly, in Grove Isle, Ltd. v. Bayshore Homeowners' Association, 418 So.2d 1046 (Fla. 1st DCA 1982), the court held that a homeowners association, alleging that construction of a marina would interfere with their enjoyment of and lead to the pollution of Biscayne Bay, did not have standing to request a formal hearing as to whether a lease of state submerged lands was needed for a developer to build a marina. The court noted that under the statutory scheme a determination that no lease was required did not insulate the developer from permitting regarding marina construction and that the homeowners association had not shown how it was affected any more than the general public by a decision not to require a lease. Another finding that the injuries alleged fell outside the required "zone of interest" of the underlying statute

was made in Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987), when the court affirmed a decision that the College of Boca Raton did not have standing in a cemetery licensing proceeding under the Florida Cemetery Act to raise concerns as to whether the cemetery would increase "traffic congestion" or create an "atmosphere not conducive to higher education." 511 So.2d at 1065. The court found "these types of injuries to be far outside the regulatory purpose of the Act and therefore the Department's rules do not create a right of participation for the College." 511 So. 2d at 1066. In each instance the court looked to the controlling statute to gauge whether the injuries alleged by the person were of the nature to be protected.

d. Conclusion

18. If the rates, terms and conditions for interconnection set by the Commission for Sprint-United/Centel are not applicable to the non-petitioning entities, any injury they may suffer will be abstract at best. If they are not bound by the rates, terms and conditions for interconnection set by the Commission for Sprint-United/Centel, the non-petitioning entities (MCImetro, AT&T, and FCTA) will not suffer an injury in fact of sufficient immediacy to entitle them to continue to participate as intervenors. If Section 364.162, Florida Statutes (1995), creates a system under which only an ALEC that actually files a petition to set interconnection rates is bound by the resulting rates, then other ALECs[5] do not fall

[5]In this context, the term "ALEC" includes ALECs who have been certificated and those who may become certificated in the future and whose interests are being represented by an affiliate or an

within the "zone of interest" contemplated by the legislature for proceedings under Section 364.162, Florida Statutes, and the non-petitioning entities should be dismissed.

19. While the non-petitioning entities may argue that they are entitled to participate in this proceeding to protect themselves against the development of adverse "incipient policy," that argument has no merit. This proceeding is not a rulemaking proceeding, and is not intended to set Commission policy. Rather, if the applicability of the issues as explained in Order No. 96-0214 remains unchanged, the sole purpose of this proceeding is to set the rates, terms and conditions to be paid by Continental, Time Warner and MFS when they interconnect with Sprint-United/Centel.

20. Even if the rate, terms and conditions to be paid by Continental, Time Warner and MFS when they interconnect with Sprint-United/Centel will reflect some measure of "incipient policy," the non-petitioning entities are not entitled to participate in this proceeding to protect against that possibility. Under Florida's Administrative Procedures Act, an agency may not apply nonrule policy in a final order affecting the substantial interests of a party unless the nonrule policy has a predicate in the record of the proceeding. The nonrule policy must be stated, supported by evidence, and explained, and will be subject to challenge and rebuttal by the parties to the proceeding. If the agency fails to explain adequately its nonrule policy or the nonrule policy is not supported by evidence in the record, the agency's action will be set aside and the cause will be remanded

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association.

for further proceedings. McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977); see also Florida Cities Water Co. v. Florida Pub. Serv. Comm'n, 384 So.2d 1280, 1281 (Fla. 1980) (In an appeal from an order in a rate proceeding, the Court held that the Commission's decision to disallow certain deductions consistent with its policy was not supported on the record and remanded).

21. The lessons in McDonald and Florida Cities are clear. If the rates, terms and conditions for interconnection set by the Commission for Sprint-United/Centel are not applicable to the non-petitioning entities, and those entities retain the right to file a Section 364.162 petition against Sprint-United/Centel in the future, any incipient policy developed in this proceeding cannot be applied against them without full support on the record and an opportunity for them to challenge that policy in the proceeding on their petition. Accordingly, the non-petitioning entities may not participate in this proceeding to protect themselves against the development of adverse "incipient policy," and should be dismissed from this proceeding.

IV. If the First Two Motions are Denied, the Commission Should Allow and Decide a New Legal Issue Regarding the Applicability of the Final Order to the Non-Petitioning Entities Participating in this Proceeding.

22. The Prehearing Officer should grant one or the other of the first two motions set forth above. If both motions are denied, the Companies wish to add an additional legal issue to this proceeding as follows:

Issue 15 (legal): To what extent are the non-petitioning parties that actively participate in this proceeding bound by the Commission's decision in this docket as it relates to Sprint-United/Centel?

23. Under Rule 25-22.038, F.A.C., and the Orders on Procedure in this docket, raising new issues is permitted before the issuance of the prehearing order. Sprint-United/Centel would prefer for the issues raised in their first two motions to be resolved by the Prehearing Officer at the prehearing conference scheduled for March 1, 1996. However, in an abundance of caution, the Companies are raising new issue 15 in this motion and in their prehearing statement to put the parties on notice that they intend to pursue this issue at the prehearing conference and thereafter as necessary to reach a conclusion to the matters raised by the first two motions, above.

V. Conclusion

24. One bite at the apple is enough. If a non-petitioning entity (MCIMetro, AT&T or FCTA) fully participates in the litigation between Sprint-United/Centel and the petitioners, that entity should be bound by the Commission's decision on rates, terms and conditions for interconnection. An ALEC[6] should not have an opportunity to participate fully in this proceeding, take advantage of that opportunity, and then later ignore the decision reached in this proceeding by filing its own petition under Section 364.162, Florida Statutes.

25. While Section 364.162, Florida Statutes (1995), may create a system which entitles an ALEC to negotiate with an ILEC on

[6]See footnote 5.

rates, terms and conditions for local interconnection, and to petition the Commission for a decision if those negotiations fail, it does not contemplate a system where an ALEC can fully litigate the rates, terms and conditions for local interconnection with an ILEC, and then re-litigate those issues again under the guise of its own petition if it is unhappy with the result reached in the initial litigation. While it sometimes may be difficult to determine the intent of the Legislature, this is an area where reason and the promotion of regulatory efficiency must prevail.

26. Accordingly, all entities that participate in the proceedings between the petitioners and Sprint-United/Centel should be bound by the Commission's decision. The wording of the issues or the identity of the parties participating in this case should be adjusted to so reflect.

WHEREFORE, Sprint-United/Centel respectfully request that the Prehearing Officer enter an Order modifying the issues in this case so that resolution of the issues in this docket binding on all entities who are actively participating in the docket (i.e., MCImetro, AT&T, FCTA, Time-Warner, Continental and MFS). If that motion is denied, the Companies request that the Prehearing Officer enter an order dismissing all non-petitioning entities who are actively participating in this docket (i.e., MCImetro, FCTA and AT&T) on grounds that the substantial interests of those entities will not be determined by the Final Order in the Sprint-United/Centel phase of this docket. If the first two motions are denied, the Companies request that the Prehearing Officer allow the addition of Sprint-United/Centel's proposed issue number 15.

DATED this 20th day of February, 1995.

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ATTORNEYS FOR UNITED TELEPHONE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail or hand delivery (*) or overnight express (**) this 20th day of February, 1996, to the following:

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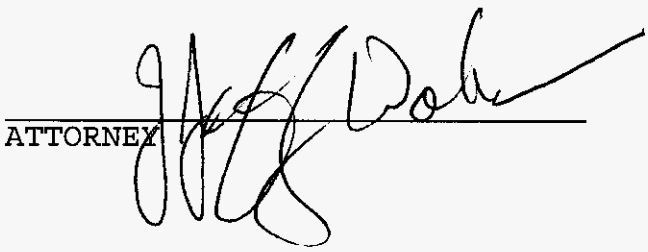

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