

605
R



Michael W. Tye
Sr. Attorney

Suite 700
101 N. Monroe Street
Tallahassee, FL 32301
904 425-6360
FAX: 904 425-6361

February 27, 1996

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

ORIGINAL
FILE COPY

Re: Docket No. 950984-TP
MFS v. United-Centel

Dear Mrs. Bayo:

Enclosed for filing in the above referenced docket are an original and fifteen (15) copies of AT&T's Response to United Telephone Company and Central Telephone Company of Florida's Motion on Issues and Parties.

Copies of the foregoing are being served on all parties of record in accordance with the attached Certificate of Service.

- ACK
- AFA _____
- APP _____
- CAF _____
- CMH *Chase*
- CTR _____
- EAG _____
- LEG 1 _____
- LIN 5 _____
- OPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

RECEIVED & FILED
mes
FPSC-BUREAU OF RECORDS

Yours truly,

Michael W. Tye
Michael W. Tye

Attachments

cc: J. P. Spooner, Jr.
Parties of Record

DOCUMENT NUMBER-DATE
U2408 FEB 27 96
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s))
to establish nondiscriminatory)
rates, terms, and conditions for)
resale involving local exchange)
companies and alternative local)
exchange companies pursuant to)
Section 364.161, Florida Statutes)
_____)

Docket No. 950984-TP

In re: Resolution of petition(s))
to establish nondiscriminatory)
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: February 27, 1996

AT&T'S RESPONSE TO
UNITED TELEPHONE COMPANY OF FLORIDA AND
CENTRAL TELEPHONE COMPANY OF FLORIDA'S
MOTION ON ISSUES AND PARTIES

AT&T Communications of the Southern States, Inc.

(hereinafter "AT&T"), pursuant to Rule 25-22.037, Florida
Administrative Code, hereby submits the following Response
to United Telephone Company of Florida ("UNITED") and
Central Telephone Company of Florida's ("CENTEL") Motion on
Issues and Parties filed in the above-referenced dockets.
UNITED and CENTEL are collectively referred to herein as
"SPRINT UNITED/CENTEL".

DOCUMENT NUMBER-DATE

02408 FEB 27 86

FPSC-RECORDS/REPORTING 899

BACKGROUND

1. On August 30, 1995, the Florida Public Service Commission ("Commission") issued its procedural orders opening the above-referenced dockets and establishing the procedural schedule to process petitions which the Commission anticipated would be filed by eligible local exchange companies ("LECs") or alternative local exchange companies ("ALECs") pursuant to Sections 364.161 and 364.162, Florida Statutes.

2. AT&T filed timely Petitions for Leave to Intervene in these proceedings requesting that the Commission designate it as a party of record because AT&T, as a certificated interexchange carrier ("IXC") in the State of Florida, has substantial interests that will be affected by the prices, terms and conditions under which ALECs interact with LECs.¹

4. One round of hearings has already been held in this docket. AT&T, as an interexchange carrier, actively participated in those proceedings to protect its substantial interests. In this phase of the proceedings, the Commission

¹ AT&T's Petition for Leave to Intervene was filed in Docket No. 950985-TP on September 15, 1995, and was filed in Docket No. 950984-TP on November 21, 1995.

held an issue identification conference on February 9, 1996 so that the petitioning parties and the respondent (in this case, SPRINT UNITED/CENTEL) could hopefully come to an agreement on what issues the parties were unable to agree upon after negotiation and how to best frame those issues for hearing. At this conference, the petitioning parties were defined as "ALECs" for the purposes of establishing the interconnection arrangements with SPRINT UNITED/CENTEL and such definition was included in the Prehearing Order issued by the Prehearing Officer.

4. SPRINT UNITED/CENTEL filed with the Commission Motion on Issues and Parties and a Request for Oral Argument at Prehearing Conference on Motions on Issues and Parties. AT&T files this Response to SPRINT UNITED/CENTEL's Motions.

I. **AT&T has Properly Intervened in these Dockets.**

Contrary to SPRINT UNITED/CENTEL's assertion, AT&T has properly intervened in these dockets by filing Petitions for Leave to Intervene in accordance with Section 25-22.039, Florida Administrative Code. That section permits persons, other than the original parties to a pending proceeding, to petition the presiding officer for leave to intervene. Such

petition must be filed at least 5 days before the final hearing, be in the proper form and contain allegations sufficient to demonstrate that the substantial interests of the intervenor will be affected through the proceeding.²

AT&T filed its Petitions for Leave to Intervene in these dockets because it has a substantial interest in the arrangements established between ALECs and incumbent LECs. As set forth in AT&T's petitions, AT&T is a certificated IXC in the State of Florida. As a certificated IXC, AT&T must use the local access services of LECs and will potentially use the local access services of ALECs to reach its customers. The prices, terms and conditions under which interconnection and unbundling/resale occur between LECs and ALECs could have a substantial impact on AT&T's ability to deliver interexchange services to its customers. Consequently, AT&T was granted intervenor status.

² Section 25-22.039 states:

"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. Petitions for leave to intervene must be filed at least 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."

The mere filing of additional petitions in these dockets does not necessitate the filing of another petition by AT&T to intervene. After Continental filed its amended petition on October 20, 1995, the Commission in a Memorandum explicitly stated that Continental's filing did "not affect the party status of any intervenor in this docket. Such parties shall be deemed parties in Continental's petition unless they notify the Commission otherwise."³ Thus, it is clear that no additional action is required of intervenors to maintain their status as such merely because additional petitioners and/or respondents become parties to this docket.

II. AT&T Should Not Be Required to Waive Its Statutory Right To Negotiate with the LECs and Petition the Commission for Resolution of Unresolved Issues as a Condition of its Participation in these Cases.

The Commission should not amend or modify its procedural order to include AT&T in the definition of an ALEC. If the Commission includes AT&T within this definition, thereby binding AT&T to any decisions reached in these cases, AT&T will be effectively precluded from

³ Memorandum from Donna Canzano, Staff Counsel, to all parties of record in Docket No. 950985-TP, dated October 25, 1995.

exercising its statutory rights to negotiate the prices, terms and conditions for interconnection and unbundling/resale between it and SPRINT UNITED/CENTEL.

The Florida statute gives each ALEC 60 days from the date that it is certificated to negotiate with a LEC mutually acceptable prices, terms and conditions of interconnection and unbundling/resale.⁴ If after this 60 day negotiation period the ALEC and LEC are unable to reach a mutually acceptable agreement, either party has the right to petition the Commission to establish those rates, terms and conditions.⁵

Additionally, the newly-enacted Telecommunications Act of 1996 affords parties the right to negotiate requests for interconnection, services, or network elements for a period of 135 days, at the conclusion of which the parties can petition the state commission to arbitrate any open issues.⁶ The new federal legislation also sets specific standards for deciding issues that are submitted to the state commission for arbitration.⁷

⁴ Sections 364.161(1) & 364.162(6), Florida Statutes.

⁵ Id.

⁶ Section 252(a) & (b), Telecommunications Act of 1996.

⁷ Section 252(c) & (d), Telecommunications Act of 1996.

When this petition was filed and the issues identified for Commission resolution, AT&T was not certificated as an ALEC in Florida and had no right to negotiate arrangements for the provision of local exchange service with SPRINT UNITED/CENTEL. Nor had the new federal law been enacted. AT&T filed to intervene in these dockets as a certificated interexchange carrier in the State of Florida whose customers and ability to serve those customers would be substantially affected by the rates, terms and conditions established between LECs and ALECs. It would have been inappropriate for this Commission to bind AT&T to any arrangements established between two local exchange companies merely because AT&T might one day become certificated as an ALEC in Florida.

The determination that AT&T should not be bound by the Commission's decision in these proceedings is not altered by the fact that AT&T filed a notice with the Commission on February 15, 1996 to become a certificated ALEC. Both the federal law and the Florida statutes clearly allow AT&T to negotiate with a LEC, including SPRINT UNITED/CENTEL, mutually acceptable arrangements and to seek resolution of unresolved issues from this Commission. Indeed, Continental

filed its October 31, 1995 Motion to Hold Proceedings in Abeyance with respect to GTE, UNITED and CENTEL because the parties had not had an opportunity to exercise its statutory right to negotiate for the 60 day period. AT&T should be afforded the same opportunity. If this Commission modifies the definition of ALEC to include AT&T such that it will be bound by the decisions in these cases, AT&T may be precluded from exercising its statutory rights to negotiate with SPRINT UNITED/CENTEL. Clearly, this result was not intended by the Florida Legislature or by Congress.

In essence, SPRINT UNITED/CENTEL is alleging that the decisions in these proceedings should have res judicata and collateral estoppel effect on the intervening parties. Although it is well settled that res judicata may be applied in administrative proceedings, res judicata is not an absolute doctrine and it has been clearly recognized that this doctrine should not be adhered to when its strict application will work an injustice, even though all the requisites appear.⁸ As the Flesche court recognized, the Commission should be more interested in the fair and proper

⁸ Flesche v. Interstate Warehouse, 411 So.2d 919, 924 (Fla. Dist. Ct. App. 1st. 1982); deCancino v. Eastern Airlines, Inc., 283 So.2d 97, 98 (Fla. 1973).

administration of justice than in rigidly applying a fiction of law designed to terminate litigation. Moreover, it has been recognized that the application of res judicata in administrative proceedings should be applied with "great caution".⁹

The Commission should exercise such caution in this case and not modify its order to include non-petitioning parties in the definition of an ALEC for the purposes of this proceeding because it would be unjust.

First, the issue of the applicability of res judicata and collateral estoppel was discussed by the parties in one of the initial proceedings involving BellSouth Telecommunications, Inc. ("BellSouth"). The parties and the Commission agreed that these doctrines would not be used to prevent intervenors from "having their day in court". It would be unfair for the Commission to change its position at this stage and preclude the non-petitioning parties from petitioning the Commission to establish appropriate arrangements between such parties and the relevant LEC.

Second, the Commission should not bind the non-petitioning parties to the decisions reached in these

⁹ Thomson v. Dept. of Environmental Reg., 511 So.2d 989, 991 (Fla. 1987).

proceedings as they pertain to the petitioners and SPRINT UNITED/CENDEL, because each ALEC has a right under Sections 364.161 and 364.162 of the Florida Statutes and under the Telecommunications Act of 1996 to negotiate with SPRINT UNITED/CENDEL and, if those negotiations fail, to bring an action before this Commission. Such rights cannot be taken away merely because SPRINT UNITED/CENDEL's negotiations with certain ALECs failed and such ALECs have filed petitions with the Commission to establish arrangements between themselves and SPRINT UNITED/CENDEL.

In addition, given the dramatic and rapid changes occurring in the telecommunications industry, not only in Florida with the revisions to Chapter 364 but also nationwide with the passage of the federal Telecommunications Act of 1996, the Commission is faced with "fluid facts and [potentially] shifting policies."¹⁰ It is likely that future negotiations will spawn different facts, new issues, additional information and changed circumstances that the intervenors are unable at this time to anticipate or identify. Indeed, since the petitions have been filed in this case and the issues as it relates to those petitioners

¹⁰ Thomson, 511 So.2d at 991.

have been identified, the Telecommunications Act of 1996 has been enacted, conferring specific rights on the parties and imposing specific duties and obligations on the incumbent LECs. Additionally, AT&T has filed to become certificated to provide local exchange service thereby triggering new statutory rights and duties with respect to AT&T.

This Commission should proceed with great caution and not modify its order to include the non-petitioning parties in the definition of ALECs, thereby binding such parties to the decisions reached in this case.

III. AT&T has Demonstrated that it has a Substantial Interest in the Outcome of this Proceeding and Therefore, Should Not be Dismissed.

The Commission should not dismiss AT&T from these cases involuntarily because AT&T has standing to participate. To have standing to participate in a Section 120.57 hearing, a party must show that it has a substantial interest in the outcome. Although SPRINT UNITED/CENTEL has accurately set forth the standard to be applied in determining whether a party has a substantial interest to afford it standing to participate in a Section 120.57 hearing, its contention that AT&T does not meet this standard is erroneous.

The District Court of Appeals has determined that before a party can be considered to have a substantial interest in the outcome of an administrative proceeding and thus be entitled to appear as a party, the party must show (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its substantial injury is of the type or nature which the proceeding is designed to protect.¹¹ AT&T meets both prongs of this test.

A. Injury in Fact

AT&T will suffer immediate and actual injury if the interconnection and unbundling/resale arrangements between SPRINT UNITED/CENTEL and the petitioners are established such that AT&T's interexchange customers will suffer a degradation in the nature and quality of telephony services. AT&T, as an IXC, must use the local access services of the LECs and will potentially use the local access services of ALECs to reach its customers. AT&T's ability to use these access services and to deliver interexchange services to its customers will be impacted by the decisions reached in these proceedings.

¹¹ Agrico Chemical Company v. Department of Environmental Regulation, et. al, 406 So.2d 478, 482 (Fla. Dist. Ct. App. 2d. 1981), *reh. den.*, 415 So.2d 1359, 1361 (Fla. 1982).

Specifically, AT&T must purchase local access from LECs and potentially ALECs so that AT&T's customers can complete long distance and toll calls to other Florida telephone subscribers. To the extent that the arrangements which are the subject of these proceedings increase the price that AT&T must pay in order to continue to provide service to its customers, AT&T will be harmed. Moreover, to the extent these proceedings establish terms and conditions that affect the quality of service and customers' ability to continue to have ubiquitous access to every Florida telephone subscriber, AT&T's ability to continue to deliver the type and quality of service that customers have come to know and expect will be substantially affected. Not only will AT&T's customers be affected by the decisions reached in these proceedings, all interexchange and local exchange customers will be affected. Thus, AT&T's interests in assuring that it is able to continue to deliver interexchange service of the highest quality and type satisfies the first prong of the Agrico test. If interconnection arrangements are established that will diminish AT&T's ability to purchase local access or deliver interexchange service to its customers, AT&T will suffer immediate and actual injury.

B. Nature of Injury

AT&T also satisfies the second prong of the Agrico test; that its injury is of the type or nature which this proceeding is designed to protect.

The Florida legislature, when it enacted Chapter 364, set forth certain principles and guidelines that the Commission must follow when interpreting and implementing the statute. Specifically the legislature found that:

the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage technological innovation, and encourage investment in telecommunications infrastructure.¹²

Moreover, the legislature requires that the Commission "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory constraint (emphasis added)."¹³

AT&T's ability to be a competitive telecommunications service provider is substantially affected by the access

¹² Section 364.01(3), Florida Statutes.

¹³ Section 364.01(4)(g), Florida Statutes.

arrangements established by LECs and ALECs. Not only will the nature and quality of interconnection and unbundling/resale between LECs and ALECs affect AT&T's ability to deliver service to its customers and effectively compete for customers, the arrangements could have a substantial economic impact on AT&T. To the extent those rates are affected, AT&T's ability to invest in telecommunications infrastructure and to develop new technology and services will be affected. Clearly, the legislature sought to protect all telecommunications service providers from suffering such injuries.

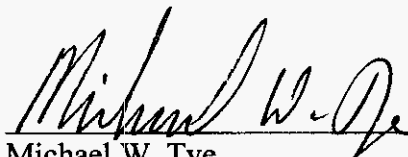
Moreover, the legislature sought to prevent anticompetitive behavior. SPRINT UNITED/CENTEL as a monopoly service provider of local exchange service has a stranglehold on access to local exchange customers. To the extent that SPRINT UNITED/CENTEL can use its position to stifle competition by hindering the ability of ALECs to interconnect with and use its network on fair and reasonable terms, AT&T and its customers will be injured. This is precisely the type of injury that the legislature sought to prevent.

Hence, this Commission should not preclude AT&T from participating in these proceedings because AT&T has a substantial interest in the outcome of these proceedings and will suffer immediate and actual injury of the nature and type the legislature sought to protect if SPRINT UNITED/CENTEL is permitted to hinder the establishment of fair and reasonable terms of interconnection and unbundling/resale.

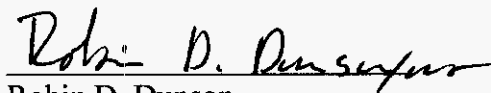
Conclusion

This Commission should deny SPRINT UNITED/CENTEL's requests because AT&T's substantial interests will be affected by the decisions reached at hearing.

RESPECTFULLY SUBMITTED this 27th day of February, 1996.



Michael W. Tye
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
(904) 425-6360



Robin D. Dunson
1200 Peachtree St., NE
Promenade I, Room 4038
Atlanta, Georgia 30309
(404) 810-8689

ATTORNEYS FOR AT&T
COMMUNICATIONS OF THE
SOUTHERN STATES, INC.

CERTIFICATE OF SERVICE

DOCKET NO. 950984-TP

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail or hand-delivery to the following parties of record this 27th day of February, 1996:

Charles Beck, Esq.
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

C. Everett Boyd, Jr., Esq.
Ervin Varn Jacobs & Odom
Post Office Drawer 1170
Tallahassee, FL 32302

Michael J. Henry, Esq.
MCI Telecommunications Corp.
780 Johnson Ferry Rd., Suite 700
Atlanta, GA 30342

Kenneth Hoffman, Esq.
Rutledge Ecenia et al
215 S. Monroe St., Ste. 420
Tallahassee, FL 32301

James Falvey, Esq.
Swidler & Berlin
3000 K St., NW, Ste. 300
Washington, DC 20007

Lee Willis, Esq.
Jeffrey Wahlen, Esq.
Macfarlane Ausley et al
228 S. Calhoun Street
Tallahassee, FL 32301

Donna Canzano, Esq.
Division of Legal Services
Florida Public Service Comm.
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0863

Floyd Self, Esq.
Messer Vickers et al
215 S. Monroe St., Ste. 701
Tallahassee, FL 32301

Richard D. Melson, Esq.
Hopping Green Sams & Smith
123 South Calhoun Street
Tallahassee, FL 32301

Peter Dunbar, Esq.
Pennington Cullpepper, P.A.
215 S. Monroe St., Ste 200
Tallahassee, FL 32301

Laura Wilson, Esq.
FL Cable Telecommunications
310 N. Monroe Street
Tallahassee, FL 32301

Anthony P. Gillman, Esq.
Kimberly Caswell, Esq.
GTE Florida, Incorporated
201 N. Franklin Street
Tampa, FL 33601

Nancy H. Sims
BellSouth Telecommunications
150 S. Monroe St., Ste. 400
Tallahassee, FL 32301

Lynn B. Hall
Vista-United Telecommunications
3100 Bonnett Creek Parkway
Lake Buena Vista, FL 32830

Robin D. Dunson, Esq.
AT&T
Promenade I, Room 4038
1200 Peachtree St., NE
Atlanta, GA 30309

Patrick K. Wiggins, Esq.
Wiggins & Villacorta, P.A.
P. O. Drawer 1657
Tallahassee, FL 32302-1657

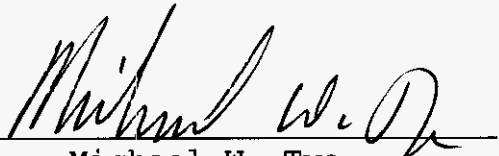
Brian Sulmonetti
LDDS WorldCom Communications
Suite 400
1515 S. Federal Highway
Boca Raton, FL 33432

David B. Erwin, Esq.
Young, VanAssenderp, Varnadoe
225 S. Adams St., Ste 200
Tallahassee, FL 32301

Timothy Devine
MFS Communications Co., Inc.
Six Concourse Pkwy., Suite 2100
Atlanta, GA 30328

Benjamin Fincher, Esq.
Sprint Communications Co.
3065 Cumberland Circle
Atlanta, GA 30339

Patricia Kurlin, Esq.
Intermedia Communications
3625 Queen Palm Drive
Tampa, FL 33619


Michael W. Tye