

HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS

570
m

JAMES S. ALVES
BRIAN H. BIBEAU
KATHLEEN BLIZZARD
ELIZABETH C. BOWMAN
RICHARD S. BRIGHTMAN
PETER C. CUNNINGHAM
RALPH A. DeMEO
THOMAS M. DeROSE
WILLIAM H. GREEN
WADE L. HOPPING
FRANK E. MATTHEWS
RICHARD D. MELSON
DAVID L. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPL
DOUGLAS S. ROBERTS
GARY P. SAMS
ROBERT P. SMITH
CHERYL G. STUART

123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314
(904) 222-7500
FAX (904) 224-8551
FAX (904) 425-3415

CONNIE C. DURRENCE
JAMES C. GOODLETT
GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
ROBERT A. MANNING
ANGELA R. MORRISON
GARY V. PERKO
KAREN M. PETERSON
MICHAEL P. PETROVICH
LISA K. RUSHTON
R. SCOTT RUTH
JULIE R. STEINMEYER
T. KENT WETHERELL, II

Writer's Direct Dial No.
(904) 425-2313

February 20, 1996

ORIGINAL
FILE COPY

OF COUNSEL
CARLOS ALVAREZ
W. ROBERT FOKES

BY HAND DELIVERY

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 950985-TP (Sprint-GTEFL)
(Local Interconnection)
Docket No. 950984-TP (Sprint-GTEFL)
(Unbundling)

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Metro Access
Transmission Services, Inc. (MCImetro) in the above referenced
dockets are the original and 15 copies of MCImetro's Response in
Opposition to Sprint-United/Centel's Motion on Issues and Parties
MCImetro's Protective Motion for Intervention.

By copy of this letter this document has been provided to
the parties on the attached service list.

Very truly yours,

Richard D. Melson

Richard D. Melson

- ACK
- AFA
- APP
- CAF
- CMU *Class*
- CTR
- EAG RDM/cc
- LEG Enclosures
- LIN cc: Parties of Record
- OPC
- RCH
- SEC
- WAS
- CT+

was
SEARCHED
SERIALIZED
INDEXED
FILED

DOCUMENT NUMBER-DATE

02435 FEB 27 1996

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s))
to establish nondiscriminatory rates,))
terms, and conditions for)
interconnection involving local) Docket No. 950985-TP
exchange companies and alternative)
local exchange companies pursuant to)
Section 364.162, Florida Statutes.)

In re: Resolution of petition(s))
to establish nondiscriminatory rates,))
terms, and conditions for)
resale involving local) Docket No. 950984-TP
exchange companies and alternative)
local exchange companies pursuant to)
Section 364.161, Florida Statutes.) Filed: February 27, 1996

MCIMETRO'S RESPONSE IN OPPOSITION TO SPRINT-UNITED/CENTEL'S
MOTION ON ISSUES AND PARTIES
AND
MCIMETRO'S PROTECTIVE MOTION FOR INTERVENTION

MCImetro Access Transmission Services, Inc. (MCImetro) hereby files its response in opposition to the Motion on Issues and Parties filed by United Telephone Company of Florida and Central Telephone Company of Florida (Sprint-United/Centel) on February 20, 1996 in the local interconnection docket and on February 21, 1996 in the unbundling/resale docket. Since the motions are identical as they relate to MCImetro's participation in the two dockets, MCImetro is filing a single consolidated response.

Each of the three alternative requests for relief in Sprint/United-Centel's motion should be denied for the reasons set forth below:

I. MCImetro Has Properly Intervened in These Proceedings.

1. These dockets were opened on the Commission's own motion "to process petitions which could be filed by eligible local exchange or alternative local exchange companies" under the provisions of Section 364.162, relating to local interconnection, and Section 364.161, relating to unbundling/resale. The procedures to be followed in these dockets were set forth in Order Nos. PSC-95-1084-PCO-TP and PSC-95-1083-PCO-TP, which were issued on August 30, 1995, prior to the filing of any petitions in either docket.

2. Sprint-United/Centel states on information and belief that MCImetro has not petitioned to intervene in the proceedings between Sprint-United/Centel and Continental, Times-Warner and MFS (collectively, "Petitioners"). (Motion ¶2) Given the procedural posture of these dockets, which were established to handle multiple petitions against multiple LECs by multiple ALECs, MCImetro believes that it has properly made itself a party to these dockets for all purposes.

3. MCI's petition to intervene in Docket No. 950985-TP was filed on September 7, 1995 and granted by Order No. PSC-95-1254-PCO-TP issued on October 11, 1995. MCI filed its own petition against Southern Bell in Docket No. 950984-TP on November 14, 1995. MCI has actively participated in both dockets since their inception, both in the first phase of the proceedings involving Southern Bell and in the current phase of the proceedings involving Sprint-United/Centel and GTE Florida Incorporated (GTEFL). The Commission has not entered an order separating the

various phases of these dockets in any way, nor requiring parties who participated in the first phase of these proceedings to refile in order to participate in subsequent phases of the proceedings.

4. MCImetro believes that its intervention and participation in these dockets has previously been approved. In an abundance of caution, however, MCImetro hereby moves to intervene and participate as a full party in the proceedings in these dockets brought by Petitioners against Sprint-United/Centel and GTEFL. The basis for MCImetro's substantial interests in these proceedings is set out more fully below.

II. MCImetro's Substantial Interests Are Affected by These Proceedings Since They Will Result in the Filing of Nondiscriminatory Tariffs Under Which MCImetro Is Entitled to Obtain Interconnection Arrangements and Unbundled Network Elements.

5. The prices, terms and conditions for interconnection and unbundling which result from these proceedings must be tariffed. Section 364.162(2), Florida Statutes (1995), provides that:

Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms and conditions shall be filed with the commission before their effective date.

Section 364.162(3), Florida Statutes (1995), requires that any rates, terms and conditions set by the Commission as the result of an interconnection or resale petition must be "nondiscriminatory." When these two subsections are read together, MCImetro submits that the filing of any prices, terms and conditions set by the Commission in a proceeding under

Section 364.162 must take the form of a generally available tariff.¹

6. Sprint-United/Centel appears to agree. In response to Issue 2 in Docket 950985-TP, Sprint-United/Centel states:

Yes, Sprint United/Centel would tariff its interconnection arrangements.

7. As a certificated alternative local exchange carrier who will be entitled to purchase local interconnection and unbundled network features, functions and capabilities out of the tariffs that result from these proceedings, MCImetro's substantial interests are clearly affected by proceedings in which those tariffed rates, terms and conditions are established.

8. MCImetro agrees that the case of Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981) rev. den. 415 So. 2d 1359 (Fla. 1982) generally sets forth the two-prong test which MCImetro must satisfy in order to assert standing under state law to participate in these proceedings. That test requires (i) an injury in fact, (ii) of the type or nature which the proceeding is designed to protect. MCImetro meets that test. First, MCImetro will suffer "injury in fact" if the Commission approves inappropriate tariffed rates, terms or conditions as a result of these proceedings. Second, MCImetro's interest is the precisely the type of interest that proceedings to establish

¹ The question of the proper form for filing rates, terms and conditions set by a negotiated agreement is not before the Commission at this time, and MCImetro accordingly takes no position on that issue.

nondiscriminatory rates, terms and conditions are designed to protect.

A. Injury in Fact

9. MCImetro faces immediate danger of a direct injury if the Commission establishes inappropriate rates, terms and conditions in this proceeding. The parties anticipate -- and MCImetro submits the statute requires -- that tariffs will be filed at the conclusion of this proceeding. MCImetro will have an absolute right to purchase the local interconnection arrangements and any unbundled network features, functions or capabilities included in those tariffs at the tariffed rates. Since those tariffs will be equally available to the Petitioners and to MCImetro on their effective date, MCImetro's potential injury from inappropriate rates, terms and conditions is just as direct and just as immediate as the potential injury suffered by the Petitioners.

10. None of the cases cited by Sprint-United/Centel compel a different result. The case of 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) stands for the proposition that standing requires more than a mere "speculative" injury. Here MCImetro's potential injury is more than mere speculation. Tariffs will result from these proceedings. Once those tariffs go into effect, MCImetro's purchase of local interconnection and unbundled network features, functions and capabilities will be governed by those tariffs unless and until MCImetro either negotiates a different arrangement with Sprint-

United/Centel or petitions the Commission and convinces it to establish different or supplementary rates, terms and conditions. For some period of time, those tariffs will establish the only basis on which MCImetro can obtain the local interconnection and unbundled elements necessary to conduct business in Sprint-United/Centel's territories in Florida as an alternative local exchange carrier. This is a sharp contrast to Village Park where the court held that the adoption of a prospectus which detailed the method by which rents might be raised or rules might be changed did not cause sufficient injury in fact. These proceedings will adopt a tariff which will set terms which will impact MCImetro's operations. The potential injury if those tariffs contain inappropriate terms, or otherwise create a barrier to entry by MCImetro, is both direct and immediate.

11. The case of 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) has no application to the facts of MCImetro's case. First, the court concluded that the possibility of an economic impact on physicians' medical practices was not of sufficient "immediacy" to give physicians standing to challenge rules that would permit non-physician optometrists to use and prescribe medications. Here, the potential harm to MCImetro is immediate, it will occur as soon as tariffs are filed and approved by the Commission. Second, the court suggested that except for the non-immediate economic injury, the interests of physicians would not be affected any differently than the interests of the general public. In the instant cases,

MCImetro's interests are affected differently than those of the general public. Only MCImetro and other ALECs, not the general public, will purchase local interconnection arrangements and unbundled elements from the tariffs that will result from these proceedings.

12. The final case cited by Sprint-United/Centel, International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So. 2d 1224 (Fla. 3d DCA, 1990) held that the possible effect on an on-going labor dispute of a rule which established fronton opening and closing dates was too speculative to give the players association standing to challenge the rules. Again, the impact to MCImetro is neither speculative nor remote - - once a tariff is approved it will, for some period of time, be the exclusive way for MCImetro to obtain from Sprint-United/Centel the essential inputs necessary for MCImetro to operate under its ALEC certificate in Sprint-United/Centel's service territory.

13. In fact, MCImetro's position in these dockets is more clearly analogous to the facts of Royal Palm Square Ass'n. v. Sevco Land Corp., 623 So.2d 533 (Fla 2d DCA 1993), review dismissed, 639 So.2d 981 (Fla. 1994), in which the owner of a shopping center with a non-exclusive easement to discharge surface waters into a lake challenged the issuance of a permit to a contiguous landowner to discharge into the same lake. In the appeal from the dismissal of this challenge, the Second DCA held that the owner of the shopping center had "a substantial interest in the (drainage) system's operation and environmental integrity"

such that standing existed to permit participation in proceedings which might undermine or impact that integrity. The potential for such an impact on the system was a sufficiently immediate injury to permit standing. In these proceedings, the tariffed rates, terms and conditions under which MCImetro may purchase local interconnection and unbundled network features, functions or capabilities will be determined. MCImetro has a substantial interest in the operational integrity of this system and thus has standing to participate in these dockets.

B. Zone of Interest

14. The three cases cited by Sprint-United/Centel regarding the second prong of the Agrico test involved the dismissal of petitions by parties whose interests were outside the "zone of interest" designed to be protected by the agency decision which they sought to challenge. In Suwanee River Area Council Boy Scouts of America v. State Department of Community Affairs, 348 So. 2d 1369 (Fla. 1st DCA 1980), the court held that an adjoining landowner did not have standing to challenge a development of regional impact (DRI) jurisdictional determination, since the DRI statute was not designed to protect the interest of adjoining landowners. In the instant case, a statute that requires the establishment of "nondiscriminatory" rates, terms and conditions is designed to protect the interests of any ALEC who will be required for some period of time to obtain service only under a tariff incorporating those terms and conditions.

15. In Grove Isle, Ltd. v. Bayshore Homeowners' Association, 418 So. 2d 1046 (Fla. 1st DCA 1982), the court held

that a homeowners association did not have standing to challenge a decision regarding the need for a marina developer to obtain a lease of state submerged lands. The association's interest in protecting Biscayne Bay from pollution was not within the zone of interest to be protected by the lease/no-lease decision.

Similarly, in Boca Raton Mausoleum v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987), a college was denied standing to challenge a cemetery license on the grounds of increased traffic congestion or the creation of an atmosphere not conducive to higher education, since those types of interests are not adjudicated by a cemetery licensing proceeding.

16. Conversely, in Gregory v. Indian River County, 610 So.2d 547, 554 (Fla. 1st DCA 1992), the court held that landowners who intervened in a proceeding which determined the extent of wetlands on the landowners' property met the second prong of the Agrico test. The determination of the amount of wetlands would impact the landowners' ability to use this land. The landowners' interests were therefore within the zone of protection of the permit proceeding. These proceedings before the Commission are intended to set the non-discriminatory terms and conditions under tariff by which MCImetro may utilize interconnection and unbundled network features, functions and capabilities. These proceedings will impact MCImetro's use of such features just as the determination of the extent of wetlands impacted the Gregory landowner's use of the subject property. Since the nondiscriminatory terms and conditions on which interconnection and unbundled elements will be offered pursuant

to tariff will be set in those dockets, MCImetro's interests are precisely the type of interests which these proceedings are designed to determine.

C. MCImetro's Substantial Interests Do Not Depend on It Being Foreclosed by These Proceedings from Subsequently Filing Its Own Interconnection or Unbundling Petitions.

17. It is not necessary for MCImetro to be directly bound by the Commission's decision in this proceeding in order for its substantial interests to be sufficiently affected to support its standing to participate as an intervenor. Section 120.52(12), Florida Statutes (1995) defines a "party" to include, among others, both those specifically named persons whose substantial interests "are being determined" in the proceeding [§120.52(12)(a)] and any other person whose substantial interests "will be affected" by the agency's action [§120.52(12)(b)].

18. These dual grounds for standing are carried forward into the Commission's own rule on intervention. Rule 25-22.039, Florida Administrative Code, states that persons "other than the original parties to a pending proceeding" can intervene upon a showing that:

. . .the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

(emphasis added)

The first part of this provision allows intervention by persons who meet the §120.52(12)(a) standard that their interests "will be determined" through the proceeding. The second part of this provision allows intervention by persons who meet the

§120.52(12)(b) standard that their interests "will be affected" through the proceeding.

19. It is not necessary for MCImetro to file its own petition, or to be directly bound by the Commission's decisions on the Continental, Times-Warner or MFS petitions, in order for its substantial interests "to be affected" through these proceedings. Sprint-United/Centel's assertion that MCImetro has no standing unless it is directly bound is tantamount to reading sub-section 120.52(12)(b) out of the statute, and the final clause out of Rule 25-22.039, and insisting that only those whose interests are "determined" can participate as parties. That position is simply inconsistent with the statute and the Commission's rules.

D. MCImetro Has A Florida Statutory Right to File Its Own Interconnection and/or Unbundling Petitions Notwithstanding That Other Parties Have Reached Negotiated Agreements or Have Had Their Petitions Previously Resolved by the Commission.

20. Sprint-United/Centel's motion is an attempt to deprive MCImetro of its right under Florida law to file its own petition to resolve any interconnection and/or unbundling issues that cannot be resolved by negotiations between the parties.

21. Section 364.162(2), Florida Statutes, gives MCImetro an absolute right to petition the Commission to establish rates, terms and conditions for local interconnection at any time after August 31, 1995. Similarly, Section 364.161(1) gives MCImetro an absolute right to petition the Commission to resolve unbundling disputes at any time more than 60 days after an unbundling

request has been made.² Nothing in the statute contemplates a "generic" proceeding in which all parties are bound. Nor does anything in the statute contemplate that the resolution of the first petition or petitions to be filed will directly bind subsequent petitioners.

22. As indicated in Mr. Price's direct testimony filed in this phase of the local interconnection docket, MCImetro has not filed petitions against Sprint-United/Centel because negotiations between the parties have not yet reached an impasse. Until they do, it would be inconsistent with the statutory scheme for MCImetro to be directly bound by any decision entered by the Commission in response to a petition filed by a third party.

E. Conclusion

23. Assuming that the two-prong standing test of Agrico applies to an intervenor, MCImetro passes that test. MCImetro will suffer an immediate adverse impact if these proceedings are resolved contrary to its positions, and the determination of appropriate tariffed provisions is precisely the type of interest that this proceeding is designed to protect.

24. MCImetro is participating in these proceedings not because of its interest in the Commission's "incipient policy," but because the tariffs filed at the conclusion of these proceedings will bind MCImetro unless and until it negotiates different or supplemental arrangements, or successfully petitions

² This pleading relates only to MCImetro's rights under the Florida statute. MCImetro's rights under the federal Telecommunications Act of 1996 are not discussed or analyzed in this pleading.

the Commission to establish such arrangements. Sprint-United/Centel's prayer that the Commission either dismiss MCImetro from this docket, or deny MCImetro's intervention for lack of standing, must therefore be rejected.

25. Further, MCImetro has a Florida statutory right to file its own interconnection and/or unbundling petitions regardless of any action that the Commission may take to resolve petitions filed by other parties, or to approve agreements negotiated by other parties. Therefore, Sprint-United/Centel's prayer that the Commission restate the issues in such a way that MCImetro will be directly bound by their resolution in this docket must also be denied.

III. Sprint-United/Centel's Alternative Request That The Commission Include a New Legal Issue Regarding the Applicability of the Final Order to the Non-Petitioning Parties Should Also Be Denied.

26. There is no need for the Commission to decide at this juncture the precise way in which the decisions that result from these proceedings will apply to MCImetro and the other non-petitioning parties. A complete analysis of this issue potentially requires the consideration of the concepts of stare decisis, collateral estoppel, and res judicata; the effect of Commission tariffs; the construction of the "nondiscrimination" requirement of Section 364.162; and the correct application of the provisions in both Section 364.161 and 364.162 which entitle each disappointed negotiator to file its own interconnection and unbundling petitions. Such a detailed analysis is not necessary to resolve the petitions that are actually pending. At most it

would set the ground rules for future petitions that may or may not ever be forthcoming. Such an issue is not ripe for decision by the Commission, or resolution by the court on appeal of a Commission order, unless and until there is a specific case in which a specific petitioner asserts that it is not bound by the determinations made in this proceeding.

27. It is premature, and a would be a waste of the Commission's resources, to attempt to resolve this complex legal issue in the current proceeding. Sprint-United/Centel's motion to include an additional legal issue regarding the applicability of the results of this proceeding to MCI Metro and the other non-petitioning intervenors should therefore be denied.

RESPECTFULLY SUBMITTED this 27th day of February, 1996.

HOPPING GREEN SAMS & SMITH, P.A.

By: Richard D. Melson
Richard D. Melson
Post Office Box 6526
123 South Calhoun Street
Tallahassee, FL 32314
904/222-7500

and

MICHAEL J. HENRY
MCI TELECOMMUNICATIONS CORP.
Suite 700
780 Johnson Ferry Road
Atlanta, GA 30346
404/843-6373

Attorneys for MCI Metro Access
Transmission Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by hand delivery (*) or by U.S. Mail this 27th day of February, 1996.

Lee L. Willis
J. Jeffrey Wahlen *
Macfarlane, Ausley, Ferguson &
McMullen
227 S. Calhoun Street
Tallahassee, FL 32301

Anthony P. Gillman
Kimberly Caswell
GTE Florida Incorporated
c/o Richard M. Fletcher
106 E. College Ave., Ste. 144
Tallahassee, FL 32301-7704

Leslie Carter
Digital Media Partners
1 Prestige Place, Ste. 255
Clearwater, FL 34619-1098

James C. Falvey
Swidler & Berlin, Chartered
3000 K Street, N.W., Ste. 300
Washington, DC 20007

David Erwin
Young van Assenderp & Varnadoe
225 S. Adams St., Suite 200
Tallahassee, FL 32301

Richard A. Gerstemeier
Time Warner AxS of Florida
2251 Lucien Way, Ste. 320
Maitland, FL 32751-7023

Patrick K. Wiggins
Wiggins & Villacorta
501 East Tennessee Street
Tallahassee, FL 32301

Andrew D. Lippman
Metropolitan Fiber Systems
One Tower Lane, Suite 1600
Oakbrook Terrace, IL 60181-4630

J. Phillip Carver
c/o Nancy H. Sims
Southern Bell Telephone
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Patricia Kurlin
Intermedia Communications
9280 Bay Plaza Blvd., Ste. 720
Tampa, FL 33619-4453

Kenneth A. Hoffman
Rutledge, Ecenia, Underwood,
Purnell & Hoffman
215 S. Monroe St., Suite 420
Tallahassee, FL 32301-1841

Jodie Donovan-May
Teleport Communications Group
1133 21st Street, N.W., Ste. 400
Washington, DC 20036

Michael W. Tye
101 North Monroe Street, Ste. 700
Tallahassee, FL 32301

Robin D. Dunson
1200 Peachtree St., N.E.
Pomenade I, Room 4038
Atlanta, GA 30309

Laura Wilson
Florida Cable
Telecommunications Assoc. Inc.
310 N. Monroe Street
Tallahassee, FL 32301

Floyd R. Self
Messer, Caparello, Madsen,
Goldman & Metz, P.A.
P.O. Box 1876
Tallahassee, FL 32302

William H. Higgins
AT&T Wireless Services
250 S. Australian Ave., Suite
900
West Palm Beach, FL 33401

Donna Canzano *
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Jill Butler
Florida Regulation Director
Time Warner Communications
2773 Red Maple Ridge
Tallahassee, FL 32301

Brian Sulmonetti
LDDS Woldcom Communications
1515 S. Federal Hwy., Suite 400
Boca Raton, FL 33432

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs,
Odom & Ervin
305 S. Gadsden Street
Tallahassee, FL 32301

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

Sue E. Weiske
Senior Counsel
Time Warner Communications
160 Inverness Drive West
Englewood, CO 80112

Peter M. Dunbar, Esq.
Charles W. Murphy, Esq.
Pennington & Haben, P.A.
215 S. Monroe Street, 2nd Fl
Tallahassee, FL 32301

Timothy Devine
MFS Communications Company, Inc.
Six Concourse Parkway, Ste. 2100
Atlanta, GA 30328

Richard M. Rindler
James C. Falvey
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Donald L. Crosby
Continental Cablevision, Inc.,
Southeastern Region
7800 Belfort Parkway, Ste. 270
Jacksonville, FL 32256-6925

A. R. Schleiden
Continental Fiber Technologies
d/b/a AlterNet
4455 Baymeadows Road
Jacksonville, FL 32217

Bill Wiginton
Hyperion Telecommunications, Inc.
Boyce Plaza III
2570 Boyce Plaza Road
Pittsburgh, PA 15241

Richard M. Rindler

Attorney