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Florida Cable **Telecommunications** Association

Steve Wilkerson, President

April 16, 1996

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VIA HAND DELIVERY

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

RE: Docket No. 950985-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are an original and fifteen copies of corrected pages 3, 5, 6 and 8 of FCTA's Request for Reconsideration filed April 15, 1996. These pages correct only inadvertent clerical mistakes. Please replace pages 3, 5, 6 and 8 with the corrected pages. Copies of the corrected pages have been served on the parties of record.

We apologize for any inconvenience this may have caused. Please contact me with any questions.

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Yours very truly,

Laura L. Wilson

Laura L. Wilson
Vice President, Regulatory Affairs &
Regulatory Counsel

Enclosures

cc: All Parties of Record
Mr. Steven E. Wilkerson

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entering into negotiated settlements in the future. These results are contrary to the requirements of the revised Chapter 364, Florida Statutes (1995) and its intent to promote consumer choice. There is no competent substantial evidence supporting this disparate treatment of ALECs.

A. THE ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY APPROVING A DISCRIMINATORY RATE.

The revised Chapter 364 places the obligation on the Commission to ensure that the local interconnection rates, terms and conditions are "non-discriminatory." Section 364.01(4) expresses the Legislature's intent that the Commission "exercise its exclusive jurisdiction" to ensure that all providers are treated fairly and encourage competition. Consistent with that intent, Sections 364.16 and 364.162 on local interconnection arrangements provide:

> **Section 364.16(2):**
> Each alternative local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at non-discriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices, terms, and conditions after 60 days, either party may petition the Commission and the Commission shall have 120 days to make a determination after proceeding as required by s. 364.162(6) pertaining to interconnection services. [Emphasis supplied.]
>
> **Section 364.16(3):**
> Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at non-discriminatory prices, rates, terms, and conditions established by the procedures set forth in s. 364.162. [Emphasis supplied.]
>
> **Section 364.162(2)**
> If a negotiated price is not established by August 31, 1995, either party may petition the Commission to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and facilities. 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. [Emphasis supplied.]

Section 364.10(1):
(1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Emphasis supplied.]

The previously quoted interconnection rate provisions of Sections 364.16 and 364.162, Florida Statutes, require the Commission to dispose of petitions by setting "non-discriminatory" rates, terms and conditions of local interconnection. The Commission-approved rates, terms and conditions in this docket must be "non-discriminatory." That is the plain and unambiguous language of the statute. Similarly, Sections 364.08, 364.09, and 364.10 have, in the past, been interpreted to prohibit undue or unreasonable discrimination. "Unreasonable discrimination" arises when similarly situated customers who use the same service and cause substantially the same costs to be incurred pay different prices for the service. See e.g., In re: Petition for Declaratory Statement Concerning Potential Service to Dog Island by St. Joseph Telephone and Telegraph Company, 95 FPSC 3:466,468; In re: Intrastate Telephone Access Charges for Toll Use of Local Exchange Services, 85 FPSC 2:160; In re: Application of Telecom Express, Inc. for Authority to Provide Interexchange Telecommunications Service, 88 FPSC 10:470; In re: Investigation into NTS Cost Recovery Phase II, 88 FPSC 7:44.

The Order fails to consider or even address the Commission's statutory obligation to establish "non-discriminatory" terms. FCTA brought this issue to the Commission's attention in its prehearing statement and posthearing brief. By Order No. PSC-96-0082-AS-TP (the "first order") the Commission found one set of rates, terms and conditions to be in the public interest for certain ALECs interconnecting with BellSouth. The Commission subsequently approved mutual traffic exchange and different terms and conditions for MCImetro's and MFS' interconnection with BellSouth. There is no record evidence demonstrating that different treatment for MCImetro and

MFS is legally or factually justified. MCImetro and MFS made no attempt to demonstrate that they are differently situated from the ALECs in the first Order.

To the contrary, what the record demonstrates is that ALECs are similarly situated with respect to BellSouth. The service at issue in this proceeding is the essential service of local call termination on BellSouth's network. See e.g., Tr. 50, 366-368, 671. All ALECs need to terminate calls on BellSouth's network in order to compete with each other in BellSouth's territory. This fact is further supported by the officially recognized Orders from other state Commissions which do not differentiate among competitive local providers in setting interconnection rates.

MCImetro and MFS requested non-discriminatory rates, terms and conditions in this proceeding. Tr. 51-2, 366. The record demonstrates that bill and keep arrangements are used today for terminating local traffic among incumbent LECs. Tr. 159-160. As MFS Witness Devine stated, to adopt different arrangements for ALECs (usage rate) and independents (bill and keep) "is discrimination pure and simple." Id. Rather than discriminate between ALECs and independents, the Order discriminates among ALECs. It adopts bill and keep for certain ALECs after the Commission previously approved a usage rate for others. Such action, based on the record, is discrimination, "pure and simple." The Order departs from essential requirements of law by ignoring or overlooking the duty to ensure that rates are non-discriminatory. It then establishes an unlawfully discriminatory rate. There is no commentary in the Staff Recommendation or Order addressing this issue or providing any factual or legal reason for this discrimination.

For these reasons, the Order departs from the essential requirements of law, and FCTA's request for reconsideration should be granted.

C. THE ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY DISCOURAGING NEGOTIATION.

No one disputes that Chapter 364 intends to encourage LECs and ALECs to negotiate mutually acceptable prices, terms and conditions before petitioning the Commission to resolve disputes. However, the Order ignores or overlooks this intent. There is no discussion in the Order of how the initial approval of one set of rates for certain ALECs and the subsequent approval of "bill and keep" for MCImetro and MFS furthers this intent. Indeed, it undercuts it. This impact was ignored or overlooked in the Staff Recommendation and Order.

The Commission has considered and approved the Stipulation. By subsequently approving different terms for other similarly situated ALECs the negotiation process has, as a practical matter, been eliminated as an effective tool despite clear legislative intent that it be preserved. Parties no longer have any incentive to consent to judgment out of fear that they will be undercut without any underlying rationale or competent substantial evidence to support the action in this or future proceedings. This statutory element of promoting compromise is thereby destroyed.

Because the order ignores or overlooks the intent to encourage negotiation, reconsideration is proper. The Order must supply an underlying factual support and rationale as to how its actions fulfill the legislative intent.

D. THE ORDER IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The Order rejects the earlier Commission-approved rates in the Stipulation. The reasons for doing so are based upon supposition and faulty reasoning. There is no competent substantial evidence supporting this action. Therefore, reconsideration is proper.

At pages 9-10, the Order discusses why the terms of the Stipulation are rejected. The first reason is because the terms of the Stipulation do not ensure that each company will be fairly compensated if traffic is significantly imbalanced. Order at 10. If this is true, it is unclear why the

CERTIFICATE OF SERVICE
DOCKET NO 950985-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery(*) and/or U. S. Mail on this 16th day of April, 1996 to the following parties of record:

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