HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314
(904) 222-7500
FAX (904) 224-8551
FAX (904) 425-3415

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. RAEPPLE
DOUGLAS S. ROBERTS
GARY P. SAMS
ROBERT P. SMITH
CHERYL G. STUART

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

OF COUNSEL
CARLOS ALVAREZ
W. ROBERT FOKES

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

April 24, 1996



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. 950984-TP (Unbundling)

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Metro Access Transmission Services, Inc. (MCImetro) in the above referenced docket are the original and 15 copies of MCImetro's Response to Motion for Reconsideration.

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

Very truly yours,

Richard D. Melson

RDM/cc
Enclosures
cc: Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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|---|---|
| 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<br><br>Filed: April 24, 1996 |

**MCI METRO ACCESS TRANSMISSION SERVICES, INC.'S RESPONSE TO MOTION FOR RECONSIDERATION**

MCI Metro Access Transmission Services, Inc. (MCImetro) hereby submits its response to the Motion for Reconsideration filed by BellSouth Telecommunications, Inc. ("BellSouth"). That motion should be denied for the reasons set forth below.

## I. The Commission's Order Did Not Overlook or Fail to Consider any Relevant Evidence or Legal Principles

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). As the court in State v. Green, 106 So. 2d 817, 818 (Fla. 1st DCA 1958) said with reference to petitions for rehearing:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court *some* fact, precedent, or rule of law which the court has overlooked in rendering its decision. . . .
>
> It is not a compliment to the intelligence, the competence or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which,

had they been given proper weight, would have necessitated a different decision.

When measured against these standards, BellSouth's Motion for Reconsideration should be denied.

## II. The Interim Rate for 2-Wire Loops Is Supported by the Record and Complies With Florida Law

BellSouth challenges the $17 interim rate set by the Commission for unbundled 2-wire loops as being below cost and hence violative of Section 364.161(1), Florida Statutes.[1] BellSouth asserts that the cost of an unbundled loop is greater than $17, as shown by the confidential cost study contained in Exhibit 16, and that the other BellSouth cost figures which the Commission relied upon in setting the interim rate were "inapplicable." (BS Motion at 6, 7)

This clearly is a dispute about the weight of the evidence. BellSouth prefers for the Commission to rely solely on the recent cost study prepared for the purpose of this proceeding. The Commission chose instead to rely on other cost studies prepared by BellSouth which show lower costs for local loops ($15.53 and $15.97) than the $17.00-plus cost now claimed by BellSouth. (Ex. 11 at Att. F, page 6; Ex 12) As the trier of fact, the Commission has the responsibility to weigh the evidence before it. In doing so, the Commission concluded that a rate of $17.00, which was more than

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[1] BellSouth also challenges the interim rate for a 2-wire port. Since MCImetro currently intends to provide its own switching, and not to rely on unbundled ports, it leaves the response to this issue to the parties who are more directly affected.

$1.00 above the cost indicated by the earlier studies, was an appropriate rate to adopt until further cost analysis is completed.

BellSouth also argues that it is unjust for the Commission to set rates for unbundled network elements at a level that does not provide contribution to the company's joint and common costs. BellSouth then claims that to set rates at such a level is inconsistent with the Commission's universal service order under which universal service is to continue to be funded, on an interim basis, through mark-ups on LEC services. This argument misses the point. BellSouth has mark-ups today on a host on competitive and non-competitive services. Nothing in the Commission's universal service order suggested that the Commission would automatically approve new mark-ups on new bottleneck monopoly services.

The testimony in this docket showed that unbundled loops are an essential input into the ALECs' provision of their competitive service and, as such, should be priced at TSLRIC with no contribution to joint and common costs. (T 157-158) While the Commission did not adopt this principle outright, it did determine that prices should be set much closer to cost than BellSouth had proposed. Nothing in this decision conflicts with the universal service order.

Under the standards articulated in Diamond Cab, BellSouth's disagreement about the weight to be given to its various cost studies, or about the degree of contribution to be recovered through unbundled loop rates, is not the type of issue that is properly considered on a motion for reconsideration.

BellSouth's Motion for Reconsideration for the first time discloses BellSouth's intention to charge significantly more for an unbundled loop than the $17.00 interim rate approved by the Commission. BellSouth states that it intends to apply a federal subscriber line charge and a flat-rate surrogate for the federal carrier common line charge in addition to the Commission-prescribed rate for an unbundled loop. (BS Motion at 5-6) Such a charge would be contrary to the Commission's order, which contemplates that $17.00 represents the **total** price for an unbundled loop. In its order on reconsideration, the Commission should clarify its intent that $17.00 is the total price for an unbundled loop, and should expressly provide that such rate will be reduced, dollar for dollar, by any monies that BellSouth collects from the purchaser of the unbundled loop through the application of federal rate elements.

### III. The Required Colocation of Loop Concentration Equipment Is Valid

BellSouth contends that the Commission should hold in abeyance the portion of its order regarding colocation of loop concentration equipment in order to give parties an opportunity to negotiate for colocation under the Telecommunications Act of 1996. That suggestion should be rejected outright.

The record shows that MFS attempted, unsuccessfully, to negotiate the colocation of loop concentration equipment under state law prior to filing its unbundling complaint against BellSouth. There is nothing in the Act that requires the Commission to give BellSouth a second opportunity to negotiate

under federal law before the Commission acts to resolve a dispute that is properly before it under state law.

Section 251 of the Act does not treat colocation differently from any other interconnection requirement. The logical extension of BellSouth's position, therefore, is that the Act precludes Commission action on any interconnection issue until a federal negotiation period has run. Nothing in the Act has such a sweeping effect, and nothing precludes states from considering interconnection issues under any appropriate state procedure.

## IV. The Order's Provisions Relating to Termination Charges Are Not an Unconstitutional Impairment of Contract

BellSouth claims that the provisions of the order which enable a customer to convert a bundled service provided by BellSouth to an unbundled service provided by an ALEC with no penalties or termination charges constitutes an unconstitutional impairment of BellSouth's contracts, particularly with ESSX customers.

The Florida Supreme Court has recognized that contracts with public utilities are subject to the reserved police power of the state, and can be modified by the Commission when such modification is in the public interest. H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 914 (Fla. 1979). The Florida cases which BellSouth relies upon to suggest a different conclusion are inapposite. The decisions in Yamaha and Pomponio did not involve regulated public utilities. The decision in United Telephone Company of Florida v. PSC, 496 So. 2d 116 (Fla. 1986) did involve a public utility. The contract at issue, however, was the settlements agreement between and among a number of utilities, not a contract between a utility

and its customers. The court in United Telephone simply held that the Commission's power to modify utility-customer contracts in the public interest did not extend to utility-utility contracts. Since the termination liability provisions at issue in this case are in utility-customer contracts, nothing in United Telephone detracts from the Commission's power to regulate such contracts.

The Commission's action in this case is no different in principle than the FCC's action in allowing a "fresh look" when competitive expanded interconnection was implemented or when 800 service was introduced. See, e.g., In re: Expanded Interconnection, Report and Order, 7 F.C.C.R. 7369 at ¶¶ 201-203. In the expanded interconnection docket, the FCC specifically rejected the incumbent LECs' arguments that a "fresh look" policy would violate the contract clause of the Federal Constitution. In re: Expanded Interconnection, Second Memorandum Opinion and Order on Reconsideration, 8 F.C.C.R. 7341 at ¶¶ 16-17.

As a matter of public policy, a customer who enters into a contract with a monopoly provider of service when no competitive providers are available should have the right to select a competitive provider, without penalty, when competition is first introduced. Otherwise, the monopolist has every incentive to tie customers up in long term contracts with significant termination penalties in order to insulate itself from future competition.

In this case, the Commission properly exercised its regulatory authority to prevent such an unjust result. That action, which was necessary to protect the public interest, does not violate the constitutional provisions regarding impairment of contracts.

**CONCLUSION**

For all the reasons set forth above, BellSouth's motion for reconsideration should be denied. To the extent that BellSouth's position on the combined federal and state rate to be charged for unbundled loops is contrary to the intent of the Commission's order, the order should be clarified to state that the total rate collected by BellSouth for an unbundled loop, including any federal SLC or CCL charges, is capped at the $17.00 rate set established by the Commission.

RESPECTFULLY SUBMITTED this 24th day of April, 1996.

HOPPING GREEN SAMS & SMITH, P.A.

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

and

MARTHA MCMILLIN
MCI TELECOMMUNICATIONS CORP.
780 Johnson Ferry Road, Ste. 700
Atlanta, GA 30346

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 U.S. Mail this 24th day of April, 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. 1440
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
3625 Queen Palm Drive
Tampa, FL 33619

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

William B. Graham, Esquire
Bateman Graham
300 East Park Avenue
Tallahassee, FL 32301

67312.1
COS/950984

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., Ste. 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 WorldCom 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

Mark K. Logan
Bryant, Miller & Olive, P.A.
201 S. Monroe St., Suite 500
Tallahassee, FL 32301

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

Peter M. Dunbar, Esq.
Charles W. Murphy, Esq.
Pennington, Culpepper, Moore,
Wilkinson, Dunbar & Dunlap, 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

Rod

Attorney