RICHARD M. RINDLER
ATTORNEY-AT-LAW

SWIDLER & BERLIN
CHARTERED

FILE COPY

DIRECT DIAL
(202)424-7771

April 26, 1996

VIA FEDERAL EXPRESS

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

Re: Docket No. 950985

Dear Ms. Bayo:

Please find enclosed for filing in connection with the above-referenced docket the original and 15 copies of the Consolidated Opposition of Metropolitan Fiber Systems of Florida, Inc. to Requests For Reconsideration of Florida Cable Telecommunications Association and Time Warner. Also enclosed is a disk formatted in WordPerfect 6.1 for Windows which contains a copy of the enclosed document.

Please date stamp and return the extra copy in the enclosed self-addressed stamped envelope. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Richard M. Rindler

ACK
AFA
APP Enclosures
CAF
CMU Cleared
CTR
EAG
LEG 1
LIN 5
OPC
RCH
SEC 1
WAS
OTH 152757.1

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

3000 K STREET, N.W. ■ SUITE 300
WASHINGTON, D.C. 20007-5116
(202)424-7500 ■ TELEX 701131 ■ FACSIMILE (202)424-7645

DOCUMENT NUMBER-DATE
04815 APR 29 96
FPSC-RECORDS/REPORTING

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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: April 26, 1996**

CONSOLIDATED OPPOSITION OF METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. TO REQUESTS FOR RECONSIDERATION OF FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION AND TIME WARNER

Metropolitan Fiber Systems of Florida, Inc. ("MFS"), by its undersigned attorneys, files this Opposition to Florida Cable Telecommunications Association, Inc.'s ("FCTA") Request For Reconsideration and Time Warner AXS of Florida, L.P.'s and Digital Media Partners' ("Time Warner") Request for Reconsideration ("Request") of Order No. PSC-96-0445-FOF-TP ("Order 2"), issued on March 29, 1996, pursuant to Rule 25-22.060(b), Florida Administrative Code and Order No. PSC-95-0888-PCO-TP.

I. INTRODUCTION

FCTA's and Time Warner's asserted grounds for reconsideration are each nearly verbatim replicas of the other: that the Commission's Order establishing non-discriminatory interconnection rates, terms and conditions for MFS and MCI Metro Access Transmission Services, Inc. ("MCIMetro"), "departs from essential requirements of law by ignoring or overlooking the Commission's [statutory] duty to establish non-discriminatory rates, terms, and conditions, and promote competition among the largest possible array of companies." Time Warner Request at 2; see also, FCTA Request at 2. The movants also argue that the

DOCUMENT NUMBER-DATE
04815 APR 29 96
FPSC-RECORDS/REPORTING

Order violates the Commission's statutory obligation to encourage negotiated settlements of terms of interconnection. Id.

The movants' requests for reconsideration should be denied as being without merit. As will be shown, the Commission has met its statutory obligation to establish nondisciminatory rates for parties (i.e., MFS, MCIMetro) who are unable to negotiate mutually acceptable interconnection terms with BellSouth. The movants do not quarrel with the Commission's authority to authorize the bill-and-keep interconnection terms that the Commission established for MFS, MCIMetro and all similarly-situated ALECs (including, presumably, the movants, once their "transitional" two year agreement expires in December, 1997), or with the fact that these rates are to be *tariffed* by BellSouth (Order 2 at 6). The Commission expressly considered the issue of differing rate regimes in its January, 1996 Order approving the movants' Stipulation, and concluded that such an outcome would not violate the statutory nondiscrimination provisions. The Commission has also concluded upon the record evidence that its Order encourages competition. Finally, granting the movants' request would discourage negotiated settlements. It would upset the negotiating parties' expectation that negotiated settlement terms are binding and not subject to modification simply because other parties obtain a different result through litigation.

The movants' grievance apparently stems from their belated misgivings about the interconnection terms which they voluntarily entered into with the incumbent local exchange carrier ("LEC"), BellSouth Telecommunications, Inc. in their December, 1995 Stipulation and

Agreement pursuant to Fla. Stat. § 364.162[1/] Time Warner even argues that notwithstanding its negotiated settlement, "the signatories to the Stipulation [*inter alia*,Time Warner and FCTA] have been denied due process."[2/] The position of Time Warner and others that have signed the Stipulation is to be distinguished from new entrants that are still negotiating, or may in the future be negotiating, with BellSouth. The Commission has stated in the MFS and MCIMetro interconnection Order that "these interconnection rates and other arrangements shall be available to all similarly situated ALECs on a non-discriminatory basis." Order at 16[3/].

[1/]On December 8, 1995, Bell, FCTA, Time Warner, and Continental Cablevision, Inc. ("Continental") filed a Joint Motion for Acceptance of Stipulation And Agreement And For Partial Stay of Proceedings ("Agreement") resolving all major issues between the signatories to the Agreement relating to Docket Nos. 940696-TP (universal service); 950737-TP (number portability); 950984-TP (resale/unbundling); and 950985-TP (local interconnection). Subsequently, two additional petitioning parties, Intermedia Communications of Florida, Inc. ("ICI"), and Teleport Communications Group Inc./TCG South Florida ("TCG") signed on to the Agreement concerning the dockets to which they are a party. See, Agreement filed as Exhibit A to TCG's Notice of Voluntary Dismissal, Docket No. 950985-TP (filed December 20, 1995).

[2/]Time Warner advances the unique argument that notwithstanding its arms length acceptance of "**binding**" and mutually acceptable terms to a "**comprehensive**" settlement agreement, see Agreement at 16, that it and other signatories have been denied due process of law. Time Warner Request at 2, ¶3 (emphasis added).

[3/]Accordingly, so that there can be no question whatsoever, the Commission should specifically reiterate that ALECs that have not signed the Stipulation are by the terms of the Order entitled to the rates, terms, conditions, and/or arrangements ordered by the Commission. In fact, the Commission should ensure that because rates, terms, conditions, and/or arrangements are generally available, new entrants should be entitled to such rates, terms, conditions and/or arrangements in their entirety and, without compromising their right to these terms, are also entitled to negotiate additional arrangements.

II. THE COMMISSION HAS MET ITS STATUTORY DUTY TO ESTABLISH NONDISCRIMINATORY INTERCONNECTION RATES FOR PETITIONING PARTIES WHO HAVE NOT NEGOTIATED MUTUALLY ACCEPTABLE TERMS

By claiming that the Commission has failed to fulfill its statutory obligation to set nondiscriminatory interconnection rates for MFS and MCIMetro (as compared with the rates negotiated by the movants), Time Warner and FCTA are attempting to shift blame to the Commission for what they apparently now see as their own ill-advised bargain. The movants suggest that Fla. Stat. § 364.162 requires the Commission to impose on non-signing parties terms of interconnection negotiated by signing parties.[4/] It is telling that the movants can offer no legal authority to support the proposition that the Commission's establishment of interconnection prices, terms, and conditions for parties unable to negotiate mutually acceptable terms, as required under Fla. Stat. §364.162(2), must conform with, and not differ from interconnection terms previously negotiated by a limited number of ALECs with their own varying cost structures, revenue base, and facilities networks.

In fact, to the extent there is any guidance on this issue, it is from the Commission in its order approving the stipulated settlement of the movants and certain other parties. On January 17, 1996, the Commission approved the movants' Agreement by Order Approving

---

[4/]The movants take pains to stress that they do "not challenge the Commission's statutory authority to authorize bill and keep arrangements." FCTA Request at 2 (emphasis in original); see also, Time Warner Request at 2 (same). The movants conveniently fail to mention that their stipulated interconnection terms are "**considered transitional**", and expire after two years, with new rate negotiations to begin no later than June 1, 1997. Agreement at 9. Therefore, the movants were careful to provide that their stipulated rates would be temporary, and envisioned that they would be eligible for other nondiscriminatory, lower cost rates upon the expiration of their negotiated Agreement on December 31, 1997.

Settlement, Order No. PSC-96-0082-AS-TP ("Order 1"). In that order, the Commission expressly considered the possible development of two different interconnection rate regimes as a result of a negotiated agreement by some (but not all) parties, and rejected the notion that such an outcome would violate the nondiscrimination provisions of the statute:

> Two differing regimes of rates, terms and conditions for competitors raises the question of whether we would be endorsing discriminatory rates, terms and conditions that are contrary to the provisions for interconnection and resale. It is clear that the new statutory regime endorses negotiations to solve implementation controversies. It is also clear that if negotiations fail, the Commission is left to resolve the controversy. Any decision that we make resolving the controversy throught litigation must be nondiscriminatory. However, where portions of the controversy are negotiated by some parties and not all, it is not clear that differing results based on negotiations versus litigation run afoul of the nondiscrimination provisions. Such differences do not appear at this point to be clearly unreasonably discriminatory. Moreover, we must also note that we will attempt to honor the negotiations to the extent permissible.

Order 1 at 4-5. To be perfectly clear, the Commission noted that its approval "is as to only those parties that have signed the agreement or will sign the agreement in the future." Id. The Commission added that absent signature to it by all parties, the "agreement cannot act as a global settlement for all parties. Those parties that have not signed the agreement cannot be bound by the agreement's provisions." Id. at 4.[5/]

[5/]Though faced with this January 17, 1996 Order contemplating two differing pricing regimes, the movants did not request reconsideration of that Order.

III. THE MOVANTS FAIL TO PRESENT ANY FACTUAL EVIDENCE OR CONTROLLING LEGAL PRICNIPLE WHICH THE COMMISSION FAILED TO CONSIDER

The sole purpose of a petition for rehearing or motion for reconsideration to an administrative agency is to alert the Commission to "some point which it overlooked or failure to consider" when issuing its order. *Diamond Cab Co. of Miami v. King*, 146 So.2d 889, 890 (Fla. 1962). "It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the...order." Id. The Commission has already thoroughly considered both the legal and factual issues presented by the movants. See, Order 1 at 4-5, *supra*, and Order 2 at 6-16. The Commission specifically considered the terms of the Agreement ("Stipulation") as an interconnection option for MFS and MCIMetro (as urged by BellSouth) and rejected it:

> We fail to see how the Stipulation ensures each company will recover its costs of local interconnection through usage-based rates. On the contrary, the Stipulation foresees a movement to mutual traffic exchange in the future: "If it is mutually agreed that the administrative costs associated with the exchange of local traffic are greater than the net monies exchanged, the parties will exchange local traffic on an in-kind basis; foregoing compensation in the form of cash or cash equivalent." Thus, we believe these provisions in the Stipulation anticipate a nearly balanced exchange of traffic.
>
> Further, based on the cost information in the record, it appears that the local interconnection rate of $0.01052/ minute contained in the Stipulation may be too high. Based on the evidence in the record, we find that mutual traffic exchange is the most appropriate arrangement at this time....

Order 2 at 10. After evaluating the record evidence, the Commission concluded

that "mutual traffic exchange appears to be the most efficient, least-cost method of interconnection, and should provide the lowest barrier to entry of any method discussed." Id. at 13. The Commission left open the possibility that BellSouth or any of the ALECs could request that the interconnection method be changed should traffic imbalances occur to the detriment of one or more parties. Id. It further found that the mutual traffic exchange interconnection terms should be filed in a tariff by BellSouth, to be "available to all similarly situated ALECs on a non-discriminatory basis." Id. at 16.[6/] A company that believes that its situation is different from the other ALECs in this proceeding "may negotiate its own rates, terms and conditions with BellSouth", and presumably file a petition should negotiations be unsuccessful. Id. Therefore, the Commission's Order does not discriminate against similarly situated ALECs, but instead affords them a "most efficient, least-cost method" of

---

[6/]FCTA and Time Warner argue that they are "similarly situated" ALECs like MFS and MCIMetro, and that the Commission's recent Order as to the latter "discriminates among ALECs". FCTA Request at 6; Time Warner Request at 4-5. This argument distorts the record. The movants opted out of the class of "similarly situated providers" to MFS and MCIMetro when they negotiated their comprehensive settlement agreement with BellSouth (and agreeing to switched access interconnection rates of $.01052 per minute).

FCTA and Time Warner are also not "similarly situated" to MFS and MCIMetro in another significant respect which they omit to mention. The movants expressly state in their Agreement that they deem their "transitional" prices, terms and conditions of local interconnection **"acceptable only in the interests of compromise to enable the introduction of local exchange competition to Florida's consumers beginning January 1, 1996."** Agreement at 9 (emphasis added). They admit they have insufficient data with respect to traffic volumes, and hence provide that their rates are transitional and to be renegotiated beginning in 18 months. Id. Clearly, the movants entered into this Agreement with a clear goal in mind (to begin introducing local exchange competition at an earlier date than other like MFS who were forced to continue litigating against the incumbent LEC before the Commission) and with a clear understanding of both potential upside and downside consequences.

interconnection. That this tariffed interconnection regime may be temporarily unavailable to Time Warner and FCTA because of their negotiated agreement hardly means that the Commission's rate structure is discriminatory.

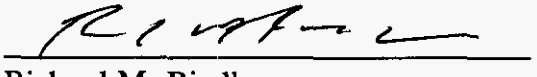
Accordingly, the Commission's Order is supported by competent, substantial evidence, and does not overlook any essential evidence nor any essential legal requirement dispositive upon its Order. The movants, FCTA and Time Warner, may regret the interconnection terms they negotiated with BellSouth which now in hindsight (when compared to the nondiscriminatory mutual traffic exchange terms set by the Commission) appear to them to be a bad bargain. The fact that they have second thoughts will not in the future discourage other parties from making their own judgment as to the benefits of negotiation or litigation. The very same forces which encouraged FCTA, Time Warner and the other parties to negotiate (i.e. to avoid litigation uncertainty, to expedite entry into local markets, and a routine cost-benefit analysis of settlement versus expected litigation result) remain vibrant and unchanged. As always, certain parties will choose to negotiate; while others who cannot mutually agree will be forced to litigate. Differing results from either path are to be expected.

IV. CONCLUSION

For the foregoing reasons, Time Warner's and FCTA's Requests for Reconsideration fail to point to any evidence or controlling principle of law which the Commission overlooked and should be denied on that basis. Further, as the Commission has found, its recent Order is nondiscriminatory to all similarly-situated ALECs who have not separately negotiated mutually acceptable interconnection terms and rates, as did FCTA and Time Warner with BellSouth. The Commission's Order also encourages competition, as it selects the low cost

interconnection method based on the record evidence, not the higher cost switched access usage rate agreed to by the movants in their Stipulation. Finally, this result encourages negotiated settlements under the statutory procedures. Any other result could have the far more disastrous effect of allowing settlements to be modified or set aside simply because non-signatory parties who proceed to have the Commission decide interconnection rates obtain a different result. Negotiated settlements would no longer be binding and the entire negotiation process would be rendered meaningless, causing more cases to be litigated and the Commission's dockets to proliferate. Accordingly, the movants' Requests for Reconsideration should be denied in their entirety.

Respectfully submitted,



Richard M. Rindler
Douglas G. Bonner
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Ste. 300
Washington, D.C. 20007-5116

Attorneys for Metropolitan Fiber Systems of Florida, Inc.

Timothy Devine
MFS Communications Company, Inc.
Six Concourse Parkway, Ste. 2100
Atlanta, Georgia 30328
(770) 390-6791 (ph.)
(770) 390-6787 (fax)

Dated: April 26, 1996

158960.1

CERTIFICATE OF SERVICE

I, Eleanor M. Willis, hereby certify that on this 26th day of April, 1996 a copy of the foregoing **Consolidated Opposition of Metropolitan Fiber Systems of Florida, Inc. to Requests for Reconsideration of Florida Cable Telecommunications Association and Time Warner**, Docket No. 950985-TP, was served, via First Class Mail, postage prepaid, to each of the following parties:

Mr. Michael Tye
AT&T Communications
of the Southern States, Inc. (T1741)
106 East College Avenue, #1420
Tallahassee, Florida 32301-7733

Mr. Timothy Devine
MFS Communications Company, Inc.
(TA012)
Six Concourse Parkway, Suite 2100
Atlanta, Georgia 30328

Ms. Laura Wilson
Florida Cable Telecommunications
Associates, Inc.
310 North Monroe Street
Tallahassee, Florida 32302

Peter Dunbar, Esq.
Charles W. Murphy, Esq.
Pennington Law Firm
215 South Monroe Street, Ste. 200
P.O. Box 10095 (zip 32301)
Tallahassee, Florida 32302

Richard Melson, Esq.
Hopping Law Firm
123 South Calhoun Street
P.O. Box 6526 (zip 32314)
Tallahassee, Florida 32301

Jodie Donovan-May, Esq.
Teleport Communication Group -
Washington, D.C.
2 LaFayette Center
1133 Twenty-First Street, N.W., Ste. 400
Washington, D.C. 20036

Kenneth Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman
P.O. Box 551
215 South Monroe Street, Ste. 420
Tallahassee, Florida 32302

Ms. Jill Butler
Time Warner Communications
2773 Red Maple Ridge, Ste. 301
Tallahassee, Florida 32301

Mr. Michael J. Henry
MCI Telecommunications Corporation
(T1731)
780 Johnson Ferry Road, Ste. 700
Atlanta, Georgia 30342

Patrick Wiggins, Esq.
Wiggins Law Firm
501 East Tennessee Street, Ste. B
P.O. Drawer 1657 (zip 32302)
Tallahassee, Florida 32308

Floyd Self, Esq.
Messer Law Firm
215 South Monroe Street, Ste. 701
P.O. Box 1876 (zip 32302)
Tallahassee, Florida 32301

Lee L. Willis, Esq.
J. Jeffrey Wahlen, Esq.
McFarlane, Ausley, et al.
227 South Calhoun Street
Tallahassee, Florida 32301

Anthony P. Gillman, Esq.
Kimberly Caswell, Esq.
GTE Florida Incorporated, FLTC0007
201 North Franklin Street
Tampa, Florida 33602

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

Leo I. George
WinStar Wireless of Florida, Inc.
1146 19th Street, N.W., Ste. 200
Washington, D.C. 20036

Charles Beck, Esq.
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

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

Clay Phillips
Utilities & Telecommunications
House Office Building, Room 410
Tallahassee, Florida 32399

David Erwin, Esq.
Young Law Firm
P.O. Box 1833
225 South Adams Street
Tallahassee, Florida 32302-1833

Nels Roseland
Executive Office of the Governor
Office of Planning and Budget
The Capital, Room 1502
Tallahassee, Florida 32399-0001

Graham A. Taylor
TCG South Florida
1001 West Cypress Creek Road
Suite 209
Ft. Lauderdale, Florida 33309-1949

Greg Krasovsky
Commerce & Economic Opportunities
Senate Office Building, Room 426
Tallahassee, Florida 32399

John Murray
Payphone Consultants, Inc.
3431 N.W. 55th Street
Ft. Lauderdale, Florida 33309-6308

H.W. Goodall
Continental Fiber Technologies, Inc.
4455 BayMeadows Road
Jacksonville, Florida 32217-4716

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

Steven D. Shannon
MCI Metro Access Transmission Services, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082

Gary T. Lawrence
City of Lakeland
501 East Lemon Street
Lakeland, Florida 33801-5079

Marsha Rule, Esq.
Wiggins & Willacorta
P.O. Drawer 1657
501 East Tennessee
Tallahassee, Florida 32302

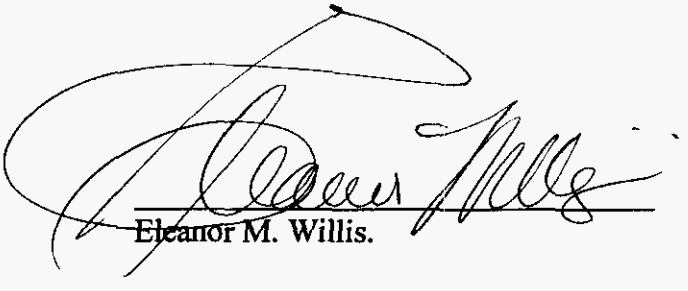
Kimberly Caswell, Esq.
c/o Richard M. Fletcher
GTE Florida Incorporated
106 East College Avenue, Ste. 1440
Tallahassee, Florida 32301-7704

F. Ben Poag
Sprint/United-Florida
Sprint/Centel-Florida
P.O. Box 165000 (M.C. #5326)
555 Lake Border Drive
Apopka, Florida 32703

J. Phillip Carver, Esq.
c/o Nancy H. Sims
Southern Bell Telephone & Telegraph
Company
150 South Monroe Street, Ste. 400
Tallahassee, Florida 32301

Robin Dunsan, Esq.
AT&T Communications
1200 Peachtree Street, N.E.
Promenade I, Room 4038
Atlanta, Florida 30309

Donald Crosby, Esq.
7800 Belfort Parkway
Suite 200
Jacksonville, Florida 32256-6825



Eleanor M. Willis.

M:\TELECOM\2312\21\159142.1

159870.12