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June 14, 1996

Via Federal Express

ORIGINAL
FILE COPY

Mrs. Blanca S. Bayo
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Consolidated Opposition of Metropolitan Fiber Systems of Florida, Inc. to Motions for Reconsideration (Docket No. 950985-TP)

Dear Mrs. Bayo:

Enclosed for filing is an original and 15 copies of the Consolidated Opposition of Metropolitan Fiber Systems of Florida, Inc. to Motions for Reconsideration in the above-referenced docket.

Please date stamp the extra copy, and return it in the enclosed self-addressed envelope.

Also enclosed is a computer disk formatted in WordPerfect 6.1 for Windows containing the enclosed document.

If there are any questions concerning this matter, please contact me.

Sincerely,

Morton J. Posner

cc (w/o encl.): Andrew D. Lipman, Esq.

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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**	ORIGINAL FILE COPY
	Filed: June 17, 1996	

CONSOLIDATED OPPOSITION OF METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. TO MOTIONS FOR RECONSIDERATION

Pursuant to Rule 25-22.060(b), Florida Administrative Code and Order No. PSC-95-0888-PCO-TP, Metropolitan Fiber Systems of Florida, Inc. ("MFS"), by its undersigned attorneys, hereby files this Opposition to Motions for Reconsideration of Order No. PSC-96-0668-FOF-TP ("Order"), issued on May 20, 1996.[1/]

I. INTRODUCTION

In order to prevail, movants for a motion for reconsideration must show that the Commission either ignored, misinterpreted or misapplied the law applicable to the evidence in this proceeding, or overlooked and failed to consider the significance of certain evidence in this docket. *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). Movants did not and cannot meet that standard. GTE makes the tortured argument that mutual traffic exchange (also known as bill

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1/ Specifically, MFS opposes the Motions for Reconsideration filed by GTE Florida Incorporated ("GTE"), United Telephone Company of Florida and Central Telephone Company of Florida (collectively "Sprint"), the Florida Cable Telecommunications Association ("FCTA"), Time Warner AxS of Florida, L.P. and Digital Media Partners (collectively "Time Warner"), and Continental Cablevision.

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and keep), which is explicitly authorized by the Telecommunications Act of 1996 ("Act") somehow violates the Act and the Florida and federal constitutions. In reality, the Commission carefully reasoned that bill and keep is a fair and efficient mechanism for reciprocal compensation which encourages competition and prevents incumbent local exchange carriers' ("ILECs'") use of the compensation rate as a barrier to market entry.

Sprint argues that the Commission may not order bill and keep without setting a date at which the compensation scheme will end. Sprint neglects to recognize that the scheme ends when it can be shown that bill and keep is no longer a reasonable approximation of carrier cost. Sprint also variously asserts that the Commission's decisions regarding toll default, cross-connect rates, intermediate handling of local traffic, and publication and distribution of directories are erroneous. Sprint's arguments with respect to these issues are also meritless.

II. GTE'S MOTION FOR RECONSIDERATION

A. Bill and Keep Is an Appropriate Reciprocal Compensation Method.

1. Bill and Keep Constitutes a "Charge" Under Florida and Federal Law.

GTE argues that the Commission's adoption of a form of bill and keep as compensation for local call termination violates Florida law. The Commission properly rejected GTE's argument and ruled that bill and keep constitutes a "charge" and is therefore in conformance with Section 364.162. Order at 19. Under Florida law, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. *Green v. State*, 604 So.2d 471, 473 (Fla. 1992); *Newberger v. State*, 641 So.2d 419, 420 (Fla. 2d DCA 1994). By reference to the

dictionary, it is easily established that bill and keep, which is essentially barter, constitutes a "charge."

According to the dictionary, "charge" is defined as "To set or ask (a given amount) as ***a price***." *The American Heritage Dictionary of the English Language*, at 226 (6th Ed., 1976) (emphasis added). "Price," in turn, is defined as "The sum of money ***or goods*** asked or given for something." *Id.* at 1038 (emphasis added). Accordingly, bill and keep is perfectly consistent with the Florida statute's requirement that a "charge" be established for interconnection. § 364.162, Fla. Stat. As to "rate," the dictionary defines it as "A ***charge*** or payment calculated ***in relation to*** any particular sum or quantity." *Id.* at 1082. The charge in this case is that GTE must accept ***all of*** MFS' traffic for termination ***in relation to*** having ***all of*** its MFS-customer bound traffic terminated on MFS' network.[2/] In other words, the price (or "charge" or "rate") MFS pays to interconnect with GTE is that it must terminate all traffic GTE sends to it. In this case, MFS must undertake the obligation and the expense of terminating traffic sent to it by GTE. The reciprocal nature and simplicity of bill and keep is what has made it so attractive to GTE and other incumbent LECs as the most common method of local traffic exchange between incumbent LECs for decades. Rather, the Commission has correctly interpreted the statute to include one of the oldest forms of compensation, barter, or, in this case, bill and keep.

Significantly, in drafting the Act, Congress concluded that bill and keep, or mutual traffic exchange ***can*** constitute a "charge." Section 252(d)(2) states that "Charges for Transport and

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[2/] Alternatively, the "rate" or "charge" for interconnection could be viewed as the rate charged by GTE to its end users under a bill and keep system, according to which GTE would bill its end users a rate and keep that entire rate or charge, despite the fact that it only carries the originating half of the call, and someone else carries the terminating half.

Termination of Traffic" shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Act, § 252(d)(2). Accordingly, GTE's attempt to read the possibility of bill and keep out of the Florida statute fails on its own terms, and is inconsistent with the contrary interpretation of the same language by Congress.

2. The Commission's Modified Bill and Keep Covers the Cost of Interconnection.

The Commission's bill and keep arrangement was deliberately structured by the Commission to ensure that it met the requirement of Section 364.162(4) that the charge for interconnection cover the cost of interconnection. The Commission specifically considered this portion of the statute in its decision:

> We disagree with LECs' argument that mutual traffic exchange violates Section 364.162, Florida Statutes. This Commission is obligated to foster competition while ensuring that the charge set for interconnection covers LECs' costs. The intent of Section 364.162, Florida Statutes, is to ensure that interconnection rates are not set below LECs' costs. When the traffic is balanced, mutual traffic exchange is akin to payment in kind. To construe the statutory language so narrowly to say that mutual traffic exchange would not be an adequate for of compensation would, in our opinion, yield an absurd result.

Order at 19. While the Commission was correctly convinced that bill and keep covers costs, the Commission adopted a fall back mechanism. If MFS or GTE "believes that traffic is imbalanced to the point that the party is not receiving the benefits equivalent to those it is providing through mutual traffic exchange, than [sic] that party may request the compensation mechanism be changed." Order at 20.

GTE claims that the Commission's ruling is not supported by substantial evidence regarding the existence of traffic balance. GTE Motion at 6-8. The argument relies upon a

misreading of the Commission's Order. The Order states that evidence whether traffic will be *balanced* "inconclusive," and that predictions of *imbalance* are "speculative." Order at 15. Aware of the possibility, but not certainty, of traffic imbalance, the Commission established a remedy procedure. If GTE is genuinely concerned about recovering its costs, the Commission has deliberately given it recourse to return to the Commission to demonstrate that bill and keep does not achieve this goal.

3. Imposition of Bill and Keep Between MFS and GTE is not Discriminatory.

Under Florida law, rates and terms of interconnection initially are to be negotiated between carriers. If negotiations fail, a party may petition the Commission to set such rates and terms. Nowhere in the Florida statute does it require that there be only one set of interconnection negotiations in the state to which all carriers, even those who did not participate in the negotiations, are bound. Nevertheless, GTE argues that the Commission's duty to establish non-discriminatory interconnection rates and terms requires it to impose on MFS the same compensation scheme that it approved as between GTE and Intermedia Communications, Inc. ("ICI"). Motion at 11-13. GTE and ICI negotiated a deal which the Commission approved and which now binds them. MFS was not a party to those negotiations. GTE could not reach agreement with MFS. The fact that GTE prefers the agreement it made with ICI, rather than the terms the Commission imposed because GTE could not agree with MFS, are no basis to reconsider the Order.

4. Bill and Keep is Not a Taking; If It Were, Bill and Keep Represents Just Compensation.

GTE's argument that "bill and keep" violates the Takings Clauses of the federal and Florida constitutions is simply without merit. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." *See BellAtlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("[o]f course, the Clause prohibits only uncompensated takings"). Takings cases generally fall into two distinct patterns. In the first, the government authorizes a physical occupation of property (or takes title). In such a case, at least for ***permanent physical invasions***, the Takings Clause requires compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In the second, the government merely regulates the use of property. Whether and how much compensation is required to compensate for the regulated use is subject to a fact-specific inquiry. *Yee*, 503 U.S. at 522-23. A constitutional analysis is entirely inapplicable in this case as "bill and keep"represents neither a physical invasion of GTE's network in a takings sense, nor a use of the network which lacks just compensation.

For the first time, GTE argues in its motion for reconsideration that the ALECs' use of GTE's network will deprive it of the ability to serve other customers. There is simply no evidence in the record to support this argument. GTE adduced no evidence that other carriers' terminating traffic would occupy the GTE network to the exclusion of other users. While GTE's network is not infinite, it can accommodate substantial traffic. If the demand for GTE's services exceeds its capacity, it can add more capacity profitably to meet demand of customers. Telephone

networks are entirely distinguishable from the paradigmatic real property taking where space is limited. Telephone networks can be expanded to accommodate additional customers.[3/]

Carriage of ALEC traffic is also distinguishable from a real estate taking in that the use of GTE's network is transient. Even while ALECs interconnect with GTE's network, GTE never cedes its ability to dedicate its network to customer use, nor to profit from that use. One minute of traffic is simply being replaced by another minute of traffic. GTE's business judgment, not the Constitution, should determine whether and how GTE will meet its demand.

Selectively quoting *Lucas*, GTE states that the mere fact of an "intrusion" into private property is a "*per se*" taking. *Lucas*, 505 U.S. at 1015. Even if ALEC use of the network was an intrusion -- which we maintain it is not -- the intrusion is not a *per se* taking. *Lucas* actually holds that when government regulations compel a property owner to suffer a "permanent [physical] invasion . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Any intrusion which may occur on GTE's network is transient and justly compensated. Moreover, *Lucas* did not concern regulations imposed by a regulatory agency on a public utility that the agency was authorized to regulate and in furtherance of the statutory scheme. There is simply no doubt that compelled interconnection of a monopoly public utility to other public utilities is permissible. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 375 (1973) (Federal Power Commission may require interconnection for purpose of transmitting wholesale electricity); *Chicago, Milwaukee, & St. Paul*

3/ There is considerable irony in an argument by GTE that competition will *increase* the demand for its services. Rather than eroding GTE's ability to provide universal service because of the loss of business, GTE now argues that it will not be compensated for costs associated with increased business.

Ry. v. Iowa, 233 U.S. 334, 344-45 (1914) (upholding requirement that railroad transport loaded cars owned by competing carriers).

III. SPRINT'S MOTION FOR RECONSIDERATION

A. The Commission Appropriately Determined that Bill and Keep May Be Applied.

Under the federal Act, reciprocal compensation rates must be based on a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). The Commission has ordered bill and keep as the appropriate reciprocal compensation scheme between ILECs and ALECs, with a mechanism for adjustments in the event of significant traffic imbalance. Sprint mistakenly argues that Section 252 requires the Commission to set a time limit on the applicability of bill and keep. Sprint Motion at 2-4. The Commission is fully within its authority to order bill and keep either as a temporary or permanent method of reciprocal compensation. Under the Commission's Order, ILECs may apply for a different scheme in the future and are free to negotiate other arrangements.

Sprint's protestations that the Commission may not order bill and keep until the ALECs provide cost support data is unavailing. Under the Act the charge of termination is a *reasonable approximation* of the additional costs. 47 U.S.C. § 272(d)(2)(A)(ii). This reasonable approximation should be based on the costs of an *efficient* carrier.[4/] There is no need for the

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[4/] GTE claims that the Commission has unfairly "prejudged" it by assuming that any mechanism other than bill and keep would be more likely to lead to anticompetitive behavior by an incumbent. GTE Motion at 17-18. As GTE is the entrenched provider of local service, it is more likely that it would engage in anticompetitive behavior than a new entrant. There is no unfairness in the Commission's attempt to open the market to competition in the public interest. Similarly, while GTE complains that it is being forced "to subsidize the market entry" of ALECs (continued...)

Commission to order cost support for every carrier, because the Commission's inquiry does not require it. If Sprint believes that the Commission's approximation of termination cost is no longer valid, it should apply for adjustment. Until then, the Commission's inquiry into termination cost has been sufficient.

B. If the Commission Does Not Wish to Apply Bill and Keep, the Record Supports a Minute of Use Rate.

MFS' proposal, as well as the Staff's primary recommendation, was that bill and keep should serve as an interim compensation arrangement.[5/] Specifically, MFS' proposal was that bill and keep apply for 18 months. If the Commission believes that bill and keep should be only a temporary compensation method, MFS renews its proposal that it apply for 18 months. If the Commission believes that a minute of use ("MOU") rate for call termination is appropriate, MFS believes that there is record support for rates that the Commission may apply. Staff's analysis was that there were appropriate MOU rates to apply to GTE and to Sprint in the event that the Commission adopted its alternative recommendation to institute usage sensitive rates. Specifically, Staff recommended that GTE and ALECs compensate each other at an MOU rate of $0.0025, and that Sprint and ALECs compensate each other at an MOU rate of $0.006 until Sprint provides cost study information to support a permanent MOU rate.[6/] MFS would not oppose institution of those rates, not because it believes that the Commission's ruling is in any way

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[4/](...continued)
(GTE Motion at 18), it fails to discuss that it has benefitted from a lack of market entry.

[5/] Staff April 5, 1996 Memorandum at 15, 16; MFS Post-hearing Brief at 11.

[6/] *Id.* at 17.

inadequate, but because it would reduce the expense of litigating the issue and eliminate any further delays to the development of competition.[7/]

C. The Commission's Rulings on Toll Default, Cross-connect Rates, And Intermediate Handling of Local Traffic Are Correct.

1. In Most Cases Only the Originating Carrier Can Determine if a Call is Local or Toll.

Sprint asserts that the Commission erred in ruling that originating switched access charges will be assessed "unless the local exchange provider *originating* the call can provide evidence that the call is actually a local call." Order at 21, 49 (emphasis added). According to Sprint, it is the *terminating* rather than *originating* carrier who can determine whether a call is local or toll. Sprint is incorrect. The originating -- not terminating -- carrier has the call record and therefore knows both the originating and terminating number called and absent SS7 capability the originating carrier is the only carrier who can reconcile whether a call is local or toll. The Commission's Order is accurate as written.

2. Special Access Cross-Connect Rates Encourage Interconnection Efficiencies and Adequately Compensate LECs.

Sprint argues that the special access cross-connect rates authorized by the Commission in the event two collocated ALECs are interconnected in collocated spaces do not permit it to recover

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[7/] Commission institution of interim termination rates would moot the concerns of GTE, FCTA, and Time Warner regarding the costs of measuring traffic balance in order to apply for usage sensitive rates, whether or not there is a "true-up" mechanism for carriers to recoup any shortfalls in revenue, and whether or not the Commission may order the adjustment procedure under the state Administrative Procedure Act. *See* GTE Motion at 9; FTCA Motion at 3; Time Warner Motion at 2; Continental Motion at 3.

the costs of providing this service to ALECs collocated in the same LEC wire center. Sprint apparently wants to charge special access cross-connect rates plus rates for "additional"equipment needed for the cross connection. Sprint Motion at 6-9. Carrier collocation and cross-connect charges allow ILECs to recoup any costs an ILEC incurs by the cross connection of collocators. Permitting the ILEC to charge additional rates could result in incenting the ILEC to accomplish the cross-connect in an inefficient manner.

3. The Commission's Rate for Intermediary Handling of Local Traffic is Appropriately Based on Cost.

The Commission's Order is clear that it did not believe that GTE's asserted tandem and intermediate switching charge of $0.002 was based on cost. Order at 24. The Commission recognized that GTE's $0.002 rate was the same as the one that it provided in the Local Transport docket, which was not cost-based. LECs including GTE in the docket were ordered to provide cost support data underlying actual cost, resulting in a negotiated and agreed upon rate of $0.00075 ultimately approved by the Commission. The Commission imposed the same $0.00075 rate in this docket. The Commission properly discredited GTE's rate testimony in favor of a relevant cost-based rate the Commission has already approved.

D. Sprint Benefits from a Single Directory and Should Publish and Distribute Directories at No Charge.

Sprint disingenuously argues that it derives no benefit from ALEC directory listings and consequently that it should be relieved of its obligation to publish and distribute directories to ALEC customers at no charge. Sprint Motion at 11. While Sprint claims that its directories are published by separate entities, it fails to disclose that those "separate entities" are Sprint affiliates. Sprint's affiliates do not charge Sprint for residence and business listing and in fact pay Sprint for

business listings included in the yellow pages. Order at 36. Sprint's assertion it derives no revenues from directory listings is absurd. Moreover, Sprint would devalue the benefit it derives from its directories if MFS' customers were excluded from it. The public interest, as well as Sprint's interest, favors a single directory for all telephone subscribers in a geographic area which is complete. Devine Direct Testimony at 42 (Jan. 22, 1996). So long as Sprint's directory is complete, it is unquestionably of value and should be published and distributed free of charge to MFS customers.[8/]

IV. CONCLUSION

The Commission carefully considered and properly resolved the issue of reciprocal compensation, as well as the other issues raised in the motions for reconsideration filed in this proceeding. It determined that under the circumstances in this case bill and keep was authorized and is an efficient, and administratively simple means of providing interconnection compensation while encouraging the development of competition in Florida consistent with the Commission's obligation. Bill and keep ensures that both carriers' costs are recovered, and guarantees a reciprocal interconnection compensation arrangement. Bill and keep is consistent with Florida law, including the requirement that interconnection compensation recover the cost of interconnection. The Commission, recognizing uncertainty surrounding traffic balance, included

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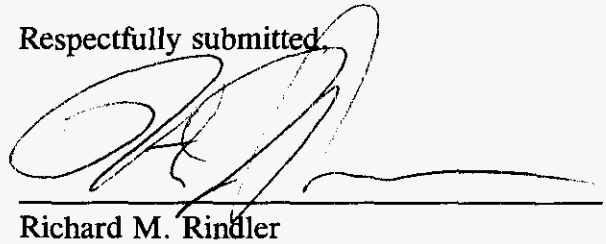
[8/] Sprint also concedes that it has a less than arm's length relationship with the directory publisher, which partially provides information pages at no cost to Sprint. Sprint Motion at 13. Under Sprint's reasoning that directories are to be priced at cost like any other unbundled network element, Sprint should have no objection to passing through the benefits of its special relationship with its publishing affiliates and to publishing and distributing directories to MFS customers at no cost. Sprint should also have no objection to using its special publishing relationship to work with ALECs to ensure that their information pages are included in the directory. Sprint Motion at 13. Any assertion that such coordination "saddles" Sprint with costs is fanciful.

a provision that permits ILECs to come back to the Commission with a showing that its costs are not being covered as a result of a traffic imbalance. If the Commission decides to pursue a usage sensitive rate, however, the record provides an appropriate permanent rate of $0.0025 for GTE and an appropriate temporary rate of $0.006 for Sprint.

Respectfully submitted,



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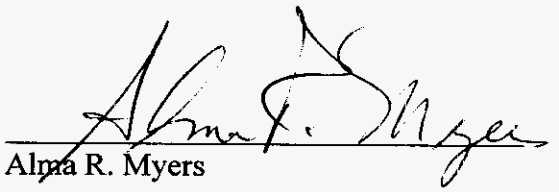
Dated: June 14, 1996

CERTIFICATE OF SERVICE

I, Alma R. Myers, do hereby certify on this 14th day of June, 1996 that a copy of the foregoing Consolidated Opposition of Metropolitan Fiber Systems of Florida, Inc. To Motions for Reconsideration Docket No. 950985-TP, were served, first-class mail, on the parties on the attached list.



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