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FILE COPY

Legal Department

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July 8, 1997

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

RE: Docket No. 961346-TP

Dear Mrs. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion To Dismiss The Petition For Relief Under 47 U.S.C. § 251(i) Of Telenet of South Florida, Inc., which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

*J. Phillip Carver*  
J. Phillip Carver (2X)

- ACK
- AFA \_\_\_\_\_ Enclosures
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU *Carver*
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG *1*
- LIN *2*
- OP \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC *1*
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

cc: All Parties of Record  
A. M. Lombardo  
R. G. Beatty  
W. J. Ellenberg

RECEIVED & FILED  
*[Signature]*  
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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 961346-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 8th day of July, 1997 to the following:

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Charlie Pelligrini  
Staff Counsel  
Florida Public Service  
Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

  
J. Phillip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of Petition(s) to )  
Establish Right of Access of Telenet of ) Docket No. 961346-TP  
South Florida, Inc. to Call Forwarding )  
Lines Offered by BellSouth )  
Telecommunications, Inc. and for Arbitration) Filed: July 8, 1997  
\_\_\_\_\_)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION  
TO DISMISS THE PETITION FOR RELIEF UNDER  
47 U.S.C. § 251(i) OF TELENET OF SOUTH FLORIDA, INC.**

BellSouth Telecommunications, Inc., ("BellSouth"), hereby files, pursuant to Rule 25-22.037, Florida Administrative Code, its Motion to Dismiss the Petition for Relief Under 47 U.S.C. § 251(i) of Telenet of South Florida, Inc., and states the following:

1. On November 12, 1996, Telenet of South Florida, Inc. ("Telenet") filed a Petition for Arbitration. The issue was (and still is) whether Telenet can resell remote call forwarding services in a way that violates § A13.9.1.A.1 of BellSouth's General Subscribers Service Tariff. This section of the tariff provides as follows:

Call forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment in whole or in part, of message toll charges that would regularly be applicable between the station originating the call and the station of which the call is transferred.

2. BellSouth moved to dismiss this Petition, and contended that it was not a proper request for arbitration, but rather a complaint as to how BellSouth applied its tariff. The Florida

Public Service Commission ("Commission") denied BellSouth's Motion and allowed this matter to proceed as an arbitration. The single issue in this arbitration was whether the restriction upon the use of the services purchased by Telenet for resale was reasonable and otherwise sustainable.

3. The Commission resolved the matter by issuing on April 23, 1997 its Final Order on Arbitration (Order No. PSC-97-0462-FOF-TP). The Commission specifically found that BellSouth's tariff restriction is appropriate (Order, p. 12). The Commission stated that "[t]he record shows that Telenet is currently reselling BellSouth's call forwarding services in a way that avoids the payment of toll or access charges, which violates BellSouth's tariff" (Order, p. 2) (emphasis added). The Commission also confirmed that while an ALEC may configure its local calling area in any way it chooses, "Section 364.16(3)(a), Florida Statutes, nonetheless does not allow an ALEC to knowingly deliver traffic where terminating access charges would otherwise apply. Therefore, while an ALEC may have a different local calling area than an incumbent LEC, it is required by statute to pay the applicable access charges." (Order, p. 11).

4. Immediately after the conclusion of the hearing, BellSouth undertook to negotiate with Telenet a resale agreement that would incorporate the decision of the Commission in the arbitration. Telenet, however, has taken the rather novel approach of refusing to enter into an agreement that incorporates

the terms of the Commission's arbitration between it and BellSouth. Instead, Telenet wishes to enter into an interconnection and resale agreement having precisely the same terms as the agreement between BellSouth and AT&T. BellSouth has agreed to this request, with one exception. BellSouth has insisted on the inclusion of a provision that would require Telenet to represent that it would utilize the agreement in a way that is consistent with Florida law and this Commission's Order upholding the resale restriction. Telenet has, as stated in its Petition, refused to enter into any agreement that would require it to abide by this Commission's Order and by the subject Florida Statutes.

5. At the same time, of course, Telenet has also attacked the Commission's Order both in a Motion for Reconsideration, and in a Motion for Stay. Both of these Motions were denied by the Commission in a vote taken at the Agenda Conference on June 24, 1997. This most recent petition (and the latest Motion to Stay, filed on July 1, 1997) are simply Telenet's latest attempt to avoid the ruling of this Commission despite the fact that its prior attempts to do so have been repeated rebuffed. This time, however, Telenet has taken the novel approach of arguing that it is entitled under the Act to avoid the Commission's ruling in the arbitration between it and BellSouth by opting, instead, to receive the terms of the pre-existing AT&T agreement. Telenet states that this agreement does not have the subject restriction.

Thus, Telenet appears to believe that, if it utilizes this agreement, it can continue to do business in precisely the way that it does now, purchasing remote call forwarding services and utilizing these services to carry calls across exchange boundaries in a way that violates the tariff restriction, the ruling of this Commission, and the Florida Statute. Telenet's contention that it should be allowed to do business in this manner has no more merit now than in the numerous previous instances that this position has been argued and rejected. It should, likewise, be rejected here.

6. Telenet's Petition makes the same old argument in a new way, by invoking the provisions of Section 252(I) of the Act.

This provision states as follows:

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS-- a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Telenet reasons that because the restriction of the use of call forwarding service so as not to violate Florida law was not explicitly included in the AT&T agreement, Telenet may opt to take this agreement, and, thereby, avoid the decision of this Commission that specifically applied to Telenet. This theory is wrong, first of all, because BellSouth is, in effect, offering this service to Telenet on precisely the same terms as AT&T. The agreement between BellSouth and AT&T provides that the agreement

between those parties must be implemented in a way that comports with applicable law. Thus, the use that Telenet wishes to make of call forwarding services is prevented by the AT&T agreement. Telenet appears to hold the inexplicable belief, however, that it may sign an agreement with this language and, nevertheless, use call forwarding to avoid the payment of access charges, i.e., use it in a way that violates Florida law. At least in part for this reason, BellSouth insisted on the insertion of the above-referenced language, so that the agreement between the parties would reflect the matters specifically considered by the Commission and ruled upon in the arbitration.

7. Telenet is also, and more fundamentally, wrong because its interpretation of Section 252(i), if accepted, would lead to a truly perverse result. Telenet contends that it may avoid the Commission's ruling entirely by opting for the AT&T agreement, an agreement in which resale of this type was not, in any way, an issue. 252(1) is, however, simply not applicable. This section provides that if the service is offered to one interconnector, then it must be offered to another on the same terms. Telenet's bizarre rendering of this section, however, is quite different, and can be paraphrased as follows: "If the Commission specifically determines in the context of an arbitration that a restriction is reasonable, then a party may avoid the Commission's ruling (and the restriction) by choosing an earlier agreement in which the issue has never considered." It is

obvious that Section 272(i) was not intended to be used in this manner. If this were the case, then a party would be able to get away with virtually any practice in the use (or misuse) of a resale or interconnection agreement by pointing to some earlier agreement in which the prohibited practice was never at issue, and in which it was, therefore, not considered. Again, Telenet should not be allowed to misuse 252(i) to reach this result.

8. The Petition, however, does raise an issue that bears consideration by the Commission (even though the instant petition can properly be dismissed without reaching this issue): the general question of whether a restriction on resale specifically approved by the Commission as reasonable applies to other parties whose previously entered agreements do not contain the restriction. BellSouth believes that the Commission should rule that such a restriction should apply to earlier agreements. Obviously, the process of reviewing restrictions to determine whether they are, or are not, reasonable is fluid. Since specific restrictions are raised in the context of individual arbitrations, a given restriction on resale will only come before the Commission based on a specific resale request. In other words, the procedure outlined by the Act does not allow for the Commission to develop prospectively an exhaustive catalogue of every possible sustainable restriction. Instead, the Commission must consider them as they are raised. Thus, the obvious result is that until a reasonable restriction is considered and



sustained in response to a particular resale request that is contrary to that restriction, there will be a number of agreements that make no mention of it whatsoever.

9. To use the Telenet case as an example, to BellSouth's knowledge, no other interconnector has attempted to use the resale of call forwarding in a way that violates Florida law and the tariff restriction that has been found reasonable. Thus, this issue has not been raised in any of the many agreements reached prior to this Telenet. If sustained restrictions apply only prospectively, beginning with the first case in which they are raised, then anyone reaching an agreement prior to the time that the Commission first rules on the restriction would be free to disregard it. This inconsistency makes no sense. To the contrary, if the Commission determines that a particular resale restriction is reasonable, then BellSouth (or for that matter any party to whom the restriction would be available), should be entitled to amend any agreement that has been entered to include the restriction.

10. Again, without this result, parties would be able to avoid restrictions determined to be reasonable simply because the restricted use not considered, much less made the subject of negotiations or arbitration, at the time the earlier agreement was entered into. This inconsistency would serve no purpose, and would, in effect, amount to a discriminatory application of the reasonable restriction to some parties, but not to others. For

this reason, BellSouth believes that when a restriction is upheld as reasonable, it should be applicable to anyone purchasing the restricted service for resale, even under a previously executed agreement.

11. For the reasons set forth above, Telenet's Petition should be summarily dismissed. Moreover, BellSouth requests that the Commission's Order also determine that any resale restriction that is specifically held to be reasonable in the context of an arbitration may be added by amendment to all agreements (either arbitrated or negotiated) to which the restriction would also apply.

WHEREFORE, BellSouth requests the entry of an Order dismissing Telenet's Petition and granting the additional relief described above.

Respectfully Submitted this 8th day of July, 1997.

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