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December 1, 2003

**BY HAND DELIVERY**

Ms. Blanca Bayó, Director  
Division of Records and Reporting  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 030867-TL, 030868-TL, 030869-TL, and 030961-TI

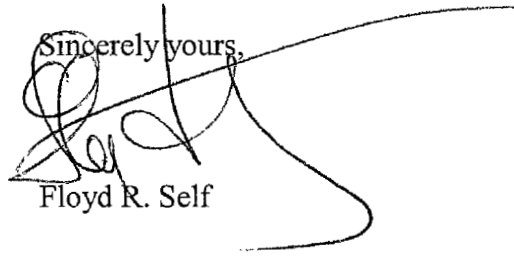
Dear Ms. Bayó:

Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC and MCI WorldCom Communications, Inc. are an original and fifteen copies of their Response in Opposition to Motion for Summary Final Order in the above referenced dockets.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb  
Enclosures  
cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Verizon Florida Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes.	DOCKET NO. 030867-TL
In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes.	DOCKET NO. 030868-TL
In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.	DOCKET NO. 030869-TL
In re: Flow-through of LEC switched access reductions by IXC's, pursuant to Section 364.163(2), Florida Statutes.	DOCKET NO. 030961-TI Filed: December 1, 2003

**RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY FINAL ORDER**

AT&T Communications of the Southern States, LLC ("AT&T") and MCI WorldCom Communications, Inc. ("MCI"), pursuant to Rule 28-106.204(4), Fla. Admin. Code, hereby file this response in opposition to the Motion for Summary Final Order filed by the Attorney General, and request that the Florida Public Service Commission deny the Motion. In support of this response, AT&T and MCI state:

1. During its 2003 Regular Session, the Florida Legislature passed Senate Bill 654, which contained a section by which local exchange telecommunications companies ("LECs") may petition the Florida Public Service Commission ("Commission") "to reduce its intrastate switched network access rate in a revenue-neutral manner." That section of Senate Bill 654 was

codified as Section 364.164, Fla. Stat.

2. In determining whether to grant or deny a petition, the Commission is charged with giving consideration to whether the petition will:

(a) Remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers.

(b) Induce enhanced market entry.

(c) Require intrastate switched network access rate reductions to parity over a period of not less than 2 years or more than 4 years.

(d) Be revenue neutral.

3. Each of the criteria set forth in the statute require a factual analysis of each LEC petition, including exhibits and attachments thereto.

4. On August 27, 2003, Verizon Florida, Inc., Sprint-Florida, Inc., and BellSouth Telecommunications, Inc. filed petitions to reduce their intrastate switched network rates to interstate parity in a revenue neutral manner pursuant to Section 364.164, Fla. Stat. Each made specific factual allegations that the rate proposal met each of the statutory considerations set forth in Section 364.164(1), Fla. Stat. Each LEC petition was accompanied by exhibits and the testimony of several witnesses, all of which are considered to be part of each LEC petition.

5. On September 3, 2003, the Office of Public Counsel filed a Motion to Dismiss the petitions. On September 30, 2003, the motion was granted with leave to amend.

6. On the basis of the September 30<sup>th</sup> decision, Verizon Florida, Inc., Sprint-Florida, Inc., and BellSouth Telecommunications, Inc. each filed amended petitions to reduce their intrastate switched network rates to interstate parity in a revenue neutral manner as required by the process set forth in Section 364.164, Fla. Stat. Each made specific factual allegations that

the rate proposal met each of the statutory considerations set forth in Section 364.164(1), Fla. Stat. Each amended petition was accompanied by exhibits and the testimony of several witnesses, all of which are considered to be part of each LEC's amended petition.

7. On November 17, 2003, the Florida Attorney General filed a Petition to Intervene, and a Motion for Summary Final Order. In his motion, the Attorney General stated that "[t]he record raises no genuine issue as to whether the Petitions will benefit residential consumers. . . . The Petitions should therefore be denied as a matter of law." Attorney General's Motion for Summary Final Order at ¶5.

#### **Standard for Summary Relief**

8. Rule 28-106.204, Fla. Admin. Code provides that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact." That standard is substantively identical to that for a summary judgment, in which, upon consideration of the pleadings, affidavits, evidence, etc. "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1.510(c), Fla.R.Civ.P.

9. There is a dearth of judicial caselaw as to the standard to be applied in deciding a motion for Summary Final Order under Rule 28-106.204(4), Fla. Admin. Code. However, as the standard for summary relief is the same for both a summary final order and a summary judgment, the standards established by the courts for a summary judgment are applicable and should be applied in determining whether to grant the Attorney General's Motion for Summary Final Order. In that respect, the Commission has previously recognized the applicability of standards for summary judgment to a motion for summary recommended order.

See *In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc.*, Order Granting Motion for Summary Final Order, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP, 00 FPSC 8:390, 8:398 (August 24, 2000).

10. It is undisputed that “[f]or purposes of summary judgment, a court is to treat the allegations of the complaint as true.” *University Nursing Care Center, Inc. v. First Union National Bank*, 835 So.2d 1186, 1189, (Fla. 1st DCA 2002); see also *Moore v. Morris*, 475 So.2d 666 (Fla. 1985). As set forth by the First District:

Under Florida law, however, the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.1977). The movant's unsworn motion for summary judgment is not sufficient to rebut the allegations of an unsworn complaint, which must be accepted as true for the purposes of a motion for summary judgment, unless conclusively disproven.

*Green v. CSX Transportation, Inc.*, 626 So.2d 974, 975 (Fla. 1st DCA 1993).

11. Even in cases where reasonable persons might justifiably make different inferences and deductions to reach different conclusions as to whether a genuine issue of material fact exists, the issue should be submitted to the fact finding entity. *Mecier v. Broadfoot*, 584 So.2d 159, 160 (Fla. 1st DCA 1991). This is particularly true in rate setting proceedings, where their fact intensive nature makes them unsuitable for summary relief, especially the complete dismissal of the case as is being requested by the Attorney General.

12. The Attorney General has completely failed to demonstrate, nor has he even alleged, that the allegations in the Petitions, including exhibits and testimony of numerous witnesses, all of which must be accepted as true, fail to meet the standards established in Section

364.164(1), Fla. Stat. Therefore, the Motion for Summary Final Order must be denied.

### **Erroneous Basis for Commission Action**

13. The Motion for Summary Final Order must also fail because the Attorney General mischaracterizes the action that must be performed by the Commission. The Attorney General asserts that the amended petitions fail to demonstrate that the relief requested “will benefit residential consumers.” While the overall rate relief to residential consumers is a legislatively anticipated benefit of the implementation of Section 364.164, Fla. Stat., it is not the standard for consideration by the Commission and, therefore, cannot form the basis for summary relief.

14. Section 364.164(1)(a), Fla. Stat. provides that the Commission must determine if the amended petitions filed under that section will “remove current support for basic local telecommunications services that prevents the creation of a more attractive competitive local exchange market for the benefit of residential consumers.” A reading of that section demonstrates that “the creation of a more attractive competitive local exchange market for the benefit of residential consumers” is a statement of legislative intent as to the effect that will be derived from the “remov[al of] current support for basic local telecommunications services.”

15. That expression of legislative intent is further demonstrated by a review of the Senate’s 2003 Session Summary of Major Legislation Passed. In reiterating and paraphrasing the effect of Senate Bill 654, the Senate Committee on Communication and Public Utilities detailed that the Commission could not approve a petition unless “[c]urrent support for basic local telecommunications services that is preventing the development of more competitive options for the benefit of residential customers is removed.” (e.s.) Based on both the language of

the statute and its interpretive Senate Committee analysis, the Commission is to consider whether the petition demonstrates that the LEC will “remove current support for basic local telecommunications services.” If that is the case, then the Commission will have fulfilled the Legislative policy determination that such an act will benefit residential consumers.

16. In its Motion for Summary Final Order, the Attorney General fails to allege in any manner that the petitions as amended do not meet the standards under which the Commission must grant or deny LEC petitions as amended. Rather, the Attorney General focuses on an alleged violation of a “standard” of benefits to residential customers. As indicated previously, the Legislature debated, voted on, and enacted the policy decision as to whether the removal of current support for basic local telecommunications services would be to “the benefit of residential consumers.” It is not the duty or responsibility of the Commission to second guess the Legislature as to that basic policy decision, or to rewrite that Legislative expression of intent and effect. Thus, the “standard” cited by the Attorney General fails to provide an adequate legal basis upon which to grant summary relief. Therefore, the Motion for Summary Final Order must be denied.

WHEREFORE, based on the Attorney General’s failure to demonstrate that the allegations in the amended petitions, taken as true, do not support the relief requested, and based on the Attorney General’s reliance on a criterion that is not the subject of the Commission’s review under Florida Statutes Section 364.164(1), AT&T Communications of the Southern States,

LLC. and MCI WorldCom Communications, Inc. respectfully request that the Commission deny the Motion for Summary Final Order, and allow this proceeding to be heard on the merits.

RESPECTFULLY SUBMITTED, this 1<sup>st</sup> day of December, 2003.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U. S. Mail this 1<sup>st</sup> day of December, 2003.

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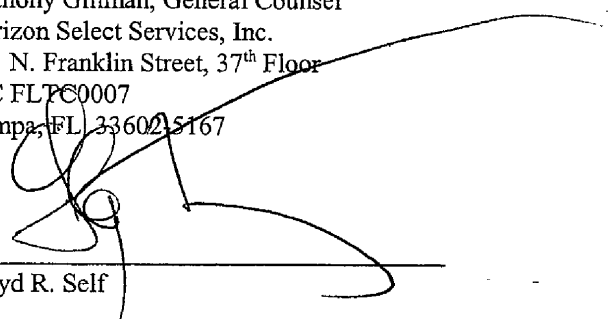
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