J. Phillip Carver
General Attorney

Southern Bell Telephone
and Telegraph Company
c/o Marshall M. Criser III
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Phone (305) 530-5558

April 6, 1994

Mr. Steve C. Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. [illegible]-TP - Intermedia's Petition

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Memorandum in Opposition to Motion of Florida Cable Television Association for Reconsideration and/or Clarification of order No. PSC-94-0285-FOF-TP, which we ask that you file in the captioned docket.

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 to the parties shown on the attached Certificate of Service.

Sincerely yours,

J. Phillip Carver (AW)

J. Phillip Carver

Enclosures

cc: All Parties of Record
A. M. Lombardo
Harris R. Anthony
R. Douglas Lackey

DOCUMENT NUMBER-DATE
03234 APR -6 94
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expanded interconnection for alternate access vendors within local exchange company central offices by INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.	Docket No. 921074-TP Filed: April 6, 1994

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION OF FLORIDA CABLE TELEVISION ASSOCIATION FOR RECONSIDERATION AND/OR CLARIFICATION OF ORDER NO. PSC-94-0285-FOF-TP

BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company") hereby files, pursuant to Rule 25-22.037(2)(b), this Memorandum in Opposition to the Motion of Florida Cable Television Association for Reconsideration and/or Clarification of Order No. PSC-94-0285-FOF-TP.

The Florida Cable Television Association ("FCTA") filed its Motion for Reconsideration on March 25, 1994 for the purpose of arguing that the Florida Public Service Commission erred by allowing the continued use by local exchange companies ("LECs") of Contract Service Arrangements ("CSAs"). FCTA's motion is totally lacking in merit and should be summarily rejected. FCTA's motion must fail for three separate and independent reasons: (1) The motion raises matters that are not at issue in This docket and that cannot be properly raised in the context of this proceeding. (2) Even if the argument made by FCTA were

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properly encompassed within this docket, FCTA cannot properly raise legal contentions for the first time by way of a motion for reconsideration. (3) Even if FCTA's motion were procedurally proper in all respects, it lacks any substantive merit.

A number of past events are pertinent to FCTA's motion. As FCTA concedes, contract service arrangements have been allowed since 1984. (FCTA's Motion at p. 3) The statutory revision to Chapter 364, which FCTA contends prohibits the use of CSAs without a finding of effective competition, became effective on October 1, 1990. (Laws 1990, c. 90-244, § 37) The instant case commenced two years later with the filing of a petition by Intermedia Communications of Florida, Inc., on October 16, 1992.

The only issue concerning pricing flexibility that was identified for resolution in Phase I of this docket was framed as follows:

> ISSUE 15: If the Commission permits expanded interconnection, what pricing flexibility should the LECs be granted for special access and private line services? (Procedural Order No. PSC-93-0811-PCO-TP, May 26, 1993)

FCTA responded to this issue in its prehearing statement by asserting that it had no position on the issue at that time. (Prehearing Statement of FCTA, at p. 5) FCTA also offered no testimony on this point. In its Posthearing Brief, FCTA opposed additional pricing flexibility generally, but either neglected or

declined to raise its current position regarding the permissibility of the pricing flexibility that has been available for the past ten years. (Posthearing Brief of FCTA, pp. 12-13) Nevertheless, FCTA now raises for the first time in its Motion for Reconsideration the contentions that contract service arrangements have been legally improper since the statutory revision four years ago and that this Commission erred because it did not abolish CSAs in the subject Order.

First, the issue specifically identified in Phase I of this docket was whether additional pricing flexibility should be granted due to the anticipated effect of expanded interconnection. Consistent with this, the Commission ordered that pricing flexibility be expanded by allowing, at least in concept, zone density pricing in a manner that is consistent with the "FCC's zone pricing flexibility concept" (Order No. PSC-94-0285-FOF-TP at p. 23) There was no issue identified (and neither FCTA nor any other party requested the identification of an issue) as to whether existing pricing flexibility should be abolished as a result of a statutory revision that occurred more than two years before this docket even commenced. Further, it is clear that this issue bears no direct relationship to expanded

interconnection or to the specific pricing flexibility issue[1] that was identified in this docket and addressed at the hearing by the parties. If FCTA wishes to raise this essentially unrelated issue, then it should do so in the proper manner, by filing a petition for that purpose. Instead, FCTA has improperly attempted to append this issue at the last possible moment to a docket where it clearly does not belong.

Second, even if FCTA's contention on this point could appropriately be raised in this docket, the time for properly doing so has long since past. As FCTA acknowledges in its motion, the appropriate standard for a motion for reconsideration was set forth in Diamond Cab Company v. King, 146 So.2d 889, 891 (Fla. 1962):

> The purpose of a petition for rehearing is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance.

This same standard was set forth in somewhat greater detail by the First District Court of Appeal in the earlier case of Cole v. Cole, 130 So.2d 126, 130 (1st DCA 1961) as follows:

> A rehearing is a second consideration of a cause for the sole purpose of calling to the

[1] FCTA, in fact, does not challenge in its Motion for Reconsideration the Commission's decision to increase the scope of pricing flexibility by allowing zone density pricing.

> attention of the court any error, omission, or oversight that may have been committed in the _first_ consideration. (emphasis added)

Thus, a motion for reconsideration exists to bring to the tribunal's attention matters that were before it previously, but that the tribunal failed to consider.[2] This is clearly not the instant situation.

To the contrary, FCTA has either previously elected not to make this argument or neglected to do so. FCTA did not timely raise its argument in order to allow this Commission the opportunity to consider it for the first time during the hearing. Thus, even if FCTA's argument were well taken substantively, the fact that it was "overlooked" the first time (i.e., during the hearing) is due entirely to FCTA's failure to raise it. Therefore, if anyone erred in this regard, it was not the Commission, but rather FCTA. Accordingly, FCTA's use of a motion for reconsideration to raise for the first time a purely legal issue that it could have raised previously is plainly an abuse of the reconsideration process.

Third, even if FCTA had raised this issue in the appropriate manner, its contention should still be rejected because its

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[2] The sole exception to this rule is that a motion for reconsideration may be used to submit to the Court or agency newly-discovered evidence. This exception obviously does not apply in this instance. _See_, _Cole_, _Id._, at 130.

interpretation of Chapter 364 is baseless. Section 364.338, Florida Statutes, provides specifically that "where the Commission finds that a telecommunications service is effectively competitive, market conditions be allowed to set prices ..." as long as certain conditions are met. (Section 364.338(1)) Thus, the type of regulatory flexibility contemplated by this section is nothing less than doing away, in whole or in part, with the controlling regulatory framework and allowing the market for a service to set prices, when, in fact, the market has developed to such a point that this is a viable alternative to monopoly regulation.

Likewise, Section 364.338(3) provides that when a service is determined to be effectively competitive the Commission may "exempt the service from some of the requirements of this chapter and prescribe different regulatory requirements than are otherwise prescribed for a monopoly service". (Section 364.338(3)(a)1.) Alternatively, this Commission may "require that the competitive service be provided pursuant to a fully separated subsidiary...". (Section 364.338(3)(a)2.)

It should appear obvious to anyone attempting a fair reading of § 364.338 that the type of "regulatory flexibility" described in Chapter 364 is considerably more than, and fundamentally different from, limited pricing flexibility. The regulatory

flexibility described in Chapter 364 involves substantial, even extreme, change to the regulatory framework in a situation in which the market for a product is fully developed. Despite this clear meaning, FCTA would have this Commission believe that a CSA, a limited type of pricing flexibility that predates the statutory revision by six years, is encompassed within the term "regulatory flexibility" as that term is used in Section 364.338. There is nothing in the unambiguous language of Section 364.338 to support this conclusion. FCTA has failed to provide any other statutory language, case authority or, for that matter, even simply logic to support its contention. Accordingly, FCTA's argument must be rejected.

FCTA's Motion for Clarification should likewise be rejected. In the subject Order, this Commission states specifically that the CSA process will be retained. (Order at p. 23) In a separate paragraph, the Commission then states that it is approving "in concept, zone pricing flexibility for the LECs". (Order at p. 23) The Order then "adopt(s) the FCC's zone pricing flexibility concept as a guide ..." Id. Next, this same paragraph of the Order provides that "if a LEC desires to deviate from the FCC parameters, it shall be required to identify the variation and provide justification for the change". Id. Thus,

it is clear that CSAs and zone density pricing are dealt with in the Order independently and in separate paragraphs.

Despite this, FCTA requests the Commission to confirm that it meant to say that CSAs are a variation of zone density pricing that may not be employed without first satisfying the requirements of § 364.338. In other words, FCTA is requesting that this Commission "clarify" its Order by announcing a decision that is diametrically opposed to the result that must follow from the clear, unambiguous language of the Order. Accordingly, this portion of FCTA's motion should also be summarily rejected.

For the reasons set forth above, Southern Bell respectfully requests the entry of an Order denying FCTA's Motion for Reconsideration and/or Clarification.

Respectfully submitted this 6TH day of April, 1994.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

Harris R. Anthony (PW)

HARRIS R. ANTHONY
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street, Ste. 400
Tallahassee, FL 32301
(305) 347-5555

Mary Jo Peed (PW)

MARY JO PEED
c/o Marshall M. Criser III
150 So. Monroe Street, Ste. 400
Tallahassee, FL 32301
(404) 529-7208

CERTIFICATE OF SERVICE
Dockets No. 921074-TL, 930955-TL,
940014-TL, 940020-TL, 931196-TL, 940190-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 6TH day of April 1994, to:

Tracy Hatch
Division of Communications
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0866

Charles Murphy
Division of Legal Services
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302

Intermedia Communications
9280 Bay Plaza Blvd., #270
Tampa, FL 33619-4453

Charles J. Beck
Deputy Public Counsel
Office of the Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Thomas Parker
GTE Florida Incorporated
P.O. Box 110, MC 7
Tampa, FL 33601-0110

C. Dean Kurtz
Central Tel. Co.of Florida
Post Office Box 2214
Tallahassee, FL 32316-2214

Florida Cable Television
Association, Inc.
310 N. Monroe Street
Tallahassee, FL 32301

Interexchange Access Carrier
Coalition (IACC)
Brad E. Mutschelknaus
Rachel J. Rothstein
Ann M. Szemplenski
Wiley, Rein, & Fielding
1776 K Street, NW
Washington, D.C. 20006

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff and Reeves
Suite 716
315 South Calhoun Street
Tallahassee, FL 32301

Joseph P. Gillan
J. P. Gillan and Associates
Post Office Box 541038
Orlando, FL 32854-1038

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs, Odom &
Ervin
305 South Gasdsen Street
Tallahassee, FL 32301

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Sprint Communications Co.
Ltd. Partnership
c/o Tony Key, Director
3065 Cumberland Circle
Atlanta, GA 30339

Laura L. Wilson, Esq.
c/o Florida Cable Tele-
vision Association, Inc.
Post Office Box 10383
310 North Monroe Street
Tallahassee, FL 32302

Paul Jones, Esq.
Time Warner Cable
Corporate Headquarters
300 First Stamford Place
Stamford, CT 06902-6732

Peter M. Dunbar
Pennington, Haben, Wilkinson,
Culpepper, Dunlap, Dunbar,
Richmond & French, P.A.
Post Office Box 10095
Tallahassee, FL 32302

Michael W. Tye
Suite 1410
106 East College Avenue
Tallahassee, FL

Harriet Eudy
ALLTEL Florida, Inc.
Post Office Box 550
Live Oak, FL 32060

Lee L. Willis
J. Jeffry Wahlen
John P. Fons
Macfarlane, Ausley, Ferguson
& McMullen
Post Office Box 391
Tallahassee, FL 32302

David B. Erwin
Young, van Assenderp,
Varnadoe & Benton, P.A.
225 South Adams Street
Suite 200
Post Office Box 1833
Tallahassee, FL 32302

Charles Dennis
Indiantown Telephone System
Post Office Box 277
Indiantown, Florida 34956

John A. Carroll, Jr.
Northeast Telephone Company
Post Office Box 485
Macclenny, Florida 32063-0485

Daniel V. Gregory
Quincy Telephone Company
Post Office Box 189
Quincy, Florida 32351

Jeff McGehee
Southland Telephone Company
210 Brookwood Road
Post Office Box 37
Atmore, Alabama 36504

Jodie L. Donovan
Regulatory Counsel
Teleport Communications Group
Inc., Ste. 301
1 Teleport Drive
Staten Island, NY 10311

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnel & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302-0551

F. Ben Poag
United Telephone Company of FL
P.O. Box 165000
Altamonte Springs, FL 32716

Michael J. Henry
MCI Telecommunications Corp.
Suite 700
780 Johnson Ferry Road
Atlanta, GA 30342

Richard D. Melson
Hopping Boyd Green & Sams
Post Office Box 6526
Tallahassee, FL 32314

Benjamin H. Dickens, Jr.
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W., Suite 300
Washington, DC 20037-1527

Douglas S. Metcalf (Ad Hoc)
Communications Consultants,
Inc., Suite 250
631 S. Orlando Avenue
P.O. Box 1148
Winter Park, FL 32790-11

J. Phillip Carver (pw)