Florida Cable **Telecommunications** Association

Steve Wilkerson, President

April 15, 1996

ORIGINAL
FILE COPY

VIA HAND DELIVERY

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

RE: DOCKET NO. 950985-TP

Dear Ms. Bayo:

Enclosed for filing in the above-captioned docket are an original and fifteen copies of Florida Cable Telecommunications Association, Inc.'s ("FCTA") Request for Reconsideration. Copies have been served on the parties of record pursuant to the attached certificate of service.

Also enclosed is a copy on a 3-1/2" diskette in WordPerfect format, version 5.1

Please acknowledge receipt and filing of the above by date stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing.

Yours very truly,

Laura L. Wilson
Vice President, Regulatory Affairs &
Regulatory Counsel

Enclosures

cc: Mr. Steven E. Wilkerson
All Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of Petition(s) to establish non-discriminatory 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 15, 1996

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.'S
REQUEST FOR RECONSIDERATION

The Florida Cable Telecommunications Association, Inc. ("FCTA"), by and through its undersigned attorney, respectfully submits to the Florida Public Service Commission ("Commission") this Request for Reconsideration of Order No. PSC-96-0445-FOF-TP issued March 29, 1996 in the above-captioned proceeding as prescribed by Rule 25-22.060, Florida Administrative Code. As grounds therefore, FCTA states as follows:

INTRODUCTION

This proceeding involves the promotion of competition by setting non-discriminatory rates, terms and conditions of local interconnection pursuant to Section 364.162, Florida Statutes (1995). Under that Section, if a negotiated price is not established, a party may petition and the Commission must then establish non-discriminatory rates, terms and conditions of local interconnection. Petitions were filed by Teleport Communications Group, Inc. (TCG), Continental Cablevision, Inc. (Continental), Metropolitan Fiber Systems of Florida, Inc. (MFS), MCImetro Access Transmission Services, Inc. (MCImetro), and Time Warner AxS of Florida, L.P./Digital Media Partners (Time Warner). All of these petitions were to be addressed at the January 10-11,

1996 hearing. However, on December 8, 1995, BellSouth, FCTA,[1] Continental and Time Warner signed a Stipulation and Agreement (Stipulation) that was also later signed by Intermedia (ICI), TCG, and Sprint Metropolitan Network, Inc.

The Commission approved the rates, terms and conditions of the Stipulation at the December 19, 1995 Agenda Conference. Order No. PSC-96-0082-AS-TP issued January 17, 1996. Per the Stipulation, FCTA withdrew its testimony but continued its participation in the docket out of concern over preventing discriminatory rates, terms and conditions of local interconnection for MFS and MCImetro.

The FCTA requests reconsideration of Order No. PSC-96-0445-FOF-TP ("Order") establishing local interconnection rates, terms and conditions between BellSouth and MFS/MCImetro. The Order departs from essential requirements of law by ignoring or overlooking the Commission's statutory duty to: (1) establish non-discriminatory rates, terms, and conditions; (2) promote competition among the widest possible array of companies; and (3) encourage negotiated settlements of interconnection terms. FCTA does not challenge the Commission's statutory authority to authorize bill and keep arrangements. FCTA instead challenges the act of originally approving one interconnection rate and structure for a large group of ALECs in Order No. PSC-96-0082-AS-TP and subsequently approving different rates, terms and conditions for MCImetro and MFS without any legal or factual record basis for the disparate treatment. The result is punitive. Signatories to the Stipulation have been discriminated against, are placed at a competitive disadvantage vis-a-vis other ALECs in BellSouth's territory, and are discouraged from

[1]As stated in FCTA's Petition for Intervention and at the December 19, 1995 Agenda Conference, FCTA represented numerous entities in this proceeding including cable companies, cable affiliated AAVs and certificated ALECs owned by or affiliated with cable companies. The agreement with BellSouth is intended to extend to all such entities upon ALEC certification.

entering into negotiated settlements in the future. These results are contrary to the requirements of the revised Chapter 364, Florida Statutes (1995) and its intent to promote consumer choice. There is no competent substantial evidence supporting this disparate treatment of ALECs.

A. THE ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY APPROVING A DISCRIMINATORY RATE.

The revised Chapter 364 places the obligation on the Commission to ensure that the local interconnection rates, terms and conditions are "non-discriminatory." Section 364.01(4) expresses the Legislature's intent that the Commission "exercise its exclusive jurisdiction" to ensure that all providers are treated fairly and encourage competition. Consistent with that intent, Section 364.162 on local interconnection arrangements provides:

> **Section 364.16(2):**
> Each alternative local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at non-discriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices, terms, and conditions after 60 days, either party may petition the Commission and the Commission shall have 120 days to make a determination after proceeding as required by s. 364.162(6) pertaining to interconnection services. [Emphasis supplied.]
>
> **Section 364.16(3):**
> Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at non-discriminatory prices, rates, terms, and conditions established by the procedures set forth in s. 364.162. [Emphasis supplied.]
>
> **Section 364.162(2)**
> If a negotiated price is not established by August 31, 1995, either party may petition the Commission to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and facilities. Whether set by negotiation or by the Commission, interconnection and resale prices, rates, terms and conditions shall be filed with the Commission before their effective date. [Emphasis supplied.]

Section 364.162(6):
An alternative local exchange telecommunications company that did not have an application for certificate on file with the Commission on July 1, 1996, shall have 60 days from the date on which it is certificated to negotiate with a local exchange telecommunications company mutually acceptable rates, terms, and conditions of interconnection and for the resale of services and facilities. If a negotiated price is not established after 60 days, either party may petition the Commission to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and facilities. The Commission shall have 120 days to make a determination after proceeding as required by subsection (3). [Emphasis supplied.]

In addition, the following general statutory provisions are applicable to this proceeding:

Section 364.08:
(1) A telecommunications company may not charge, demand, collect or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time. A telecommunications company may not refund or remit, directly or indirectly, any portion of the rate or charge so specified or extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. However, it shall be lawful for the Commission to authorize employee concessions if in the public interest. [Emphasis supplied.]

Section 364.09:
A telecommunications company may not, directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person a greater or lesser compensation for any service rendered or to be rendered with respect to communication by telephone or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person for doing a like and contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions. [Emphasis supplied.]

Section 364.10(1):
(1) A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Emphasis supplied.]

The previously quoted interconnection rate provisions of Sections 364.16 and 364.162, Florida Statutes, require the Commission to dispose of petitions by setting "non-discriminatory" rates, terms and conditions of local interconnection. The Commission-approved rates, terms and conditions in this docket must be "non-discriminatory." That is the plain and unambiguous language of the statute. Similarly, Sections 364.08, 364.09, and 364.10 have, in the past, been interpreted to prohibit undue or unreasonable discrimination. "Unreasonable discrimination" arises when similarly situated customers who use the same service and cause substantially the same costs to be incurred pay different prices for the service. See e.g., In re: Petition for Declaratory Statement Concerning Potential Service to Dog Island by St. Joseph Telephone and Telegraph Company, 95 FPSC 3:466,468; In re: Intrastate Telephone Access Charges for Toll Use of Local Exchange Services, 85 FPSC 2:160; In re: Application of Telecom Express, Inc. for Authority to Provide Interexchange Telecommunications Service, 88 FPSC 10:470; In re: Investigation into NTS Cost Recovery Phase II, 88 FPSC 7:44.

The Order fails to consider or even address the Commission's statutory obligation to establish "non-discriminatory" terms. FCTA brought this issue to the Commission's attention in its prehearing statement and posthearing briefs. By Order No. PSC-96-0082-AS-TP (the "first order") the Commission found one set of rates, terms and conditions to be in the public interest for certain ALECs interconnecting with BellSouth. The Commission subsequently approved mutual traffic exchange and different terms and conditions for MCImetro's and MFS' interconnection with BellSouth. There is no record evidence demonstrating that different treatment for MCImetro and

MFS is legally or factually justified. MCImetro and MFS made no attempt to demonstrate that they are differently situated from the ALECs in the first Order.

To the contrary, what the record demonstrates is that ALECs are similarly situated with respect to BellSouth. The service at issue in this proceeding is the essential service of local call termination on BellSouth's network. See e.g., Tr. 50, 366-368, 671. All ALECs need to terminate calls on BellSouth's network in order to compete with each other in BellSouth's territory. This fact is further supported by the officially recognized Orders from other state Commissions which do not differentiate among competitive local providers in setting interconnection rates.

MCImetro and MFS requested non-discriminatory rates, terms and conditions in this proceeding. Tr. 51-2, 366. The record demonstrates that bill and keep arrangements are used today for terminating local traffic among incumbent LECs. Tr. 159-160. As MFS Witness Devine stated, to adopt different arrangements for ALECs (usage rate) and independents (bill and keep) "is discrimination pure and simply." Id. Rather than discriminate between ALECs and independents, the Order discriminates among ALECs. It adopts bill and keep for certain ALECs after the Commission previously approved a usage rate for others. Such action, based on the record, is discrimination, "pure and simple." The Order departs from essential requirements of law by ignoring or overlooking the duty to ensure that rates are non-discriminatory. It then establishes an unlawfully discriminatory rate. There is no commentary in the Staff Recommendation or Order addressing this issue or providing any factual or legal reason for this discrimination.

For these reasons, the Order departs from the essential requirements of law, and FCTA's request for reconsideration should be granted.

B. THE ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY CONSTRUCTING BARRIERS TO COMPETITION

The revised Chapter 364 places the obligation on the Commission to promote competition among the "widest possible array of providers" and eliminate rules and regulations that delay or impede competition. Section 364.01(4), Fla. Stat. (1995). The Order recognizes this duty at page 14 but fails to address how the adoption of two separate rate structures for ALECs interconnecting with BellSouth meets that goal. This issue was also raised in FCTA's Posthearing Brief and ignored in the Staff Recommendation and Order.

The Order does not advance the goal of promoting competition among the widest possible range of providers. It conflicts with it by giving MCImetro and MFS what are identified by the Order as numerous "advantages" of mutual traffic exchange over the Stipulation and BellSouth's proposal in this proceeding. Order at 12 and 13. The fact the Commission approved these presumed "advantages" for MCImetro and MFS is prima facia evidence that the Commission is discriminating between ALECs.

The Order overlooks the requirement that whatever compensation arrangements are adopted must foster the ultimate development of effective competition. Tr. 364. The Commission-approved rates in this proceeding that pick the winners and the losers in the marketplace. The Commission has approved a rate for BellSouth call termination. The subsequent approval of a different rate for the same service when provided to MCImetro and MFS, overlooks or fails to consider that the ALEC parties to this proceeding are going to be competing against each other. The Commission must avoid setting rates, terms and conditions that make it more or less likely that one ALEC will compete more effectively than another. Rather, all ALECs should be placed on equal competitive footing. Because the Order ignores or overlooks the statutory duty to promote competition, the Commission should grant FCTA's request for reconsideration.

C. THE ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY DISCOURAGING NEGOTIATION.

No one disputes that Chapter 364 intends to encourage LECs and ALECs to negotiate mutually acceptable prices, terms and conditions before petitioning the Commission to resolve disputes. However, the Order ignores or overlooks this intent. There is no discussion in the Order of how the initial approval of one set of rates for certain ALECs and the subsequent approval of "bill and keep" for MCImetro and MFS furthers this intent. Indeed, it undercuts it. This impact was ignored or overlooked in the Staff Recommendation and Order.

The Commission has considered and approved the Stipulation. By subsequently approving more different terms for other similarly situated ALECs the negotiation process has, as a practical matter, been eliminated as an effective tool despite clear legislative intent that it be preserved. Parties no longer have any incentive to consent to judgment out of fear that they will be undercut without any underlying rationale or competent substantial evidence to support the action in this or future proceeding. This statutory element of promoting compromise is thereby destroyed.

Because the order ignores or overlooks the intent to encourage negotiation, reconsideration is proper. The Order must supply an underlying factual support and rationale as to how its actions fulfill the legislative intent.

D. THE ORDER IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The Order rejects the earlier Commission-approved rates in the Stipulation. The reasons for doing so are based upon supposition and faulty reasoning. There is no competent substantial evidence supporting this action. Therefore, reconsideration is proper.

At pages 9-10, the Order discusses why the terms of the Stipulation are rejected. The first reason is because the terms of the Stipulation do not ensure that each company will be fairly compensated if traffic is significantly imbalanced. Order at 10. If this is true, it is unclear why the

Commission approved the Stipulation in the first place. Further, there is no evidence of record demonstrating that traffic will be significantly imbalanced. However, if traffic is out of balance by more than 105%, parties will obviously be compensated under the Stipulation by mutual traffic exchange. At page 12 of the Order, the Commission finds that mutual exchange enables carriers to cover their costs of furnishing interconnection. The Order supplies no supporting facts or rationale for the conclusion that mutual traffic exchange above the 105% cap will not ensure cost recovery while mutual traffic exchange pursuant to the terms of the Order will ensure cost recovery.

After concluding that the Stipulation does not ensure cost recovery, the Order then concludes that the rate in the Stipulation "may be too high." It is unclear how the rate does not ensure cost recovery on the one hand but may, nonetheless, be too high on the other hand. The Order cites no record evidence to support this conclusion and no rationale is given for the apparent inconsistency. Indeed, the conclusion is not supported by competent and substantial evidence. BellSouth presented no evidence of the relevant costs of local call termination. Order at 13. There is no competent substantial evidence supporting the conclusion that the rate may be too high.

Finally, the Order erroneously concludes that "the Stipulation foresees a movement to mutual traffic exchange in the future," and that, as a result, the Stipulation anticipates a nearly balanced exchange of traffic. There is absolutely nothing in the record to support this conclusion. To the contrary, the existence of the cap itself cuts against this conclusion. The plain language of the Stipulation states that the 105% cap is intended as a competitive safeguard. There is no competent and substantial evidence as to what the parties to the Stipulation intended by the provision: "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 equivalent." The only witness testifying about this provision was Witness Devine of MFS which did not sign the agreement and

is not competent to testify about the parties' intentions. He, nonetheless, stated that he did not know what the Stipulation intended concerning this term. Hearing Exhibit No. 6 at 41.

The Order overlooks or fails to consider another equally plausible interpretation. That is, to provide a convenience to the parties if traffic is far out of balance. The cap applies to whichever carrier has the lower amount of terminating traffic. The ALEC could terminate 5 minutes of traffic the first month for BellSouth and BellSouth could terminate 1,000 minutes for the ALEC, or vice versa. The 105% cap would be determined based upon the 5 minutes. In this context, if the administrative costs are greater than the net monies exchanged, the parties could mutually agree on an in-kind payment for the month. Traffic is significantly out of balance in this scenario, but the parties could mutually agree to forego compensation nonetheless. There is no record basis for the Commission to conclude that the existence of the provision "anticipates nearly balanced exchange of traffic." In truth, it provides a convenience to the parties if mutually agreeable and it demonstrates that ALECs have not waived their right to request bill and keep, if they so desire, at the termination of the agreement. The Order misconstrues the Stipulation in an attempt to bolster its rejection of the Stipulation and substitutes speculation for competent substantial record evidence. Therefore, FCTA's request for reconsideration should be granted.

WHEREFORE for the foregoing reasons, FCTA requests the Commission grant its Request for Reconsideration and establish non-discriminatory rates, terms and conditions of local interconnection in this proceeding consistent with the legislative intent to promote competition and encourage negotiated settlement.

RESPECTFULLY SUBMITTED this 15th day of April, 1996.

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CERTIFICATE OF SERVICE
DOCKET NO 950985-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery(*) and/or U. S. Mail on this 15th day of April, 1996 to the following parties of record:

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