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October 28, 1996

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

RE: Docket No. 950985-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Stay of Orders Pending Judicial Review. Please file these documents 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 on the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White
Nancy B. White (AW)

Enclosures

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

11445-96

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s))	
to establish nondiscriminatory)	
rates, terms, and conditions for)	Docket No. 950985-TP
interconnection involving local)	
exchange companies and alternative)	Filed: October 28, 1996
local exchange companies pursuant)	
to Section 364.162, Florida Statutes)	
)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION
FOR STAY OF ORDERS PENDING JUDICIAL REVIEW

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 25-22.061(2), Florida Administrative Code, seeks a stay of the FPSC's Order No. PSC-96-0445-FOF-TP (Initial Order) and Order No. PSC-96-1231-FOF-TP (Order on Reconsideration) pending judicial review. In support of this motion, BellSouth states as follows:

I. BACKGROUND

1. Under the 1995 revisions to Chapter 364 of the Florida Statutes, incumbent local exchange companies ("LECs") were required to provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory rates, terms, and conditions. Section 364.16(3), Florida Statutes. Alternative local exchange companies ("ALECs") were required to negotiate with LECs to establish prices, terms, and conditions of local interconnection. Section 364.162(1), Florida Statutes. If a negotiated price was not established, a party could petition the Commission to establish such rates, terms, and conditions. Id.

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FPSC-RECORDS/REPORTING

2. Beginning on September 1, 1995, Teleport Communications Group, Inc., Continental Cablevision, Inc., Metropolitan Fiber Systems of Florida, Inc. ("MFS"), MCI Metro Access Transmission Services, Inc. ("MCI"), Time Warner AxS of Florida, L.P., and Digital Media Partners, filed petitions requesting that the Commission establish rates, terms, and conditions for local interconnection with BellSouth. By the time the hearing began on January 10, 1996, BellSouth had resolved all outstanding issues with all petitioners, with the exception of MFS and MCI. AT&T of the Southern States, ("AT&T"), McCaw Communications Company ("McCaw"), and the petitioners all remained in the docket as intervenors.

3. As part of its proposal for interconnection, BellSouth advocated an access charge-based compensation payment arrangement. MFS, MCI, AT&T, and McCaw argued for the adoption of "bill and keep" (mutual traffic exchange). The remaining parties advocated the adoption of the terms of the Stipulation entered into between BellSouth and these parties for the interconnection rates.

4. On March 29, 1996, the Commission issued its Initial Order, adopting bill and keep, and requiring BellSouth to tariff its interconnection rates. BellSouth sought reconsideration of the Commission's Initial Order. On October 1, 1996, the Commission issued its Order on Reconsideration, denying BellSouth's Motion that the Initial Order be reconsidered. The Commission also ordered BellSouth to file its tariff for the interconnection rates, terms and conditions

within 30 days from the date of the issuance of the Order on Reconsideration. Under this Order, BellSouth's tariffs will be filed on October 31, 1996.

5. On October 28, 1996, BellSouth filed its Notice of Appeal of both the Initial Order and Order on Reconsideration. BellSouth's Notice to Appeal is attached hereto. BellSouth now seeks a stay of both the Initial Order and Order on Reconsideration with regard to the bill and keep requirements.

II. THE COMMISSION SHOULD ISSUE A STAY PENDING JUDICIAL REVIEW

6. BellSouth seeks a stay pending judicial review, in accordance with Rule 25-22.061(2), Florida Administrative Code and Florida Rule of Appellate Procedure 9.310(a). In order to determine whether to grant a stay, the Commission may consider whether BellSouth is likely to prevail on appeal; whether BellSouth has demonstrated that it is likely to suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest.

7. BellSouth believes it will prevail on appeal because, as BellSouth has explained at length in its Motion for Reconsideration, mandatory bill and keep is a violation of state and federal law. BellSouth will suffer irreparable harm if a stay is not granted. The Commission has essentially mandated BellSouth to provide local interconnection for free, even though BellSouth will incur costs for providing local interconnection. BellSouth will not be able to

recover its losses due to bill and keep if the Commission's order is eventually overturned. Moreover, the Commission's Initial Order mandating bill and keep will have a chilling effect on continuing negotiations. In contrast to the harm to BellSouth if a stay is not granted, the harm to the public if a stay is entered will be inconsequential. As explained in BellSouth's Motion for Reconsideration, BellSouth has entered into many interconnection agreements with ALECs in Florida. These ALECs can enter the market at any time. Moreover, subsequent to this docket, BellSouth entered into agreements containing interconnection rates with both MCI and MFS, the two remaining petitioners in this docket. Thus, both MFS and MFS have the ability to obtain local interconnection from BellSouth.

8. In addition, MFS, MCI, AT&T and American Communication Services, Inc. ("ACSI"), recently filed Petitions for Arbitration seeking, among other things, rates for local interconnection. (Docket Nos. 960757, 960833, 960846, and 960916). BellSouth subsequently entered into agreements resolving the issue of local interconnection rates with ACSI and MFS. Decisions will be made within the next few weeks on the arbitrations of MCI and AT&T. Therefore, the vast majority of ALECs have the capability to enter the local service market at this time. A stay of the Commission's Orders in this docket will not delay competition in the local market. The stay will not harm competition, competitors, or the public.

9. In its Motion for Reconsideration filed in this docket, BellSouth asserted that the Commission's Initial Order violates BellSouth's constitutional rights. Mandatory bill and keep constitutes a taking of BellSouth's property, without compensation, just or otherwise, in violation of the state and federal constitutions. While the Commission may weigh these concerns in reconsidering its Order, it does not have the jurisdiction to actually rule on constitutional challenges to its actions. "[C]onstitutional challenges to administrative agency actions are for the courts alone to determine and are not for administrative resolution." Metropolitan Dade County v. Dep't of Commerce, 365 So.2d 432, 435 (Fla. 3d DCA 1978). See also, Adams Packing Ass'n. Inc. v. Fla. Dep't of Citrus, 352 So.2d 569, 571 (Fla. 2d DCA 1977) ("It is a firmly established principle of law that challenges to the constitutionality of acts of the legislature and actions of an administrative agency created by the legislature are for the courts alone to determine."); Dep't of Revenues v. Young American Builders, 330 So.2d 864, 865 (Fla. 1st DCA 1976); Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 158 (1982). This law confirms the Commission counsel's advice to the Commission in the expanded interconnection docket: "I don't believe that you have the authority to go out and start ruling on constitutional issues." (Pruitt, Agenda Tr. in Docket 921074-TP, Feb. 1, 1994, at 14.).

10. The Commission must, therefore, grant a stay to allow judicial determination of the constitutional issues BellSouth has raised. "Ordinarily, when a constitutional attack is made upon administrative proceedings, they should be stayed pending resolution of the validity of those proceedings." 19838 NW, Inc. v. Div. of Alcoholic Bev. and Tobacco of the Dep't of Bus. Reg., 410 So.2d 967, 968 (Fla. 4th DCA 1982). The Court then may invalidate the agency action and order modifications in the administrative decisionmaking process as necessary to render the agency's final order constitutional. Key Haven, 427 So.2d at 158. Because this Commission cannot "impair judicial jurisdiction to determine constitutional disputes," it must not implement its order concerning bill and keep, as it now stands. Dep't of Transp. v. Morehouse, 350 So.2d 529, 533 (Fla. 3d DCA 1977); Dep't of Rev. v. Amrep Corp., 358 So.2d 1343, 1349 (1978). The Commission is obliged to grant a stay until the constitutional questions BellSouth has raised are settled on appeal.

11. Rule 25-22.061(2), Florida Administrative Code, does not require that bond be posted; it only states that a stay "may" be conditioned upon the posting of a bond. BellSouth requests that no bond be set because granting a stay will not prejudice any party. As noted above, the parties to this case have the means to enter the market via signed interconnection agreements with BellSouth containing interconnection rates. AT&T is the only party to this docket that has not agreed to interconnection rates with BellSouth. AT&T's Petition

for Arbitration, however, is due to be decided by this Commission on November 26, 1996. BellSouth submits that the lack of bond will not harm AT&T.

For all the reasons discussed in this Motion, BellSouth asks the Commission to issue a stay of its Order. The stay should continue until an appellate court decides the constitutional and other issues BellSouth has raised in its Motion for Reconsideration.

BELLSOUTH TELECOMMUNICATIONS, INC.

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