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MEMORANDUM

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *MCB CRT*
DIVISION OF COMMUNICATIONS (SIRIANNI) *MFS*

RE: DOCKET NO. 961346-TP - PETITION FOR ARBITRATION OF
DISPUTE WITH BELLSOUTH TELECOMMUNICATIONS, INC.,
REGARDING CALL FORWARDING, BY TELENET OF SOUTH FLORIDA,
INC.

AGENDA: JUNE 24, 1997 - REGULAR AGENDA - POST HEARING DECISION -
MOTION FOR RECONSIDERATION- PARTY HAS REQUESTED ORAL
ARGUMENT

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\961346R3.RCM

CASE BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth declined to continue selling call forwarding to Telenet, alleging that Telenet uses the service in violation of section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff (GSST). Telenet alleged that the tariff provision is an anticompetitive restriction and that it had not been able to reach a resale agreement with BellSouth.

BellSouth at first advised Telenet that it would terminate all call forwarding services to Telenet on November 21, 1996. Later, this date was extended to December 5, 1996, in order to provide the parties with time to work out conditions by which the status quo could be preserved until the Commission's decision.

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On December 5, 1996, BellSouth filed its answer and response to Telenet's petition and a motion to dismiss. Telenet filed its opposition to BellSouth's motion to dismiss on December 17, 1996. In Order No. PSC-97-0072-FOF-TP, issued January 23, 1997, the Commission denied BellSouth's motion to dismiss. An evidentiary hearing was held on February 12, 1997.

On April 23, 1997, the Commission issued Order No. PSC-97-0462-FOF-TP (Order), in which it ruled that BellSouth may continue to sell its call forwarding services to Telenet subject to section A13.9.1.A.1. Telenet filed a Motion for Reconsideration on May 7, 1997, in which it also requested oral argument. On May 15, 1997, BellSouth filed a Response and Memorandum in Opposition to Motion for Reconsideration. This recommendation addresses Telenet's motion.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Telenet of South Florida, Inc.'s request for oral argument?

RECOMMENDATION: Yes. The Commission should permit oral argument limited to five minutes. (PELLEGRINI, SIRIANNI)

STAFF ANALYSIS: In its motion for reconsideration, Telenet has requested oral argument, pursuant to Section 25-22.060(1)(f), Florida Administrative Code. Rule 25-22.058, Florida Administrative Code, requires that a request for oral argument be contained in a separate document, accompany the pleading upon which argument is requested, and state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Telenet's request does not comply with these requirements.

Nevertheless, Rule 25-22.060, Florida Administrative Code, provides that the Commission has discretion to permit oral argument on a motion for reconsideration. Telenet's use of BellSouth's call forwarding service has presented this Commission with a novel and fairly complex question. Even though staff believes that Telenet has sufficiently laid out its arguments in support of reconsideration in its motion, to facilitate competitive entry as envisioned by the Telecommunications Act of 1996 (the Act) to the fullest extent possible, staff recommends that Telenet, as well as BellSouth, should be permitted an opportunity for oral argument limited to five minutes.

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ISSUE 2: Should the Commission grant Telenet of South Florida, Inc.'s Motion for Reconsideration of Order No. PSC-97-0462-FOF-TP?

RECOMMENDATION: No. Telenet of South Florida, Inc.'s Motion for Reconsideration fails to satisfy the standard for reconsideration enunciated in Diamond Cab Co. of Miami v. King, 146 So.2d 89 (Fla. 1962). (PELLEGRINI, SIRIANNI)

STAFF ANALYSIS: The standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 Fla. 1st DCA 1981). Moreover, a petition for reconsideration must present to the Commission some such point by reason of which its decision is necessarily erroneous. Atlantic Coast Line R. Co. v. City of Lakeland, 115 So. 669, 680. 1927); Mann v. Etchells, 182 So. 198, 201 (Fla. 1938); Hollywood, Inc. v. Clark, 15 So.2d 175, 180 (Fla. 1943). A motion for reconsideration is not a medium by which a party may advise the Commission of its disagreement with the decision, reargue matters presented in briefs and in oral argument, or ask the Commission to change its mind as to a matter that has already received its careful attention. Sherwood v. State, 111 So.2d 96, 97-98 (Fla. 3d DCA 1959) (quoting State ex rel Jaytex Realty Co. v. Green, 105 So.2d 817, 818-19 (Fla. 1st DCA 1958)).

As noted in the Case Background, on May 8, 1997, Telenet filed a Motion for Reconsideration of Order No. PSC-97-0462-FOF-TL. The company set forth six grounds on which it based its motion. These are addressed separately below.

(1) Telenet argued that the Commission's decision was in large part based upon application of Section 364.16(3)(a), Florida Statutes, which requires that no alternative local exchange company deliver traffic through a local interconnection arrangement without paying appropriate terminating access charges. Telenet alleged that the question of terminating access charges pursuant to Section 364.16(3)(a), Florida Statutes, was never framed as an issue to be resolved in this proceeding, and, therefore, the Commission's consideration of terminating access charges was misplaced.

BellSouth responded that Section 364.16(3)(a), Florida Statutes, was inherently part of the Commission's consideration of whether the tariff restriction was appropriate. The tariff restriction prohibits the avoidance of toll charges by use of call forwarding. The statute requires the payment of terminating access

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charges for delivery of toll traffic by means of a local interconnection arrangement.

Staff believes that the Commission correctly applied Section 364.16(3)(a), Florida Statutes, to the facts of this case. The Commission may not, in the general case, validate any telecommunications service that violates any provision of Chapter 364, Florida Statutes. Thus, Telenet cannot be heard to say that terminating access charges was not properly before the Commission. Staff believes, therefore, that the Commission's reliance on Section 364.16(3)(a), Florida Statutes, was not a mistake of law. Staff recommends that Telenet's motion for reconsideration should be denied on the ground that it was.

(2) Telenet further argued that there is no local interconnection arrangement between Telenet and BellSouth. Telenet asserted that Section 364.16(3), Florida Statutes, is not implicated in the absence of a local interconnection agreement or arrangement. Telenet maintained that it is simply a customer of call forwarding services, not a discrete network operator seeking connection with BellSouth's switched network. In addition, Telenet asserted that the Commission made no finding that an interconnection arrangement exists between the two companies.

BellSouth argued that, while the Commission found that Telenet had not executed a formal interconnection agreement with BellSouth, the Commission did find that Telenet indeed had an interconnection arrangement with BellSouth by virtue of interweaving its Interactive Voice Response (IVR) switching system and business lines with BellSouth's network and call forwarding service. BellSouth further argued that Telenet raised nothing in its motion that the Commission failed to consider in concluding that there is a local interconnection arrangement between the companies.

Staff believes that the Commission did determine that a local interconnection arrangement implicating Section 364.16(3), Florida Statutes, exists between Telenet and BellSouth, and that that determination is sufficiently supported by the record testimony of each company's witness. Order at 9-10. While that testimony clearly indicates the absence of a formal agreement between the companies, it just as clearly indicates a physical connection between the companies' systems that constitutes an interconnection arrangement. Staff believes that in its motion Telenet did not present persuasive argument suggesting that the Commission overlooked or misunderstood some point of fact that would have caused it to determine that an arrangement between the companies as contemplated by the statute did not exist. Therefore, staff

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recommends that the Commission did not overlook or misunderstand some point of fact in determining that a local interconnection arrangement exists between Telenet and BellSouth. Staff recommends that the Commission deny reconsideration on this ground.

(3) Telenet also argued that the Commission erred in failing to make a finding that the tariff restriction is reasonable. Noting that the Commission found the tariff restriction to be nondiscriminatory, Telenet maintained that the Commission was required to find that the restriction was both reasonable and nondiscriminatory in order to uphold its validity.

BellSouth responded that in determining that the sale of its call forwarding was subject to the tariff restriction, the Commission necessarily found the restriction to be both reasonable and nondiscriminatory.

Under the Act and Chapter 364, Florida Statutes, the Commission may uphold only those restrictions on resale of services that it finds to be reasonable and nondiscriminatory. Staff believes that in this case the Commission did find that BellSouth's tariffed call forwarding restriction is both reasonable and nondiscriminatory. Order at 6-9. The Commission considered the reasonableness of the tariff restriction at length. Its finding that the restriction is reasonable is implicit in its evaluation of the tariff. It cannot be said that the Commission found the restriction to be unreasonable and yet applicable. Telenet's argument that the Commission's failure to determine the reasonableness of the restriction requires reconsideration amounts to form over substance and would not result in a different decision. The Commission made no mistake of law. Therefore, staff recommends that the Commission make the required findings that BellSouth's call forwarding use restriction is both reasonable and nondiscriminatory, and deny Telenet's motion for reconsideration on the ground that it did not. It would be appropriate, however, for the Commission to expressly clarify that the tariff restriction is reasonable.

(4) Telenet also argued that the Commission overlooked its ruling in Order No. PSC-96-1579-FOF-TP, issued in Dockets Nos. 960833-TP, 960846-TP and 960916-TP, concerning restrictions on the resale of services. In that Order, the Commission determined that "no restrictions on the resale of services shall be allowed, except for restrictions applicable to the resale of grandfathered services, residential services, and Lifeline/LinkUp services to end users who are eligible to purchase such service directly from BellSouth." Telenet maintained that the Commission's decision in

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this proceeding was required to conform with its ruling in Order No. PSC-96-1579-FOF-TP, and that it did not.

BellSouth responded that, the Commission's ruling in Order No. PSC-96-1579-FOF-TP notwithstanding, the Commission is authorized by Section 251(c)(4)(B) of the Act and Section 364.161(2), Florida Statutes, to approve reasonable and nondiscriminatory restrictions on the resale of services. BellSouth asserted that the Commission's ruling in Order No. PSC-96-1579-FOF-TP is not a controlling precedent in this proceeding.

Staff believes that the Commission's ruling on resale of services restrictions in Order No. PSC-96-1579-FOF-TP is inapplicable in this proceeding. First, the Commission's ruling in that Order is specific to the parties in Dockets Nos. 960833-TP, 960846-TP and 960916-TP. Second, BellSouth's call forwarding tariff restriction was not placed specifically in issue in those proceedings. Third, it is simply inappropriate to construe the Commission's resale restrictions ruling as nullifying a tariff restriction whose effect is to require the use of a resold service in compliance with Florida law. BellSouth's call forwarding tariff restriction tracks Section 364.16(3), Florida Statutes. Staff believes that the Commission's ruling in Order No. PSC-96-1579-FOF-TP is limited to those resale restrictions the elimination of which does not produce an anomalous or unlawful result. Therefore, staff recommends that the Commission reject Telenet's contention that it erred in not applying its ruling on resale restrictions in Dockets Nos. 960833-TP, 960846-TP and 960916-TP to the circumstances of this case, and deny Telenet's motion for reconsideration on the ground that it should have done so.

(5) Furthermore, Telenet argued that the Commission failed to consider its request that BellSouth be required to unbundle call forwarding. Telenet stated that its objective in bringing this proceeding was to compel BellSouth to unbundle multipath call forwarding, pursuant to Section 364.161(1), Florida Statutes. Telenet maintained that the Commission's failure to recognize an unbundling issue was error and requires reconsideration.

BellSouth responded that Telenet declined at the issue identification meeting to add an issue concerning unbundling and pricing of call forwarding services. BellSouth pointed out that, on BellSouth's motion and over Telenet's objection, the Presiding Officer struck Telenet testimony concerning unbundling and pricing of call forwarding services.

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The sole issue before the Commission in this proceeding has been whether BellSouth may continue to sell its call forwarding services to Telenet subject to the present tariff restriction. As BellSouth has argued, Telenet declined to add an issue concerning unbundling and pricing of call forwarding services, or to couch the statement of the issue in those terms. Moreover, upon argument at the hearing, the Presiding Officer found that, in its petition, Telenet had not demanded relief on the basis of an order unbundling BellSouth's call forwarding service. Order at 2. Therefore, staff recommends that the Commission find that Telenet's argument that the Commission failed to consider an unbundling issue cannot be sustained, and deny Telenet's motion for reconsideration on the ground that the Commission misapprehended the issue to be arbitrated in this proceeding.

(6) Last, Telenet argued that the Commission's failure to consider an unbundling issue and its reliance on Section 364.16(3)(a), Florida Statutes, violated Telenet's due process rights. In support of its contention that it was not afforded the opportunity to adequately prepare for hearing, Telenet cited Bendix Corp. v. The Federal Trade Commission, 450 F.2d 534 (6th Cir. 1971).

BellSouth asserted that Telenet's allegation that the Commission erred in implicating Section 364.16(3)(a), Florida Statutes, in its rationale is baseless. BellSouth argued that Telenet failed to properly raise an unbundling issue, even though it clearly had the opportunity to do so.

Staff believes that Telenet's argument that it was denied due process is flawed. In Bendix, supra, the court held that an agency may not change in midstream the theory upon which it will decide a case without giving reasonable notice of the change and opportunity to present argument under the new theory. Nothing of the kind has occurred in this proceeding. As already stated, the Commission may not, in the general case, validate any telecommunications service that violates any provision of Chapter 364, Florida Statutes. The application of Section 364.16(3)(a), Florida Statutes, to the Commission's decision in this instance did not depend upon an explicit issue statement bringing it into play. Telenet has known since a relatively early point in its negotiations with BellSouth that BellSouth's objection to Telenet's use of its call forwarding service is based on Telenet's avoidance of access charges in contravention of Florida law. Moreover, as the Commission observed in Order No. PSC-97-0462-TP, Telenet did not advocate that an unbundling issue be raised in this proceeding, consenting instead to the Commission's arbitration of the single issue whether

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BellSouth would be permitted to enforce its tariffed call forwarding use restriction in its dealings with Telenet. Thus, staff believes that it cannot be said the Telenet has been deprived of due process. Staff recommends that the Commission find that Telenet's due process rights have not been violated in this proceeding, and deny Telenet's motion for reconsideration on the ground that they have been.

Finally, staff recommends that the Commission reaffirm its encouragement to both Telenet and BellSouth to find a way to rekindle negotiations leading to an agreement that would permit Telenet to sustain its business on a basis that would be fair to BellSouth.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the Commission approves staff's recommendation in Issue 2, this docket should be closed. (PELLEGRINI)

STAFF ANALYSIS: If the Commission denies Telenet's motion for reconsideration, as recommended by staff in Issue 2, this docket should be closed.

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