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June 27, 2000

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

Re: Docket No. 991534-TP (Intermedia Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief, 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,

E. Earl Edenfield, Jr.

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cc: All Parties of Record
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R. Douglas Lackey
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Request for Arbitration Concerning Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and Request for relief.	)	Docket No. 991534-TP
	)	Filed: June 27, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

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TELECOMMUNICATIONS, INC.

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STATEMENT OF THE CASE

On October 8, 1999, Intermedia Communications, Inc. ("ICI") filed this complaint proceeding against BellSouth Telecommunications, Inc. ("BellSouth") seeking a determination as to the appropriate rates to be billed and paid for local traffic under the terms of the parties' Interconnection Agreement. The Florida Public Service Commission ("Commission") held a Pre-hearing Conference on May 18, 2000 and, subsequently, issued a Pre-Hearing Order setting forth the procedures to be followed at the hearing on June 13, 2000. The hearing was conducted as scheduled, BellSouth presenting testimony from Jerry Hendrix, Keith Milner and David Scollard and ICI presenting testimony from Heather Gold and Edward Thomas.

STATEMENT OF BASIC POSITION

The issue in this docket concerns a dispute between BellSouth and ICI under the terms of their Interconnection Agreement, including an amendment dated June 3, 1998. BellSouth's interpretation of the June 3, 1998 Amendment to the Interconnection Agreement reflects the intentions and agreements of the parties and is the more consistent with Florida law. Further, the actions of the parties subsequent to the execution of the Amendment are more consistent with BellSouth's interpretation of the Interconnection Agreement. Therefore, the Commission should sustain BellSouth's position.

STATEMENT OF POSITION ON THE ISSUE

Issue 1: What is the applicable rate(s) that Intermedia and BellSouth are obligated to use to compensate each other for transport and termination of local traffic in Florida pursuant to the terms of their Interconnection Agreement approved by the Commission?

**Position: Based on the clear, unequivocal language of paragraphs 3 and 4 of the Amendment and the conduct of the parties, the Commission should order reciprocal compensation to be paid between the parties at the elemental rates (with the requested rate amendment) in Attachment A to the Amendment.

ARGUMENT

In rendering a decision in this matter, the Commission need not look beyond the plain, unequivocal language of the June 3, 1998 Amendment to the Interconnection Agreement ("Amendment"). Clearly, the language of the Amendment modifies the rates (moving from composite to elemental) at which the parties pay each other reciprocal compensation for all local traffic in each of the states in BellSouth's service territory. While ICI attempts to limit the scope of the Amendment, ICI's interpretation is illogical, inconsistent with the facts, and would render the Amendment inconsistent with other provisions in the Master Interconnection Agreement. To the extent the Commission deems it necessary to look beyond the language of the Amendment, ICI's explanation of events both preceding and subsequent to the execution of the Amendment is contradictory, thus lacking credibility. Thus, the Commission should require the parties to pay reciprocal compensation for all local traffic at the elemental rates reflected in Attachment A to the Amendment[1].

I. BELLSOUTH'S INTERPRETATION IS CONSISTENT WITH THE PLAIN, UNEQUIVOCAL LANGUAGE OF THE AMENDMENT

The central issue in this dispute is whether the Amendment modifies the rates at which the parties pay reciprocal compensation for local traffic on a global basis or only in situations where ICI has elected a multiple tandem access ("MTA") network configuration. In order to resolve the dispute, the Commission need only look at the plain, unequivocal language of the Amendment. Even a cursory glance at the preamble reveals no mention of MTA, or any other

[1] As discussed more fully below, the Commission should modify the end office switching rate in Attachment A of the Amendment to reflect $0.002 per MOU, instead of $0.0175 for the first MOU and $0.005 for each additional MOU.

language that limits the scope of the Amendment. Thus, there is no language in the preamble that lends credence to ICI's attempt to limit the Amendment to MTA situations.

Next, the focus shifts to the numbered paragraphs of the Amendment. It should be obvious that by individually numbering each of the paragraphs in the body of the Amendment, the parties intended for each separately numbered paragraph to stand on its own. (TR, 326) The more essential provisions of the Amendment are found in paragraphs 1 through 4, which provide:

1. The Parties agree that BellSouth will upon request, provide, and ICI will accept and pay for, Multiple Tandem Access, otherwise referred to as Single Point of Interconnection, as defined in 2. following:

2. This arrangement provides for ordering interconnection to a single access tandem, or, at a minimum, less than all access tandems within the LATA for ICI's terminating local and intraLATA toll traffic and BellSouth's terminating local and intraLATA toll traffic along with transit traffic to and from other ALECs, interexchange Carriers, Independent Companies and Wireless Carriers. This arrangement can be ordered in one way trunks and/or two way trunks or Super Group. One restriction to this arrangement is that all of ICI's NXXs must be associated with these access tandems; otherwise, ICI must interconnect to each tandem where an NXX is "homed" for transit traffic switched to and from an Interexchange Carrier.

3. The Parties agree to bill Local traffic at the elemental rates specified in Attachment A.

4. This amendment will result in reciprocal compensation being paid between the Parties based on the elemental rates specified in Attachment A.

Clearly, paragraphs 1 and 2 of the Amendment address ICI's right to obtain MTA. (TR, 35) In fact, paragraph 1 provides ICI with the unilateral right to obtain an MTA network configuration, as defined in paragraph 2, from BellSouth. Interestingly, paragraph 1 specifically references paragraph 2, but fails to reference either paragraph 3 or 4. (*Id.*) This is critical for two reasons. First, if the parties intended to limit paragraphs 3 and 4 to only apply to MTA situations, it is logical to assume that those paragraphs would also have been specifically referenced in

paragraph 1. Second, if the entire Amendment is only directed to MTA, as ICI contends, there would be no reason to specifically reference any other paragraph in paragraph 1, as each paragraph in the Amendment would already be providing terms and conditions applicable only to MTA.

ICI's interpretation of the Amendment results in an irreconcilable conflict between the Amendment and the Master Interconnection Agreement. As ICI concedes, paragraph 1 of the Amendment gives rise to a unilateral or one-way option on the part of ICI to request MTA. (*Id.*) BellSouth did not obtain the reciprocal right to request MTA from ICI. (TR, 45) This is important because MTA is used only in the origination of traffic, not the termination of traffic.[2] (*Id.*) Thus, under ICI's interpretation, in those instances where ICI is using an MTA arrangement to originate local traffic, ICI will be paying BellSouth the lower elemental rates in Attachment A to the Amendment while BellSouth, for local traffic BellSouth originates, would continue to pay ICI the higher composite rates found in the Master Interconnection Agreement. This arrangement, however, would violate Section IV(A) of the Master Interconnection Agreement, which requires that all reciprocal compensation for local traffic be mutual (i.e. at the same rate). (*Id.*) Only BellSouth's interpretation of the Amendment does not result in a conflict with the terms of the Master Interconnection Agreement.

Looking at the plain, unequivocal language of paragraphs 3 and 4 of the Amendment, neither paragraph mentions nor references MTA. In fact, the plain language of paragraph 3 provides, without limitation or qualification, that the rates in Attachment A apply to "local traffic." In her testimony, witness Gold attempted to take liberties with the actual wording of

[2] As this Commission is well aware, reciprocal compensation is paid for terminating local traffic.

paragraphs 3 and 4 by adding the words "when MTA is elected and provisioned." (TR, 23) On cross-examination, however, Ms. Gold admitted, "those words are not there." (TR, 37) Ironically, it is this language that Ms. Gold attempted, unsuccessfully, to insert into paragraphs 3 and 4 that BellSouth would have expected to see if those paragraphs pertained solely to MTA.

As noted above, ICI contends that every provision in the Amendment applies only to instances where ICI has requested MTA. In other words, paragraphs 1 and 2 of the Amendment, which address MTA, control paragraphs 3 and 4 of the Amendment (TR, 39), thus rendering the precise wording of paragraphs 3 and 4 moot. This is not the first instance where arguments such as those presented by ICI have been considered, and subsequently rejected, by the courts in Florida. In *Barco v. Penn Mut. Life Ins. Co. of Philadelphia*, 36 F.Supp 932 (U.S.D.C., S.D. of Fla., 1941), *aff'd.*, 126 F.2d 56 (5th Cir., 1942), for example, the Court considered arguments surrounding the interpretation of an insurance contract. In *Barco*, the insured argued that the fourth provision of the insurance contract subordinated the separate provisions where the term "in default" was actually defined, thus rendering those provisions meaningless. In finding the insured's interpretation of the insurance contract unsupportable, the Court held:

> If undue prominence is given to the provisions of the policy in division number 4, and that is read by itself, or interpreted in the sense that all other provisions must be made to subordinate themselves to this as a basic or controlling clause, then the insured could not be said to be "in default".... This construction, however, would do violence to the cardinal rule that all provisions of a contract must be given their due meaning, if that can be done in harmonizing all the provisions of a written contract. I, therefore, am of the opinion that this term "in default" means just what it says....

Barco, at 935.

As in *Barco*, ICI's interpretation of the Amendment does "violence" to the rule that all contractual provisions be given their due meaning. This violence is magnified by the fact that ICI admits that, when considering each individually numbered paragraph separately, BellSouth's interpretation is correct:

> Purely apart from the circumstances that gave rise to the amendment, it is true, I suppose, that if those paragraphs were interpreted in isolation, they arguably would support BellSouth's view that the amendment requires the Attachment A rates to be applied region-wide upon execution, without any other linkage.

(TR, 27) The linkage referenced by ICI is the recital clause of Attachment A. (TR, 38) As demonstrated below, ICI's reliance on the recital clause as linkage is contrary to Florida law.

ICI contends that the rates reflected in Attachment A to the Amendment only apply in instances where ICI has elected MTA. As the sole basis for its contention, ICI cites the recital clause of Attachment A, which provides that "Multiple Tandem Access shall be available according to the following rates for local usage." (*Id.*) Again, ICI's interpretation is not consistent with the operative clause that follows in paragraph number 2 of Attachment A, which provides that "the Parties agree to bill Local Traffic at the elemental rates specified below." Furthermore, as noted in *Johnson v. Johnson*, 725 So.2d 1209 (Fla. 3d DCA, 1999), "[u]nder Florida law, an operative clause of an agreement prevails over the recital clause when there is a discrepancy between the two." Thus, even viewing Attachment A in a light most favorable to ICI, there is still a discrepancy between the recital clause and the operative clause which, under Florida law, must be resolved in favor of the operative clause. As in paragraph 3 of the Amendment, there is no language in paragraph 2 of Attachment A that limits or prevents the global application of the elemental rates to all local traffic.

Again, consistent with paragraph 3 of the Amendment, paragraph 2 of Attachment A references local traffic being billed at "elemental rates." This reference to elemental rates is consistent with BellSouth's discussion of the purpose behind the Amendment, which was to modify the rate structure from composite rates to elemental rates for all local traffic. (TR, 244) Mr. Hendrix testified that there were numerous Interconnection Agreements being modified or negotiated to include elemental rates. (TR, 246-7) In fact, the BellSouth Standard Interconnection Agreement (Exhibit 17) was amended in early 1998, prior to the execution of the Amendment, to reflect elemental rates consistent with those approved by the various state commissions in BellSouth's service territory. (TR, 244) Most instructive, however, was Mr. Hendrix' reference to a number of ALECs (none of whom have challenged or questioned the global applicability of the elemental rates) that have interconnection agreements with virtually identical MTA language to that found in the Amendment. (TR, 247) Further, ICI acknowledged that the rates in Attachment A (noting a couple of numerical mistakes) are consistent with the elemental rates ordered by the various state commissions in the AT&T/MCI arbitrations held in those states. (TR, 42) Finally, it is undisputed that BellSouth could not bill a single ALEC both composite and elemental rates for a specific type of traffic, which in this instance is local traffic. Again, it is completely ludicrous to suggest, as ICI has done, that the parties would agree to a billing process that could not be implemented.

As with the language in the Amendment, there is absolutely no reason why the rates in Attachment A cannot have global application to local traffic. (TR, 41) As ICI admitted, there is nothing special about an MTA arrangement that necessitates rates different from the typical local traffic exchange scenario. (TR, 312) In fact, in its current negotiations with BellSouth over the terms of a new Interconnection Agreement, ICI agreed to elemental rates for MTA that are

identical to the elemental rates for local traffic found in Attachment A.[3] (Exhibit 23; TR, 314-5) Thus, there is nothing inconsistent with BellSouth's interpretation of the Amendment that the elemental rates in Attachment A apply globally to all local traffic, even local traffic exchanged via MTA. The same cannot be said for ICI's interpretation.

The final issue concerning the rates in Attachment A that needs to be addressed by the Commission is whether to amend the end office switching elemental rate. Notwithstanding its prior refusal to amend Attachment A of the Amendment, ICI conceded, during the course of the hearing, that the appropriate end office switching rate should be $0.002 per MOU, not $0.0175 for the first MOU and $0.005 for additional MOUs. (TR, 51-2, 54) The Commission, therefore, should order the retroactive amendment of the end office switching rate to $0.002.

II. ICI'S ACTIONS ARE INCONSISTENT WITH ICI'S INTERPRETATION OF THE AMENDMENT

There are a number of irreconcilable inconsistencies in ICI's version of the events leading up to the execution of the Amendment that make ICI's interpretation of the Amendment implausible. Most of the inconsistencies stem from the fact that ICI chose not to produce any witness that was personally involved in the negotiation or execution of the Amendment. (TR, 30) This is true notwithstanding the fact that ICI's lead negotiator on the Amendment, Julia Strow, still lives in the Tampa, Florida area and her husband is still employed by ICI. (TR, 31) Likewise, ICI chose not to present testimony from the ICI officer that executed the Amendment, James Geiger. (TR, 32) One can only assume that the reason ICI chose not to present testimony

[3] In reviewing Exhibit 23, ICI was forced to admit, yet again, that Ms. Gold had misquoted material in her testimony. (TR, 314)

from Mrs. Strow and Mr. Geiger is that their testimony would not be beneficial to ICI.[4] No other explanation makes sense, especially given their availability and, in Mrs. Strow's case, ongoing family relationship with ICI.

One of the more glaring inconsistencies in ICI's position involve the facts preceding the execution of the Amendment. Consistent with the adage that a bad story is better than no story, ICI's story is a bad one indeed. First, ICI took the position that it was directly trunked to each and every BellSouth tandem in BellSouth territory prior to the date of the Amendment. (Exhibit 11, pp. 19-21; TR, 16, 70) Based on its contention that it had direct trunking to all BellSouth access tandems, ICI proclaimed that it did not need or request MTA. (*Id.*) In fact, ICI went so far as to say that "it was categorically not the result of Intermedia's initiative to request an MTA amendment." (TR, 306; TR, 282)

The veracity of ICI's position was seriously jeopardized when confronted with the fact that ICI witness Carl Jackson had testified in the ICI arbitration proceeding in Georgia that ICI was direct trunked to less than all of the access tandems in Georgia. (Exhibit 8, pp. 20-21) In fact, the testimony became so confused on this point that the Commission requested ICI to file a late-filed exhibit to clarify the record.[5] (TR, 299) Once it became apparent that ICI had "exaggerated" the extent of the direct trunking, ICI then changed its story and indicated that MTA was requested as a result of traffic congestion. (TR, 130, 307) ICI's claim makes no sense, as MTA is for originating traffic only. Thus, requesting MTA would only exacerbate the

[4] It is also curious that ICI admits that it was aware of the problem with the Amendment as early as March 1999 (TR, 55) but did not file this complaint until October 1999, (TR, 57) contemporaneous with the departure of Ms. Strow.

[5] As of the filing of this brief, BellSouth did not receive the late-filed exhibit that ICI was directed to file by June 19, 2000. BellSouth can only assume that the late-filed exhibit would have provided clarification detrimental to ICI, thus ICI chose not to file it. If ICI did file the late-filed exhibit, BellSouth requests a copy and the opportunity to respond, if necessary, through supplemental briefing.

capacity problems experienced by BellSouth at the Buckhead tandem. (TR, 123) The veracity of ICI's "fallback" position was further questioned, this time via a legal brief filed in the ICI arbitration proceeding in Florida wherein ICI extolled Carl Jackson's testimony that ICI had never experienced traffic congestion problems with BellSouth since 1996, when the companies were interconnected. (Exhibit 21, p. 34) At that point, ICI expanded the traffic congestion story into some blackmail/conspiracy theory wherein ICI was forced into signing the Amendment (TR, 282), but that testimony is the subject of a pending Post-Hearing Motion to Strike. To the extent the testimony is not stricken, Mr. Milner adequately demonstrated the fallacy of such a suggestion. (TR, 352-3) Notwithstanding ICI's inability to adopt a position, BellSouth presented documentary evidence at the hearing in the form of an e-mail from Stuart Hudnall of BellSouth to Julia Strow of ICI demonstrating that the Amendment was created at the request of Mrs. Strow. (Exhibit 18)

Although more inconceivable than inconsistent, ICI also suggests that BellSouth merely presented the Amendment to ICI without explanation and ICI simply signed it without discussion. (Exhibit 22, p.6) Nevertheless, ICI admits that an authorized agent signed the Amendment. (TR, 34, 308) Even assuming that ICI is correct about signing the Amendment without understanding it, that act of carelessness does not excuse performance or otherwise render the Amendment null and void. As noted by the Florida courts,

> Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform.

City of Tampa v. City of Port Tampa, 127 So.2d 119 (Fla. 2d DCA 1961).

ICI's contention that it simply signed the Amendment without understanding the import is inconsistent with ICI's argument that ICI would never have signed such an Amendment given that there was a pending ISP complaint proceeding pending before the Commission. (TR, 283-4) Clearly, the ISP proceeding was one of first impression to the Commission and the outcome, at the time the Amendment was executed, was questionable. After having prevailed, it is easy for ICI to claim, in retrospect, that it would not take any action to reduce the reciprocal compensation rates. This is especially true given the possibility that, if ICI had not prevailed, ICI could potentially being paying more reciprocal compensation to BellSouth than BellSouth pays to ICI.

The final, and most egregious, inconsistency in ICI's interpretation of the Amendment is that ICI requested and received an MTA arrangement in Georgia, but continues to bill BellSouth under the composite rates in the Master Interconnection Agreement. (Exhibit 19, p.10) Even under ICI's interpretation of the Amendment the rates in Attachment A should apply in any LATA where ICI has MTA. (TR, 44) As ICI admits to having MTA in the Atlanta LATA (TR, 143-4), ICI's actions are inconsistent with ICI's own interpretation of the Amendment.

On November 6, 1998, ICI submitted an ASR to establish an MTA arrangement for ICI at BellSouth's Buckhead access tandem in Atlanta, Georgia. (TR, 118) As with every other incriminating fact in this proceeding, ICI has developed a "story" to explain why ICI would take action inconsistent with ICI's interpretation of the Amendment. In the case of the ASR, ICI contends that BellSouth requested that ICI submit the ASR and, to be cooperative, ICI complied with that request. Again, the information about BellSouth's request comes under dubious circumstances second- or third-hand from a witness other than the one who allegedly had the

conversation. (TR 119-20) Further, this "story" cannot remotely be reconciled with ICI's earlier contention that ICI would not have agreed to elemental rates because of the pending ISP complaint case. (TR, 283-4) It is inconceivable that in November 1999, after ICI had already received an ISP decision in its favor, that ICI would voluntarily request MTA, solely at the behest of BellSouth, when even under ICI's interpretation of the Amendment such a request would result in lower reciprocal compensation payments to ICI.

Next, ICI contends that after submitting the ASR at BellSouth's request, ICI decided, in February 2000, to cancel the ASR. (Exhibit 10) As supposed evidence of the cancellation, ICI produced an unconfirmed e-mail directed to some individual at BellSouth. (*Id.*) Ironically, even ICI admits that the email was not the proper means to cancel an ASR. (Exhibit 11, p. 24; TR, 160) Regardless, ICI took the position that it did not have an MTA arrangement in the Atlanta LATA.

Originally, ICI took the position that it was directly trunked to every access tandem in the Atlanta LATA (Exhibit 11, p.23) and, therefore, under the definition in the Amendment, did not have MTA. (TR, 128) It is undisputed that the Atlanta LATA has six access tandems: Columbus, East Point, Buckhead, Norcross, Gainesville and Athens. ICI, however, was unable to explain Carl Jackson's testimony that ICI was direct-trunked to only four access tandems in Georgia. (Exhibit 8, p. 21) Once confronted with the Mr. Jackson's testimony, and the fact that ICI has no direct trunking to the Columbus access tandem, which is in the Atlanta LATA, ICI admitted that it does have an MTA arrangement in Georgia.[6] (TR, 359) At that point, ICI suggested that BellSouth had unilaterally arranged MTA for ICI, without ICI's knowledge. As

[6] ICI's ultimate admission squarely contradicts prior testimony by Ms. Gold and Mr. Thomas. (See, TR, 16, 91, 111; Exhibit 11, p.19)

Mr. Milner again pointed out, MTA cannot be accomplished unilaterally by BellSouth, as MTA can only be accomplished by the originating carrier (in this instance ICI) making the necessary translations in the switch to ensure that the traffic is routed properly. (TR, 367) Otherwise, the call cannot be completed and the originating end user will receive a message that effect. It is a safe assumption that ICI's customers homed behind the other five access tandems in the Atlanta LATA make calls to BellSouth customers homed behind the Columbus access tandem. (*Id.*) It necessarily follows that ICI has made some affirmative action to enable those calls to go through, such as switch translations.

Finally, ICI apparently had MTA-like arrangements in Orlando and Jacksonville pre-existing the Amendment. (TR, 113) Subsequent to the Amendment, ICI modified its network configuration in Orlando such that it no longer qualifies as MTA. (TR, 115) In Jacksonville, however, ICI apparently still has a network configuration that qualifies as MTA under the terms of the Amendment. (*Id.*) While ICI is obviously aware of the MTA arrangement it has in Jacksonville, ICI has not requested or attempted to make the necessary network modifications that would remove the network configuration from the definition of MTA found in the Amendment. (*Id.*) Notwithstanding its MTA arrangement in Jacksonville, ICI continues to bill BellSouth for reciprocal compensation at the composite rates found in the Master Interconnection Agreement. (Exhibit 19)

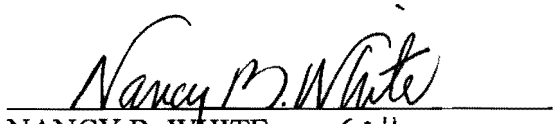
CONCLUSION

This dispute is nothing more than a simple contract interpretation arising from an Amendment that was requested by ICI, negotiated between the parties and ultimately executed by authorized representatives from each party. ICI makes a number of excuses for having signed an Amendment that has now proven to be detrimental to ICI's attempt to obtain an additional 25

million dollars in reciprocal compensation, beyond the 13 million already received from BellSouth. (TR, 18) In the end, however, all ICI can offer are unsubstantiated excuses that are contradictory and illogical. Under the clear, unequivocal language of paragraphs 3 and 4 of the Amendment, BellSouth respectfully requests that the Commission rule in BellSouth's favor and order reciprocal compensation to be paid between the parties at the elemental rates (with the requested amendment to the end office switching rate) in Attachment A to the Amendment. Such a decision by the Commission would be consistent with an axiom of contract interpretation that "the construction of all written instruments is a question of law to be determined by the court where the language used is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inferences." *Royal American Realty v. Bank of Palm Beach and Trust Company*, 215 So.2d 336 (Fla. 4th DCA, 1968).

Respectfully submitted this 27th day of June 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



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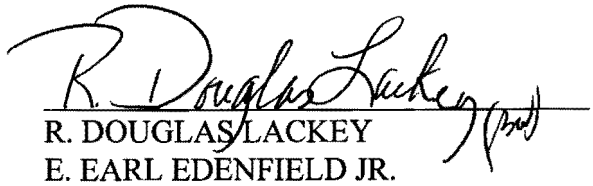

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CERTIFICATE OF SERVICE
Docket No. 991534-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 27th day of June, 2000 to the following:

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