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June 30, 2000

ORIGINAL

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RECORDS AND  
REPORTING

**BY HAND DELIVERY**

Ms. Blanca Bayó, Director  
Division of Records and Reporting  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 000690-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida are an original and fifteen copies of Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida's Motion to Dismiss, or in the Alternative, Stay in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

  
Floyd R. Self


APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMB \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
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SER \_\_\_\_\_  
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FRS/amb

Enclosure

cc: Mr. Scott Sapperstein

Parties of Record

  
RECEIVED & FILED  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

08060 JUN 30 00

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by BellSouth Telecommunications, Inc. )  
against Intermedia Communications, Inc., Phone One, Inc., )  
NTC, Inc., and National Telephone of Florida regarding )  
reporting of percent interstate usage for compensation )  
for jurisdictional access services. )  
\_\_\_\_\_ )

Docket No. 000690-TP  
Filed: June 30, 2000

**INTERMEDIA COMMUNICATIONS, INC.'S MOTION TO DISMISS**  
**OR, IN THE ALTERNATIVE, TO STAY**

Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida (collectively "Intermedia"), pursuant to Rules 28-106.103 and 28-106.204(2), Florida Administrative Code, hereby move that the Florida Public Service Commission ("Commission") dismiss the Complaint ("Complaint") of BellSouth Telecommunications, Inc. ("BellSouth") in this docket, or in the alternative, to stay these proceedings pending the completion of an audit of Intermedia's PIU pursuant to BellSouth's Florida access tariff. In support of this Motion, Intermedia states:

1. On June 5, 2000, BellSouth filed its Complaint with this Commission and served it on Intermedia via U.S. mail. In the Complaint, BellSouth alleges that Intermedia was misreporting its Percent Interstate Usage ("PIU") factors to BellSouth in violation of BellSouth's Intrastate Access Tariff and rules and regulations of the Commission. BellSouth alleges that it has "no choice but to pursue this action before the Commission."

2. Intermedia objects to the filing of this Complaint as improper because BellSouth has failed to comply with its own intrastate access tariff that expressly addresses this situation. (See Attachment "A" hereto.) Section E2.3.14(B) of BellSouth's Access Tariff specifically provides for audits to be conducted in disputes such as this, and specifies the procedures to be followed in such

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cases. Intermedia has never disputed BellSouth's right to conduct an audit and has repeatedly expressed its willingness to cooperate with an audit. On October 13, 1999, Deloitte & Touche, accountants for BellSouth, forwarded to Intermedia the necessary paperwork to perform an audit to evaluate Intermedia's PIU. Deloitte & Touche included a set of "agreed-upon procedures" for performing the audit. In accordance with the tariff, Intermedia advised Deloitte & Touche that it had not agreed to the "agreed upon procedures," that it had never seen the proposed procedures, and that it wished to negotiate with BellSouth regarding such procedures. Instead of agreeing to negotiate on the procedures of the pending audit, on March 22, 2000, BellSouth notified Intermedia that BellSouth was "suspending" the audit and "reserved the right to reinstate the audit at a later date." (See Attachment "B" hereto). BellSouth then demanded payments from Intermedia, clearly acting outside the procedures of BellSouth's tariff. Subsequently, without any further notice to Intermedia, BellSouth filed this Complaint.

3. In the present circumstances, BellSouth must abide by the terms of its tariff and conduct an audit. The tariff does not authorize BellSouth to unilaterally change a carrier's PIU. Indeed, the tariff provides an elaborate set of procedures for establishing and updating a carrier's PIU. Further, the tariff sets forth specific and detailed procedures for conducting an audit when there is a dispute regarding a carrier's PIU. By the terms of BellSouth's tariff, if BellSouth seeks to dispute the PIU, it must do so as a result of an audit: "The Company [BellSouth] will adjust the IC or End User's PIU based upon the audit results." BellSouth Access Services Tariff, Section E2.3.14(D)(1). Moreover, BellSouth's conclusion, on the basis of its own testing, however intelligent it may be, does not conclusively establish anything nor does it absolve BellSouth of its obligation to have an audit performed, which is the only procedure provided for in its tariff. Until

there is an audit, we do not know if there is a controversy to be resolved by way of a complaint. Thus, given the express requirements in the tariff on all of the issues addressed by BellSouth's Complaint, the only legally permitted course for BellSouth to follow is to have an audit of Intermedia pursuant to the procedures set forth in its own tariff on file and approved by this Commission.<sup>1</sup>

4. BellSouth, not Intermedia, published the tariff controlling verification of jurisdictional reports and BellSouth is required by law to comply with it. According to Florida law, a carrier must act solely pursuant to its tariffs and any ambiguity in the tariff should be construed against the carrier. *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So.2d 716 (Fla. 1983); *Louisville & Nashville Railroad v. Speed-Parker, Inc.*, 137 So. 724 (Fla. 1931); *Louisville & N.R. Co. v. St. Regis Paper Co.*, 102 F. Supp 713 (N.D. Fla. 1952), *aff'd*, 201 F. 2d 371 (5<sup>th</sup> Cir 1953). It is well settled in Florida that a tariff, which is required by law to be filed, is not merely a contract; "It is the law." *Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486, 496 (5<sup>th</sup> Cir. 1966). Accordingly, state and federal courts have historically treated administrative tariffs in the same manner as they would treat a legislative statute. *Pan American World Airways, Inc.*, 427 So. 2d at 719. Therefore, according to established Florida law, BellSouth is required to follow the appropriate procedures set forth in its tariff which include performing an audit to discover Intermedia's actual PIU prior to bringing this complaint before the Commission.

5. BellSouth's arrogance and refusal to follow its tariff is quite disturbing. As this

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<sup>1</sup>If BellSouth does not want to have an audit, then BellSouth must follow the tariff and live with the previously provided PIU factors. If BellSouth and Intermedia fail to agree as to how the audit will be conducted, then that may be subject to Commission action. But clearly, this Complaint is premature.

Commission is well aware, shortly before filing the complaint at issue against Intermedia, BellSouth filed a similar complaint against Thrifty Call, Inc., prior to which BellSouth had again violated its tariff by refusing to perform an audit. BellSouth cannot pick and chose which tariff provisions it will comply with and which it will ignore. BellSouth's actions with respect to PIU audits represent an abuse of its power as the incumbent local exchange carrier and its actions are wasting the time and resources of this Commission.

6. Intermedia must advise the Commission that it is greatly disturbed by BellSouth's failure to properly protect Intermedia's confidential information in its Complaint. BellSouth has improperly disclosed customer proprietary network information and other sensitive business information in total disregard of its legal obligation to maintain the confidentiality of such information. While an Answer and Counterclaim if necessary, is the proper vehicle for addressing these issues, Intermedia wishes to advise the Commission and BellSouth that in any future pleadings BellSouth should be held to the strictest standards and to make any filings with the Commission pursuant to Rule 25-22.001, Florida Administrative Code.

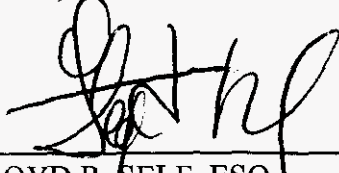
7. As a final matter, Intermedia wishes to formally advise the Commission and BellSouth that because Intermedia disputes BellSouth's proposed PIU, BellSouth cannot and should not disconnect any of Intermedia's services during the pendency of this dispute. Any efforts by BellSouth to disconnect any of Intermedia's services during the pendency of this PIU dispute will not be tolerated, and will be resisted by Intermedia by all lawful means.

8. BellSouth is required by law to comply with the terms of its own tariff. BellSouth should be required to demonstrate such compliance before undertaking the extreme step of filing any action against Intermedia. Until the tariff procedures are fulfilled, a complaint proceeding is an

abuse of process and a waste of time and resources of this Commission and Intermedia. However, if the Commission believes that it is appropriate to not dismiss this Complaint, Intermedia alternatively requests that the Complaint be stayed until such time as an audit pursuant to BellSouth's Florida Intrastate Tariff has been conducted.

WHEREFORE, Intermedia Communications, Inc. respectfully requests that the Complaint filed by BellSouth be dismissed. Alternatively, the Commission should issue an order compelling BellSouth to comply with its PIU tariff, and stay this Complaint until BellSouth has complied with the terms and conditions of its tariff and an audit has been conducted.

Respectfully submitted this 30th day of June, 2000.



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FLOYD R. SELF, ESQ.  
MESSER, CAPARELLO & SELF, P. A.  
Post Office Box 1876  
Tallahassee, FL 32302-1876  
(850) 222-0720

and

Jonathan E. Canis  
Kelley Drye & Warren, L.L.P.  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, DC 20036  
(202) 955-9664

Attorneys for Intermedia Communications, Inc.

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

## ACCESS SERVICES TARIFF

First Revised Page 14  
Cancels Original Page 14

ISSUED: February 14, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

EFFECTIVE: March 1, 1997

## E2. GENERAL REGULATIONS

(T)

## E2.3 Obligations of the IC (Cont'd)

E2.3.14 Jurisdictional Report Requirements<sup>1</sup> (Cont'd)

## A. Jurisdictional Reports (Cont'd)

10. When mixed interstate and intrastate Dedicated Access Service is provided, the jurisdiction will be determined as follows. (Cont'd)

- If the IC or End User's estimate of the interstate traffic on the service involved constitutes more than 10 percent of the total traffic on that service, the service will be provided in accordance with the applicable rules and regulations of the BellSouth Telecommunications, Inc. Tariff FCC No. 1.

The IC or End User shall keep records from which the percentage of interstate and intrastate use was estimated and upon request of the Company make the records available for inspection as reasonably necessary for purposes of verification of the percentages. The IC or End User shall supply the data within 30 days of the Company request.

## B. Jurisdictional Report Verification

1. When an IC or End User provides a projected interstate usage percent as set forth in A. preceding, or when a billing dispute arises or a regulatory commission questions the projected interstate percentage for *BellSouth SWA*, the Company may, by written request, require the IC or End User to provide the data the IC or End User used to determine the projected interstate percentage. This written request will be considered the initiation of the audit. The IC or End User shall supply the data to an independent auditor within thirty days of the Company request. The IC or End User shall keep records of call detail from which the percentage of interstate and intrastate use can be ascertained as set forth in C. following and upon request of the Company make the records available for inspection at an agreed upon location during normal business hours as reasonably necessary for purposes of verification of the percentages. The Company will audit data from one quarter unless a longer period is requested by the IC or End User and agreed to by the Company. Changes to the reported PIU will not be made for the test period. If the IC or End User does not provide the requested data to the Company or independent auditor within (30) days of the notice of audit, the IC or End User will be in violation of this Tariff and subject to E2.1.8 preceding.

Where attempts to obtain the appropriate data from the IC or End User beyond the 30 day time limit have failed, the Company may provide such documentation to the FPSC as an indication of the IC or End User being in violation of this Tariff.

2. For *BellSouth SWA* service, verification audits may be conducted no more frequently than once per year except in extreme circumstances. The Company and IC or End User will attempt to limit the audit to a reasonable time to effectively complete the audit. The Company and IC or End User shall respond promptly to requests generated during the audit to ensure timely completion of the audit.

Note 1: Except where indicated herein, references to *BellSouth SWA FGs* will also include the applicable *BellSouth SWA* Basic Serving Arrangement as detailed in the matrix in E6.1.3.A. (e.g., the term *BellSouth SWA* FGA represents both *BellSouth SWA* FGA and *BellSouth SWA* LSBSA).

ATTACHMENT "A"

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

ACCESS SERVICES TARIFF

First Revised Page 15  
Cancels Original Page 15

ISSUED: February 14, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

EFFECTIVE: March 1, 1997

## E2. GENERAL REGULATIONS

(T)

### E2.3 Obligations of the IC (Cont'd)

#### E2.3.14 Jurisdictional Report Requirements<sup>1</sup> (Cont'd)

##### B. Jurisdictional Report Verification (Cont'd)

3. Audits may be conducted by an independent auditor under contract to the Company; (b) a mutually agreed upon independent auditor; or (c) an independent auditor selected and paid for by the IC or End user. If the IC or End User selects option (c), where it pays for its own independent audit, the selected auditor must certify that the audit was performed following FCC procedures for measuring interstate and intrastate traffic as established by Commission orders, and provide to the Company a report with supporting documentation to verify such procedures. In the event that the IC's auditor is agreed upon to perform the audit, the auditor shall produce an attestation audit report upon completion of the audit.

When an auditor cannot be agreed upon within 30 days by one of the three options above, the Joint LEC Audit Committee's auditor shall perform the audit.

4. If a billing dispute arises or a regulatory commission questions the projected interstate percentage for Dedicated Access Service, the Company will ask the IC or End User to provide the data the IC or End User uses to determine the projected interstate percentage. The IC or End User shall supply the data to an independent auditor within thirty days of the Company request. The IC or End User shall keep records from which the percentage was determined and upon request of the Company make the records available for inspection as reasonably necessary for purposes of verification of the percentages.

Where an independent auditor cannot be agreed upon within 30 days the IC or End User shall supply the data to the Joint LEC Audit Committee's auditor. If the IC or End User does not comply within the 30 day time frame, the FPSC shall be notified and provided with all documentation substantiating requests made by the Company.

##### C. Maintenance of IC Records

1. The IC, Reseller, End User and AOS provider shall retain for a minimum of six (6) months call detail records, that substantiate the percentage data provided to the Company as set forth in A. preceding for *BellSouth SWA* service. Such records shall consist of one of a. and b. (if applicable), following:
- a. All call detail records, such as workpapers and/or backup documentation including paper, magnetic tapes or any other form of records for billed IC or End User traffic, call information including call terminating address (i.e., called number), the call duration, all originating and terminating trunk groups or access lines over which the call is routed, and the point at which the call enters the IC or End User's network; and
- b. If the IC has a mechanized system in place that calculated the PIU, then a description of that system and the methodology used to calculate the PIU must be furnished and any other pertinent information (such as but not limited to flowcharts, source code, etc.) relating to such system must also be made available.

Note 1: Except where indicated herein, references to *BellSouth SWA FGs* will also include the applicable *BellSouth SWA* Basic Serving Arrangement as detailed in the matrix in E6.1.3.A. (e.g., the term *BellSouth SWA FGA* represents both *BellSouth SWA FGA* and *BellSouth SWA LSBSA*).

(T)

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BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA  
ISSUED: February 14, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

## ACCESS SERVICES TARIFF

First Revised Page 16  
Cancels Original Page 16

EFFECTIVE: March 1, 1997

## E2. GENERAL REGULATIONS (T)

## E2.3 Obligations of the IC (Cont'd)

E2.3.14 Jurisdictional Report Requirements<sup>1</sup> (Cont'd)

## C. Maintenance of IC Records (Cont'd)

2. Correspondence between the Company and the IC or End User shall be limited to Certified U.S. Mail for the following: Audit Results, Choice of Auditor and Choice of Test Period. Response times by the parties shall be limited to the following: Audit Results-30 days, Choice of Auditor-30 days and Choice of Test Period-10 business days. In the absence of a response within these time frames, concurrence will be assumed on the contents of such correspondence, where applicable.

D. Audit Results for *BellSouth SWA* (T)

1. Audit results will be furnished to the IC or End User via Certified U.S. Mail (return receipt requested.) The Company will adjust the IC or End User's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit was completed, the usage for the quarter prior to completion of the audit, and to the usage for the two (2) quarters following the completion of the audit. After that time, the IC or End User may report a revised PIU pursuant to A. preceding. If the revised PIU submitted by the IC or End User represents a deviation of five percentage points or more from the audited PIU, and that deviation is not due to identifiable reasons, the provisions in B. preceding will be applied.
2. Both credit and debit adjustments will be made to the IC or End User's interstate and intrastate access charges for the specified period to accurately reflect the usage for the IC or End User's account consistent with E2.4.1 following.
3. If, as a result of an audit conducted by an independent auditor under contract to the Company, an IC or End User is found to have overstated the PIU by twenty percentage points or more, the Company shall require reimbursement from the IC or End User for the cost of the audit. The mutually agreed upon auditor will be paid for by the IC or End User. Such bill(s) shall be due and paid in immediately available funds thirty days from receipt and shall carry a late payment penalty as set forth in E2.4.1 following. If, after the 30 days, payment is not received from the IC or End User, all documentation that demonstrates attempts to collect the cost of the audit shall be turned over to the FPSC.

## E. Contested Audits

1. When a PIU audit is conducted by an independent auditor selected by the Company, the audit results will be furnished to the IC or End User by Certified U.S. Mail (return receipt requested). The IC or End User may contest the audit results based on substantive cause by providing written notification, by Certified U.S. Mail (return receipt requested), to the Company within thirty (30) calendar days from the date the audit report is furnished to the IC or End User by Certified U.S. Mail. When a PIU audit is conducted by an independent auditor selected by the IC or End User, the audit results will be furnished to the Company by Certified U.S. Mail (return receipt requested). The Company may contest the audit results by providing written notification, by Certified U.S. Mail (return receipt requested), to the IC or End User within thirty (30) calendar days from the date the audit report is furnished to the Company by Certified U.S. Mail.

**Note 1:** Except where indicated herein, references to *BellSouth SWA* Feature Groups will also include the applicable *BellSouth SWA* Basic Serving Arrangement as detailed in the matrix in E6.1.3.A. (e.g., the term *BellSouth SWA* FGA represents both *BellSouth SWA* FGA and *BellSouth SWA* LSBSA). (T)

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

## ACCESS SERVICES TARIFF

First Revised Page 17  
Cancels Original Page 17

ISSUED: February 14, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

EFFECTIVE: March 1, 1997

## E2. GENERAL REGULATIONS (T)

## E2.3 Obligations of the IC (Cont'd)

E2.3.14 Jurisdictional Report Requirements<sup>1</sup> (Cont'd)

## E. Contested Audits (Cont'd)

2. Contested audits may be resolved by a neutral arbitrator mutually agreed upon by the Company and the IC or End User. Arbitration is an option provided in addition to the IC or End User's existing right to file a complaint or legal action in a court of law or at the Commission for resolution of the dispute. The arbitration hearing will be conducted in a state or location within the Company operating territory where the IC or End User maintains a principle or significant presence as mutually agreed upon by both parties, or a state and location within the Company operating territory that is mutually agreed upon by both parties. The arbitration proceeding shall be governed by the law (both statutory and case) of the state in which the arbitration hearing is held, including, but not limited to, the Uniform Arbitration Act, as adopted in that state. The arbitration shall determine the IC or End User's PIU based on A. preceding.
3. Prior to the arbitration hearing, each party shall notify the arbitrator of the PIU percentage which that party believes to be correct. The arbitrator, in deciding, may adopt the PIU percentage of either party or may adopt a PIU percentage different from those proposed by the parties. If the arbitrator adopts a PIU percentage proposed by one of the parties, the other party (whose PIU percentage was not adopted) shall pay all costs of the arbitration. If the arbitrator adopts a PIU percentage higher than either of the PIU percentages proposed by the parties, then the party proposing the lower PIU percentage shall pay all costs of the arbitration. If the arbitrator adopts a PIU percentage lower than either of the PIU percentages proposed by the parties, then the party proposing the higher PIU percentage shall pay all costs of the arbitration. If the arbitrator adopts a PIU percentage which falls between the two percentages adopted by the parties, then the parties shall each pay one-half of the arbitration costs.
4. Absent written notification, within the time frame noted above, the IC or End User must comply with the provisions set forth in D. preceding. If the IC or End User fails to comply with these provisions, the Company may refuse additional applications for service and/or refuse to complete any and all pending orders for service or may discontinue the provision of the services to the IC or End User as specified in E2.1.8 preceding.
5. The FPSC shall be notified and given all documentation that substantiates the IC or End User non-payment.

## E2.3.15 Determination of Intrastate Charges for Mixed Interstate and Intrastate BellSouth SWA Service (T)

- A. When mixed interstate and intrastate *BellSouth SWA* service is provided, all charges (i.e., nonrecurring, monthly and/or usage) including optional feature and Basic Service Element (BSE) charges, will be prorated between interstate and intrastate. The percentage provided in the reports as set forth in E2.3.14.A preceding will serve as the basis for prorating the charges. The intrastate percentage will change as revised jurisdictional reports are submitted. The percentage of a *BellSouth SWA* service to be charged as intrastate is applied in the following manner: (T)

Note 1: Except where indicated herein, references to *BellSouth SWA FGs* will also include the applicable *BellSouth SWA* Basic Serving Arrangement as detailed in the matrix in E6.1.3.A. (e.g., the term *BellSouth SWA* FGA represents both *BellSouth SWA* FGA and *BellSouth SWA* LSBSA). (T)

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BellSouth Telecommunications, Inc.  
Room 34S91 BellSouth Center  
675 West Peachtree Street N. E.  
Atlanta, Georgia 30375

March 22, 1999<sup>2000</sup>

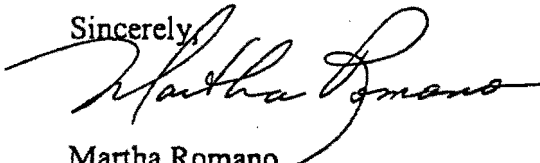
Mr. Mike McCullough  
Intermedia Communications, Inc.  
3625 Queen Palm Drive  
Tampa, Florida 33619

Dear Mr. McCullough:

This is to notify you that BellSouth is suspending the Intermedia audit of which you were notified June 10, 1999. BellSouth reserves the right to reinitiate the audit at a later date.

We appreciate your assistance and cooperation in this matter. If you have any questions, I can be reached at (404) 927-7507.

Sincerely,



Martha Romano  
Manager - Customer Markets

cc: Henry Walker, BellSouth Telecommunications, Inc.

ATTACHMENT "B"

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of Intermedia Communications, Inc., Phone One, Inc., NTC, Inc., and National Telephone of Florida's Motion to Dismiss, or in the Alternative, Stay have been served upon the following parties by Hand Delivery (\*) and/or U. S. Mail this 30th day of June, 2000.

Timothy Vaccaro, Esq.\*  
Division of Legal Services, Room 370  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Lisa S. Foshee, Esq.  
c/o Nancy H. Sims  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301

  
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Floyd R. Self