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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Expanded Interconnection)	DOCKET NO. 921074-TP
Phase II and Local Transport)	DOCKET NO. 930955-TL
Restructure)	DOCKET NO. 940014-TL
_____)	DOCKET NO. 940020-TL
		DOCKET NO. 931196-TL
		DOCKET NO. 940190-TL

FILED: 01/24/95

MOTION FOR RECONSIDERATION OF
INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.

Intermedia Communications of Florida, Inc. ("Intermedia" or "ICI"), pursuant to Rule 25-22.060, hereby files this its Motion for Reconsideration of Order No. PSC-95-0034-FOF-TP, issued on January 9, 1995 in the above dockets.

INTRODUCTION

In Order No. PSC-95-0034-FOF-TP ("Phase II Order") the Commission commits fundamental error in its interpretation of Sections 364.335 and 364.337, Florida Statutes, to prohibit the transport of switched access traffic by an AAV. The purpose of a

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motion for reconsideration is not to reargue the merits of the case, but to afford the Commission the opportunity to avoid fundamental error. In addressing the fundamental error identified above, ICI will focus on why the Commission's decision is fundamentally flawed, not why previously advanced positions should have been embraced.

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FPSC-RECORDS/REPORTING

THE COMMISSION COMMITTED FUNDAMENTAL ERROR WHEN IT RULED THAT AN AAV MAY NOT PROVIDE DEDICATED TRANSPORT OF SWITCHED ACCESS TRAFFIC FROM ITS POINT OF COLLOCATION TO AN IXC'S POINT OF PRESENCE.

In the Phase II Order, the Commission concluded that an AAV may not provide dedicated transport of switched access traffic from its point of collocation to an IXC's point of presence because that would be the provision of switched service not allowed under statute. For example, on page 23 of the order the Commission ruled as follows:

We hold that switched access transport is not dedicated transport and does not meet the statutory requirements in Sections 364.335 and 364.337. To allow AAVs switched access interconnection would be adding a switch between an AAV and the end-user. The AAV's position is, in essence, a mere extension of the AAV's network into the switched services arena.

As will be shown below, this ruling is fundamental error because it misapprehends the Commission's previous orders, confuses policy determination with statutory interpretation, and runs counter to the express Legislative intent.

A. **The Commission's interpretation confused legal interpretation with policy analysis, and misconstrued its own orders.**

The Commission's interpretation of Section 364.335(3) and Section 364.337(3)(a) is an unsuccessful attempt to harmonize two inartfully worded statutory sections with past Commission orders and rules, some of which involve these sections and some of which do not. In taking this approach, the Commission has both (1) confused the function of statutory interpretation with the function of policy formulation and (2) misinterpreted its past orders and rules. The result of this flawed analysis is to announce as a

matter of law a definition of "end-user" not contemplated by the Legislature and inconsistent with how the Commission has viewed that term in the past.

The AAV Orders

On pages 22 and 23 of the Phase II Order, the Commission attempts to anchor its decision in both Order No. 24877 and Order No. 25546:

With expanded interconnection for switched access, the customer controls the destination of a transmission by way of the LEC's switch, in that it could be any local call or a long-distance call. Thus, the end-user is not being provided dedicated private line service or special access. Section 364.337 states that AAVs can provide only private line service or special access service between an end-user and an interexchange carrier.

In fact, on reconsideration of the AAV Order, we prohibited AAVs from offering packet switching service because the "customer control capability could transform a virtual private line service into a switched service." See Order 25546.

We believe that Sections 364.335 and 364.337, Florida Statutes, allow AAVs to provide only dedicated private line service and dedicated special access. Those statutes do not authorize any transmission method other than dedicated. (Order No. 25546) (Emphasis added)

Thus we found that only dedicated transmission is permissible under Sections 364.335 and 364.337. Likewise, in expanded interconnection for switched access, the customer has control capability; thus, the service is not dedicated private line service nor is it special access service - it is a switched service.

The Commission fundamentally misapprehends the meaning of these two orders. These orders simply clarify that in determining whether a service offered by an AAV is a dedicated service - i.e., a private line - the key is what happens to the traffic once it

enters the AAVs network. If an actual or virtual dedicated transmission path is guaranteed, then the AAV may provide it; if the AAV cannot guarantee that the dedicated path is invulnerable to alteration by the end-user of the path, then it is not a private line.

This issue arose because staff was concerned that "grooming" of circuits by the AAV with either advanced DACs or with X.25 packet switching could place the AAV in the position of actually switching traffic. Moreover, notwithstanding record testimony to the contrary (Testimony of M. Viren at Tr. 239-42 in Docket No. 890183-TL), the staff and Commission were concerned that the end-user could defeat the AAVs intention to restrict its service to a dedicated path.

Additional text from Order No. 25546 informs this understanding of the Commission's concerns about switching:

Upon reexamination, the record indicated that customers could possibly control the entry/exit point of the transmission by changing the framing address of the packet, although ICI stated that this type of capability was not a service it intended to sell. ICI will not be the only AAV in Florida. This customer control capability could transform a virtual private line service into a switched service and, therefore, we find that it may not be authorized for an AAV's telecommunications network.

We find Sections 364.335 and 364.337, Florida Statutes, prohibit AAVs from providing switching within their telecommunications networks, and that the use of packet technology is switching. Therefore, we find packet switching is prohibited by these statutes. Therefore, we find it appropriate to affirm our decision in Order No. 24877 to prohibit AAVs from utilizing packet switching in their telecommunications networks. (emphasis added)

Of critical importance here is the underscored language: AAVs are viewed to be prohibited from providing switching within their networks. Neither Order No. 24877 nor Order No. 25546 are concerned about what happens to a customer's traffic before it enters or after it leaves the AAV's network. In short, these orders do not support the proposition that traffic switched by the LEC and then handed to the AAV for transport somehow mutates the dedicated pipeline service provided by the AAV to the IXC into a switched service provided by the AAV to the IXC's customer.

The Commission has unbundled transport from switching then rejected that very unbundling.

In addition to misapprehending its earlier orders, the Commission's decision is in fundamental error because it first unbundles transport from switching then rejects that very unbundling in its interpretation of the statute. Specifically, Intermedia believes that the Commission's interpretation proceeds from the unexamined conclusion that statutorily transport cannot be unbundled from switching. Thus the Commission concludes on page 26 of the Phase II Order as follows:

If the transmission passes from the end-user through the LEC's switch, it is a switched service which the AAV is prohibited from providing.

Consequently, the Phase II Order apparently rules that if an AAV provides dedicated transport to an IXC, it is providing a switched service to the IXC's subscriber. The order reaches this conclusion without examining or perhaps even recognizing the following:

- (1) the AAV provides no switching;
- (2) the AAV provides an unalterable, dedicated pipeline to the IXC;
- (3) the AAV has no contract or direct business relationship with the IXC's presubscribed customers;
- (4) the IXC pays the AAV for transport;
- (5) the IXC pays the LEC for switching;
- (6) the customer of the IXC pays the IXC for the long distance service;
- (7) the customer of the IXC remains the customer of the LEC for local service and pays the LEC for such service; and
- (8) the customer of the IXC and the LEC in all likelihood has never even heard of the AAV.

In the AAV orders "end-user" included "entities" subscribing to the private line service.

The Commission also declared in its Phase II Order that the term "end-user" in Section 364.335 cannot mean "the subscriber that uses the service," i.e., an IXC subscribing to an AAV's transport service:

An end-user initiates the call. IXCs do not initiate calls; instead, they supply a service to end-users by receiving and transmitting traffic from end-users. Therefore, we find that an IXC is not an end-user within the meaning of Section 364.335(3).

In restricting the statutory scope of the term "end-user," the Commission used policy definitions formed without any reference to Section 364.335(3) and Section 364.337(3)(a), and thus confused policy definitions with statutory interpretation. Moreover, to the extent the Legislature had different objectives for regulating

operator service providers, for example, and AAVs, the mechanical application of these policy definitions defeats legislative intent.

Intermedia has no problem with the definitions of "subscriber" and "end-user" provided within the rules for their intended sphere of operation. Indeed, Intermedia sees nothing inconsistent with the definition of subscriber and customer in Rule 25-4.003(46) and the meaning it proposes for "end-user" in Section 364.335. The definition of "end-user" in the Operator Service rules however, was intended only for that section and cannot legitimately be used as the definition of end-user in other applications.¹

Indeed, even Order No. 24877 does not conform to the that definition. To the contrary, Order No. 24877 uses "end-user" and "entity" as functionally equivalent:

If non-affiliated entities are served by AAVs, there will actually be two end users, not one end user as the statute provides. Therefore, we find that his statute limits our authority to permit AAVs to provide private line service, both intraexchange and interexchange, to that private line service between affiliated entities. Further, we find that the limitation for service between affiliated entities extends to any part of a private line (point-to-point) service in which an IXC provides a part. That is, an AAV may provide special access which connects to an

¹To the contrary, the Commission uses the terms "customer" and "end-user" interchangeably throughout the Phase II Order (see page 22, for example). Moreover, Rule 25-4.003(46) defines "subscriber" and "customer" as interchangeable terms, which the Phase II Order neglected to acknowledge. Thus, reduced to an Euclidian proof, under Commission usage in its orders and rules, "subscriber" does in fact mean "end-user":

Subscriber = customer;
Customer = end-user;
therefore subscriber = end-user.

IXC switch and have it terminate to any end user. However, if an AAV provides special access which is part of an end to end dedicated service, it may only be provided between an end user and its affiliates. (emphasis added)

Thus, when in the Phase II Order the Commission concludes that "(a)n end-user initiates a call," it is not only taking the most narrow view of that term, but also ignores the more general use of the term in the very order it supposedly bases its legal analysis upon.

The Commission misapplies its bypass prohibition.

The Commission has also cited Order No. 14804, which prohibited unauthorized bypass, as informing its statutory interpretation of Section 364.335(3) and Section 364.337(3)(a). Specifically, the Phase II Order states as follows:

Although Intermedia says there is not one word in the statutes prohibiting transport from one IXC to another, we have previously held there are certain restrictions. The bypass restriction set forth in Order No. 16804 provides that "IXCs shall not be permitted to construct facilities to bypass the LECs unless it can be demonstrated that the LEC cannot offer the facilities at a competitive price and in a timely manner." In the AAV Order, we found it appropriate to change the bypass restriction so that AAVs are authorized to bypass services subject to certain conditions. We specifically found that "neither IXCs nor any other entities shall bypass LEC facilities unless they are certified as AAVs." Thus, if an IXC collocates in a LEC's central office and seeks to transport traffic to another IXC, it would violate the bypass restriction. (Id. at 25-26)

Intermedia does not wish to belabor the point, but the bypass prohibition was a pure policy decision, not a matter of statutory interpretation. Moreover, it was driven by a desire to protect LEC switching from bypass, not transport. To state the obvious,

expanded interconnection depends on LEC switching; it does not bypass this protected function. To base the interpretation of "private line" as used in the statute on a policy order where no nexus is made between the Commission's policy and the intent behind the statutory term is illogical and thus fundamental error.

B. The Commission's interpretation is fundamentally flawed because it defeats the basic legislative intent of promoting competition.

It is critical that the Commission understand the gravity of the problem created by its ruling with respect to the provision of transport: the decision is so anticompetitive that it sacrifices much of the promise of expanded interconnection for switched access transport. Under the Phase II Order only the very largest IXCs will be able to interconnect for transport of switched long distance transport. This, of course, will further reduce their transport costs giving them even greater advantage over their smaller competitors. In promoting competition in the public interest, the Commission must create an environment where all carriers large and small can take advantage of the efficiencies from expanded interconnection for transport.

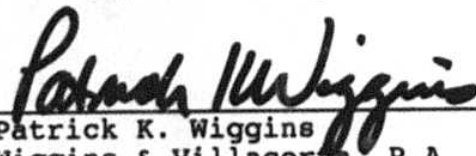
To fully serve the public interest, that Commission must recognize that its decision with respect to transport is based on a fundamentally flawed interpretation of the statute. The interpretation is fundamentally flawed not just for the reasons noted above, but also because the effect of the interpretation is inconsistent with the basic legislative intent. Specifically, the Legislature has emphasized in Chapter 364 that its provisions are

to be interpreted expansively to promote competition that is in the public interest. Rather than take this approach, the Commission has interpreted Sections 364.335 and 364.337 narrowly to inhibit competition in long distance, the one arena where competition has proved to be dramatically effective in advancing the public interest. This is not only unfortunate, it is also fundamental error.

CONCLUSION

For the reasons given above, to avoid fundamental error the Commission must reconsider its interpretation that Sections 364.335 and 364.337, Florida Statutes, prohibit an AAV from transporting switched access traffic from its point of interconnection with the LEC to an IXC's point of presence.

Respectfully submitted this 24th day of January, 1995.


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Docket No. 921074-TP

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