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February 6, 1995

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 921074-TP, 930955-TL, 940014-TL
940020-TL, 931196-TL and 940190-TL
Expanded Interconnection Phase II and LTR

Dear Mrs. Bayo:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Memorandum in Opposition to Motions for Reconsideration of Teleport Communications Group, Inc. and Intermedia Communications of Florida, Inc., 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 yours,

J. Phillip Carver (AS)

J. Phillip Carver

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Enclosures

cc: All Parties of Record
A. M. Lombardo
Robert G. Beatty
R. Douglas Lackey

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Expanded Interconnection Phase II and Local Transport Restructure | Docket No. 921074-TP<br>Docket No. 930955-TL<br>Docket No. 940014-TL<br>Docket No. 940020-TL<br>Docket No. 931196-TL<br>Docket No. 940190-TL |

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MEMORANDUM IN OPPOSITION TO MOTIONS FOR RECONSIDERATION OF TELEPORT COMMUNICATIONS GROUP, INC. AND INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.**

BELLSOUTH TELECOMMUNICATIONS INC., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company") hereby files, pursuant to Rule 25-22.037(2)(b), its Memorandum in Opposition to the motions for reconsideration of Teleport Communications Group, Inc. ("Teleport") and Intermedia Communications of Florida, Inc. ("Intermedia").

Teleport and Intermedia have each filed Motions for Reconsideration that are directed exclusively to the finding by the Florida Public Service Commission ("Commission") in Order No. PSC-95-0034-FOF-TP that alternate access vendors ("AAVs") are prohibited by Florida law from "interconnecting with the local exchange company switch for the provision of switched access" service. (Order, p. 64)[1]

The positions advanced by Teleport and Intermedia are generally similar and, in one or two instances, identical. Both fail for the same reason -- the Commission has interpreted the

[1] Given the similarity of the positions of Teleport and Intermedia, Southern Bell has responded to both in a single filing to avoid duplication.

controlling statutory authority in the only way that is consistent with the plain language of the statute. Both Teleport and Intermedia have failed to identify any error in the Commission's legal determination of the meaning of the statute.

The specific statute in question is Section 364.337(3)(a), Florida Statutes, which defines the services that may be provided by an alternate access vendor as follows:

> ..."[A]lternate access vendor services" means the provision of private line service between an entity and its facilities in another location or dedicated access service between an end-user and an interexchange carrier by other than a local exchange telecommunications company, .... (emphasis added)

It is uncontroverted that an AAV is authorized to provide only these two services, i.e., private line and dedicated access.

In its post-hearing brief, Intermedia made the creative, albeit implausible, argument that the transport of traffic from a LEC central office (or end office) to an interexchange carrier should not be viewed as an access service, either special or switched, but rather as private line service. The Commission unequivocally rejected this argument. Further, in rejecting the arguments of both Intermedia and Teleport, the Commission refused to accept their respective attempts to split definitional hairs and, instead, focused upon the ultimate issue, i.e., the type of traffic that AAVs can legally carry. The Order defined switched access services as being composed of four major rate elements, one of which is the local transport element that the AAVs wish to provide. (See, Order, p. 48) Accordingly, the Order concluded

that "if [a] transmission passes from the end-user through the LEC's switch, it is a switched service which the AAVs is prohibited from providing." (Order, p. 26) Likewise, the Commission concluded that "to allow AAVs switched access interconnection would be adding a switch between an AAV and the end user. In essence, this would be an extension of the AAV's network into the switched services arena." (Order, p. 25)

Before arriving at this ultimate conclusion, the Commission considered the various arguments of Intermedia and Teleport. While some of these arguments included attempts to redefine transport services as private line services, each of them were based upon the contention that an alternate access vendor can permissibly carry a dedicated portion of a transmission path that carries switched traffic. The Commission specifically rejected this argument, and, instead, approved the statutory analysis previously offered by Southern Bell. The Order states the following:

> Southern Bell submits that the plain language reading of Section 364.337(3)(a) cannot be reasonably construed to mean that an AAV can carry switched access traffic. It would have been easy enough for the legislature to provide that an AAV cannot provide switching, but that it can provide any non-switched part of any access service, including switched access. Instead, Southern Bell notes that the legislature chose to specifically limit alternative access vendor services to the provision of dedicated access, rather than a dedicated piece of switched access, and to further provide that this dedicated service is to be all the way from the end user to the IXC. Thus, Southern Bell contends that any argument that an AAV can use expanded interconnection as a means

> to carry switched traffic under the language of Section 364.337 is clearly untenable and must be rejected. We agree.

(Order, p. 26)

Under the applicable standard of review, the Order must stand unless a party seeking reconsideration can establish that it is erroneous by raising "some point which [the Commission] overlooked or failed to consider when it rendered its order in the first instance." (Diamond Cab Company v. King, 146 So.2d 889, 891 (Fla. 1962). Both Teleport and Intermedia have failed entirely to raise any matter that the Commission has overlooked in reaching the decision that the plain language of Section 364.337 prohibits AAVs from carrying switched access traffic. Indeed, the above-quoted determination by the Commission of the meaning of the statute is scarcely addressed by either party. Instead, both embark upon a variety of abstruse attempts to establish points that, in the final analysis, are simply irrelevant to the core statutory interpretation of the Order.

For example, Teleport argues that, as a matter of policy, the Commission should allow it to provide the service in question. Teleport then proposes several ways in which the statutory language could be twisted so as to recategorize the transport provided by alternate access vendors as private line service (i.e., a variation of the argument already made by Intermedia and rejected by the Commission). Legally, however, this proposal must fail.

It is the duty of this Commission to apply the plain language of the controlling statute. The Commission is not free to make a policy decision and then go on to make a patently implausible construction of the statute to support the policy decision. Instead, the statute must be interpreted to mean what it clearly says. The Commission has done this, and Teleport's position that this should be undone is legally unsupportable.

Intermedia also makes a policy argument similar to that offered by Teleport, although one that purports to have some statutory justification. Specifically, Intermedia argues that Chapter 364 has the overarching goal of fostering competition. Intermedia then claims that the Commission's interpretation of Section 364.337 is anticompetitive and, therefore, contrary to the statute in general.

Southern Bell submits that the Commission has correctly interpreted the plain language that specifically applies to the scope of the services that can be offered by AAVs. Moreover, under Florida law, it is a well established rule of statutory interpretation that specific statutory provisions control over the more general provisions. "[W]here there is in the same statute a specific provision, and also a general one that in its most comprehensive sense would include matters embraced in the former, the particular provision will nevertheless prevail ...." Fletcher v. Fletcher, 573 So.2d 941, 942 (Fla. 1st DCA 1991). The general policy of Chapter 364 of promoting competition cannot override the language of the statutory provision that directly

and specifically applies. Thus, even if Intermedia were correct in the assertion that the statutory prohibition is anticompetitive and/or in conflict with Chapter 364 generally, its argument that the clear language of Section 364.337 can be ignored for this reason is simply wrong.

Intermedia also advances a policy argument in a different way. It notes that the Order contains an analysis of the Commission's past policy as to the limits upon services that can be offered by alternate access vendors. Intermedia then attempts to argue that the Commission has, in effect, misconstrued its own orders. Although this position seems unlikely, even if Intermedia is correct, this point ultimately does not matter. The Commission's decision turns upon a statutory interpretation. Because the statutory interpretation is correct, this portion of the Order is fundamentally unimpeachable. The correct statutory analysis is sufficient to support the decision of the Commission that alternate access vendors cannot carry switched traffic. Any additional policy analysis that the Order may contain is simply surplusage. In other words, it does not matter whether the surplusage is right or wrong, because the statutory analysis provides an independent legal basis to support the Order.[2]

Both Teleport and Intermedia make again the argument that the transport service in question is really private line service

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[2] Intermedia likewise argues that the Commission has misconstrued its own bypass policy. (Intermedia Motion, pp. 8-9) This argument fails for the same reason.

because it is a point to point service "dedicated to the exclusive use of an end user" (§364.335(3)), the "end user" being an IXC. Both Teleport and Intermedia also claim that the Commission's rejection of this contention is incorrect because the rule the Order relies upon to define an end user is directed to the context of operator services (Rule 25-24.610(1)(c).

It is true that there is nothing in the part of the statute dealing with AAVs that adopts a particular definition of the term "end user." However, common sense dictates that the end user must be defined as the entity that ultimately obtains a telecommunications service, not an entity that buys a portion of a service and packages it for resale. Logically, an end user is someone who makes the ultimate use of the telecommunications service, i.e., in this case, toll service. The IXC is the provider of the service to the end user. Access is a component of the service that is purchased either from the local exchange company or an alternate access vendor, repackaged along with other elements of the service, and then sold to the end user. No matter how much Teleport and Intermedia complain about the application of Rule 25-24.610, the fact remains that the Commission has defined the term "end user" in the only logical manner.

Intermedia also makes an argument by which it concludes that "the Commission's decision is in fundament error because it first unbundles transport from switching then rejects that very unbundling in its interpretation of the statute." (Intermedia

Motion at p. 5) To the contrary, the Commission ruled that the statute prohibits an AAV from carrying switched traffic. It is true that the Commission's Order approves expanded interconnection, and thereby makes it technically possible for a non-LEC to carry switched traffic without actually doing the switching. The Order does nothing, however, (nor as a matter of law can it do anything) to change the clear statutory prohibition of any attempt by an AAV to carry this traffic. Intermedia's notion that an order authorizing the use of a new form of connection somehow nullifies the intent of the statute is plainly wrong.[3]

Despite Teleport and Intermedia's arguments, a simple fact remains: the plain language of §364.337, F.S. prohibits an alternate access vendor from carrying switched traffic. The Order simply applies this plain language and reaches the only logical, supportable result. Given this, there is no basis for reconsideration of the Order on this point.

WHEREFORE, Southern Bell respectfully requests that entry of an order denying the Motions for Reconsideration of Intermedia and Teleport for the reasons set forth above.

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[3] Teleport likewise attempts to argue (although in a different way) that authorizing interconnection eradicates the statutory limitation. Teleport engages in the fiction that if an IXC purchases a "cross connection facility" at the LEC central office, then the AAVs' transport of switched traffic is somehow transformed into just another form of point to point private line service.

Respectfully submitted this 16th day of February, 1995.

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**CERTIFICATE OF SERVICE**
**Dockets No. 921074-TL, 930955-TL,**
**940014-TL, 940020-TL, 931196-TL, 940190-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 6th day of FEBRUARY 1995, to:

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