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FILE COPY

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August 17, 1995

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

Re: Docket No. 920260-TL

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Brief of the Evidence, 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,

J. Phillip Carver (es)
J. Phillip Carver

ACK
AFA 3
APP
CAF
CMU Martin
CTR
EAG
LEG 1
LIN 5
OPC
RCH Watson
SEC 1
WAS
OTH

Enclosures

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

DOCUMENT NUMBER-DATE
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company.	Docket No. 920260-TL Filed: August 17, 1995

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S

BRIEF OF THE EVIDENCE

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STATEMENT OF THE CASE

This docket was initiated pursuant to Order No. 25552 (issued December 31, 1991) to analyze and evaluate the rate stabilization Plan under which BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell") had operated since 1988. On January 5, 1994, Southern Bell and the Office of Public Counsel ("OPC" or "Public Counsel") jointly filed a document entitled, Stipulation and Agreement Between The Office of Public Counsel and Southern Bell Telephone and Telegraph Company. On January 12, 1994, Southern Bell filed a document entitled, Implementation Agreement for Portions of the Unspecified Rate Reductions in Stipulation and Agreement Between The Office of Public Counsel and Southern Bell Telephone and Telegraph Company. On February 11, 1994, the Florida Public Service Commission ("Commission") entered Order No. PSC-94-0172-FOF-TL, Order Approving Stipulation and Implementation Agreement.

The Implementation Agreement stated that the Commission would "conduct hearings to determine the rate design by which the amounts not specifically allocated by the Stipulation and [the] Implementation Agreement shall be disposed of in ... 1995 ($25 million) ...." (Implementation Agreement, Par. 4, p. 11). The Agreement further stated that "the PARTIES [to the Agreement] or any other interested persons shall submit, not less than 120 days

prior to the scheduled effective date of each reduction, their proposals as to how such reductions should be implemented." (Implementation Agreement, Par. 4, pp. 11-12)

On May 15, 1995, Southern Bell filed a revision to its General Subscribers Service Tariff to use the $25 million unspecified rate reduction to fund the implementation of Extended Calling Service (ECS) on 252 intra-company routes. On July 28, 1995, Southern Bell filed with the Commission a letter whereby it stated that, at the request of Public Counsel as well as a number of Southern Bell's customers, Southern Bell was amending its filing to add 36 additional routes. Proposals of alternative ways to allocate the $25 million rate reduction were filed by McCaw Cellular Communications of Florida, Inc. ("McCaw") and by Communications Workers of America, Locals 3121, 3122 and 3107 ("CWA"). A total of eleven parties participated in this docket.[1]

On May 24, 1995, the Prehearing Officer issued the Order Establishing Procedure (Order No. PSC-95-0642-PCO-TL), which set the hearing of this matter for July 31, 1995. During the hearing, direct and rebuttal testimony was presented by Southern Bell's

[1] In addition to those previously mentioned, six additional parties intervened: AT&T Communications of the Southern States, Inc. ("AT&T"); The Florida AdHoc Telecommunications Users Committee ("AdHoc"); The Florida Cable Telecommunications Association, Inc. ("FCTA"); Florida Mobile Communications Association ("FMCA"); Sprint Communications Company Limited Partnership ("Sprint"), and MCI Telecommunications Corporation ("MCI").

witness, Joseph A. Stanley, Director-Pricing. Rebuttal testimony was also presented on behalf of Southern Bell by Jerry D. Hendrix, Manager-Regulatory and External Affairs. Other parties that presented direct testimony were CWA, McCaw, AT&T, AdHoc, FIXCA and Sprint. The hearing produced a transcript of 439 pages and 22 exhibits. At the conclusion of the hearing, the Commission directed the parties to brief four legal issues in addition to the four issues that had been previously identified. The four legal issues were subsequently memorialized in a Memorandum to the parties dated August 3, 1995.

This brief is submitted in accordance with the post hearing procedures of Rule 25-22.056, Florida Administrative Code. For the sake of continuity, Southern Bell has listed the four issues originally identified in this docket in numerical sequence. Southern Bell has then listed the four separately identified legal issues in numeral sequence as Legal Issues 1 through 4. The statement of each issue is followed immediately by a summary of Southern Bell's position on that issue and a discussion of the basis for that position. Each summary of Southern Bell's position is labeled accordingly and marked by an asterisk. In any instance in which Southern Bell's position on several issues are similar or redundant, the discussion of these issues has been combined or cross-referenced rather than repeated.

Issue No. 1: Which of the following proposals to dispose of $25 million for Southern Bell should be approved?

(a) SBT's proposal to implement the Extended Calling Service (ECS) plan pursuant to the tariff filed on May 15, 1995. (T-95-304)

(b) CWA's proposal to reduce each of the following by $5 million:

1. Basic "lifeline" senior citizens telephone service;
2. Basic residential telephone service;
3. Basic telephone service to any organization that is non-profit with 501(c) tax exempt status;
4. Basic telephone service of any public school, community college and state university;
5. Basic telephone service of any qualified disabled ratepayer;

(c) McCaw's and FMCA's proposal that a portion be used, if necessary, to implement the decisions rendered in Docket Number 940235-TL.

(d) Any other plan deemed appropriate by the Commission. c5001D

*Position 1(a): Southern Bell's proposal to implement Extended Calling Service pursuant to the tariff filed on May 15, 1995, should be approved because it benefits almost all of Southern Bell's Florida customers.

*Position 1(b): CWA's proposal should not be approved because it is redundant and conveys only a small benefit to a select few special interest groups.

*Position 1(c): The proposal of McCaw and FIXCA should not be approved because it is speculative, dependent upon a decision not yet made by this Commission and benefits only a small number of consumers.

*Position 1(d): The suggestion by AdHoc and AT&T that PBX and DID services be repriced should be rejected because it benefits only business customers and because there has already been a recent rate reduction for these services.

Issue 1(a):

Southern Bell presented testimony by Mr. Joseph A. Stanley, Jr. to support its ECS proposal.[2] Mr. Stanley testified that the rate reduction associated with the implementation of ECS on the routes proposed in the May 15, 1995 filing would more than satisfy the rate reduction requirement for 1995. Mr. Stanley also explained the plan as well as the ways in which it would satisfy the expressed calling needs of customers.

Mr. Stanley described ECS as an enhancement to existing local exchange service offerings. It provides expanded area calling for customers whose community of interest needs extend beyond current local calling area. (Tr. 47) ECS provides seven-digit dialing capability to selected exchanges at rates that are significantly less than Southern Bell basic toll rates. Calls to ECS exchanges are billed at $.25 per message for residence customers. For business customers, each call is billed at $.10 for the initial minute and $.06 for each additional minute. There is no change in the monthly recurring access line rate for existing local exchange service. (Tr. 48) Because a customer pays only if he uses the service, ECS does not impose an EAS surcharge on customers who have limited or no need for an expanded service area. (Tr. 49)

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[2] Mr. Stanley is a Director of BellSouth and is responsible for developing tariffs for local exchange and toll services for the nine BellSouth states. (Tr. 47)

He also testified that ECS represented a particularly appropriate service for allocation of the rate reduction because it is extremely responsive to customer desires and to the economic development needs of the state. (Tr. 48) This is readily apparent from the number of extended area service ("EAS") requests which come before the Commission. During the last three years, 40 such requests have been considered. Currently, there are 21 EAS requests pending. (Tr. 49-50)

The particular ECS routes included in the plan were selected to satisfy customers' community of interest calling needs. These needs arise from where customers work, where they worship, where they shop, where they attend school, and where they receive medical care. These needs differ for different people and for different communities. There were five major guidelines used in selecting routes for Southern Bell's proposed ECS plan. These included the presence of an obvious community of interest, traffic studies, the existence of local optional calling plans, the elimination of leap-frog local calling situations, and reciprocal routes. (Tr. 50-51) In addition, BellSouth added 18 two-way routes to the plan on July 28, 1995 as a result of a settlement agreement reached with the Office of Public Counsel. (Tr. 42-43, Exh. 5)

Southern Bell's ECS proposal meets customer and economic development needs for expanded local calling areas that, in the

words of Mr. Stanley, "have been expressed in petitions to this Commission, in bills before the Florida legislature, and in customer contacts with Southern Bell employees throughout the state." (Tr. 53) The plan, as amended, provides reduced usage rates to customers in each of the areas currently requesting EAS service. Moreover, "ECS offers customers a larger seven-digit calling area, as well as significant reductions in the usage rate for the expanded service area." (Tr. 53) ECS will provide benefits to a great number of Florida subscribers, and at the same time enhance the economic development of the more rural communities. (Tr. 53)

Issue 1(b):

In contrast, the CWA proposal directs the rate reduction to special interest groups rather than making the reductions available to the majority of Southern Bell customers in Florida. (Tr. 53-54) The CWA has proposed a $5 million reduction to the basic telephone rates of five different groups: senior citizens, residential customers, non-profit organizations, public schools (including colleges and universities), and disabled customers. (Tr. 171-172) The CWA's witness, William Knowles, however, was unable to render any opinion on the eligibility guidelines for these groups and, indeed, admitted that a single customer might be entitled to

multiple rate reductions as a member of more than one group. (Tr. 179, 184)

In addition, Mr. Knowles was unable to calculate the amount of the reduction per customer in any single category.[3] (Tr. 180) The Southern Bell proposal, on the other hand, would provide broad based reductions on routes throughout the state. These reductions would be available to almost all Southern Bell customers. (Tr. 54) None of the parties to this docket endorsed the CWA proposal. (Tr. 195, 205, 250, 348-349)

Issue 1(c):

McCaw's proposal targeted the required rate reduction to an even smaller special interest group than the CWA proposal. McCaw proposed (and the FMCA adopted the proposal) to use the rate reduction to implement any decision rendered in the cellular interconnection docket, Docket No. 940235-TL. (Tr. 192) This proposal presupposes the outcome of an unrelated docket before this Commission, a docket in which a decision will not be rendered until September 12, 1995. (Tr. 192) Further, McCaw's proposal would benefit only mobile service providers, while Southern Bell's ECS proposal would benefit individual rate payers. Even if McCaw

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[3] Mr. Stanley, however, testified that, under the CWA proposal, the $5 million directed to basic residence customers would provide a bill reduction of only about ten cents per month for each customer. (Tr. 54)

passed the benefits of its proposal on to its individual customers (which has not been suggested by McCaw), Southern Bell's proposal would, nevertheless, make benefits available to many more end users. (Tr. 54-55)

Moreover, the McCaw proposal should be rejected because it is simply another type of access charge reduction. In his testimony, Mr. Metcalf, on behalf of AdHoc, suggested that the rate reduction be applied to switched access charges in the less than 55 mile band. (Tr. 255) There are, however, no banded switched access rates in Florida. Switched access rates will be reduced by $55 million, effective October 1, 1995, and an additional $35 million effective October 1, 1996. These are the second and third steps of a three step reduction included in the Implementation Agreement and stipulated by, among others, AT&T, MCI, Sprint, and FIXCA. These reductions total $140 million. Parties to this stipulation agreed that they would make no proposal to the Commission that would require the use of the unspecified remainder ($25 million) to further reduce switched access rates during 1995. In addition, under the new statute, Southern Bell must reduce its intrastate switched access rates by 5% annually beginning October 1, 1996, until the rates are at parity with December 31, 1994 interstate switched access rates. (Tr. 372-373) Given the substantial amount already targeted to access reductions, and the agreement of the

parties not to request additional reductions, Southern Bell believes it would be grossly inappropriate to apply the $25 million unspecified reduction in a way that is tantamount to a further access charge reduction. Instead, the $25 million should be used to implement the proposed Expanded Local Calling plan that is responsive to expressed customer needs. (Tr. 68-69)

Issue 1(d):

AdHoc and AT&T proposed that the rate reduction be used to reduce the rates for PBX trunks and Direct Inward Dialing ("DID"). (Tr. 208, 251) This is an inappropriate use of the $25 million for a number of reasons.

First, Mr. Guedel for AT&T and Mr. Metcalf for AdHoc argued that pricing differences cause PBX service to have a competitive disadvantage to ESSX® service. (Tr. 208, 251) This assertion is without merit. Mr. Stanley calculated that the relative market share of Southern Bell's ESSX service had increased no more than 1% in the past three years. Given this, there is no question but that PBX can and does successfully compete with ESSX Service. (Tr. 64) This fact also casts serious doubt on Mr. Metcalf's contention that the PBX market has lost tremendous market share in the last few years. (Tr. 251)

Second, in 1994, Southern Bell reduced the price of PBX trunks and Direct Inward Dialing (DID) by $35 million. These reductions

included disaggregation of hunting from PBX trunk rates. This was significant because it meant that customers could purchase a lower rated trunk for outgoing traffic. Hunting was desegregated from Network Access Registers (NARs), which are used in the provisioning of ESSX Service. However, the reductions to the PBX trunks were greater than those to NARs, thus working to the advantage of PBX. (Tr. 65)

Third, Southern Bell offers MegaLink® Service as an alternative to the purchase of PBX trunks. MegaLink Service consists of a "pipe" that contains the equivalent of 24 trunks. A customer can buy the pipe and then pay to activate the individual trunks as they are needed. The pricing advantages relative to PBX trunks can be significant for a customer with higher traffic volumes. Overall demand for MegaLink Service has been strong in Florida with sufficient units sold to handle over 53,000 PBX trunks. (Tr. 65-66)

Fourth, AdHoc asserts that reducing PBX trunk rates will result in a more active and competitive market. (Tr. 253) However, this is already one of the most competitive markets in the telecommunications industry, and it has been for many years. The competition is not typically between a single PBX proposal and an ESSX Service proposal. Rather, it is between multiple PBX proposals from multiple vendors and, possibly, an ESSX Service

proposal. With a market share of less than 12%, ESSX Service cannot possibly be considered the leader in this market. It is simply not reasonable to expect that changing the pricing relationship between PBX trunks and ESSX Service would have such a profound effect. In Mr. Stanley's opinion, nothing would happen beyond what is already happening today. (Tr. 66)
Indeed, implementation of the revisions to Chapter 364 will mean that other companies will likely enter the local market and offer alternatives to Southern Bell's PBX trunks. (Tr. 67)

Fifth, if the proposal of AdHoc and AT&T were implemented, the main benefit would be to large business customers who would have their rates reduced. (Tr. 68) No residential customers use PBX service. (Tr. 226-227, 268-269) PBX vendors would also likely benefit in that they would be better positioned to capture a portion of the ESSX Service market share.[4]

Sixth, both Mr. Guedel for AT&T and Mr. Metcalf for AdHoc, acknowledged that ESSX loops and PBX trunks are not technically provisioned in the same manner, particularly when DID capability is provided. (Tr. 227-228, 273-275) Additional hardware and software are required for PBX systems that are not required for ESSX loops. (Id.). Therefore, there are additional costs to the LEC involved

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[4] Southern Bell could benefit somewhat if significant reductions occurred in markets that AAVs are likely to enter. (Tr. 68)

in the provision of PBX trunks and DID that are not present in the provision of ESSX loops. (Id.)

For the reasons discussed above, a reduction in rates for PBX trunks and DID is unwarranted. Clearly, this is not the best use of the $25 million reduction, and, for this reason the proposal of AdHoc and AT&T should be rejected.

Finally, Joseph P. Gillan, the witness for FIXCA, suggested that the interim refund mechanism outlined in the Settlement Agreement be used to allocate the $25 million. This suggestion was necessitated by his contention that, if the Commission approves Southern Bell's plan, it should do so only after taking the time to develop policies that would restrict the conditions under which the plan were offered. (Tr. 294) While Southern Bell will address these specific proposed restrictions in its discussion of Issue 2, Mr. Gillan's suggestion is unnecessary, and counter-productive.

As Mr. Stanley stated in his rebuttal testimony, "over the past few years, Southern Bell has experienced a substantial amount of customer interest in EAS. ECS has already been used in Florida to address EAS needs. ECS has been well received by both the Commission and customers and provides a standardized and lasting approach. It will cut EAS requests substantially if not totally eliminate them. A customer refund will do nothing to satisfy these

demands. ECS is in the customer's interest and should be implemented using the $25 million rate reduction." (Tr. 71-72)

If however, the implementation of this plan were unnecessarily delayed as Mr. Gillan suggests, a negative impact on customers is more than likely. As Commissioner Deason observed in response to Mr. Gillan's suggestion and the delay it will certainly entail:

> ...[T]here are going to be hundreds of thousands of customers out there who are wanting to know what happened to this plan that is going to give us some toll relief? We say, 'Well, there's a new law and there's going to be competition.' And they say, 'That's all well and good, but why am I having to pay for the next six months or a year? I want some relief now.'
>
> 'That's what we are going to hear.'

(Tr. 340) For the reasons set forth above, Southern Bell's plan will provide a greater benefit to a greater number of customers than would any of the other plans proposed. Southern Bell's ECS plan should be approved and implemented without delay.

Issue No. 2: If the Southern Bell proposal is approved, should the Commission allow competition on the Extended Service calling routes? If so, what additional actions, if any, should the Commission take? c

***Position: Competition should be allowed on the ECS routes as contemplated by the Stipulation and Agreement between BellSouth Telecommunications and FIXCA, dated March 31, 1994. No additional actions need be taken.**

In the Stipulation and Agreement between BellSouth Telecommunications, Inc., and the Florida Interexchange Carriers Association, dated March 31, 1994, the parties agreed that "interexchange carriers may continue to carry traffic on the routes in question that they are authorized to carry." Southern Bell does not object to expanding this agreement to include the routes in this proposal, thereby allowing competition on these routes. The Commission, however, need not impose any additional conditions that were not included in the original Agreement.[5] (Tr. 55)

Generally, AT&T, AdHoc, and FIXCA assert that Southern Bell's proposed ECS plan will hinder competition and re-monopolize service on the routes where it is implemented. (Tr. 203, 250, 293-294) This assertion is completely without merit. Competition will not be harmed by the approval of ECS. The IXCs enjoy, and will continue to enjoy, a number of competitive advantages over the local exchange companies in the intraLATA market. First, IXCs can provide complete toll services -- intraLATA, interLATA, interstate, and international -- while the LECs are limited to the provision of

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[5] The parties, particularly FIXCA's witness, Mr. Gillan, have argued for restrictions on Southern Bell's proposed Extended Calling by contending, in part, that these restrictions are required by the revised Chapter 364. (Tr. 293) Although Southern Bell addresses in Legal Issue 1 the reasons that this matter is to be resolved under the former version of Chapter 364, the substance of the issues raised by Mr. Gillan will be addressed in this section.

toll services within the LATA. The provision, therefore, of "one stop shopping" for toll services is a benefit that the IXCs enjoy that is not available to the LECs. (Tr. 225-226) In addition, many of the IXCs provide discount plans based on the total volume of toll calling made by a customer. (Tr. 226)

Second, IXCs can and do use "melded" access rates, blending both intrastate and interstate rates as a basis for establishing their toll floor. (Tr. 371) Although AT&T's witness, Mr. Guedel, denied this, the Commission recognized the technical advantage that the IXCs have in this area in Order No. 24859 (Docket No. 900708-TL). Given the pricing flexibility that the IXCs have with respect to the use of "melded" intrastate and interstate access rates, it is clear that IXCs can effectively compete on an intraLATA basis. Therefore, it is clear that ECS will not preclude competition. (Tr. 371-372)

Third, intraLATA toll service in Florida today represents less than 20% of the total toll business. Even if Southern Bell could capture the entire intraLATA market, which is certainly not realistic, the IXCs would still control over 80% of the total market. (Tr. 61)

AdHoc's witness, Mr. Metcalf, asserted that the ECS plan was anticompetitive because it was a form of measured service, mandatory, and required seven-digit dialing. (Tr. 256) Southern

Bell's ECS plan does not change either the dialing pattern or the rates for calling within a customer's existing local calling area. Customers with no need to make calls over a new ECS route will see no change. No aspect of ECS imposes local measured service on any part of a customer's existing bill. (Tr. 69)

ECS is mandatory only in the sense that it is the sole calling plan Southern Bell will offer over certain routes. However, unlike mandatory Extended Area Service (EAS), customers only pay when they make calls. ECS has already been implemented on a number of routes in Florida. It has been well accepted by the Commission and by customers. Likewise, seven digit dialing has been utilized on all existing intra-NPA ECS routes, just as it has with EAS. Again, the plan has been very well received. Southern Bell believes the great majority of customers will welcome seven digit dialing over the affected routes. (Tr. 70)

As stated by Southern Bell's witness, Mr. Stanley, "there is an alternative for customers if ECS does not meet their needs. That alternative is called competition. Southern Bell's competitors offer 10XXX dialing today and will very soon be able to offer 1+ dialing. While ECS offers a slightly more convenient dialing pattern, it has the disadvantage of not allowing customers to aggregate their usage and take advantage of the resulting discounts and convenience that they may enjoy with an IXC. Seven

digit dialing does not give Southern Bell the insurmountable competitive edge that intervenor witnesses suggest." (Tr. 70-71)

AT&T and FIXCA specifically alleged that Southern Bell's proposed ECS rates did not meet the imputation requirements of the revisions to Chapter 364. (Tr. 204, 293) Again, this allegation is without merit. As presented in the testimony of Jerry D. Hendrix, the Manager for Southern Bell responsible for handling switched access tariffs and rate development, Southern Bell's proposed ECS rates meet the imputation requirements of the revisions to Chapter 364. (Tr. 365) The following shows the imputation calculations performed by Mr. Hendrix and Mr. Gillan:

Gillan (FIXCA)		Hendrix (Southern Bell)	
	Average Per Minute		Average Per Minute of Use
Estimated Average ECS Revenue/Minutes	$0.0642	ECS/intraLATA toll	$0.1350
Estimated Access (Effective 10/1/95)	$0.0745	Applicable Switched Access	$0.0574
Source: Average of Business and Residential ECS Revenue Per Minute Calculated Using Relative Business and Residence MTS (Message Telecommunications Service) Minutes (1st Q, 1994), Southern Bell's Responses to FIXCA's First Set of Interrogatories, No. 1, Docket No. 930330-TP.		(Includes Carrier Common Line (CCL) and Local Switching, and reflects rates to be effective 10/01/95.)	

(Tr. 364-365)

Mr. Hendrix, in his calculations used Southern Bell's average per minute of use rate for ECS/intraLATA toll, which included all toll services, except for 800 and WATS. In his calculation, Mr. Gillan developed an estimate of the average ECS revenue per minute. The aggregation of expanded local and toll services is appropriate because Southern Bell is aggregating functionally equivalent services. In North Carolina, AT&T and Mr. Gillan argued that the aggregation of various LEC toll services as a part of the imputation standard was not appropriate. The North Carolina Commission, however, concluded in its Order issued June 30, 1995 in Docket Nos. P-100, Sub 126 and 65, that it was appropriate to aggregate functionally equivalent toll services in North Carolina for the purpose of the imputation test. (Tr. 366-367)

In addition, Mr. Gillan used all switched access elements in calculating a per minute of use rate (CCL, Local Switching, and Local Transport). This is inappropriate. The appropriate switched access rate elements to use in determining if the requirements of the statute is satisfied are CCL and Local Switching. At the present time, the rates for these elements are assessed to all purchasers of switched access regardless of their transport vendor. (Tr. 367) To include the Local Transport rate element would be

contrary to the revisions to Chapter 364. Revised Section 364.051(6)(c) states that:

> The price charged to a consumer for a non-basic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

Local Transport is not a monopoly component for switched access. There are several alternatives to Southern Bell's Local Transport services through Alternate Access Providers (AAVs). AAVs are active in Florida (Teleport, MFS, AlterNet, Intermedia, IntelCom) and have targeted major cities such as Miami, Fort Lauderdale, and West Palm to displace Local Transport services offered by Southern Bell. These AAVs are active and are aggressively seeking customers. The number of alternative access providers will continue to grow under the revisions to Chapter 364. Although this Commission has not authorized intrastate switched access competition, competitive access providers carry such traffic using private lines or special access, or on an interstate basis. (Tr. 385-387) Therefore, it is inappropriate to include local transport in the average per minute of use rate. (Tr. 367-368)

Mr. Gillan also asserted on behalf of FIXCA that ECS could be implemented by this Commission only if it were made available for resale at a wholesale rate and an interconnection rate was adopted to apply to the origination/termination of ECS traffic. (Tr. 293-294) In addition, he argued that Southern Bell would have to create support systems for this resale. (Tr. 320) Finally, Mr. Gillan stated that the Commission must retain 1+ intraLATA dialing and that ECS could only be implemented as an optional service. (Tr. 321) The last point has previously been addressed in this discussion. Moreover, in his deposition, Mr. Stanley acknowledged that the IXCs could compete for ECS calls on a 1+ basis. (Exh. 19, p. 16).

With regard to the interconnection rate and resale, Mr. Gillan asserted that these are required by law under the revised Section 364.161. (Tr. 321, 323-324) The problem with this argument is that there is absolutely nothing in this section to provide support for Mr. Gillan's conclusion. In regard to resale specifically, this section of the statute states the precise opposite. First, Section 364.161 requires LECs to resell unbundled network functions. In his pre-filed testimony, Mr. Gillan implausibly interpreted this language to mean that the entire ECS service must be offered at a wholesale price to competitors of Southern Bell. (Tr. 297) When questioned about this contention on cross

examination, Mr. Gillan attempted to buttress his interpretation with the even more implausible contention that, if Southern Bell is made to sell ECS service wholesale to a competitor, then this is the sort of unbundled network function covered by §364.161 because it has been "unbundled from its retail price." (Tr. 324) Further, Mr. Gillan contended that Southern Bell should be made to offer this "unbundled" service even though Section 364.161(a) clearly states that "the parties shall negotiate the terms, conditions, and prices of any feasible unbundling request." Section 364.161(1), F.S. It is only after any negotiations fail that the Commission may dictate appropriate terms and price. §364.161(1), F.S.

For the reasons discussed above, the IXCs are more than capable of competing with Southern Bell for these calls. Thus, no actions need be taken by this Commission to allow competition on these routes.

Issue No. 3: When should tariffs be filed and what should be the effective date?

*** Position: The tariff filed by Southern Bell on May 15, 1995 should be approved, and the effective date should be October 1, 1995.**

As Southern Bell's witness, Joseph Stanley, stated in his testimony, Southern Bell has already filed tariffs that "include all the changes necessary to implement ECS on the new routes, ..." (Tr. 55-56) and thereby to effectuate the $25 million dollar rate

reduction. For the reasons set forth previously in response to Issue No. 1, the Commission should approve this plan.

Under the Implementation Agreement as well as the earlier agreement with Public Counsel, the rate reduction is scheduled to occur on October 1, 1995. (Agreement with OPC, Par. 5c, Implementation Agreement, Par. 1b) Consistent with this, a review of the Prehearing Order (Order No. PSC-95-0895-PHO-TL) reveals that every party that has taken a position on this issue, with the exception of FIXCA, believes that October 1, 1995 should be the effective date of the tariffs, assuming they are approved. (Prehearing Order, pp. 18-19) FIXCA, however, takes the position that implementation of the ECS plan should be delayed until after the "development and implementation of the policies ..." that FIXCA contends are necessary. (Order at pp. 18-19) For the reasons addressed previously in response to Issue 2, FIXCA's proposal should be rejected because the restrictions on ECS service that it proposes are neither legally necessary nor appropriate as a matter of policy.

Moreover, the proposal of FIXCA would have the practical affect of delaying the implementation of Southern Bell's proposal until well into 1996. As Commissioner Deason observed during the hearing, the implementation of FIXCA's proposal would require "another massive undertaking, another docket, perhaps, another

period for testimony and discovery and all that. And, in the meantime, not weeks and days but months are going to go by." (Tr. 340) In the meantime, of course, rate payers would be, at least temporary, denied the benefits of this rate reduction.

Southern Bell submits that the public interest will not be served by this delay. Moreover, any delay of the sort advocated by FIXCA is unnecessary since, again, none of the restrictions that FIXCA has attempted to impose are either legally necessary or sound as a matter of public policy. Accordingly, this Commission should order the result to which all other parties appear to agree, that the tariff be effective on October 1, 1995.

Issue No. 4: Should this docket be closed?

* **Position: No. This docket should remain open.**

The instant proceeding involves only a portion of the matters that were originally encompassed within this docket, and which were addressed by the settlement agreement approved by the Commission. For example, Paragraph 4 of the Implementation Agreement provides that another rate reduction shall occur in 1996 by the approximate amount of $48 million dollars. Implementation of this portion of the agreement will require a hearing, much like the instant one, to determine how to allocate this reduction. Accordingly, this docket should remain open to resolve pending matters, including the

determination as to how to allocate the rate reduction scheduled for 1996.

Legal Issue No. 1: Since this docket was opened prior to the new law being enacted, should the unspecified $25 million rate reduction scheduled for October 1, 1995, be processed under the former version of Chapter 364, Florida Statutes?

***Position: Yes. The unspecified $25 million rate reduction should be processed under the former version of Chapter 364, Florida Statutes.**

The general rule under Florida law is that a new statute will apply to a pending action, or not, depending on the nature of the matters at issue in the action. This general rule was stated by the First District Court of Appeal in Rothermel v. Fla. Parole and Probation Commission, 441 So.2d 663, 664 (Fla. 1st DCA 1983) as follows:

> It is true that Florida follows the general rule that in the absence of a clear legislative expression to the contrary, a law is presumed to apply prospectively, ... [citation omitted] .... However, statutes which do not alter contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation and, absent a saving clause, all pending proceedings are affected.

The previous year, the First District Court had opined specifically as to what constitutes a vested right in Division of Workers' Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982). The Court stated that "to be vested, a right must be more than a

mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, ..."[6] General Florida law also provides that a saving clause indicates that a statute is intended to apply retroactively, and that it will, therefore, apply prospectively only to those specific cases within the coverage of the clause. See, generally, Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979)

Therefore, under these general principles, a new statute would apply to an action pending on the effective date of the statute, unless this application would alter vested rights. Alternatively, a saving clause can cause the prior version of a statute to apply, even though, absent this clause, the new statute would apply.

Applying these general rules to the instant case prompts the conclusion that, absent a saving clause, the revised Chapter 364 would likely apply because this proceeding is not to adjudicate a party's vested interest or entitlement, either under the Implementation Agreement or otherwise. Instead, this proceeding is to determine the appropriate way to allocate a rate reduction that will begin to take effect later this year. At the same time, the revised Chapter 364 does have a saving clause, Section 364.385.

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[6] Citing, Aetna Insurance Co. v. Richardelle, 528 So.2d 280, 284 (Tex. Civ. App. 1975).

Thus, the determinative issue is whether this clause covers the instant case.

Section 364.385 of the revised statute has three subsections, each of which contains a saving clause. Subsection 1 applies to certificates previously issued and rates previously approved by the Commission. Subsection 2 applies to pending applications for extended area service and extended calling service as well as to proceedings before the Commission generally. Subsection 3 relates to certain positions of Order No. PSC-94-0172-FOF-TL, the Order approving the settlement agreement. Of the three, Subsection 1 clearly does not apply in this instance. Subsection 3 might apply if the matter at issue were some vested right arising from the Order. As set forth above, however, this is not the case. Therefore, Subsection 2 is the only one of the three subsections that is pertinent to this matter.

The portion of Subsection 2 that relates specifically to extended area service and extended calling service states that applications pending before the Commission on March 1, 1995 shall be governed by Chapter 364 as it existed prior to the effective date of the new legislation. While this matter involves extended calling service, it does not involve an application filed prior to that date. Therefore, this portion of Subsection 2 would not apply. Instead, the relevant part of the saving clause is that

portion of Subsection 2 that applies to proceedings generally, which states the following:

> Proceedings including judicial review pending on July 1, 1995, shall be governed by law as it existed prior to the date on which this section becomes law. ... Any administrative adjudicatory proceeding which has not progressed to the stage of a hearing by July 1, 1995, may, with the consent of all parties and the Commission, be conducted in accordance with the law as it existed prior to January 1, 1996.

(Section 364.385(2))

The first sentence quoted above clearly provides that proceedings (i.e., adjudicatory proceedings, legislative proceedings, rulemaking, etc.), including any judicial review of these proceedings, that are pending on July 1, 1995 are to be governed by the old version of the statute. Given this, one would assume that this section of the statute means what it plainly states,[7] and that the previous version of Chapter 364 must apply because this matter was pending on July 1, 1995. The problem in stopping with this straightforward analysis is that the second sentence quoted above appears to implicitly conflict with this interpretation. This second sentence states that if all parties to

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[7] When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, ... the statute must be given its plain and obvious meaning. Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987), quoting, A. R. Douglas Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (Fla. 1931).

an adjudicatory hearing (and the Commission) consent to apply the old law, then they may do so. This language suggests that, in the absence of this consent, the new law would apply, a conclusion that is directly contrary to the clear dictates of the above-quoted first sentence of this section.

Given this apparent conflict, it is appropriate to look for guidance to the saving clause as it appeared in the previous version of the statute.[8] The saving clause in the immediate past version of Chapter 364 stated, in pertinent part, the following:

> Proceedings including judicial review pending on October 1, 1990, shall be governed by the law as it existed prior to October 1, 1990. Any administrative adjudicatory proceeding which has not progressed to the stage of a hearing, may, with the consent of all parties and the Commission, be conducted in accordance with the provisions of this act.[9]

(Section 364.385(2), Florida Statutes, 1991) Thus, under the prior version of the saving clause, the intended meaning was relatively clear: proceedings that were pending at the time that the statute became effective were governed by the old version of the statute, unless the parties agreed to be governed by the new.

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[8] See, Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979), in which the Florida Supreme Court accepted legislative history as an indication of the current legislative intent.

[9] This language also tracks closely the saving clause in the current version of the Administrative Procedure Act, Section 120.72(2), Florida Statutes.

The difficulty in interpreting the current Subsection 2 arises from the fact that, in re-writing Chapter 364, the legislature has effectively reversed the meaning of the last sentence of this part of the saving clause. Before, this language gave parties the option of choosing the new law; now it gives them the option of choosing the old, even though the earlier language of this section clearly provides that, in general, the old law already applies.

Even if this conflict cannot be resolved, it can at least be put into context by the general rule of statutory construction that a tribunal is "obligated to avoid constructing [the] particular statute so as to achieve an absurd or unreasonable result." Carawan v. State, 515 So.2d 161, 167 (Fla. 1987). It would, indeed, be unreasonable to assume that by changing the language in the second sentence quoted above, the legislature meant to change the meaning of the first sentence without actually making any changes to it. Further, this construction would render the saving clause in Subsection 2 pointless. Again, the purpose of a saving clause is to apply the old statute in circumstances where, absent the clause, the new statute would apply. Thus, if the legislature had intended to do away with the saving clause for pending proceedings -- with the result that the new law applies -- then it would have simply deleted the clause. It is hard to believe that the legislature would have attempted to effect the same result by

leaving the clause, but intentionally altering it to make this section internally inconsistent and contradictory.

The conclusion of all this is, in part, that the current version of the statute does appear to contain some ambiguity. Nevertheless, it is clear that any ambiguity that may exist as to the meaning of the "election clause" should not be allowed to cloud the meaning of the clear statement in Subsection 2 that the old law applies to actions pending on July 1, 1995. Instead, the Commission should apply that plain and simple provision and find that the prior version of 364 governs all pertinent issues in this docket.

Legal Issue No. 2: If approved, would Southern Bell's ECS plan become part of basic local telecommunications service as defined in Section 364.02(2), Florida Statutes?

***Position: No. Since Southern Bell's ECS plan is governed by the previous version of Chapter 364, it is not necessary to categorize this plan as either basic or non-basic service. If the new version of Chapter 364 did apply, however, Southern Bell's ECS plan would be a non-basic service.**

As set forth above, the saving clause of the newly enacted Chapter 364 dictates that the prior version of Chapter 364 applies to all aspects of this proceeding. This necessarily means that Southern Bell's ECS plan, or any other alternative the Commission might choose to distribute the $25 million rate reduction, should be governed by all provisions of the previous version of Chapter

364, not the current version. Since the concept of basic and non-basic service first appears in the newly revised Chapter 364, the distinction between the two types of service is simply not relevant to Southern Bell's ECS service. In other words, the ECS plan need not be categorized as either basic or non-basic service.

If, however, the new version of Chapter 364 did apply, then ECS would be a non-basic service. Non-basic service is defined in the new statute at Section 364.02(8) to mean any service that is not defined as basic local service, a local interconnection arrangement, or a network access service. ECS service clearly does not fall within the definition of a network access service in Section 364.163 or the definition of a local interconnection arrangement in Section 364.16. Therefore, the only question is whether ECS falls within the definition of basic local telecommunications service. Section 364.02(2) defines that term as follows:

> 2. 'Basic Local Telecommunications Service' means voice-grade, flat-rate residential and flat-rate single-line business local exchange services which provides dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multi-frequency dialing, and access to the following: emergency services such as '911', all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing. For a local exchange telecommunications company, such terms shall include any extended area service routes, and extended

calling service in existence or ordered by the commission on or before July 1, 1995.

Thus, the term "basic local telecommunications service" refers primarily to flat-rate residential and flat-rate single-line business service having the characteristics listed above. Southern Bell's ECS plan is not a flat-rate service. Therefore, it could qualify as basic service only under the last sentence quoted above, i.e., if it constituted extended calling service that either existed or had been ordered by the Commission by July 1, 1995. Since this is not the case, Southern Bell's ECS plan must be categorized as a non-basic service.

Accordingly, if this proceeding were not governed by the former version of the statute -- in other words, if the definitions in the new statute applied to Southern Bell's ECS service -- then ECS would be a non-basic service subject to all applicable statutory requirements.

Legal Issue No. 3: If it is not a part of basic local telecommunications service, does Southern Bell's ECS plan violate the imputation requirement of Section 364.051(6)(c), Florida Statutes?

***Position: No. Southern Bell's ECS plan is not subject to the imputation requirement of Section 364.051(6)(c) because it is controlled by the former version of Chapter 364. The ECS service, however, would satisfy the imputation requirement of Section 364.051(6)(c) if it did apply.**

As set forth in response to Legal Issue No. 1, the former Chapter 364 applies to the ECS plan because this action was pending on the effective date of the new statute. Therefore, the imputation requirement of Section 364.051(6)(c) does not apply.

As stated above, if the revised Chapter 364 did apply to the service, then the service would be non-basic. Accordingly, it would be necessary for it to pass the statutory imputation test. This test is set forth in Section 364.051(6)(c) as follows:

> (c) The price charged to a consumer for a non-basic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

As stated in the rebuttal testimony of Southern Bell's witness, Jerry Hendrix, "Southern Bell's proposed ECS rates satisfy the imputation requirement of the new statute." (Tr. 364) The basis for Mr. Hendrix' conclusion has been set forth previously in response to Issue No. 2. Accordingly, Southern Bell will not repeat it here. It will suffice to say again that, even if the new statute did apply, Southern Bell's ECS plan passes the imputation requirement of Section 364.051(6)(c).

<u>Legal Issue No. 4</u>: Does Southern Bell's ECS proposal violate any other provision of the revised Chapter 364, Florida Statutes,

excluding those previously identified in the positions on the issues listed in the prehearing order?

***Position:** No. Southern Bell has not violated any portion of the revised Chapter 364.**

A number of parties listed in their Prehearing Statement restrictions that they believe the Commission should impose on Southern Bell's ECS plan, either as a matter of law of as a matter of public policy. In response to Issue No. 2 above, Southern Bell has stated the basis of its position that none of these restrictions are necessary. Legal Issue No. 4, however, now has the practical effect of inviting parties to raise new legal arguments that Southern Bell's ECS plan violates the revised Chapter 364.

For the reasons previously stated, the prior version of Chapter 364 applies to matters under consideration in this docket, including Southern Bell's ECS plan. Therefore, the issue of whether Southern Bell's ECS plan complies with the revised Chapter 364 is moot. Moreover, Southern Bell categorically states that its ECS plan does not violate any provision of the new statute, even if the new statute applied.

At the same time, it is impossible for Southern Bell to anticipate and reply to every legal argument to the contrary that has not been made previously, but that might be made. In fact, the more implausible the possible argument on this point by an

intervenor, the more difficult it would be for Southern Bell to predict and address it preemptively.

Accordingly, Southern Bell has filed contemporaneously with the filing of this brief a motion to be granted leave to respond within seven days to any position on this issue taken by an intervenor that includes a new argument that Southern Bell's plan violates the revised Chapter 364.

CONCLUSION

Southern Bell's proposed ECS plan is unquestionably the best alternative for allocating the unspecified $25 million dollar reduction. Of the plans proposed, the ECS plan will provide the greatest benefit to the greatest number of customers and will meet the expressed desires of customers for toll relief. Competition should be allowed on all routes on which the EAS plan is ordered. AT the same time, the Commission should reject the self-serving proposals of various parties to delay or restrict Southern Bell's ECS plan. These proposed restrictions are neither legally necessary, nor are they appropriate as a matter of policy.

Southern Bell's ECS plan should be ordered pursuant to the prior version of Chapter 364. The saving clause in the new Chapter 364 makes clear that the former Chapter 364 applies. Accordingly, Southern Bell's service is not subject to an imputation test. If

it were subject to such a test, however, the ECS plan would pass under the criteria set forth in the new statute.

For all the reasons set forth herein, the Commission should order the implementation of Southern Bell's ECS plan without delay.

Respectfully submitted this 17th day of August, 1995.

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Docket No. 920260-TL

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