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&  
BERLIN  
CHARTERED

76-1346-TC 26

November 11, 1996

**VIA FEDERAL EXPRESS**

Ms. Blanca S. Bayo  
Director, Division of Records & Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Petition for Arbitration of Telenet of South Florida, Inc. with BellSouth  
Telecommunications, Inc., Pursuant to Fla. Stat. §364.161

Dear Ms. Bayo:

Please find enclosed an original and 15 copies of the above-referenced Petition of Telenet of South Florida Inc. for Arbitration with BellSouth Telecommunications, Inc., pursuant to Fla. Stat. §364.161. Also enclosed is a 3.5" diskette (high-density) containing the Petition for Arbitration in WordPerfect format for the Windows 3.1 operating system.

Please date stamp and return the enclosed reference copy in the self-addressed, postage-prepaid envelope.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact us.

Very Truly Yours,



Doug G. Bonner  
Colin M. Alberts

Counsel for Telenet of South Florida, Inc.

Enclosures

cc: Mitch Kupinsky (Telenet)  
Joe Lacher (BellSouth)

3000 K STREET, N.W. ■ SUITE 300  
WASHINGTON, D.C. 20007-5116

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**BEFORE THE**  
**FLORIDA PUBLIC SERVICE COMMISSION**

In re: Resolution of Petition(s) to Establish Right )  
of Access of Telenet of South Florida, Inc. ) Docket No.  
to Call Forwarding Lines Offered by BellSouth ) Filed: November 12, 1996  
Telecommunications, Inc., and for Arbitration )

**PETITION OF TELENET OF SOUTH FLORIDA, INC.**  
**FOR ARBITRATION OF ITS DISPUTE WITH BELL SOUTH**  
**TELECOMMUNICATIONS, INC. REGARDING CALL FORWARDING**

Telenet of South Florida, Inc. ("Telenet"), through its undersigned counsel, and pursuant to Florida Administrative Code Rule 25-22.036, and Section 364.161, Florida Statutes, files this Petition for Arbitration of its dispute with BellSouth Telecommunications, Inc. ("BellSouth") with respect to the provision of call forwarding to its commercial customers in general and Telenet in particular:

1. Telenet is authorized to provide competitive local exchange service as an alternative local exchange company ("ALEC"). The address of Telenet is:

Telenet of South Florida, Inc.  
10422 Taft Street  
Pembroke Pines, FL 33026-2819

2. The individuals to notify in this proceeding are:

Douglas G. Bonner  
(Fla. Bar No. 376825)  
Colin M. Alberts  
SWIDLER & BERLIN, CHARTERED  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007

202/424-7500 (ph.)  
202/424-7643 (fax)

RECEIVED AND FILED DATE

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### Statement of Interest and Negotiating History

3. Pursuant to Section 364.161, Florida Statutes, Telenet and BellSouth have 60 days to negotiate acceptable terms, conditions and prices of feasible unbundling requests. If negotiations prove unsuccessful after 60 days, either party has the right to file a petition for a satisfactory resolution of requests for unbundled services, network features, functions, or capabilities, including systems and routing processes. Telenet, beginning in July of 1996, initiated negotiations with BellSouth for the provision of new multi-path call forwarding lines. More than 60 days have passed and, as discussed below, negotiations have not proven successful. Telenet therefore files this Petition requesting that the Commission require BellSouth to provide tariffed services, and specifically multi-path call forwarding.

4. Beginning on November 3, 1995, representatives of the company to be incorporated as Telenet were contacted by BellSouth representatives with service descriptions and price quotes for call forwarding lines for "the needs for [Telenet's] business." On January 5, 1996, Telenet applied to the Florida Public Service Commission ("PSC" or "the Commission") for a Certificate to Provide Alternative Local Exchange Telecommunications services, pursuant to Section 364.337(1) of the Florida Statutes. Following review of the application, the Commission granted the Certificate sought by Telenet, on April 17, 1996. Commission Order No. PSC-96-0538-FOF-TX, Docket No. 960043-TX.

5. Throughout November and December of 1995, Mitch Kupinsky, Vice President of Telenet, placed orders for services including multi-path call forwarding offered by BellSouth, and received them. This allowed Telenet to create its initial network in Dade and Broward

counties. On June 4, 1996, William Demers was hired as General Manager for Telenet. Mr. Demers and Mitch Kupinsky together began negotiations with BellSouth representatives in July 1996 in order to obtain the connections and assemblies from BellSouth necessary for Telenet's operations to expand to Palm Beach county, and to resolve outstanding problems with systems already installed. Among the services sought by Telenet throughout this period was a system known as "multi-path call forwarding." BellSouth representatives assured Demers that BellSouth would be happy to provide Telenet with whatever BellSouth services were needed, in September, 1996. Demers and Kupinsky had made it clear in July and August negotiations with BellSouth that Telenet would be seeking to use multi-path call forwarding, and as a result Telenet relied upon BellSouth's representations that it would provide all necessary services in going forward with establishing its operating plan and expanding its network.

6. Based on these meetings, Marvin Kupinsky, Telenet's President and sole stockholder, made a substantial investment to purchase a network of these lines, and placed orders for "special assemblies", for business purposes which were obvious to the vendor, BellSouth. Moreover, through Telenet marketing efforts, approximately 100 customers have become Telenet customers, and are currently using the existing service. At least 250 additional customers have also made commitments to use Telenet's services once operations are fully extended to Palm Beach County. Additional funds have been earmarked by Telenet for an advertising campaign, but this has been stymied by BellSouth's threatened action to terminate services to Telenet effective November 21, 1996, discussed more fully below.

7. Thus, since November, 1995, and particularly from July of 1996 to date, numerous work orders have been processed by BellSouth for Telenet as its network architecture

was built and expanded. In late August and early September of 1996, testing done by Telenet revealed that a large percentage of the lines which Telenet had earlier purchased from BellSouth were not equipped with the call forwarding features that had been ordered in conjunction with the lines and which BellSouth had originally agreed to provide.

8. On September 16, 1996, a meeting was held between Demers, Marvin Kupinsky, and Mitch Kupinsky of Telenet, and O.G. "Doc" Moore and Tony Aniello representing BellSouth. The purpose of this meeting was to arrange for the sale by BellSouth to Telenet of special assemblies and T-1 lines which would enable Telenet to expand its service offerings and service growing customer demand (including service to its 250 newer customers), and to allow Telenet to ascertain why the ordered multi-path call forwarding features had not been provided with the lines ordered in July and August. The assemblies and T-1 lines would allow call multiplexing as envisioned in Telenet's operational plan.

9. On September 17, 1996, the day after the September 16 meeting, BellSouth indicated for the first time, that in its view, Telenet's services were in violation of the BellSouth General Subscriber Service Tariff ("Tariff"), and that Telenet would have to negotiate a Resale Agreement with BellSouth if it wished to continue to use multi-path call forwarding. On September 19, 1996, BellSouth stated by letter to Telenet that it would not authorize any new service for Telenet on behalf of BellSouth until Telenet initiated a request for a Resale Agreement. (See Exhibit A). Telenet is not delinquent in payments to BellSouth for any services provided and BellSouth is not claiming that any payments are past due.

10. On October 10, 1996, Demers again spoke with Moore. Moore stated that BellSouth had decided that Telenet's operations, particularly the use of multi-path call

forwarding, was a violation of Section A13.9.1A.1 of BellSouth's Tariff. That Tariff provides in pertinent part:

...Call Forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment of in whole or in part, of message toll charges that would regularly be applicable between the station originating the call and the station to which the call is transferred.

Moore then stated that Telenet was on notice and demanded that Telenet cease and desist use of multi-path call forwarding. By letter dated October 15, 1996, Moore notified Telenet that in the absence of "proof" that a violation of BellSouth's call forwarding tariff was not occurring, BellSouth would remove its provision of multi-path call forwarding services on November 21, 1996.

11. Telenet is powerless to require BellSouth to provide necessary call forwarding equipment and services upon BellSouth, or to alter discriminatory and anticompetitive provisions in BellSouth's Tariff which are contrary to law. However, the Commission should order BellSouth to provision all appropriate arrangements for provision of multi-path call forwarding, as well as all supporting equipment and services (such as T-1 lines) in light of BellSouth's failure to respond to Telenet's requests to negotiate.

12. Simultaneously with the filing of this Petition, Telenet has filed a Petition for Temporary Injunction in the Seventeenth Judicial Circuit in and for Broward County, Florida, seeking a temporary injunction preventing BellSouth from discontinuing essential services to Telenet until the Commission has had sufficient opportunity to decide Telenet's Petition challenging the legality of BellSouth's tariff restriction and requesting arbitration. A copy of this Motion is attached hereto as Exhibit A.

### **Statements of Disputed Issues of Material Fact**

13. Telenet believes that call forwarding services and supporting hardware sold by BellSouth should be available equally and reciprocally to all paying customers, including and in particular alternative local exchange carriers. One of the services that Telenet needs to provide service are the Call Forwarding Variable features as described in Section A13.9.1 of the General Subscriber Service Tariff issued by BellSouth.

14. Telenet maintains that provision of multi-path call forwarding is necessary to provide service to its customers in South Florida. BellSouth retains sole control of this bottleneck element of the local exchange network, and refuses to offer it to commercial customers in an attempt to protect its profit stream for intraLATA toll and other charges. Telenet supports the liberalization of this specific element of the BellSouth network for use by new telecommunications entrants. The results of providing call forwarding to resellers will create a more robust and permanent form of local exchange competition from which Florida consumers will experience substantial cost savings and greater options for local service. As such, Telenet's competitive services are in the public interest.

15. BellSouth should permit Telenet to purchase call forwarding lines and special assemblies, for the purpose of facilitating the federal and state guidelines for allowing interconnection to unbundled link elements.

16. Telenet proposes that BellSouth's long run incremental costs should serve as the target price and cap for unbundled network elements (such as multi-path call forwarding) where such elements must be employed by competitive carriers to compete realistically and practically with the entrenched monopoly service provider, BellSouth. These guidelines

would ensure that new entrants in addition to Telenet are not subject to discriminatory charges that BellSouth does not apply to its own end users.

**Basis for Relief**

17. The ultimate facts and law that entitle Telenet to the requested relief include, but are not limited to the following:

18. Pursuant to Section 364.161(1), Florida Statutes, Telenet may file a petition for Commission intervention so that BellSouth will unbundle its services, network features, functions, or capabilities, including access to "systems and routing processes" and resell them to any other telecommunications provider "to the extent technically and economically feasible" if the parties fail to reach an agreement after 60 days. As discussed above, Telenet and BellSouth have not been able to reach an agreement on any resale issue.

19. Pursuant to Section 364.161(2), Florida Statutes, "*no local exchange telecommunications company may impose any restrictions on the resale of its services or facilities except those that the commission may determine are reasonable*" (emphasis added). As discussed above, BellSouth has inserted in its General Subscriber Services Tariff an unreasonable and anticompetitive restriction on the resale of call forwarding services, the purpose of which can only be the maintenance of its monopoly position and a barrier to entry of local exchange service competitors.



20. Pursuant to Section 364.01(3), the Florida Legislature has concluded that that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.

An order by this Commission mandating that BellSouth provide call forwarding services to Telenet, and rejecting BellSouth's discriminatory tariff limitation, would advance the stated public interest of the State of Florida.

21. Pursuant to 47 U.S.C. §§ 251(c)(4)(B) and 47 U.S.C. §§ 251(b)(1) of the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996 ("1996 Act" or "Federal Act"), amending the Communications Act of 1934, it is mandated that local exchange carriers such as BellSouth have "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services." As discussed above, BellSouth's Tariff provision is just such an unreasonable and discriminatory condition.

22. Pursuant to Section 25-22.036 of the Commission's Rules, Telenet's substantial interests are affected by the impasse in its negotiations with BellSouth. Telenet must be able to purchase call forwarding arrangements from BellSouth in order to provide competitive local exchange service to its customers in the territory served by BellSouth in which Telenet is currently active. Until such arrangements are purchased: (1) Telenet cannot provide such service for its existing and potential Florida customers; (2) advancement of the legislative goal of local exchange competition in Florida will be frustrated, and; (3) Florida

consumers of competitive services will be deprived of the benefits of these competitive services.

23. The Commission has 120 days from the date of this filing to establish nondiscriminatory rates, terms, and conditions for provision of call forwarding lines as an unbundled network element, as requested above by Telenet.

**Demand for Relief**

**WHEREFORE**, Telenet respectfully requests that the Commission, within 120 days from the date of this filing:

1. Enter an order granting Telenet's request that BellSouth provide all necessary call forwarding services and equipment to Telenet, as described in this Petition and the accompanying Affidavit.
2. Grant Telenet such other relief as the Commission may deem necessary or appropriate.

Respectfully Submitted,

  
SWIDLER & BERLIN, CHTD.

Douglas G. Bonner  
(Fla. Bar No. 376825)  
Colin M. Alberts  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007-5116  
(202) 424-7500

Attorneys for Plaintiff  
Telenet of South Florida, Inc.

Dated: November 11, 1996

**EXHIBIT A**

**Motion of Telenet of South Florida, Inc. for an Order  
and Injunction Against BellSouth Telecommunications, Inc.,  
and Memorandum of Points and Authorities in Support thereof**

**IN THE CIRCUIT COURT  
FOR BROWARD COUNTY, FLORIDA**

**TELENET OF SOUTH  
FLORIDA, INC.,**

**Plaintiff,**

**v.**

**BELLSOUTH  
TELECOMMUNICATIONS, INC.,**

**Defendant**

**Case No.**

**) PETITION OF PLAINTIFF TELENET OF  
) SOUTH FLORIDA, INC. FOR ORDER  
) AND TEMPORARY INJUNCTION**

Pursuant to Fla. R. Civ. P. 1.610, Plaintiff Telenet of South Florida, Inc. ("Telenet") petitions the Court to enter the accompanying proposed Order and Temporary Injunction enjoining defendant BellSouth Telecommunications, Inc. ("BellSouth") to comply with its existing connection and service agreements with Telenet, and not to terminate certain existing services provided to Telenet by BellSouth, which BellSouth has threatened to do on November 21, 1996.

Telenet urgently requests that the Court grant an immediate injunction on or before November 20, 1996, to avoid irreparable injury to plaintiff. Telenet further requests that this Court grant such injunctive relief without a hearing; or, in the alternative, that a hearing be scheduled within the next three (3) business days. Telenet intends to personally serve the Defendant at the following address immediately following the filing of the Petition with this Court:

Joe P. Lacher, President  
BellSouth -- Florida  
150 West Flagler Street  
Suite 1901  
Miami, Florida 33130

The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities submitted in support thereof.

Respectfully submitted,

SWIDLER & BERLIN, CHTD.

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Douglas G. Bonner  
(Fla. Bar No. 376825)  
Colin M. Alberts  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007-5116  
(202) 424-7500

Attorneys for Plaintiff  
Telenet of South Florida, Inc.

Dated: November 12, 1996

**IN THE SEVEENTEENTH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA**

	)	
<b>TELENET OF SOUTH</b>	)	
<b>FLORIDA, INC.,</b>	)	<b>Case No.</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>BELLSOUTH</b>	)	
<b>TELECOMMUNICATIONS, INC.,</b>	)	
	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF THE</b>
	)	<b>PETITION OF TELENET OF SOUTH</b>
	)	<b>FLORIDA, INC. FOR AN ORDER AND</b>
<b>Defendant</b>	)	<b>TEMPORARY INJUNCTION</b>
	)	

**INTRODUCTION**

Plaintiff, Telenet of South Florida, Inc. (“Telenet”), pursuant to Fla. R. Civ. P. 1.610, respectfully petitions this Court for issuance of a temporary injunction directing defendant BellSouth Telecommunications, Inc. (“BellSouth”) to comply with its existing connection and service agreements with Telenet and to not terminate such service, which BellSouth has threatened to do effective November 21, 1996.

If BellSouth is not enjoined from unjustifiably terminating further service to Telenet for anticompetitive and discriminatory reasons in violation of Fla. Stat. §§ 361, 364 and 47 U.S.C. §§ 251(c)(4)(B) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996 (“1996 Act” or “Federal Act”), it will continue to cause immediate, substantial and irreparable harm to Telenet.

## STATEMENT OF FACTS

Telenet is an alternative local exchange carrier ("ALEC") organized under the laws of the State of Florida as a closely-held corporation on December 4, 1995. Telenet provides intra-region telecommunications services throughout Dade, Broward, and Palm Beach counties to residential and business customers at a substantially lower price than the incumbent local exchange carrier, BellSouth. Telenet uses a computer voice mail network which provides all customers with access codes and enables them to use what are usually considered toll call lines for a flat fee within the existing service area. This is accomplished by utilizing forwarding lines to create direct connections between each Telenet Interactive Voice Response (IVR) switching system, which route calls between each other. Long-distance links between IVRs are broken up by forwarding links into shorter cascaded local links.

Beginning on November 3, 1995, representatives of the company to be incorporated as Telenet were contacted by BellSouth representatives with service descriptions and price quotes for call forwarding lines for "the needs for [Telenet's] business." On January 5, 1996, Telenet applied to the Florida Public Service Commission ("PSC" or "the Commission") for a Certificate to Provide Alternative Local Exchange Telecommunications services, pursuant to Section 364.337(1) of the Florida Statutes. Following review of the application, the Commission granted the Certificate sought by Telenet, on April 17, 1996. Commission Order No. PSC-96-0538-FOF-TX, Docket No. 960043-TX.



Throughout November and December of 1995, Mitch Kupinsky, Vice President of Telenet, placed orders for services including multi-path call forwarding offered by BellSouth, and received them. This allowed Telenet to create its initial network in Dade and Broward counties.

On June 4, 1996, William Demers was hired as General Manager for Telenet. Mr. Demers and Mitch Kupinsky together began negotiations with BellSouth representatives in July 1996 in order to obtain the connections and assemblies from BellSouth necessary for Telenet's operations to expand to Palm Beach county, and to resolve outstanding problems with systems already installed. Among the services sought by Telenet throughout this period was a system known as "multi-path call forwarding."<sup>1</sup> BellSouth representatives assured Demers that BellSouth would be happy to provide Telenet with whatever BellSouth services were needed. Furthermore, Demers and Kupinsky had made it clear in July and August negotiations with BellSouth that Telenet would be seeking to use multi-path call forwarding, and as a result Telenet relied upon BellSouth's representations that it would provide all necessary services in going forward with establishing its operating plan and expanding its network. At all material times during this period, BellSouth was marketing these services, and making available the special assembly hardware that made them possible, to customers throughout Florida.

Based on these meetings, Marvin Kupinsky, Telenet's President and sole stockholder, made substantial investments in purchasing a network of these lines, and placed orders for special assemblies, for purposes which were clearly self-evident to the vendor, BellSouth. Moreover, through investments in internal telemarketing, approximately 100 customers have become Telenet

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<sup>1</sup> The term "multi-path call forwarding" is used interchangeably with the term "remote access call forwarding" and other technical terms to describe the identical feature.

clients, and have been and are currently using the existing service. At least 250 additional customers have already made commitments to use Telenet's services once operations are fully extended to Palm Beach County. Further allocations of money have been earmarked by Telenet for an advertising campaign, but has been stymied by BellSouth's actions.

Thus, from November of 1995 through mid-September of 1996, and particularly from July of 1996 to date, numerous work orders have been processed by BellSouth for Telenet as the network architecture was built and expanded. In late August and early September of 1996, testing done by Telenet revealed that a large percentage of the lines which Telenet had earlier purchased from BellSouth were not equipped with the call forwarding features that had been ordered in conjunction with the lines and which BellSouth had originally agreed to provide.

On September 16, 1996, a meeting was held between Demers, Marvin Kupinsky, and Mitch Kupinsky of Telenet, and O.G. "Doc" Moore and Tony Aniello representing BellSouth. The purpose of this meeting was to arrange for the sale by BellSouth to Telenet of special assemblies and T-1 lines which would enable Telenet to expand its service offerings and service growing customer demand (including service to its 250 newer customers), and to allow Telenet to ascertain why the ordered multi-path call forwarding features had not been provided with the lines ordered in July and August. The assemblies and T-1 lines would allow call multiplexing as envisioned in Telenet's operational plan. On September 17, 1996, the day after the September 16 meeting, BellSouth indicated for the first time, that in its view, Telenet's services were in violation of the BellSouth General Subscriber Service Tariff ("Tariff"), and that Telenet would have to negotiate a Resale Agreement with BellSouth if it wished to continue to use multi-path call forwarding. On September 19, 1996, BellSouth stated by letter to Telenet that it would not

authorize any new service for Telenet on behalf of BellSouth until Telenet initiated a request for a Resale Agreement. (See Exhibit A). Telenet is not delinquent in payments of monies to BellSouth for all services provided and BellSouth is not claiming that any payments are past due.

On October 10, 1996, Demers again spoke with Moore. Moore stated that BellSouth had decided that Telenet's operations, particularly the use of multi-path call forwarding, was a violation of Section A13.9.1A.1 of BellSouth's Tariff. That Tariff provides in pertinent part:

...Call Forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment of in whole or in part, of message toll charges that would regularly be applicable between the station originating the call and the station to which the call is transferred.

Moore then stated that Telenet was on notice and demanded that Telenet cease and desist use of multi-path call forwarding. By letter dated October 15, 1996, Moore notified Telenet that in the absence of "proof" that a violation of BellSouth's call forwarding tariff was not occurring, BellSouth would remove its provision of multi-path call forwarding services on November 21, 1996.

## **ARGUMENT**

### **I. THE STANDARD FOR AWARDED TEMPORARY INJUNCTIVE RELIEF**

In Florida, a party is entitled to a temporary injunction if it can prove:

- (1) the likelihood of irreparable harm;
- (2) the unavailability of an adequate remedy at law;;
- (3) substantial likelihood of success on the merits; and
- (4) that granting the injunction would not disserve the public interest.

See *Snibbe v. Napoleonic Society of America*, 1996 WL 539021 (Fla. 2nd DCA 1996); *Graham v. Edwards*, 472 So.2d 803 (Fla. 3rd DCA 1985). As shown below, all four elements are met in this case, and issuance of the requested preliminary injunction is appropriate.

**II. TELENET WILL SUFFER IRREPARABLE INJURY IF TEMPORARY INJUNCTIVE RELIEF IS NOT GRANTED**

Irreparable harm sufficient to obtain equitable relief can be established upon a showing that “the potential destruction of a business, without a track record from which to calculate the potential loss and with harm of a continuing nature,” will otherwise result without equitable relief. *U.S. 1 Office Corp. v. Falls Home Furnishings, Inc.*, 655 So.2d 209, 210 (Fla. 3rd DCA 1995). As Telenet is a relatively new start-up competitive alternative local exchange carrier, it is responding to new competitive rules in the local exchange marketplace ushered in with the passage of the Telecommunications Act of 1996 in February, 1996.

Unfortunately, the refusal of BellSouth to provide equipment and services will have a disastrous effect on Telenet’s prospects of continuing operations, let alone rapidly growing customer subscribership or service offerings. Like any business organized around a precise technological plan, Telenet’s cannot survive if it is denied a critical element of that technology. Nor can Telenet “mitigate” its failure to obtain the requested service from BellSouth by shopping around to other facilities-based telecommunications providers. BellSouth, as the incumbent monopoly local exchange carrier, is the sole provider of the services which Telenet requires to serve its customers. Telenet has expended significant time and monetary outlays to develop business good will within its target market in the tri-county area in South Florida, by telemarketing of its existing service. It has a developing customer base and market for its

competitive services, with commitments already made to potential and subscribed customers. If Telenet cannot provide its service on a continuing, uninterrupted basis to all customers and without restriction, it will most certainly lose its customer base and be forced out of business. Only intervention by this Court, by entry of an order enjoining BellSouth from discontinuing service to Telenet, and to continue to provide all essential services to Telenet, can prevent this. The irreversible damage to Telenet that will be caused by BellSouth's threatened action to terminate service (and not provide additional needed services) is of the character that cannot be estimated in dollars and cents, and can only be rectified by an injunction. *Cf. Neel v. Williams Communication Service, Inc.*, 638 So.2d 1017, 1018 (Fla. 2nd DCA 1994).

In sum, Telenet will suffer irreparable harm if Defendant's threatened termination of services is not enjoined.

**III. TELENET HAS NO ADEQUATE ALTERNATIVE REMEDY AT LAW IF PRELIMINARY INJUNCTIVE RELIEF IS NOT GRANTED**

The present case is not one which lends itself to an immediate remedy at law. Telenet is not facing a loss of business which would result in ascertainable monetary damages; it is facing the failure of its business, which only an equitable solution can prevent. If the key element of its technological operating model is removed, present subscribers as well as an expanding pool of future customers will have no confidence in either the reliability or the availability of Telenet's services. It will effectively prevent Telenet from establishing a corporate identity, or even solidifying a client base. The initial months of a start-up business are critical to its ability to attract customers, to develop service reputation, and to grow its business. The loss to Telenet's reputation and goodwill caused by an interruption in service by BellSouth would be irreversible.

This loss cannot be remedied by an award of damages. *State v. Continental Car Services, Inc.*, 650 So.2d 173, 175 (Fla. 2nd DCA 1995)

Also unascertainable is the amount of Telenet's future income stream. Although Telenet has begun operations, its earnings have only begun to trickle in. Telenet cannot begin to estimate the level of success its marketing strategy will have, or how wide a subscribership it will eventually have in South Florida. Moreover, any estimate would be impossible for the additional reason that Telenet has only a fraction of the lines and hardware of its projected eventual network up and running. Therefore, any projection of its earnings or worth is entirely speculative and not quantifiable to any degree necessary to characterize this dispute as more properly one of law, than of equity. *See Continental Car Services, supra* at 175.

**IV. TELENET HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS IN PREVAILING ON THE MERITS OF THIS CASE**

Simultaneously with the filing of this action, Telenet has filed a Petition for Arbitration with the Florida Public Service Commission, seeking an decision which would declare BellSouth's tariff restrictions to be discriminatory and anticompetitive under both Florida law and the Telecommunications Act of 1996. This Petition is well grounded in Florida law and regulatory practice, and a copy is attached as Exhibit B to this Memorandum. By this Petition to the Commission, Telenet is taking all necessary steps for a timely arbitration of this tariff dispute concerning BellSouth's tariff provisions. Fla. Admin. Code § 25-22.036. Under the controlling Florida statute, an arbitration of this petition must occur within 120 days of filing. However, given the looming termination date of November 21, 1996 which BellSouth threatens Telenet

with, and the devastating consequences of such a termination, a collateral action in this Court to seek injunctive relief is necessary pending the outcome of the arbitration of Telenet's petition.

Many of the same issues of Florida law raised in the Petition are relevant to this action, and demonstrate Telenet's ultimate likelihood of prevailing upon the merits of its claims, both in a hearing for permanent injunctive relief as well as in its regulatory action. For example, Fla. Stat. § 364.161 holds that no local exchange company (such as BellSouth) may impose restrictions on the resale of services or facilities except those which the Commission may determine are reasonable. The Commission, upon a finding that the rules, regulations, or practices of any telecommunications company are unjust or unreasonable, may set rules governing those practices by order or rule. Fla. Stat. § 364.14(2). The Commission can also require that telecommunications services be transferred from BellSouth to its customer. See, Fla. Stat. § 364.16(1).

Finally, BellSouth's actions violate the Federal Communications Act of 1934, as modified by the Telecommunications Act of 1996 ("1996 Act"). Foremost among the Federal Act's provisions relevant to this action is its mandate that all local exchange carriers such as BellSouth have "[the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services." 47 U.S.C. § 251(b)(1); 47 U.S.C. § 251(c)(4)(B).

Therefore, there is a substantial likelihood that Telenet will prevail upon the merits of its underlying challenge to the legality of BellSouth's tariff restriction.

**V. AN INJUNCTION WILL PROMOTE COMPETITIVE LOCAL EXCHANGE SERVICES AND SERVE THE PUBLIC INTEREST**

Both Florida and Federal laws recently enacted have underscored and declared the public interest in advancing competition in the telecommunications industry, particularly in the local exchange market. The Florida Legislature has determined

that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.

Fla. Stat. § 364.01(3); *see also* 47 U.S.C. § 157.

Telenet's own operations to date have confirmed a strong public demand for its competitively-priced services, from both existing and potential customers in the tri-county area of South Florida. By granting the injunctive relief sought, and permitting Telenet's services to continue, this Court will not merely avoid harm to the public interest (the standard for injunctive relief), but will be affirmatively advancing the public interest, by enforcing the mandates set out in Florida Statutes and the 1996 Act.



**CONCLUSION**

For the foregoing reasons, Telenet requests that this Court grant Telenet a Temporary Injunction, enjoining defendant from terminating Telenet's existing services or refusing to provide additional necessary services for Telenet to service its customers, and order defendant to comply with its obligations under Federal and Florida law, as enumerated in the accompanying proposed Order and Preliminary Injunction.

Respectfully submitted,

SWIDLER & BERLIN, CHTD.

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Dated: November 12, 1996

**CERTIFICATE OF SERVICE**

I, Colin M. Alberts, hereby certify that on this 11th day of November, 1996, a notification of the filing of Telenet of South Florida, Inc.'s Petition for Arbitration with BellSouth Telecommunications, Inc. to the Florida Public Service Commission, was served by U.S. Mail upon the following party in interest:

Joe P. Lacher, President  
BellSouth -- Florida  
150 West Flagler Street  
Suite 1901  
Miami, Florida 33130



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Colin M. Alberts