10:30 am

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ORIGINAL
FILE COPY

August 24, 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 Supplemental Brief of BellSouth Telecommunications, 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,

J. Phillip Carver

J. Phillip Carver

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Enclosures

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of revenue requirements and rate stabilization plan of Southern Bell.	)	Docket No. 920260-TL
	)	Filed: August 24, 1995

SUPPLEMENTAL BRIEF OF
BELLSOUTH TELECOMMUNICATIONS, INC.

On August 17, 1995, BellSouth Telecommunications, Inc., ("BellSouth", "Southern Bell" or "Company") filed its Brief of the Evidence in the above-styled docket. At that time, Southern Bell also filed a motion to request leave to file within seven days a supplemental brief to address any new matters raised in response to Legal Issue No. 4. As stated in that motion, this issue necessarily entails an opportunity for intervenors in this docket to raise for the first time new legal arguments that Southern Bell's proposed ECS plan violates the revised Chapter 364. Southern Bell hereby files its Supplemental Brief for the purpose of responding to these arguments.

A review of the briefs filed by the various intervenors reveals that most parties have either advanced no new legal theories or have addressed Legal Issue 4 in a general and cursory fashion that requires no response by Southern Bell. There are, however, two parties who have attempted to raise a new legal issue under the general rubric of Legal Issue 4, MCI Telecommunications Corporation ("MCI") and Florida Interexchange Carriers Association ("FIXCA").

At the outset, Southern Bell again states in response to the arguments of both MCI and FIXCA that the revised Chapter 364 does

not apply. As set forth in Southern Bell's Brief of the Evidence, Section 364.385 (the saving clause of the revised Chapter 364) dictates that the prior version of Chapter 364 applies to Southern Bell's ECS plan as well as to all substantive matters at issue in this docket. (See, Southern Bell Brief, pp. 25-31, 35) Accordingly, the revised Chapter 364 is not applicable, and the question of whether Southern Bell's plan violates the revised Chapter 364 is moot. Even if the new version of the statute applied, however, the respective arguments of MCI and FIXCA should be rejected for the reasons set forth below.

MCI:

MCI contends that to comply with the revised Chapter 364, Southern Bell must make its ECS service available for resale without restriction. In reality, this position is not a legal argument that the ECS plan violates the revised Chapter 364. Instead, this position raises factual and policy questions that happen to relate to the application of the revised statute.

MCI is correct in noting that Section 364.161(2) of the revised Chapter 364 provides "... no local exchange telecommunications company may impose any restrictions on the resale of its services or facilities except those the Commission may determine are reasonable." MCI is also generally correct that the placement of Southern Bell's ECS tariff in Section A2 of the General Subscriber Service Tariff makes ECS subject to the general restrictions that apply, including the prohibition of

resale in A2.2.1B. Accordingly, the question of whether this restriction is "reasonable" is, in fact, a legitimate one under the new statute. Unfortunately, this issue was not raised by MCI or any other party to this proceeding prior to the filing of MCI's brief, and it is not a proper legal issue to be raised at this juncture.

The revised Chapter 364 statute allows only those restrictions that are determined by the Commission to be "reasonable." It does not flatly prohibit all restrictions. The question of "reasonableness" cannot be resolved by simply applying the law. The issue of whether the restrictions in Southern Bell's A2 Tariff -- or for that matter, any restrictions -- are reasonable, necessarily requires this Commission to consider the factual context in which this service is offered and the related policy issues that apply. In other words, this is the type of issue that can only be resolved by making a factual determination, which, assuming the facts are disputed, would require a hearing.

Unfortunately, MCI did not raise this issue in time to be addressed in the hearing on the instant matter, when the issue could have been given full and appropriate consideration. Clearly, each party to this docket had an opportunity to raise any factual or legal issue that it believed provided a basis for the Commission to reject Southern Bell's plan. The record reflects the fact that the various intervenors felt no compunction about doing so. Again, MCI either elected not to

raise the issue of the reasonableness of the restriction on resale, or it neglected to raise the issue. In either event, MCI should not be allowed to benefit by this omission by now labeling this matter as a legal issue and raising it initially at this juncture even though it obviously cannot be resolved as a matter of law, i.e., without resolving the fact and policy questions that inhere in any determination of whether the restriction is "reasonable."

MCI does not acknowledge this omission, but rather attempts to argue that because Southern Bell has not advanced evidence to support the reasonableness of the resale restriction in its tariff, the Commission should find that, as a matter of law, the restriction is unreasonable. This argument not only reverses the manner in which issues are typically raised, but also makes no practical sense. Obviously when a carrier, in this case, Southern Bell, proposes a service that is the subject of a proceeding, it is impossible for it to present evidence to support each and every challenge to its service that might be raised in the future by any intervenor. The simple fact is that Southern Bell did not put on evidence to establish the reasonableness of the restrictions in the tariff when applied to the ECS plan because no party raised this as an issue. MCI's notion that Southern Bell had the duty to defend the restriction even though no party challenged it in the hearing is certainly novel, but ultimately it has no merit.

Moreover, if MCI does, in fact, wish to make an issue of the restrictions of the A2 tariff as applied to the ECS plan, it will have ample opportunity to do so in the future. If MCI, (or, for that matter, any other authorized telecommunications provider) wishes to purchase and resell ECS in violation of Southern Bell's tariff, then the question of whether or not this is allowable will undoubtedly be brought before the Commission in one way or another. In that event, the Commission would have the appropriate opportunity to review the positions of all parties, to conduct a hearing if necessary, and to resolve all of the various issues necessary to determine if the restriction is, in context, "reasonable." There is a forum for MCI to make its argument if it wishes to do so. It did not take the opportunity to do so in this proceeding, however, and should not be allowed to raise this issue now by mislabeling it as a legal issue.

FIXCA:

FIXCA's contention that Southern Bell's ECS plan violates the revised Chapter 364 is, in fact, a legal argument. FIXCA's argument, however, is flatly wrong. FIXCA first notes that Southern Bell has calculated the amount to be imputed for purposes of Section 364.051(6)(c) by aggregating ECS service and toll services, and that Southern Bell has done so because it believes the services are functionally equivalent. (FIXCA Brief, p. 24; See Hendrix Testimony, Tr. 366) FIXCA then reasons that if Southern Bell aggregates these services for purposes of its imputation calculation, then any customer who buys either service

must be charged the same price. FIXCA states that "Southern Bell proposes to charge customers who are receiving essentially the same service, according to Southern Bell, and who are therefore, similarly situated," different prices. (FIXCA Brief, p. 24) Thus, FIXCA's logic on this point amounts to the proposition that because different customers are buying the same service, they are necessarily similarly situated. Therefore, Southern Bell must charge them the same price or be guilty of price discrimination. This proposition, however, is not only logically flawed, but also shows a disregard for the manner in which the prohibition against unreasonable discrimination has been universally applied in the past.

First, while FIXCA argues that Southern Bell's ECS plan violates the revised Chapter 364 (and has, in fact, cited a newly created portion of the statute), the notion that a carrier cannot unduly discriminate between similar situated customers is nothing new. In fact, this general rule existed in the prior version of 364 and continues to exist in a general form in Sections 364.08, 364.09, and 364.10. Southern Bell is unaware of any instance, however, in which the prohibition of discrimination has been interpreted to mean that two customers who buy the same service are automatically similarly situated. To the contrary, this Commission has recognized in a variety of contexts the fact that charging customers different rates for the same services is permissible if their circumstances are different in some meaningful way that allows for a reasonable distinction to be

drawn. If it were otherwise, then the statute would not proscribe unreasonable or undue discrimination, but rather all discrimination between customers.

In fact, the Extended Area Service ("EAS") rules of this Commission (Rules 25-4.057 through 25-4.064, Florida Administrative Code) would appear to be premised on the notion that when certain objective criteria are met that relate to calling volume and distribution, then it is appropriate to charge customers who make toll calls on the subject routes a different rate than customers who make toll calls (i.e., utilize the same service) on other routes. If this were not the case, then the EAS plans and other forms of toll relief that this Commission has ordered over the years would all have been improperly discriminatory. Instead, the community of interest factors that exist on particular routes constitute a reasonable justification for charging customers on these routes rates that are different than on routes where there is no community of interest. For this reason, these EAS plans do not violate the long standing prohibition of unreasonable discrimination. Again, the statute does not prohibit all distinctions between customers, only discrimination that is unreasonable.

Likewise, in his direct testimony, Mr. Stanley set forth at considerable length the factors that Southern Bell applied to determine the particular routes on which it would offer its ECS plan. (Tr. 50-52) These factors track very closely those that have historically been utilized to identify a community of

interest that will support the implementation on a particular route of EAS or some other type of toll relief. Given this, there is no question but that the plan's distinction between customers to whom the ECS plan would be provided and those to whom it would not be provided is reasonable. Again, FIXCA's argument to the contrary amounts to the unsupportable conclusion that all customers who purchase the same service are similarly situated, any dissimilar circumstances not withstanding. This argument should be summarily rejected.

For the reasons set forth above, this Commission should reject the arguments of FIXCA and MCI raised in response to Legal Issue No. 4.

Respectfully submitted this 24 day of August, 1995.

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CERTIFICATE OF SERVICE
Docket No. 920260-TL

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