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ORIGINAL
FILE COPY

April 12, 1996

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

RE: Docket No. 950985-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration. Please file these documents 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 on the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (sw)

Nancy B. White

Enclosures

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to Section 364.162, F.S.	)	Docket No. 950985-TP Filed: April 12, 1996

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth" or "Company"), files pursuant to Rule 25-22.038(2), Florida Administrative Code, its Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP ("Order"), issued on March 29, 1996, by the Florida Public Service Commission ("Commission") in the above referenced docket. Reconsideration is required because the Order: (a) fails to impose a charge as required by Florida law, (b) unlawfully fails to set a local interconnection charge sufficient to cover the cost of local interconnection, (c) takes BellSouth's property without compensation, just or otherwise, and (d) mandatorily imposes "bill and keep" in violation of the Telecommunications Act of 1996. The dissent describes in clear and persuasive words the mischief this Order does to the negotiation process. There is no need to repeat those arguments. They are adopted. This brief will concentrate on the legal errors contained in the Order. In support of its Motion for Reconsideration, BellSouth states the following:

I. Procedural Background

This proceeding was initiated on August 31, 1995, when Teleport Communications Group ("TCG") filed a petition to have the Commission establish appropriate rates, terms, and conditions for local interconnection between BellSouth and TCG. Subsequently, Continental Cablevision, Inc. ("Continental"), Metropolitan Fiber Systems of Florida, Inc. ("MFS") and MCI Metro Access Transmission Services, Inc. ("MCI") filed similar petitions. Numerous parties intervened. Hearings were held on this matter on January 10-11, 1996.

Prior to the hearings on this matter, TCG and BellSouth were successful in resolving the issues raised in TCG's petition. In October, 1995, TCG and BellSouth entered into a Stipulation and Agreement concerning the charges for local interconnection, as well as various unbundling and resale issues. In December, 1995, BellSouth entered into a similar Stipulation and Agreement with the Florida Cable Telecommunications Association, Inc. ("FCTA") and its members, Continental, Time Warner AxS of Florida, L.P. ("Time Warner"), Digital Media Partners, and Intermedia Communications of Florida, Inc. ("Intermedia"). TCG agreed to this second Stipulation, which replaced the earlier agreement between TCG and BellSouth. By Order No. PSC-96-0082-AS-TP, issued on January 17, 1996, the Commission approved the December, 1995 Stipulation and Agreement. Therefore, the sole petitioners remaining in the docket were MFS and MCI. While AT&T

participated in the hearings in this docket, it did so as an intervenor only, not as a petitioner.

By Order NO. PSC-96-0445-FOF-TP, issued on March 29, 1996, the Commission ordered BellSouth to terminate local traffic on a mutual traffic exchange basis with MCI and MFS. Mutual traffic exchange is also known as "bill and keep". The Commission also ordered BellSouth to act as an intermediary and deliver calls originated from or terminated to carriers that are not directly connected to the network of an alternative local exchange companies ("ALECs") but who are interconnected with BellSouth. In addition, the Commission ordered that the Residual Interconnection Charge ("RIC") on toll calls sent or "ported" through BellSouth's network and terminated on an ALEC's network should be billed and collected by the company terminating the call.[1] The Commission, in reaching a decision on these issues,

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[1] The Order also required BellSouth to tariff its interconnection rates, to establish meet-point billing arrangements, to allow ALECs to cross-connect to each other when collocated in the same BellSouth wire center, to compensate MFS and MCI for the origination of 800 traffic terminated to BellSouth, to meet certain requirements for the provision of Basic and Enhanced 911 service, to provide certain technical arrangements for the provision of operator services, to list ALEC customers in BellSouth's directory assistance database, to provide certain billing and collection services to ALECs, to provide Common Channel Signaling to ALECs, to provide certain mechanized intercompany operational procedures, to adhere to certain operational requirements, and to provide nondiscriminatory NXX assignments.

Moreover, the Commission also ordered BellSouth to provide directory listings for MFS and MCI in BellSouth's yellow page directories. With regard to this latter point, while BellSouth Telecommunications is willing to make arrangements for such listings to be included in the yellow page directories, it must be noted that BellSouth Telecommunications is not the company that
(continued...)

either ignored, misinterpreted or misapplied the law applicable to the evidence in the proceeding, or overlooked and failed to consider the significance of certain evidence in this docket. See Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The findings of the Commission rely on speculation, conjecture, and an incorrect reading of Florida law. Moreover, the decision reached by the Commission lacks the requisite foundation of competent and substantial evidence. Finally, the decision violates specific federal laws which are applicable in matters such as this.

First, the Order fails to set a charge for local interconnection, a charge that is required by Florida law. Second, also in violation of Florida law, the Order fails to set a local interconnection charge that is sufficient to cover the cost of providing local interconnection. Third, the mandating of "bill and keep" constitutes a taking of BellSouth's property without compensation, just or otherwise, in violation of Florida and federal law. Finally, mandatory "bill and keep" is forbidden by the Telecommunications Act of 1996.

In addition, the Order erroneously holds that the carrier terminating a toll call sent or ported through BellSouth's network and terminated on an ALEC's network is the appropriate receiver of the RIC. Such a decision overlooks the fact that the

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[1](...continued)
publishes the yellow page directories. Thus, an order directing BellSouth Telecommunications to publish listings in such directories is misdirected.

RIC is an element of the transport charge, and the transport charge is appropriately due the Company that provides the transport.

The Order also fails to set a charge for the intermediary function that BellSouth is ordered to perform, i.e., to deliver calls originated and/or terminated from carriers who are not directly connected to the ALEC's network, but who are interconnected with BellSouth. Florida law requires that the Commission set such a charge where, as here, the uncontradicted evidence in the record supports the charge. Alternatively, if the omission were intentional, the lack of a rate to cover the cost of providing such a function is contrary to Florida law.

The sections below examine each of the grounds for reconsideration in turn, examining the specific evidence that exists in the record and reviewing the applicable law.

II. Mandatory "Bill and Keep" Violates Florida Law

In the Order, the Commission required BellSouth to interconnect with MFS and MCI for the termination of local traffic on a "bill and keep" (mutual traffic exchange) basis. (Order at p. 39). "Bill and keep" is a mechanism by which each company terminates traffic for the other with no distinct and separate charge for such termination. (Tr. p. 370). Indeed "bill and keep" is a misnomer. It should be labeled as what it really is, "free interconnection." This label is appropriate

because, to the extent traffic between the parties is not perfectly in balance it is tantamount to free interconnection.[2] The adoption of "bill and keep" or "free interconnection" by the Commission constitutes a violation of Florida law.

Section 364.16(3), Florida Statutes, requires each local exchange telecommunications company to provide access to and interconnection with its facilities to alternate local exchange telecommunications companies requesting such access and interconnection. To that end, Section 364.162, Florida Statutes, requires companies to negotiate mutually acceptable rates, terms, and conditions. If the parties are unable to bring the negotiations to a successful conclusion, then the Commission is to establish the rates, terms, and conditions of interconnection, upon petition by the parties. BellSouth had proposed such charges which the Commission rejected in favor of "bill and keep".[3]

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[2] This is to be contrasted with the oft-cited situation where traditional local exchange companies interconnected with each other on a "bill and keep" basis. In that environment, under traditional rate of return regulation, each local exchange company collected the costs of such interconnection from its own subscribers pursuant to Commission approved and tariffed rates. Competitive pressures to keep such rates low were largely non-existent in the distant past, which make such a practice tolerable. This is simply no longer the case.

[3] The Commission appeared to be swayed by the suggestion by Staff that the negotiated interconnection rate of $0.0105 would be the highest interconnection rate in the country. (March 5, 1996 Agenda Conference, p. 35). This is absolutely not supported by the record. In California, MFS entered into an interconnection agreement with Pacific Bell that contained a interconnection rate of 1.4 cents/minute. (Exhibit 3). In Michigan, the Commission ordered an interconnection rate of 1.5 cents/minute. (Exhibit 10). (continued...)

Importantly, the Commission is obligated to establish an actual "charge" or "rate" for interconnection. Creating a situation where neither party pays the other for interconnection does not meet this requirement. It is essentially free, a clear violation of the law. Specifically, throughout Section 364.162, Florida Statutes, the phrase "local interconnection charge" is used. For instance, if negotiations are unsuccessful, the Commission is required to set the "rates, terms and conditions for interconnection." Section 364.162(2), Florida Statutes. Then, in setting the rates for local interconnection, the Commission is instructed three times in Section 364.162 that the rates for interconnection are not to be set below cost. That is, Section 364.162(3), Florida Statutes, states twice that the "rates shall not be below cost....". Section 364.162(4) specifically states that "in setting the local interconnection charge, the Commission shall determine that the charge is sufficient to cover the cost of furnishing interconnection."[4] An

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[3](...continued)
MCI agreed to an interconnection rate of 1.5 cents/minute in an interconnection agreement entered into with NYNEX for Massachusetts. (Exhibit 10). Clearly, the negotiated rate of 1.05 cents/minute suggested by BellSouth is not the highest rate in the country. Therefore, the Commission's conclusion that the negotiated rate was too high is both unsupported by the evidence in the record and based on erroneous information.

[4] (Order, p. 10). One of the reasons the Commission rejected BellSouth's proposed interconnection rate was that the rate "inappropriately" included contribution towards universal service, implying that this was contrary to the universal service order. (Order No. PSC-95-1592-FOF-TP). (Order, pp. 9-10). The Commission's conclusion on this point does not comport with what it
(continued...)

order which does not establish a rate or charge for interconnection cannot be lawful, as set forth below.

A. "Bill and Keep" Does Not Constitute a Rate or Charge

The Commission, by ordering "bill and keep", has not set a "rate" or "charge" for local interconnection and, therefore, has not fulfilled the explicit requirements of Section 364.162, Florida Statutes. This Section, as noted above, does not mention "bill and keep", mutual traffic exchange, trade, or barter as a basis for local interconnection. It speaks of "rates" and "charges". It is clear that the legislature expected a monetary amount, to be arrived at by negotiation or by the Commission, to be set as payment for the termination of calls between local telecommunications companies.[5] The rules of statutory

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[4](...continued)
said in the universal service Order. In that order, the Commission specifically authorized the funding of universal service through markups on services offered by incumbent local exchange companies, including local interconnection. (Order No. PSC-95-1592-FOF-TP, p. 28). It is incredible that the Commission would now tell BellSouth that the Company cannot put such a markup on local interconnection. There is nothing in the record that justifies such a refusal.

[5] It should be noted that, while there was disagreement as to the appropriate rate levels for local interconnection, AT&T stated that "pricing [local interconnection and switched access] at equal levels would greatly simplify ... processes." (Tr. p. 494) (matter in brackets added). Moreover, MFS acknowledged that it would prefer a minute of use rate as opposed to bill and keep. (Exhibit 6, pp. 67-69). Further, the parties who signed the Stipulation obviously believe that they are not barred from entering the market with a minute of use interconnection rate. Even MCI signed an agreement for a minute of use rate in (continued...)

interpretation do not permit a different result.

In order to determine the meaning of a statute, any tribunal, including an administrative agency, must consider all pertinent legal principles of statutory construction. The most basic of these principles is that no interpretation is appropriate when the statute is facially clear and totally lacking in ambiguity. In such an instance, the tribunal considering the statute does not interpret it but rather applies it in the manner that is dictated by its clear language. As the Supreme Court stated in Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987):

> The first rule of statutory interpretation is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning'. A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So.2d 157, 159 (Fla. 1931).[6]

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[5](...continued)
Massachusetts. (Exhibit 10). Therefore, a finding by this Commission that a minute of use rate is somehow a barrier to competition is totally unjustified. It is an assumption that "should be rejected as mere delusions of proof that contributed nothing of probative value." Atlantic Coast Line R.R. Co. v. King, 135 So.2d at 202 (Fla. 1961).

[6] The same rule was expressed, albeit in somewhat different language, in Citizens v. Public Service Commission, 425 So.2d 534, 541-42 (Fla. 1982) as follows:

> The rule in Florida is that where the language of the statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, the Court should not depart from the plain language used by the legislature.

Thus, when a statute's meaning is so obvious that there is no room for interpretation, the tribunal considering the statute has nothing to do other than apply its plain language to reach an obvious result.

Section 364.162 uses plain words with plain meanings. The statute requires that the Commission set a "rate" or "charge" for local interconnection. Webster's[7] defines "rate" to be "a charge, payment or price fixed according to a ratio, scale or standard." Webster's New Collegiate Dictionary, 957 (1st Ed. 1973). Black's defines "rate" to mean the "price stated or fixed for some commodity or service of general need or utility supplied to the public measured by specific unit or standard." Black's Law Dictionary, 1134 (5th Ed. 1979). The word "charge" means "the price demanded for something." Webster's at 187. These definitions do not mention mutual traffic exchange or any other form of barter. The conclusion is clear; the plain language of the statute requires that the Commission set a price for interconnection.

It is clear that Section 364.162 is not ambiguous in any way. The statute mandates that a charge or rate must be set for local interconnection. Nevertheless, even if this were a circumstance in which discerning the meaning of "rate" or "charge" in Section 364.162 required some degree of

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[7] Under Florida law, plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. Green v. State, 604 So.2d 471, 473 (Fla. 1992); Newberger v. State, 641 So.2d 419, 420 (Fla. 2d DCA 1994).

interpretation, other principles of statutory interpretation would assure the same result.

When a statute is susceptible to more than one interpretation, the reviewing tribunal must first seek to give effect to the intent of the legislature in creating the statute. As stated in Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1249 (Fla. 1985), "[w]here reasonable differences arise as to the meaning or application of a statute, the legislative intent must be the polestar of judicial construction." At the same time, the Supreme Court has repeatedly held that the legislative intent must be determined whenever possible by looking to the way in which it is reflected in the language of the statute:

> In statutory construction, case law clearly requires that legislative intent be determined primarily from the language of the statute. [citations omitted]. The reason for this rule is that the legislature must be assumed to know the meaning of the words and to have expressed its intent by the use of the words found in that statute.

S.R.G. Corp. v. Dept. of Revenue, 365 So.2d 687, 689 (Fla. 1978). "It is a well-established rule of construction that the intent of the legislature as gleaned from the statute is the law." Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983) (quoting Small v. Sun Oil Co., 222 So.2d 196, 201 (Fla. 1969)). Accordingly, in determining the legislative intent, "the statutory language is the first consideration." St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). In this instance, the legislative

intent is clear from the statutory language; there is to be a charge for local interconnection.

It is only appropriate to attempt to discover the legislative intent by looking outside a statute when the language of the statute itself is not sufficiently clear to reveal this intent. In this uncommon circumstance, the typical source of guidance is the legislative history of the particular statute. See, e.g., Streeter, supra; Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958).[8] In this docket, the Commission accepted as evidence, the transcript of a meeting of the House of Representatives Committee on Utilities and Telecommunications held on April 12, 1995, wherein discussion was had as to the delinking of the universal service fund and interconnection charges. The legislators did not, to contrast what they did do with what they did not do, discuss the delinking of the universal service fund and mutual traffic exchange. (Exhibit 1 at p. 25).

To argue that Section 364.162 can or must be interpreted to allow "in-kind" compensation, which has to be the basis for the order in view of the literal language of the statutes, would violate the prohibition against reading words into a statute. James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657 (Fla. 3d DCA 1962) (where a statute is clear and unambiguous, the court

[8] In Ison v. Zimmerman, 372 So.2d 431, 433 (Fla. 1979), the Supreme Court accepted as extrinsic evidence of the legislative intent the history of the legislation together with "contemporaneous commentary on the drafters intent" that was contained in the reporter and "subsequent legislative action".

may not steer it to a meaning that its plain wording does not supply); Armstrong v. Edgewater, 157 So.2d 422 (Fla. 1963) (where there is doubt as to the legislative intent, or when speculation is necessary, the doubt should be resolved against the power of the court to supply missing words). To argue that the Legislature really intended to allow a mutual traffic exchange mechanism ignores the fact that the Legislature could have so allowed by drafting legislation specifically making that option available to the Commission. Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976) ("The mention of one thing implies the exclusion of another.")

In its Order, the Commission did not provide any rationale to support the notion that mutual traffic exchange constituted a legitimate "charge" or "rate" for local interconnection under Section 364.162(2), Florida Statutes, because there is simply no basis for such a conclusion. Therefore, the Commission's Order is contrary to Florida law, which must be reconsidered and reversed. DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1st DCA 1957).

B. "Bill and Keep" Does Not Cover the Costs of Interconnection

Adopting the concept of "bill and keep" also violates Section 364.162(4) that requires that the charge for local

interconnection cover the costs of interconnection.[9] One of the fundamental problems with the "bill and keep" arrangement is that it contains no recovery for the costs associated with the termination of local calls. (Tr. p. 488). In its Order, the Commission stated that mutual traffic exchange allows companies to cover the costs of interconnection because each company "receives benefits equal to the benefits it provides". (Order, p. 12). The difficulty with this is that the charge is to recover costs, not to insure the equality of benefits. Moreover, for such an argument to have a glimmer of logic, it must be based on the premise that the amount of local traffic terminating on the network of BellSouth and the network of the ALEC will be equal or in "balance", and that each party's costs will be equal.

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[9] The Commission found that the BellSouth prefiled proposal of using switched access charges for the interconnection rate (which charges would cover the cost of interconnection) could create a price squeeze and create a barrier to competition. (Order. p. 9). The Commission failed to consider that BellSouth proposed an imputation test that requires that the incumbent local exchange company's price for the competitive retail service (in this case, local exchange service) must equal the direct cost of providing the retail service plus the contribution earned from the wholesale service (in this case, local interconnection). (Tr. pp. 666-667). While MCI argued for a different imputation test that would require the incumbent local exchange company to recover from its retail service the price it charges for local interconnection plus all costs of providing the retail service, the disagreement was over the nature of the test, not the existence of the imputation test. (Tr. p. 723). BellSouth clearly demonstrated that these two imputation tests would differ only when the LEC's cost of providing the wholesale service to itself was different than the cost of providing the service to another company. (Docket 950984, Tr. p. 379). Interestingly, in the example at the transcript page just cited, BellSouth's imputation standard would have resulted in lower charges to consumers, not higher charges as may have been implied.

That is, if traffic is in balance and the costs are equal, each party could bear its own termination costs and the costs of interconnection would be recovered via the benefits of an "in-kind" exchange of traffic. (Exhibit 12, p. 10).

There are, however, severe problems with this analysis. First, neither MFS, MCI, nor AT&T, presented competent substantial evidence that traffic would be in balance. AT&T's witness admitted he had no evidence concerning traffic balances. (Exhibit 3, p. 42). MCI's witness speculated that traffic would be in balance "within a year or two", but presented no empirical evidence. (Exhibit 12, p. 10). Indeed, the only evidence concerning traffic balances was presented by MFS's witness and that clearly showed that traffic was not in balance. (Exhibit 6, p. 26). Notwithstanding this very clear and uncontroverted evidence, the Commission found BellSouth's contention that traffic would be imbalanced to be supposition and speculation.[10]

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[10] The Commission itself speculated that the provisions in the Stipulation "anticipate a nearly balanced exchange of traffic." (Order, p. 10). This is clearly not the case. The stipulation provides that if traffic is out of balance, a cap of 105%, based on the traffic of the carrier with fewer minutes, will apply. The stipulation, of course, was a complete agreement covering many topics. As a part of that agreement, and precisely as a result of concern over an out of balance situation, the parties provided a cap. Similarly, because of the uncertainty of whether traffic would be balanced, the parties provided that they could mutually agree to move to a "bill and keep" arrangement on a voluntary basis for a time period which could be altered or changed. All of this, which was wholely voluntary and a part of an overall agreement, certainly does not suggest a conclusion on the part of the parties that traffic will be in balance. There is absolutely no other evidence in the record upon which such an assumption can be based. The Commission has no idea of the intent and motives of the parties to the Stipulation in agreeing to any specific provision and should not assume anything.

(Order, pp. 9-10).

In fact, and contrary to the Commission's position, there is no evidentiary support for the Commission's assumption that traffic will be in balance. Thus, the Commission's conclusion is plainly arbitrary. The Commission must rely upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1st DCA 1957). See also Agrico Chem. Co. v. State of Fla. Dep't of Environmental Reg., 365 So.2d 759, 763 (Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So.2d 425, 426 (Fla. 3d DCA 1965). The evidence must "establish a substantial basis of fact from which the fact at issue can reasonably be inferred." DeGroot, 95 So.2d at 916. The Commission should reject evidence that is devoid of elements giving it probative value. Atlantic Coast Line R.R. Co. v. King, 135 So.2d 201, 202 (1961). "The public service commission's determinative action cannot be based upon speculation or supposition." 1 Fla. Jur. 2d, § 174, citing Tamiami Trail Tours, Inc. v. Bevis, 299 So.2d 22, 24 (1974). The Commission's decision is doubly arbitrary because it ignores competent evidence that contradicts the Commission's assumption. "Findings wholly inadequate or not supported by the evidence will not be permitted to stand." Caranci v. Miami Glass & Engineering Co., 99 So.2d 252, 254 (Fla. 3d DCA 1957).

The second problem with this attempt to rationalize why "bill and keep" is the same as setting a "rate" or "charge" to

cover "costs" is that, even if traffic were in balance, neither BellSouth nor the ALEC[11] may be covering its costs. For example, if it costs BellSouth five cents a minute to terminate a local call on its network and it costs an ALEC three cents a minute to terminate a local call on its network, the "bill and keep" arrangement will not allow either party to recover its costs even if the traffic is in balance. In the situation illustrated, if the traffic were perfectly balanced, the carrier with the lower cost might be able to conclude that it somehow is okay because the payments it avoided making to the other carrier exceeded its own costs. However, using the numbers given above, BellSouth would be unable to recover the net difference of two cents per minute under any theory. If the traffic is unbalanced, the situation could be worse or better, depending on the direction of the imbalance. (Tr. p. 488). The uncontroverted evidence, however, given by MCI and MFS acknowledges that the costs of interconnection for BellSouth and the costs of interconnection for an ALEC would not necessarily be identical. (Tr. pp. 249-250 and 774).[12] The point, to be clear, is that unless both parties'

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[11] While MFS and MCI have been critical of the cost data filed by BellSouth in this case, it is worth noting that MCI and MFS have not performed any cost studies showing the cost of call termination, or if they did, they did not include them in the record. That being the case, the Commission has no evidentiary basis on which it can determine that mutual traffic exchange allows MFS and MCI to cover their interconnection costs.

[12] In fact, the costs for the ALEC will not be identical. The ALEC, under the Commission's order, will be encouraged to use the efficiencies inherent to BellSouth's network, functionalities for which BellSouth will not be compensated. The ALECs are not (continued...)

costs are identical and unless the traffic is perfectly balanced, this interconnection arrangement does not provide, even in theory, a mechanism for BellSouth, as well as other parties, to recover the costs incurred. (Tr. pp. 488-489).

The attempt to reconcile the notion of "bill and keep" with the statutory requirements that a "charge" or "rate" be set to cover "costs" fails. The Commission has been forced to assume that BellSouth will cover its interconnection costs and that traffic will be in balance under "bill and keep". Section 364.162(4) does not allow the Commission to make such an assumption; it requires the Commission to make a determination that the interconnection charge will cover cost. The Commission has not made such a determination. An assumption that interconnection costs will be covered is not only a violation of Florida law, it is also not based on competent and substantial evidence. Duval Util. Co. v. Fla. Pub. Serv. Comm'n., 380 So.2d 1028, 1031 (Fla. 1980).

[12](...continued)
encouraged, under the Order, to provide efficient functionalities internal to their own networks.

III. Mandatory "Bill and Keep" Violates the Takings Clause Under State and Federal Constitutions

The Order raises serious concerns under the Fifth and Fourteenth Amendments[13] to the United States Constitution, as well as the Florida Constitution, Article 1, Section 9, that proscribes confiscation of the Company's property without just compensation.[14] Mandatory "bill and keep", as the Commission has ordered, amounts to a taking without just compensation in violation of the Takings Clauses of the Florida and U.S. Constitution. Under the Commission's order, BellSouth is obligated to utilize its facilities to provide transport and termination of calls without receiving any compensation for allowing these calls to transit its network.

Government action that requires a property owner to allow a utility to dedicate a portion of its property to use and transit by others constitutes a taking for Fifth Amendment purposes. "Such public access would deprive [the] petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Dolan v. City of Tigard, 114 S.Ct. 2309, B16 (1994), quoting Kaiser Aetna v. U.S., 444 U.S. 164, 176 (1979). Thus, even a

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[13] U.S. Const. Amend. V, applicable to the States through the Fourteenth Amendment, provides, in relevant part: "nor shall private property be taken for public use, without just compensation".

[14] A public service commission's regulatory regime is subject to the Takings Clause. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

small government-mandated physical intrusion into one's property for the purpose of carrying public utility traffic is a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 424-426 (1982); accord Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The degree of the intrusion is immaterial; "regulations that compel the property owner to suffer a physical "invasion of his property" constitute a per se taking "no matter how minute the intrusion." Lucas, 112 S. Ct. at 2893.

The requirement that BellSouth transport and terminate traffic from ALECs constitutes a physical intrusion onto BellSouth's property. BellSouth must engineer its telephone exchange plant to accommodate the busy-hour traffic originated by all users, including ALECs. Because many of the facilities involved are traffic-sensitive, the need to handle the traffic originated by all users, including ALECs, requires BellSouth to make investments in physical property to accommodate such traffic in order to avoid degrading service generally. When traffic is offered by the ALECs for termination on BellSouth's network, BellSouth is obligated to devote measurable network capacity to the carriage of this traffic. As a result, property in BellSouth's switching offices and transport network is measurably occupied by the ALEC-originated traffic, and BellSouth is denied the use of this property to serve others for the duration of the ALEC-originated calls. Because BellSouth has and will invest in physical plant in order to terminate ALEC-originated traffic as well as all other types of traffic, this plant is measurably

occupied when traffic occurs, and BellSouth is denied the ability to use this physical plant for any other purpose, a taking clearly occurs. See Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1444 (D.C. Cir. 1994).

In Duquesne Light Co. v. Barasch, the Supreme Court set forth the "guiding principle" of Takings Clause law respecting public utility regulation:

> [T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.... If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth...Amendment[].[15]

Accordingly, the Commission's adoption of a "bill and keep" requirement passes constitutional muster only if BellSouth receives just compensation for the deprivation of its property. With the Commission's "bill and keep" proposal, that does not occur. The LEC receives not one penny in compensation for terminating ALEC originated traffic, without regard to the volume of traffic offered or the investment in physical plant needed to accommodate it. While the government clearly has the authority to regulate the rates charged by public utilities, the Takings Clause does not permit it to require the dedication of facilities and the provision of service without compensation. A government-imposed "bill and keep" policy that is not based on reciprocal compensation is confiscatory and therefore violates the Takings

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[15] Duquesne Light Co., infra, at 307-308.

Clause of the Fifth Amendment as well as Article I, Section 9 of the Constitution of Florida. The Commission's order, therefore, cannot stand.

IV. Mandatory "Bill and Keep" is Prohibited By The Telecommunications Act of 1996

On February 8, 1996, the Telecommunications Act of 1996 (the "Act") was signed into law. This was after this proceeding was heard and briefed, but before a decision was reached. The impact of the Act was not discussed during the Commission's deliberations in this proceeding. To the extent that this proceeding and Order are construed to be a matter within the scope of the Act, the action ordered by the Commission is not lawful.

Section 251(b)(5) of the Act obligates all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 251(c)(1) requires incumbent local exchange companies to negotiate in good faith in accordance with Section 252, the particular terms and conditions of agreements to fulfill the duties described in Section 251(b)(1-5) and subsection (c). If a voluntary agreement is reached with regard to reciprocal compensation, the state commissions must approve the agreement, unless it discriminates against a telecommunications carrier not a party to the agreement, or the Commission finds that the implementation of the agreement is not consistent with the public

interest.[16] If an agreement cannot be voluntarily reached on the terms of reciprocal compensation, then the Act contemplates that the state commissions will resolve the issues through arbitration. In this case, Section 252(c) states that the state commission shall establish rates for interconnection, services, or network elements according to Section 252(d).

Section 252(d) establishes the pricing standards related to interconnection, network element charges, reciprocal compensation, and resale. Section 252(d)(2)(A) provides the general rule with regard to the pricing of reciprocal compensation arrangements, stating that a state commission shall not consider such arrangements to be just and reasonable unless (1) the arrangements provide for the mutual and reciprocal recovery of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier, and (2) the arrangements determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. Thus, the applicable pricing standard for judging the reasonableness of the terms and conditions for reciprocal compensation clearly contemplate the recovery by each carrier of the costs associated with the termination of calls on its network. "Bill and keep", as previously discussed, does not do this.

This subsection also includes an additional provision

[16] Section 252(e)(2)(A)(i-ii).

entitled "Rules of Construction". The specific language in this subsection is very illuminating on the issue of "bill and keep". It states, in relevant part, that "[t]his paragraph shall not be construed ... to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements) ...." (emphasis added). Thus the federal law clearly contemplates that the "recovery" of costs and "bill and keep" are mutually exclusive. This is bolstered by the fact that "waiving" one's right to mutual recovery specifically contemplates the conscious and intentional relinquishment of a known right. By using the term "waive", the Act clearly allows the negotiating parties to relinquish the mutual recovery of costs voluntarily should they so desire; that is, to enter into voluntary "bill and keep" arrangements.[17] However, it does not authorize this Commission, or any commission to mandate that a party accept "bill and keep" as the method of cost recovery. Since the Commission's Order requires the parties to accept and implement a "bill and keep" mechanism, it is inconsistent with the pricing standard contained in Section 252(d)(2)(A) and therefore is unenforceable under Section 261(b) of the Act.

The foregoing interpretation of the new federal law is not something BellSouth has cut from whole cloth. In an exchange

[17] As pointed out in Footnote 10, this is precisely what the parties to the stipulation did. They voluntarily agreed to "bill and keep" for a period where the facts justified such a practice.

between a witness for TCG and Commissioner Julia Johnson, during the hearings to determine the appropriate interconnection rates for United Telephone Company of Florida and Central Telephone Company of Florida, the witness noted that the federal law specifically allows a state commission to approve an agreement that affords "mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)". (Transcript, March 11, 1996, pp. 144-145). Commissioner Johnson correctly noted that while Section 252(d)(2)(B)(i) addresses negotiated agreements, it did not "necessarily suggest that bill and keep is appropriate for Commissioners or commissions to impose upon parties". (Id., p. 147). This is precisely the point. The federal law allows parties to enter into "bill and keep" arrangements voluntarily; it does not allow state commissions to order such arrangements.

V. The Residual Interconnection Charge

In addition to the clear violations of both federal and state laws addressed above, the Order also contains provisions not supported by competent and substantial evidence. The Order found that in a situation where calls were terminated or originated from companies not directly connected with each other or to the ALEC's network, but connected to BellSouth, the Residual Interconnection Charge ("RIC") should be collected by

the company providing terminating access. (Order, p. 19).

The RIC arose out of the local transport restructure proceeding at the Federal Communications Commission ("FCC"). (Tr. p. 208 and Exhibit 13, p. 7). Transport was broken into two pieces, a traffic sensitive, cost-based element and the RIC element, which AT&T admitted was based on accounting costs and calculated to capture the contribution that was previously embedded in the transport charge. (Tr. p. 210 and Exhibit 13, pp. 8-9). There was also a local transport restructure proceeding in Florida during which a RIC was established for the same purpose, although AT&T denied the element was cost based. (Tr. pp. 208-209 and Exhibit 13, pp. 10-11).

The per minute RIC was based on an estimated number of LEC transport minutes. (Exhibit 13, pp. 17-18). In order to preserve this contribution to the LEC, the RIC was to be collected by the LEC who owned the final end office used to complete the call to the end user. This way, if a carrier bypassed the LEC network and provided its own transport, the LEC would still collect a portion of the monies that had previously been embedded in transport rates. Allowing the ALECs to collect the RIC, particularly where they have no costs of transport, nor revenue requirement normally associated with the RIC, will simply provide them with a windfall and will prevent the LECs from collecting the money the RIC was expressly created to facilitate.

VI. The Commission Failed to Establish a Charge for the Intermediary Function

In its Order, the Commission appeared to require BellSouth to provide an intermediary function for the transport of a local call by BellSouth between two ALECs who are both interconnected with BellSouth, but not with each other. (Order, p. 19 and Tr. p. 554). BellSouth's prefiled proposal was that if ALECs felt such a function was necessary and the technical and financial issues could be resolved, then BellSouth could provide such a function. (Tr. p. 555). Under the Stipulation, BellSouth agreed to provide this function for the price of the tandem switching and transport rate elements, plus two-tenths of a cent. (Tr. p. 557). This price covers BellSouth's cost of providing the function. (Id.). Based on the Stipulation, it was determined that no technical impediments existed. (Tr. pp. 555-556). During cross-examination, it even appeared that MCI might be willing to pay the stipulated charge for this function. (Tr. p. 558).

In any event, the parties appeared to agree that a price for the intermediary function was appropriate. The Commission, however, failed to set a charge for the intermediary function. Indeed, the Commission failed to even discuss this aspect of the issue. Since the service has a cost, in keeping with the previous discussions regarding the requirement of rates that cover costs for services utilized by ALECs, this matter must be reconsidered by the Commission.

VII. Conclusion

The Commission reached a decision in this case on the issues discussed herein by relying on supposition, speculation, and conjecture. This it cannot do. DeGroot, supra. Moreover, the Commission's decision is contrary to both federal and state law. The Commission must reconsider its decision and reject "bill and keep" as the appropriate method for local interconnection, and grant the other relief sought by BellSouth in this motion.[18]

[18] If this Commission does not reconsider its position on "bill and keep", BellSouth respectfully requests that the Commission include in its final order, a provision that if judicial review is sought by any party, that any carrier interconnecting on a "bill and keep" basis during the pendency of the appeal will be required to keep adequate records to allow the proper billing of a "rate" or "charge" for interconnection, commencing on the original date of interconnection, in the event of a reversal or remand of the Commission's Order. BellSouth has no desire to inhibit or delay the continuing development of competition in Florida and therefore will not seek a stay of the Commission's Order if an appeal is necessary. However, fundamental fairness requires that if Bellsouth ultimately prevails, it should be able to recover the monies to which it is entitled.

Respectfully submitted this 12th day of April, 1996.

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