

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed Revisions to) DOCKET NO. 941190-TI
Rule 25-4.118, F.A.C.) ORDER NO. PSC-95-0374-FOF-TI
Interexchange Carrier Selection) ISSUED: March 15, 1995
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING PETITION FOR FORMAL PROCEEDING

BACKGROUND

BY THE COMMISSION:

By petition filed January 10, 1995, AT&T Communications of the Southern States (AT&T or the Company), pursuant to Section 120.54(17) Florida Statutes, and Rule 25-22.016(6)(a), Florida Administrative Code, requested that we conduct a hearing concerning proposed revisions to Rule 25-4.118, F.A.C., and that the hearing be a "draw-out" proceeding conducted pursuant to Section 120.57, Florida Statutes. Those rule revisions concern requirements for documents which are utilized by consumers to change their selection of interexchange carriers.

Pursuant to Rule 25-22.016(6)(b), we went forward with a Section 120.54(3), Florida Statutes, rulemaking hearing on January 18, 1995 while this petition was pending. AT&T participated in that hearing, but in doing so did not waive its rights to seek a Section 120.57 hearing.

In considering AT&T's request, our decision is governed by whether the petitioner asserts that its substantial interests will be affected in the proceeding and

affirmatively demonstrates to the agency that the proceeding [section 120.54(3) rulemaking hearing] does not provide adequate opportunity to protect those interests.

Section 120.54(17), Florida Statutes.

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DISCUSSION

We first consider whether AT&T's request for a Section 120.57 "draw-out" hearing should be granted. We conclude that it should not be granted. AT&T has asserted that its substantial interests will be affected by this rulemaking. The Company represents that it advocated the use of consistent state and federal standards with respect to interexchange (IXC) selection before us previously and that we generally adopted that approach in current Rule 25-4.118.

Now that AT&T has adopted business practices in accord with the present formulation of the IXC carrier selection rule, the Company is concerned that proposed revisions to that rule will necessitate costly changes even though the public has not been harmed by those practices. Moreover, the Company fears that Florida-specific marketing practices may become necessary as a result of the revisions, which would not only be burdensome to the Company, but also to the public, which might be deprived of some of the benefits of interexchange competition as a consequence. Petition, p. 4-5.

Though the substantial interests of AT&T are, in fact, affected by this rulemaking, a Section 120.57 "draw-out" hearing is only warranted if the Company could not protect its substantial interests without a draw-out. In support of its claim that the Company could not protect its substantial interests absent a draw-out, AT&T notes four main factors:

1. Timing: An FCC rulemaking is currently in progress and AT&T is concerned that action by us may not be consistent with the FCC action, leading to the burdensome need for Florida-specific marketing previously discussed. Petition, p. 5-6.
2. Lack of Full Commission Participation: AT&T believes that the full Commission or a Commission panel, rather than a hearing officer from the Division of Appeals, should hear this matter because the current rule was initially adopted in the context of a proceeding that involved us directly. Petition, p. 6-7.
3. Lack of Discovery Rights: AT&T contends that, rather than a quasi-legislative rulemaking hearing, a hearing in which formal discovery takes place will enable the Company to demonstrate that certain IXCs are responsible for consumer complaints and to propose a solution that protects the public interest without unduly restricting

the legitimate business activities of other carriers. Petition, p. 7-8.

4. Lack of Opportunity to Develop Evidence: The Company submits that "the Commission should change or depart from existing standards on which companies have relied only if there is a clear showing, based on substantial evidence of record, that the existing standards are inadequate to protect the public interest and that the newly proposed standards are the least restrictive means of protecting the public". Petition, p. 9. AT&T notes that this result is also consistent with statutory directives, Section 364.01(3)(c) and (d), Florida Statutes, as well.

The problem with these assertions, from the perspective of this petition, is that they do not demonstrate AT&T's inability to protect its substantial interests without a draw-out. As AT&T's Post Hearing Comments demonstrate, these arguments could be presented, and were, in the ordinary context of rulemaking. As further indicated by staff's post-hearing comments, there is no dispute that an FCC rulemaking process in this area is currently in progress, that some companies' activities have contributed far less than others to these kinds of consumer complaints or that unnecessary impacts on competition should be avoided. It is not these facts that are in dispute, but rather what the best policy should be in light of these facts. Moreover, we will be required to consider those facts in our review of this rulemaking, and, in effect, will hear from the participants through their contributions to the record.

Where the matter here concerns a search for the best policy in light of facts which are largely undisputed, we believe that a draw-out is unnecessary. In this analysis, the observations of the Court in Adam Smith Enterprises, Inc. v. State, Department of Environmental Regulation, 553 So. 2d 1260, 1273, n. 19, (1st DCA 1989) are pertinent:

Formalized adjudicatory methods are clearly nonessential for purposes of rational rulemaking. There are procedures set forth in Section 120.54 expressly designed to provide the administrator access to all data, criticisms, suggestions, alternatives, and contingencies relevant to his decisions. Adjudicatory methods are in fact insufficient to this task. A rulemaker must typically make and coordinate many empirical conclusions dependent on raw material outside the

conventional evidentiary categories of "testimony" and "exhibits". For example, the rulemaker must often draw upon prior experience, expert advice, the developing technical literature, ongoing experiments, or seasoned predictions.

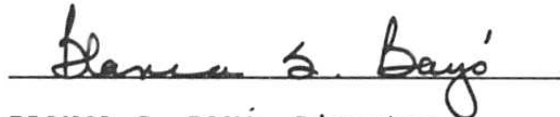
The foregoing suggests that draw-out proceedings should be reserved for the process of deciding facts that are in dispute, and that the ordinary rulemaking process should be utilized in this case where the question ultimately to be determined is what the best policy is in light of the acknowledged facts.

In view of the above it is

ORDERED by the Florida Public Service Commission that the Petition For Formal Proceeding filed by AT&T Communications of the Southern States is denied. It is further

ORDERED that this docket shall remain open.

BY ORDER of the Florida Public Service Commission this 15th day of March, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

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