BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into the rates for interconnection of mobile service providers with facilities of local exchange companies.	DOCKET NO. 940235-TL ORDER NO. PSC-96-0334-FOF-TL ISSUED: March 8, 1996

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 GRANTING MOTION TO STRIKE AND DENYING MOTION FOR STAY

BY THE COMMISSION:

I. CASE BACKGROUND

In Docket No. 870675-TL, the Commission investigated the interconnection of mobile carriers with facilities of Local Exchange Companies (LECs). That investigation culminated with the issuance of Order No. 20475 on December 20, 1988, in which the Commission approved rates, terms and conditions for interconnection between mobile service providers (MSPs) and LECs. One of the notable decisions reached in that docket was the linkage of mobile interconnection usage rates with access charges through a specified formula.

On September 15, 1993, BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (BellSouth or the Company) filed a petition to disassociate usage-based mobile interconnection charges from the formula. The petition was considered in Docket No. 930915-TL. In that docket the Commission found that Southern Bell had not fully supported its petition to disassociate the MSP network usage rates from the formula. Further, that the formula, which was established with input from many parties, should not be discarded on the basis of a petition from one company. Accordingly, the Commission denied Southern Bell's Petition and undertook a generic investigation in Docket No. 940235-TL, to determine the appropriate rates, terms and conditions

for mobile interconnection, including whether the formula for mobile service provider usage charges was still appropriate.

The Commission conducted a hearing on these issues on March 27 and 28, 1995 and rendered its decision on September 12, 1995, which is reflected in Order No. PSC-95-1247-FOF-TL. The Commission made the following determinations:

1. The formula linking mobile interconnection rates with access charges is eliminated.

2. Usage rates for mobile interconnection are frozen at their current levels, except for Type 2B interconnection.

3. The usage rate for Type 2B interconnection will be $0.01 per minute.

4. If the parties are able to negotiate appropriate elements of interconnection, including usage rates, they are not precluded from doing so.

5. GTE Florida Incorporated must clarify its mobile interconnection tariff to specify the facilities over which its Star Information Plus (*SIP) is provided.

6. Rates for NXX establishment will continue to be based on direct costs plus a 15% contribution, unless the parties negotiate a different rate.

7. Southern Bell's and GTEFL's proposed tariff changes for their MSP facilities charges are approved, with the exception of Southern Bell's Control Access Register (CAR) charge.

8. Tariffs shall be filed no later than sixty days after the date of the order, with an effective date of December 31, 1995.

On November 13, 1995, McCaw Communications of Florida, Inc. (McCaw), filed an appeal with the Supreme Court of Florida of the Commission's final order. On December 7, 1995, McCaw filed a Motion for Stay, with the Commission, for portions of the Order, pending appeal. BellSouth and GTE Florida Incorporated (GTEFL) filed responses in opposition to McCaw's Motion for Stay on December 18, 1995 and December 21, 1995, respectively. Subsequently, on January 17, 1996, McCaw filed a Motion to Strike

GTEFL's Response in Opposition to Motion for Stay. Finally, GTEFL filed a response to McCaw's Motion to Strike on January 25, 1996.

II. Motion to Strike

In support of its Motion to Strike GTEFL's Response in Opposition to McCaw's Motion for Stay, McCaw cites Rules 25-22.036(2)(a) and 25-22.028, Florida Administrative Code, stating that the first permits parties to file responses to a written motion within seven (7) days after service, while the latter permits five (5) additional days if service is by mail.

GTEFL points out that there is no subsection 2(a) of Rule 25-22.036, Florida Administrative Code and states that Rule 25-22.036, Florida Administrative Code, has nothing to do with filing periods for responses to motions. GTEFL goes on to argue that under Rule 25-22.061, Florida Administrative Code, which deals with motions to stay, there is no time limit for filing a response to a request for a stay of a Commission order. GTEFL concludes that because McCaw has failed to cite any applicable Rule or other basis for striking GTEFL's opposition, that opposition should be allowed to stand. Further, even if the Commission determined that it was filed late, it should be allowed to stand since no party will be prejudiced by GTEFL's opposition remaining in the record.

We find that, although it may be true there is no subsection 2(a) of Rule 25-22.036, Florida Administrative Code, McCaw's assertion that GTEFL's motion is untimely is a proper basis for striking GTEFL's opposition. Rule 25-22.037(2)(b), Florida Administrative Code, provides that other parties may, within seven (7) days after service of a written motion, file written memoranda in opposition. Further Rule 25-22.028(4), Florida Administrative Code, permits an additional five (5) days if service is by mail. According to these rules, GTEFL's opposition was untimely. Therefore, McCaw's Motion to Strike shall be granted.

III. Motion for Stay

Rule 25-22.061(2), Florida Administrative Code, provides:

> In determining whether to grant a stay, the Commission may among other things, consider: (a) whether the petitioner is likely to prevail on appeal; (b) whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and (c) whether the delay will cause substantial harm or be contrary to the public interest.

1) Whether the Petitioner is likely to prevail on appeal

On this point, McCaw states that on appeal it will demonstrate that the Commission's departure from its existing policy of linking interconnection rates on December 7, 1995, with access charges is totally without any foundation or competent, substantial evidence. McCaw states that the Commission's order does not cite or rely upon any evidence of record to support breaking the link for Types 1, 2A, 2D, 2A-CCS7, 2D-CCS7, or 2T usages.

BellSouth asserts that McCaw has done nothing more than state that it will "demonstrate" on appeal that the Commission's policy decision is without foundation. BellSouth argues that the Commission's policy decision to break the link between access charges and mobile interconnection usage rates, was expressly considered as an issue and that the Commission cited the reasons for reaching the conclusion that it did.

The Florida Supreme Court has stated time and again, a court reviewing a decision rendered by an administrative agency does not undertake to reweigh the evidence. Rather, the court's task is "merely to determine whether competent, substantial evidence supports a Commission order." Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). Further, Section 120.68(10), Florida Statutes, provides in pertinent part:

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of Section 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.

After reviewing the evidence, we determined that, except for Type 2B interconnection, usage rates for mobile interconnection should be frozen at their current levels. In furtherance of this decision, we decided that the formula linking mobile interconnection rates with access charges should be eliminated. Specifically, we found:

> As detailed in this order, we believe that the current rate levels are satisfactory, ... It is prudent to hold those rates at their current levels, rather than allow them to continually move downward, which would occur with the usage rates under the current formula. No party has stated a major objection to the current rate levels except SBT. From our review of the available evidence, we conclude that cost recovery and contribution levels

> are satisfactory. SBT's arguments of insufficient cost recovery are not adequately supported.
>
> Switched access charge prices will continue their downward trend. Setting permanent usage rates will more or less stabilize contribution levels derived from mobile interconnection usage rates (assuming incremental costs are stable). Breaking the link with access charges may facilitate future negotiation processes, which would be desirable.
>
> Therefore, we find that, except as to type 2B interconnection, usage rates for mobile interconnection shall be frozen at their current levels. As to all mobile interconnection usage rates, the flow through requirement for switched access charges shall be eliminated. See Order No. PSC-95-1247-FOF-TL at p. 15.

The previous excerpt demonstrates that we first determined it was appropriate to freeze the rate levels McCaw cites. This decision was based on evidence that the current rates are satisfactory and that the contribution levels are satisfactory. Accordingly, we find that McCaw is not likely to prevail on appeal.

2) Whether the Petitioner is likely to suffer irreparable harm

McCaw argues that, absent a stay, it is likely to suffer irreparable harm in that any reductions in access charges will be denied to mobile carriers. McCaw goes on to state that without a stay, any benefit from a reduction will be lost forever, thus causing irreparable harm. Further, McCaw asserts it has already been harmed by the Commission's decision to not flow through the October 1, 1995, BellSouth access charge reduction.

BellSouth argues that McCaw ignores the fact that access pricing decisions could be made by LECs in connection with the formula that would have only insignificant impacts on composite mobile usage rates. Further, according to BellSouth, McCaw conveniently fails to consider that the Commission's decision to reduce Type 2B rates results in large rate reductions -- nearly fifty percent in the case of BellSouth. Thus, the company concludes McCaw may actually benefit economically from the Commission's order.

We find that McCaw's argument should be rejected. First, it is somewhat analogous to the argument this Commission rejected in Docket No. 930330-TP. See Order No. PSC-95-0918-FOF-TP. We found

that LECs do not have a constitutional right to a certain level of toll revenues per se. Likewise, we do not believe McCaw is entitled to a certain level of reductions in MSP usage charges. It should be noted that we could conceivably never follow through on policy decisions if a stay was granted simply because a company claimed a loss of a benefit because of a policy change. Second, as discussed earlier, we concluded that, under the current rate levels, cost recovery and contribution levels are satisfactory and that if the current rates continue downward, the LEC revenue impacts could become undesirably large. Further, setting permanent usage rates will more or less stabilize contribution levels derived from mobile interconnection usage rates. Granting a stay would permit the current rates to continue their downward trend, thus impacting the contribution levels we sought to stabilize.

3) Whether the delay will cause substantial harm or be contrary to the public interest

McCaw asserts that no party will be substantially harmed by a delay nor will a delay be contrary to the public interest. It argues that it is in the public interest to grant a delay because there is a potential benefit to the public to have reductions in access charges flowed through to interconnection rates.

BellSouth argues that McCaw's motion should be summarily rejected because it is directly in conflict with the public interest. BellSouth refers to Order No. PSC-95-1247-FOF-TL, at p. 15:

> Cellular and paging usage has grown substantially since the last mobile interconnection case, and with it, the revenue impact on LECs of the flow through requirement. Given the new legislative mandate to reduce intrastate switched access charges to 12/31/94 interstate levels, we believe the magnitude of the LEC revenue impacts associated with the current formula and flow through requirement could become undesirably large.

Thus, according to BellSouth, by filing its Motion for Stay, McCaw is simply attempting once again to delay the implementation of a Commission policy decision with which it happens to disagree.

As discussed above, our decision to freeze the usage rates and break the link to access charges was made based on evidence that the current rates are satisfactory and that contribution levels are satisfactory. Further, if the current rates continue downward, the LEC revenue impacts could become undesirably large. McCaw's

argument that no party will be substantially harmed by a delay is contrary to our finding.

McCaw also argues that there could be a potential benefit to the public to have reductions in access charges flowed through to MSP interconnection rates. We find that this argument is an inadequate basis for a stay. We believe this is mere speculation. Although it is true that McCaw will benefit from the reductions, there is no assurance that McCaw's customers will benefit.

Upon consideration, we find that McCaw's Motion for Stay should be denied. The Company has failed to demonstrate that it is likely to prevail on appeal, that it will suffer irreparable harm absent a stay or that denying a stay would cause substantial harm or be contrary to the public interest. We weighed the evidence before us and made a policy decision based on that evidence. McCaw simply disagrees with our decision.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that McCaw Communications of Florida, Inc.'s Motion to Strike GTE Florida Incorporated's Response in Opposition to McCaw's Motion for Stay is granted. It is further

ORDERED that McCaw's Motion for Stay is denied. It is further

ORDERED that this docket shall remain open pending the conclusion of the protest period in Order No. PSC-96-0132-FOF-TL and resolution of the appeal filed by McCaw with the Supreme Court.

By ORDER of the Florida Public Service Commission, this 8th day of March, 1996.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MMB

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.

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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.