FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JULY 28, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN) MCB
DIVISION OF COMMUNICATIONS (NORTON, GREER) RNT SLG

RE: DOCKET NO. 961230-TP - PETITION BY MCI TELECOMMUNICATIONS CORPORATION FOR ARBITRATION WITH UNITED TELEPHONE COMPANY OF FLORIDA AND CENTRAL TELEPHONE COMPANY OF FLORIDA CONCERNING INTERCONNECTION RATES, TERMS, AND CONDITIONS, PURSUANT TO THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

AGENDA: AUGUST 5, 1997 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - POST-HEARING DECISION - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\961230RC.MCB

CASE BACKGROUND

On May 6, 1996, MCI Telecommunications Corporation, individually and on behalf of its affiliates, including MCImetro Access Transmission Services, Inc. (collectively, MCI), formally requested negotiations with United Telephone Company of Florida and Central Telephone Company of Florida (collectively, Sprint), under Section 252 of the Telecommunications Act of 1996 (the Act). On October 11, 1996, MCI filed with the Commission a Petition for Arbitration Under the Telecommunications Act of 1996. Docket No. 961230-TP was established to address MCI's petition. The Commission conducted an evidentiary hearing in the case on December 18, 1996, and issued Order No. PSC-97-0294-FOF-TP on March 14, 1997, resolving the arbitration issues presented.

On March 31, 1997, Sprint filed a Motion for Reconsideration and/or Clarification of Order No. PSC-97-0294-FOF-TP and Motion for Stay. MCI filed a Response to Sprint's Motion for Reconsideration and Sprint's Motion for Stay on April 7, 1997.[1] This recommendation addresses Sprint's motion.

ISSUE 1: Should the Commission grant Sprint's Motion for Reconsideration?

RECOMMENDATION: No. The Commission should deny Sprint's Motion for Reconsideration. The motion fails to present any point of fact or law that the Commission overlooked or failed to consider when it made its decision in the first instance. (BROWN, NORTON, GREER)

STAFF ANALYSIS: The standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which this Commission failed to consider in rendering its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 Fla. 1st DCA 1981). A motion for reconsideration must present to the Commission some such point by reason of which its decision is necessarily erroneous. Atlantic Coast Line R. Co. v. City of Lakeland, 115 So. 669, 680. 1927); Mann v. Etchells, 182 So. 198, 201 (Fla. 1938); Hollywood, Inc. v. Clark, 15 So.2d 175, 180 (Fla. 1943). A motion for reconsideration is not a medium by which a party may simply advise the Commission of its disagreement with the decision, present additional arguments on matters fully addressed, reargue matters presented in briefs and in oral argument, or ask the Commission to change its mind as to a matter that has already received its careful attention. Sherwood v. State, 111 So.2d 96,

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[1] On April 14, 1997 Sprint-Florida and MCI filed their signed arbitration agreement reflecting the Commission's arbitration decision addressing all of the unresolved issues except the ones addressed in Sprint's Motion for Reconsideration. The Commission approved their agreement on May 29, 1997 in Order No. PSC-97-0565-FOF-TP. In that order the Commission also determined that Sprint's Motion for Stay was moot.

97-98 (Fla. 3d DCA 1959) (quoting State ex rel Jaytex Realty Co. v. Green, 105 So.2d 817, 818-19 (Fla. 1st DCA 1958)).

In its Motion for Reconsideration and/or Clarification, Sprint asks the Commission to reconsider its decisions regarding resale of voice mail service; the use of TSLRIC for costing purposes; the preclusion of recovery of common costs; the requirement that Sprint provide cost studies for every end office to cost local call termination; and the requirement that Sprint include switching features in its unbundled switching price. In its Response to Sprint's Motion for Reconsideration, MCI urges the Commission to deny the motion on all points except deaveraging of unbundled local loop costs. Staff has reviewed the record of the proceeding and recommends that Sprint has not satisfied the standard of review for reconsideration of any matter addressed in its motion. Staff does recommend, however that the Commission should clarify its Order regarding Sprint's obligation to provide cost studies for end offices to cost local call termination. That recommendation will be addressed in Issue 2.

Voice Mail

As it did at the hearing in this case, and in its post-hearing brief, Sprint argues that it is not required to make voice mail service available for resale under the provisions of Section 251(c)(4) of the Act, because voice mail is not "telecommunications" and thus the provision of voice mail service is not a "telecommunications service" that must be resold. Sprint argues again that voice mail is a "store and forward" technology not a "transmission" technology, as required by the Act's definition of "telecommunications". In its motion, Sprint adds the argument that the Commission overlooked the definition of voice mail as "telemessaging" in Section 260(c) of the Act, and claims that the Section 260(c) categorization of voice mail as "telemessaging" shows that;

> . . . the Act, in fact, has adopted and reaffirmed the FCC's classification of voice mail as an 'enhanced' service or an 'information' service. If voice mail were a 'telecommunications service', there would be no reason to define 'telemessaging service' to mean 'voice mail' . Sprint Motion, p. 3.

MCI responds that Sprint has not provided a proper basis for the Commission to reconsider its decision on the resale of voice mail service. MCI argues that Sprint is simply reasserting the

position it argued at the hearing and in its posthearing statement that voice mail is not "telecommunications" or a "telecommunications service" that is available for resale.

With respect to Sprint's new argument that Section 260(c) of the Act shows that voice mail is not a telecommunications service, MCI contends that nothing in that section of the Act suggests that voice mail is anything other than a "telecommunications service" for purposes of resale under Section 252. MCI states that Section 260 does not alter or override the Act's operative definitions of telecommunications and telecommunications service.

> 'Telecommunications' . . . is 'the transmission , between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.' 47 U.S.C. 153(48) Since voice mail is information of the sender's choosing which is transmitted between or among points specified by the user without change in form or content of the information as sent or received, it fits squarely within the definition of 'telecommunications service'.

MCI explains that the purpose of Section 260 of the Act is to establish nondiscrimination safeguards to protect other providers of telemessaging services from potential anticompetitive behavior, and it does not act as a limitation on the definition of "telecommunications" or "telecommunications service" under the resale provisions of Section 252.

Staff recommends that in Order No. PSC-97-0294-FOF-TP the Commission fully considered and fully addressed Sprint's main argument that voice mail is not a telecommunications service to be resold under the provisions of Section 252 of the Act. Sprint's additional argument that the characterization of voice mail as "telemessaging" in Section 260(c) proves that the Act adopts the FCC's earlier characterization of voice mail as an "enhanced service" and not a "telecommunications" service is simply a new argument on an old theme that the Commission considered before. It does not present a mistake of law on which the Commission should base a decision to reconsider its initial decision on the matter.

Furthermore, Staff does not agree with Sprint's analysis of the effect of Section 260. As MCI explained in its response, Section 260 addresses the establishment of nondiscrimination safeguards to protect other providers of telemessaging services from anticompetitive behavior by incumbent telecommunications

providers. Its characterization of telemessaging to include voice mail is expressly limited to the provisions of that section, and it does not preclude the characterization of voice mail also as "telecommunications". Section 260 does not address the provision of telecommunications services for resale under Section 252, and it does not establish the fact that the FCC has determined that voice mail service is not to be considered a telecommunications service available for resale under the Act. In fact, in its First Report and Order 96-325, issued August 8, 1996, the FCC specifically stated that it would leave the determination of what services should be available for resale to the states. In that Order the FCC said the following;

> . . . . MCI argues that we should explicitly identify the following as telecommunications services that must be made available for resale: measured-rate business, flat-rate business, measured-rate residential, flat-rate residential; custom calling features (including all CLASS services); call blocking services; voice Messaging; Integrated Services Digital Network (ISDN), Basic Rate Interface(BRI), and Primary Rate Interface(PRI); flat-rate and measured trunk services(including all types of PBX trunks); Automatic Number Identification (ANI) over T-1; data services; promotions, optional calling plans, special pricing plans; calling card, directory services; operator services. . . .
>
> Incumbent LECs on the other hand, argue for a much more limited set of services, primarily those generally thought of as basic telephone services. . .
>
> We conclude that an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a "telecommunications service;" and (2) is provided at retail to subscribers who are not "telecommunications carriers." We thus find no statutory basis for limiting the resale duty to basic telephone services, as some suggest.
>
> We need not prescribe a minimum list of services that are subject to the resale requirement. State commissions, incumbent LEC's, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining the LEC's retail tariffs. . . . Order 96-325, pps.435-438.

In its Arbitration Order in this proceeding, the Commission fully considered whether voice mail was "telecommunications" and whether the provision of it was a "telecommunications service" pursuant to the provisions of Section 252 of the Act. Sprint has not shown that the Commission overlooked or failed to consider a fact or point of law in its determination that voice mail was a service that Sprint was obligated to offer for resale under the Act. Therefore staff recommends that the Commission deny reconsideration of this matter.

TSLRIC vs. TELRIC

Sprint claims in its motion that the Commission improperly required the use of TSLRIC as the costing methodology for interconnection and unbundled network elements when there was no record evidence that either MCI or Sprint requested or supported TSLRIC for that purpose. Sprint argues that the Commission's authority under the arbitration provisions of the Act and under Florida arbitration law was limited to the issues submitted by the parties. Sprint also argues that no evidence was presented at the hearing that TSLRIC is the appropriate cost methodology, and therefore there is no record basis for the Commission's use of TSLRIC. Sprint claims that both parties relied upon and supported the TELRIC methodology for the costs presented.

Sprint also complains that the Commission's decision to use TSLRIC costing methods led it to the burdensome decision to require Sprint to conduct "extensive, new TSLRIC studies for unbundled loops", rather than the proxy models both parties used during the proceeding. Sprint requests that the Commission reconsider its decision on TSLRIC and determine that a TELRIC- based unbundled loop study using Sprint's proxy is appropriate.

Sprint suggests that if the Commission does not reconsider its TSLRIC decision, it should at least allow Sprint an extension of time to complete the unbundled loop studies. Sprint asks for a minimum of six months from the date of the Order on Reconsideration to submit the studies. Sprint also states that it will need additional time to file TSLRIC estimates for loop distribution. Sprint asks that it be granted an extension of time to prepare those studies to 60 days after MCI furnishes Sprint with forecasts of loop distribution demand and locations where loop distribution will be ordered.

Sprint also asks the Commission to reconsider or clarify its order so that Sprint may use TELRIC and its proxy studies to develop deaveraged unbundled loop costs, and if not, Sprint asks

for an extension of time of at least six months from the issuance of the Order on Reconsideration to submit deaveraged unbundled loop costs. Sprint's request for an extension of time to file its cost studies will be addressed in Issue 3.

MCI opposes reconsideration of the Commission's TSLRIC vs. TELRIC decision and any extension of time to file cost studies upon which permanent rates may be set. MCI states that even though Sprint and MCI supported TELRIC at the hearing, Sprint has raised no point of fact or law that would require the Commission to reconsider its choice.

MCI does agree with Sprint that the record supports the use of deaveraged prices for unbundled local loops. MCI claims that there is no record support for imposing an averaged unbundled loop rate even on an interim basis. MCI suggests that the cost studies submitted in the record of the proceeding could provide the basis for the Commission to construct deaveraged interim prices pending Sprint's submittal of required TSLRIC cost studies.

Staff recommends that Sprint has not provided any grounds at all that comply with the standard for reconsideration to support its request that the Commission reconsider its decision to apply a TSLRIC methodology to set prices for unbundled elements. The Commission fully addressed the question of which methodology to use to price unbundled elements. It reviewed the parties' proposals extensively, and rejected them. It explained in detail why it preferred the TSLRIC methodology over the methodologies the parties proposed. It devoted an entire section, 12 pages in all, to an analysis of those issues. See Order No. PSC-97-0294-FOF-TP, pps. 11-23.

Sprint disagrees with the Commission's decision, but it has not shown that the Commission made any mistake of fact or law that would cause the Commission to reconsider that decision.
As previously stated, a motion for reconsideration is not a medium by which a party may simply advise the Commission of its disagreement with the decision, present additional arguments on matters fully addressed, reargue matters presented in briefs and in oral argument, or ask the Commission to change its mind as to a matter that has already received its careful attention. Sherwood v. State, 111 So.2d 96, 97-98 (Fla. 3d DCA 1959) (quoting State ex rel Jaytex Realty Co. v. Green, 105 So.2d 817, 818-19 (Fla. 1st DCA 1958)). Therefore, staff recommends that the Commission deny reconsideration of this matter.

Common Costs

Sprint claims that the Commission's decision to offset an alleged overstatement of its annual charge factors in its TELRIC estimates against the recovery of common costs that it requested is not based on competent substantial evidence in the record and is therefore arbitrary and capricious. Sprint requests that the Commission reconsider its decision and permit Sprint to increase the costs of its unbundled elements by 14.58%.

MCI responds that Sprint offers no proper basis for its request that the Commission reconsider its decision regarding common costs. MCI claims that Sprint is simply requesting that it be permitted to increase the costs of its unbundled elements by 14.58% just as it did in the hearing and in its posthearing statement. MCI argues that the record supports the Commission's finding that the 14.58% common cost factor proposed by Sprint was overstated. MCI also argues that Sprint has not shown any point of fact or law that the Commission overlooked or failed to consider when it made its determination that Sprint's common costs were offset by the annual charge factor, and therefore reconsideration should be denied.

Again, staff recommends that Sprint has not provided any grounds to support its request that the Commission reconsider its decision to deny Sprint recovery of its common costs in the price of unbundled elements. The Commission specifically found that Sprint's annual charge factors were overstated, and determined that those charge factors were sufficient to obviate the need for additional common costs in the calculation of rates for unbundled elements. See Order No. PSC-97-0294-FOF-TP, p. 21. Sprint may disagree with the Commission's decision; Sprint may criticize the decision and the reasoning on which it was based; but Sprint has not shown any mistake of fact or law that would cause the Commission to reconsider that decision. Therefore, staff recommends that the Commission should deny reconsideration on this matter.

Inclusion of switching features in unbundled local switching price

Sprint claims that the Commission has misinterpreted the Act in requiring Sprint to include switching features, such as call waiting, Call Id, and Centrex, in its local switching price. Sprint states that the Commission's erroneous conclusion requires Sprint to price unbundled local switching at a level that is below the cost of providing those features. Sprint claims that the Act does not require that switching features must be incorporated into

the unbundled switching rate. Sprint claims that switching features may also be unbundled and offered separately. Since Sprint did not include the costs of the switching features, Sprint argues that the switching price the Commission set does not cover the total cost. Sprint states; "If the Commission does not grant Sprint's request for reconsideration of the Commission's erroneous legal interpretation, the Commission must allow Sprint to submit a revised unbundled switching rate that covers all of the costs."

MCI responds that the Commission properly determined that the Act requires the unbundled switching rate to include the vertical features of the switch. MCI states that the decision is consistent with the FCC's interpretation of the Act's definition of network element. MCI cites the FCC's First Report and Order, August 8, 1996 par. 412, where the FCC said;

> The 1996 Act defines network element as 'a facility or equipment used in the provision of a telecommunication service' and 'the features, functions, and capabilities that are provided by means of such facility or equipment.' Vertical switching features, such as call waiting, are provided through the hardware and software comprising the 'facility' that is the switch, and thus are 'features' and 'functions' of the switch. . . . Therefore, we find that vertical switching features are part of the unbundled local switching element.

MCI states that the Commission considered Sprint's suggestion that an additional 22% of retail rates should be added to unbundled switching rate to cover vertical features, but the Commission rejected Sprint's proposal. Therefore, MCI argues, Sprint has not presented any point of fact or law that the Commission failed to consider in its initial decision.

Staff recommends that Sprint has not presented sufficient grounds for the Commission to reconsider its decision to include vertical features of the switch in the price for unbundled switching. The Commission considered this question specifically in Order No. PSC-97-0294-FOF-TP at page 22, where it said;

> Sprint has also proposed that switching features such as Caller Id, Call Waiting, and Centrex, normally included in unbundled local switching, be priced separately at 22% of retail rates. We disagree with this

> approach and find that no separate prices shall be approved for switching features. Rather, the features shall be incorporated into the unbundled switching rate itself, as required by the Act.

Sprint may disagree with the Commission's interpretation of the Act, but as previously stated, disagreement with the decision does not meet the standard for reconsideration. Therefore, staff recommends that the Commission should deny Sprint's motion for reconsideration of this matter.

ISSUE 2: Should the Commission grant Sprint's Motion for Clarification regarding Sprint's obligation under the call-termination section of Order No. PSC-97-0294-FOF-TP to provide cost studies for every end office for which Sprint has not already provided studies and grant Sprint an extension of time to file those studies?

RECOMMENDATION: Yes. The Commission should clarify Order No. PSC-97-0294-FOF-TP to explain that under the call-termination section of Order No. PSC-97-0294-FOF-TP Sprint is not required to provide studies for every end office for which Sprint has not already provided studies. Sprint should conduct studies to the extent necessary to identify the appropriate zone for each central office.

STAFF ANALYSIS: In its motion Sprint asks the Commission to clarify the language of its decision on page 6 of Order No. PSC-97-0294-FOF-TP to indicate that Sprint is not required to study each and every end office switch for purposes of costing call termination. Sprint claims that costing procedures consistently and effectively rely on sampling as an effective costing technique rather than studying the entire universe. Sprint suggests that the Commission did not intend to impose such a burdensome requirement on it.

MCI agrees with Sprint's request to the extent that it would not be appropriate to include outdated technology in a forward-looking costing methodology.

Staff believes that it is appropriate to clarify the Commission's directive on page 6 to explain that Sprint need not file cost studies for every end office switch. As the Commission pointed out, Sprint did not provide the information necessary to determine the appropriate zones for its remaining end offices for purposes of call termination. The Commission did not intend to impose any additional burdensome requirement on the company. Therefore staff recommends that the Commission should direct Sprint to conduct studies only to the extent necessary to identify the appropriate zone for each central office. This requirement essentially will complete the schedule that was filed with the Commission and identified at the hearing as Exhibit 21, p. 80 of 122.

ISSUE 3: Should the Commission grant Sprint an extension of time to file the cost studies required by Order No. PSC-97-0294?

RECOMMENDATION: Yes. The Commission should grant Sprint an extension of time of 120 days from the date that the Order on Reconsideration is issued to file the cost studies required by Order No. PSC-97-0294 as clarified.

STAFF ANALYSIS: Considering the fact that the Commission's calendar is very full, staff believes that the Commission will not be able to review Sprint's cost studies until the 1st quarter of 1998. Therefore, it is reasonable to allow Sprint an additional 120 days to prepare and file the studies.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending review of the cost studies Sprint is required to provide under the terms of Order No. PSC-97-0294-FOF-TP.

STAFF ANALYSIS: Order No. PSC-97-0294-FOF-TP required Sprint to submit cost studies for the Commission's review in setting permanent interconnection and resale rates. This docket should remain open pending the submission and review of those cost studies.