

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

DECEMBER 13, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (O'PRY, NORTON, SHELFER)
DIVISION OF LEGAL SERVICES (ELIAS, CANZANO, HATCH) *FR*

RE: DOCKET NO. 920260-TL - COMPREHENSIVE REVIEW OF THE
REVENUE REQUIREMENTS AND RATE STABILIZATION PLAN OF
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY *RUE*

AGENDA: DECEMBER 19, 1995 - REGULAR AGENDA - POST HEARING
DECISION - PARTIES MAY NOT PARTICIPATE

CRITICAL DATES: ORDER REQUIRES ECS IMPLEMENTATION ON JANUARY
1, 1996

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\920260C.RCM

CASE BACKGROUND

This docket was initiated pursuant to Order No. 25552 to conduct a full revenue requirements analysis and to evaluate the Rate Stabilization Plan under which BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company (BellSouth, Southern Bell or the Company) had been operating since 1988. Hearings were rescheduled several times in an effort to address all of the concerns and issues that arose with the five consolidated proceedings over the ensuing two and a half years.

On January 5, 1994, a Stipulation and Agreement Between Office of Public Counsel (OPC) and Southern Bell was submitted. On January 12, 1994, Southern Bell filed an Implementation Agreement for Portions of the Unspecified Rate Reductions in Stipulation and Agreement Between OPC and Southern Bell. Other parties filed motions in support of the Stipulation and Implementation Agreement. The Commission voted to approve the terms of the settlement at the January 18, 1994 agenda conference. See Order No. PSC-94-0172-FOF-TL. The terms require, among other things, that rate reductions be made to certain Southern Bell services. Some of the reductions

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have already been implemented. Other reductions are scheduled to occur according to the following time table:

7/1/94	* Switched access reductions - \$50 million, (completed)
	* - \$10 million (specified below) - Reduced mobile interconnection usage rates - Eliminated Billed Number Screening charge - Reduced DID trunk termination rates
10/1/95	* Switched access reductions - \$55 million * <u>Unspecified rate reductions - \$25 million</u>
10/1/96	* Switched access reductions - \$35 million * Unspecified rate reductions - \$48 million

According to the terms of the Stipulation and Implementation Agreement, approximately four months before the scheduled effective dates of the unspecified rate reductions, Southern Bell will file its proposals for the required revenue reductions. Interested parties may also file proposals at that time. Parties who have already received or are scheduled to receive rate reductions for the services to which they subscribe, are generally precluded from taking positions that would benefit themselves.

On May 15, 1995, Southern Bell filed a tariff proposal to introduce Expanded Calling Service (ECS) to satisfy the unspecified 1995 outstanding \$25 million revenue reduction in accordance with the Stipulation. CWA and McCaw also filed proposals.

A hearing was held on July 31, 1995 to consider how best to implement the \$25 million revenue reduction. Order No. PSC-95-1391-FOF-TL issued November 8, 1995 approved Southern Bell's Extended Calling Service plan detailed in its May 15, 1995 filing, as supplemented by the additional 36 one-way routes, to become effective January 1, 1996.

On November 15, 1995, BellSouth filed a Motion for Modification of Order No. PSC-95-1391-FOF-TL. The motion seeks to advance the implementation date for the approved ECS routes from January 1, 1996, to December 18, 1995. The motion states that "... (t)he order's implementation should be modified because it will constitute a hardship for BellSouth's customers, as well as BellSouth to meet the January 1, 1996 implementation date."

On November 27, 1995, the Florida Interexchange Carriers Association (FIXCA) filed a response to Southern Bell's Motion for Modification. In the response, FIXCA advises that it would file a Notice of Appeal and Motion for Stay of Order No. PSC-95-1391-FOF-TL. FIXCA states: "The Commission should not consider Southern Bell's Motion for Modification, and certainly should not move the ECS implementation date forward, until it rules on FIXCA's Motion for Stay." On November 28, 1995, FIXCA filed a Notice of Appeal and Motion for Stay of Order No. PSC-95-1391-FOF-TL. On November 30, 1995, MCI Telecommunications Corporation (MCI) joined in the Motion for Stay. On December 4, 1995, BellSouth filed a Memorandum in Opposition to FIXCA's Motion to Stay.

The two requests are, in substance, mutually exclusive. This recommendation addresses FIXCA's Motion for Stay and Southern Bell's Motion for Modification for Order No. PSC-95-1391-FOF-TL.

DISCUSSION OF ISSUES

ISSUE 1: Should the Florida Interexchange Carriers Association's Motion for Stay of Order No. PSC-95-1391-FOF-TL be granted?

PRIMARY

RECOMMENDATION: No. Staff believes that, based on the application of Rule 25-22.061(2), Florida Administrative Code, the Motion for Stay should be denied.

ALTERNATIVE

RECOMMENDATION: Yes. Staff agrees with the analysis of the factors set forth above in the primary recommendation regarding the likelihood of success on appeal, irreparable harm and the harm to the public interest. However, based on the Florida Supreme Court's decision reversing the Commission's denial of a stay of the Commission's intraLATA presubscription decision, staff recommends that a stay be granted.

PRIMARY

STAFF ANALYSIS: Rule 25-22.061(2), Florida Administrative Code, states that the Commission may, among other things, consider three factors in determining whether to grant a stay of a final order pending judicial review:

- (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.

A. Whether the petitioner is likely to prevail on appeal

FIXCA believes that the Commission "has clearly erred in its interpretation of the new law." The motion on page 3 states "...though FIXCA believes the new law applies to this case, regardless of which law applies, ECS is a non-basic service." FIXCA points out that upon election of price cap regulation, all local exchange company (LEC) services become either basic or non-basic services. FIXCA argues that ECS does not fall into the category of basic service as defined by Section 364.02(2), Florida Statutes, and therefore, is a non-basic service upon election of price cap regulation, regardless of which law applies.

FIXCA also states that the Commission's decision in this case turns on its interpretation of the new telecommunications law. FIXCA states that the Court's review of the Commission's decision will be governed by Section 120.68(9), Florida Statutes, which provides that

If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

- (a) Set aside or modify the agency action, or
- (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

FIXCA argues that the Commission's interpretation of the new law is clearly erroneous and subject to reversal by the Court. First, FIXCA contends that the Commission erred when it found that the prior telecommunications law applies to Southern Bell's ECS proposal, stating that the savings clause could not be clearer on this point. Second, FIXCA asserts that the Commission's interpretation that ECS is a basic service is directly contrary to the statute's plain language. Third, FIXCA argues that the Commission's analysis of the new law and classification of ECS as

basic service led it to ignore the imputation mandate of Section 364.051(6)(c), Florida Statutes.

FIXCA contends that the Commission has failed to ensure that competition will continue on the ECS routes. FIXCA states that rather than moving forward to a more competitive telecommunications environment, the Commission Order moves backwards by taking a market that is competitive today and remonopolizing it for the future. FIXCA notes that it never has objected to Southern Bell's ECS proposal. Rather, its position is that the Commission must put resale and interconnection rates in place to comply with the statute's imputation requirements so that competition will continue on these routes.

Southern Bell responds that FIXCA's motion should be denied because it has failed entirely to establish any one of the prerequisites to the granting of a motion for stay. Further, Southern Bell contends that FIXCA's motion reveals that it is attempting to obtain a stay, not just to delay the implementation of Southern Bell's ECS plan, but to prevent implementation of the plan altogether. Specifically, FIXCA asserts that the Commission should stay implementation of the ECS plan and substitute for it the refund mechanism FIXCA advocated at the hearing, and which the Commission rejected.

Southern Bell states that as legal support for its contention that it is likely to prevail upon appeal, FIXCA cites to nothing more than a string of general authority that a court will reverse an agency's interpretation of law when it is wrong. Southern Bell asserts that FIXCA neglects to even mention the pertinent principles of statutory construction or the standard of review that applies to the Commission's application of these principles. Southern Bell notes that a final order of this Commission reaches the appellate court "clothed with a presumption of correctness and will not be disturbed in the absence of a positive showing that it is erroneous as a matter of law or constitutes an abuse of discretion." Clayton v. Clayton, 275 So. 2d 588, 589 (Fla. 1st DCA 1973).

In its motion Southern Bell analyzes in detail the legal points raised by FIXCA. Southern Bell concludes that FIXCA has done nothing more than disagree with the Commission's holding without setting forth any legal basis to support its notion that the Order is in error.

Staff believes that the Commission has correctly interpreted its authority pursuant to Chapter 95-403, Laws of Florida. Further, staff notes that the Commission took the rather unusual step of requiring the parties to brief the impact of the new law before it considered the appropriate disposition of the \$25 million rate reduction. Accordingly, it does not appear that FIXCA 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

FIXCA states that its members are interexchange carriers who currently provide service on some or all of the routes approved for ECS. FIXCA states that currently these are extremely competitive toll routes and that FIXCA members have worked hard to bring the level of competition which exists today to those routes. FIXCA argues that with implementation of ECS, interexchange carrier (IXC) competition will vanish for two reasons. First, while the ECS calls will be dialed on a 7 (intra NPA) or 10 (inter NPA) digit basis, FIXCA asserts that customers of its member IXCs will have to dial at least 11 digits to place the same call. Second, FIXCA states that IXCs cannot begin to match the rate offered by Southern Bell on those routes because Southern Bell rates do not even cover the access charges that IXCs will have to pay Southern Bell for carrying the same traffic. Therefore, FIXCA concludes, its members who have devoted resources to developing customer relationships on these routes will be shut out of the market and thus irreparably harmed. FIXCA further states that once the ECS plan is put in place:

even if the Court later reverses the Commission's decision, carriers who must leave the market as a result of the Commission's decision will have a difficult time returning to the position they were in prior to ECS implementation. Such harm cannot be remedied prospectively. (Motion, page 13)

Southern Bell responds that FIXCA has provided no factual support for the contention that it will suffer irreparable harm in the absence of a stay. FIXCA's support for the contention that implementation of Southern Bell's ECS plan will result in the eradication of competition on the affected routes relates primarily to dialing patterns and the charges that its members pay for access. Southern Bell states that FIXCA offers nothing to demonstrate that the Commission's finding that there is no cognizable argument that this plan would, as a matter of law,

remonopolize the intraLATA (local access and transport area) toll market is unsupported by substantial competent evidence or otherwise an abuse of discretion.

Southern Bell contends that instead, FIXCA simply takes as a given that Southern Bell's ECS plan will necessarily result in competitive damage to FIXCA's members and then leaps to the conclusion that any damage that might occur would be irreparable. FIXCA provides no factual or legal support whatsoever for its contention that its members will be driven from the market by the implementation of ECS or that they could not reenter the market at some subsequent time. Thus, Southern Bell contends that while FIXCA has alleged irreparable harm, it has failed utterly to establish this necessary element.

Staff notes that the Commission heard extensive testimony and considered extensive arguments concerning the competitive implications of Southern Bell's ECS proposal. Competing IXCs are permitted, as the Commission expressly stated, to continue to carry this traffic. Further, a dialing disparity, as complained of in FIXCA's motion, exists today on intraLATA toll routes, until such time as the Court lifts its stay of the Commission's order in Docket No. 930330-TP.

C. Whether the delay will cause substantial harm or be contrary to the public interest

FIXCA asserts that if the Commission stays its Order, customers will continue to enjoy the benefits of competition, as they do today. FIXCA also states:

During the pendency of the stay, the ratepayers will not be harmed in any way because they will receive the benefit of the Southern Bell settlement via a refund of the \$25 million as a credit to their bills as expressly provided for in the settlement.

FIXCA states that a stay will avoid customer confusion in the event the Commission's decision is reversed. If the decision is stayed, the status quo will be maintained, and Southern Bell's customers will continue to receive a refund on their bills.

FIXCA also notes that this is the Commission's first interpretation of the new telecommunications statutes in several respects: the first interpretation related to the savings clause; one of the first interpretations as to the application of the new

law in a particular situation; and the first interpretation as to the appropriate classification of a particular service as basic or non-basic. FIXCA states:

These are extremely important decisions affecting the substantial interests of many parties and upon which there is vast difference of opinion. Before implementation, the Commission would do well to await the Court's decision on whether it has appropriately interpreted the statute.

BellSouth responds on pages 8 and 9 of its motion that

FIXCA's motion should be summarily rejected because it is directly in conflict with the public interest. In both the testimony offered at the hearing, and later in its Brief, FIXCA contended that the Commission should reject BellSouth's ECS plan and, instead, require BellSouth to refund the \$25 million by way of a credit on customers' bills. The Commission, of course, rejected FIXCA's position along with all of the other proposals other than BellSouth's. In doing so, this Commission specifically stated that 'we believe that it is in the public interest to approve BellSouth's ECS plan. All residential and business customers making calls on the ECS routes will benefit by approximately \$48 million annually (unstimulated) from the approval.' (Order, p. 15)

Staff believes that the Commission's decision that Southern Bell's ECS plan is in the public interest was appropriate. Although FIXCA is correct that the \$25 million rate reduction will continue to benefit customers via the credit if the Commission chooses to stay its Order, this amount is approximately half the benefit of the \$48 million (unstimulated) rate reduction associated with implementation of the ECS plan.

Staff also notes that competitive concerns formed the basis of two Commissioners' dissent from the majority decision to approve the ECS proposal. However, on balance, staff believes that FIXCA has not demonstrated that a stay of the Commission's Order is appropriate. Therefore, staff recommends that FIXCA's Motion for Stay of Order No. PSC-95-1391-FOF-TL be denied.

ALTERNATIVE

STAFF ANALYSIS: Staff agrees with the analysis of the factors set forth above in the primary recommendation regarding the likelihood of success on appeal, irreparable harm and the harm to the public interest. However, based on the Florida Supreme Court's decision reversing the Commission's denial of a stay of the Commission's intraLATA presubscription decision, staff recommends that a stay be granted.

In the intraLATA presubscription proceeding in Docket 930330-TP, the Commission determined that intraLATA 1+ presubscription was in the public interest and directed the LECs to begin implementation of intraLATA presubscription pursuant to a schedule set forth in Order No. PSC-95-0203-FOF-TP. Motions for reconsideration were filed by Southern Bell and GTEFL. During the pendency of the motions for reconsideration, GTEFL filed a motion asking the Commission to stay Order No. PSC-95-0203-FOF-TP, pending appeal or the conclusion of the ongoing state and federal efforts to reform telecommunications regulation. The arguments rejected by the Commission are summarized as follows:

- 1) GTEFL will prevail on appeal because the Order [No. 95-0203] lacks a sufficient evidentiary basis and is contrary to law;
- 2) GTEFL will suffer irreparable harm because it will lose 35% - 40% of its market share based on price parity with IXCs and its ROE will decline 110 basis points to 9.22%;
- 3) Harm to the public interest from delay of intraLATA presubscription will be inconsequential; this is demonstrated by the fact that the small LECs received a delay in implementation of two years;
- 4) Stay is required until Court can resolve the constitutional questions raised; and
- 5) Stay should be granted pending GTEFL's request for relief from its consent decree.

The Commission denied the request on the basis that GTEFL had failed to show that the Company would likely prevail on appeal, would suffer irreparable harm, or that a stay would not be contrary to the public interest. The Commission further determined that a stay for either the constitutional questions or pending federal developments was inappropriate. See Order No. PSC-95-0918-FOF-TP.

GTEFL, in conjunction with its notice of appeal, filed a motion in the Florida Supreme Court seeking a review of the Commission's denial of the stay and asking the Court to impose the stay. Southern Bell joined in the notice of appeal and the motion for the stay. GTEFL's arguments to the Court are summarized as follows:

- 1) GTEFL will win on appeal because there is no legal foundation for the Commission's decision, particularly in light of the changes brought by the new telecommunications statute and the introduction of price caps;
- 2) GTEFL will lose 35% to 87% of its market share based on price parity with IXCs or volume discounts, respectively; revenue losses may be up to \$48.3; and ROE will fall potentially to 7.3%;
- 3) The above losses are irremediable;
- 4) Once lost, market share is extremely difficult to get back;
- 5) The Commission has artificially created a market structure in which GTEFL is powerless to respond to competition from intraLATA 1+ presubscription;
- 6) GTEFL does not oppose competition but when market disadvantages are externally imposed by law or regulation, fair and open competition is impossible;
- 7) It is arbitrary and capricious to expect GTE to suffer losses that have nothing to do with its skill in the marketplace; and
- 8) The harm to the public from granting a stay will be inconsequential.

The Court granted GTEFL's request for a stay and has stayed both the Commission's orders and the appellate proceedings. The stay was expressly tied to pending action in the federal court to lift the interLATA prohibition. It is essential to note that the interLATA prohibition is the linchpin of GTEFL's appeal. The interLATA prohibition is the sole source of all the allegations that the effect of the Commission's intraLATA decision is anticompetitive. The interLATA prohibition is ultimately the sole basis of GTEFL's appeal. As GTEFL itself stated to the Court,

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"When the decree restriction falls, GTE will withdraw its appeal of the PSC's presubscription decisions before this Court."

The significance of GTEFL's arguments discussed above to the instant case is that the arguments in both cases supporting the issuance of a stay are virtually identical. The central component of FIXCA's request for a stay in the instant case is the anticompetitive effect of endorsing a price structure for intraLATA calls within Southern Bell's territory. The price for ECS calls, either business or residential, is below the relevant switched access charges. FIXCA argues that there will be irreparable harm from being unable to compete on the ECS routes because the switched access charges that IXCs must pay Southern Bell are higher than the ECS rates that endusers will enjoy. FIXCA's argument is at its core identical with the argument that GTEFL successfully made to the Court and which apparently persuaded the Court to grant the stay.

The Court's initial order granting the stay stated that proceedings are "stayed pending the disposition of the case pending in the United States District Court for the District of Columbia." The order contains no substantive discussion, only a short statement of the result. However, it is clear that the Court tied the stay to the interLATA prohibition. To reach such a result, it appears clear that the Court found some merit in GTEFL's argument. Since the Court's granted GTEFL's request for stay and the issues in the instant case are virtually identical, staff recommends that the Commission grant the stay.

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ISSUE 2: Should BellSouth's Motion for Modification of Order No. PSC-95-1391-FOF-TL be granted?

RECOMMENDATION: If the Commission approves staff's alternative recommendation in Issue 1 and grants FIXCA's Motion for Stay, this issue is rendered moot. If, however, the Commission approves staff's primary recommendation and denies FIXCA's Motion for Stay, Southern Bell's Motion for modification should be granted; however, the implementation date should be changed to January 15, 1996. The customer credit required by Order No. PSC-95-1391-FOF-TL should be extended to January 15, 1996.

STAFF ANALYSIS: If the Commission approves staff's alternative recommendation in Issue 1 and grants FIXCA's Motion for Stay, this issue is rendered moot. If, however, the Commission approves staff's primary recommendation and denies FIXCA's Motion for Stay, the staff analysis is set forth below.

By Order No. PSC-95-1391-FOF-TL issued November 8, 1995, the Commission approved Southern Bell's request to implement the Extended Calling Service (ECS) plan on 284 one-way routes, effective January 1, 1996. This petition seeks approval to place these rates in effect thirteen days earlier, on December 18, 1995. The Company's petition states the following reasons for requesting the earlier effective date:

- 1) to provide customers the benefits from ECS as soon as possible pursuant to the Stipulation;
- 2) to avoid any adverse effects on customer service, possible system outage and delays resulting from year end processing; and
- 3) to allow administrative and systems personnel sufficient time to make year-end reports required by this Commission, the Federal Communications Commission and the Securities and Exchange Commission.

With approval of the modified implementation date, the customer credit should be extended accordingly. (Order No. PSC-95-1391-FOF-TL, November 8, 1995 requires Southern Bell to issue a credit for the period October 1, 1995 through December 31, 1995 since the \$25 million rate reduction was not implemented on October 1, 1995). One of the reasons the Commission approved the January 1, 1996 implementation date was that on that date, alternative local exchange companies (ALECS) could be certificated and begin

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competing with local exchange companies (LECS). Delaying, rather than advancing the implementation to avoid potential problems associated with BellSouth's year-end activities is consistent with that purpose.

Staff believes the January 1, 1996 implementation date could cause potential problems, if the ECS conversion and the year-end activities are done simultaneously.

As stated above, FIXCA's Motion for Stay and BellSouth's Motion for Modification are, in substance, mutually exclusive. The timing of FIXCA's request, the due process requirement that all parties be provided a reasonable opportunity to respond to the Motion for Stay, and the appropriateness of considering both requests at the same time, made it impractical to consider BellSouth's Motion before the requested implementation date. Counsel for BellSouth has advised staff that January 15, 1996, is the best alternate date for implementation. Therefore, if the Motion for Stay is denied, staff believes Southern Bell's request is appropriate and should be approved.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to continue to implement the agreement approved by the Commission in Order No. PSC-94-0172-FOF-TL.

STAFF ANALYSIS: This docket should remain open to continue to implement the agreement approved in Order No. PSC-94-0172-FOF-TL.