

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth
Telecommunications, Inc. to
remove interLATA access subsidy
received by St. Joseph Telephone
& Telegraph Company.

DOCKET NO. 970808-TL
ORDER NO. PSC-98-1639-FOF-TL
ISSUED: December 7, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER ON MOTIONS FOR RECONSIDERATION
AND GRANTING STAY OF ORDER NO. PSC-98-1169-FOF-TL

BY THE COMMISSION:

CASE BACKGROUND

On July 1, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition to Remove InterLATA Access Subsidy received by St. Joseph Telephone and Telegraph Company, which is now GTC, Inc. d/b/a GT Com (GTC). On July 22, 1997, BellSouth filed a revised Petition. On August 11, 1997, GTC filed an Answer in opposition to BellSouth's revised Petition. By Order No. PSC-98-0639-PHO-TL, issued May 7, 1998, AT&T Communications of the Southern States, Inc.'s (AT&T) petition to intervene was granted.

A hearing was held in this Docket on May 20, 1998. By Order No. PSC-98-1169-FOF-TL, issued August 28, 1998, we rendered our decision on the issues addressed at hearing. By our Order, we determined that the interLATA access subsidy to GTC should be terminated, and that BellSouth should file a tariff to reflect a reduction in a specific rate to offset the terminated subsidy payment to GTC. On September 11, 1998, GTC filed a Motion for Reconsideration of our Order and a Motion for Stay of the Order.

DOCUMENT NUMBER-DATE

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FPC-RECORDS/REPORTING

On September 21, 1998, BellSouth filed its Response and Cross-Motion for Reconsideration and Motion to Hold the Subsidy Payments Subject to Refund. On September 23, 1998, AT&T filed its Response to GTC's Motion for Reconsideration and a Cross-Motion for Reconsideration. No responses to the Cross-Motions were filed. Our determination on the Motions for Reconsideration and the requests for stay are set forth herein.

REQUESTS FOR STAY

GTC argued that it is entitled to a stay of Order No. PSC-98-1169-FOF-TL pending the resolution of the motions for reconsideration and any subsequent appeal pursuant to Rule 25-22.061(1)(a), Florida Administrative Code. GTC stated that our Order is the equivalent of an access rate decrease for GTC to its interexchange carrier (IXC) customers, which will deprive GTC of \$1,223,000 a year. GTC indicated that it will post a bond during the effective period of the stay.

BellSouth argued that it should not be required to continue making subsidy payments to GTC. BellSouth asked that it be allowed to hold the subsidy payments subject to refund pending our decision on the motions for reconsideration and any subsequent judicial review. BellSouth also asked that we stay the provisions in the Order requiring it to file a tariff reducing a specific rate. BellSouth argued that this will protect the parties and the customers. Thus, BellSouth asked for a modification of the stay requested by GTC and that its Motion to Hold Subsidy Payments Subject to Refund be granted.

Rule 25-22.061(1)(a), Florida Administrative Code, states that

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

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Generally, a motion for stay under Rule 25-22.061, Florida Administrative Code, is filed and addressed after judicial review of our Order has actually been requested. See Order No. PSC-95-1590-FOF-EI, issued in Docket No. 950110-EI, on December 27, 1995. We do, however, acknowledge that it is likely an appeal will be filed in this case. We also note that unless Order No. PSC-98-1169-FOF-TL is stayed, the rate reduction and subsidy termination will become effective immediately. Practically speaking, if Order No. PSC-98-1169-FOF-TL is not stayed and is later rejected by the appellate court, in whole or in part, we would likely find it very difficult to make the parties whole again, particularly BellSouth. Therefore, we shall stay Order No. PSC-98-1169-FOF-TL in its entirety in order to maintain the status quo. Thus, we hereby grant GTC's Motion, and deny BellSouth's motion. BellSouth's suggested "modified" stay and Motion to Hold Subsidy Payment Subject to Refund does not maintain the status quo, because BellSouth would no longer be making the subsidy payment to GTC. The stay shall remain in effect pending the final outcome of judicial review, if any. If a Notice Of Appeal is not timely filed, Order No. PSC-98-1169-FOF-TL shall become effective the following day.

Upon consideration of the foregoing, GTC's Motion for Stay is granted, BellSouth's request for a modified stay is denied, and BellSouth's Motion to Hold Subsidy Payments Subject to Refund is denied. GTC shall hold the subsidy payments in an escrow account with interest applied in accordance with Rule 25-4.114(4), Florida Administrative Code, from the date of our November 17, 1998, decision. If no Notice Of Appeal is timely filed in response to this Order, Order No. PSC-98-1169-FOF-TL shall become effective the day after the date for filing a Notice of Appeal.

GTC'S MOTION FOR RECONSIDERATION

We have reviewed GTC's Motion for Reconsideration to determine whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111

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So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, we have considered that a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its Motion, GTC asked us to reconsider our decision in Order No. PSC-98-1169-FOF-TL, because our Order addresses the subject of Docket No. 980498-TP. GTC stated that on April 6, 1998, it filed a Petition to Terminate Access Subsidy and Convert to Payment of Access Charge Revenue Directly to GTC, Inc., Docket No. 980498-TP. GTC stated that at one point in this proceeding, Dockets Nos. 970808-TP and 980498-TP were consolidated for consideration by us. GTC explained that these dockets were, however, separated prior to hearing. GTC argued that our Order No. PSC-98-1169-FOF-TL nevertheless resolves the issues in Docket No. 970808-TL in a way that precludes GTC from being able to obtain relief in Docket No. 980498-TP.

GTC stated that Order No. PSC-98-1169-FOF-TL requires BellSouth to reduce a specific rate by \$1,223,000. GTC noted, however, that it has asserted in its Petition in Docket No. 980498-TP that BellSouth should make a \$1,223,000 reduction in access charges. GTC explained that once BellSouth has made this reduction in one rate, it cannot be required to make the same reduction to its access charges. GTC argued that we erred by not considering the existence of GTC's Petition in Docket No. 980498-TP in rendering Order No. PSC-98-1169-FOF-TL. GTC asserted, therefore, that it had been deprived of due process.

In its Response, BellSouth argued that our decision in Order No. PSC-98-1169-FOF-TL renders GTC's Petition in Docket No. 980498-TP moot. BellSouth noted that it filed its Petition to Remove InterLATA Access Subsidy Received by GTC on July 1, 1997. GTC did not file its petition in Docket No. 980498-TP until approximately ten months later, and only six weeks prior to the hearing in Docket No. 970808-TL. BellSouth stated that an issue was, however, identified in Docket No. 970808-TL regarding the disposition of funds if the subsidy was terminated. BellSouth asserted that GTC could have filed testimony in Docket No. 970808-TL regarding this

issue, rather than filing a separate petition. GTC did not, and the issue was decided. BellSouth argued that GTC failed to take advantage of the process for addressing this matter. Thus, BellSouth stated that GTC has not identified any basis for us to reconsider our Order on this point.

AT&T stated that GTC has not identified any mistake of fact or law made by us in rendering Order No. PSC-98-1169-FOF-TL. AT&T agreed that our decision does appear to have an impact on GTC's Petition in Docket No. 980498-TP, but stated that GTC had the opportunity to fully address the access charge issue in this Docket.

At pages 11-13 of Order No. PSC-98-1169-FOF-TL, we addressed staff witness Mailhot's suggested alternative that the subsidy payments be terminated, that GTC be allowed to increase its access charges, and that BellSouth be required to reduce its access charges by the amount of the subsidy. Witness Mailhot's proposal was nearly identical to GTC's proposal in its Petition in Docket No. 980498-TP. While GTC stated that it supported witness Mailhot's proposal in this case, GTC did not provide additional evidentiary support. Ultimately, we decided that there was not enough evidence in the record to support witness Mailhot's proposal. See Order at pp. 12-13. GTC has not identified any mistake of fact or law in our decision.

We note that Docket No. 980498-TP was not originally filed for consideration in conjunction with Docket No. 970808-TL, although the Dockets were briefly consolidated for consideration. The short period of time, however, between the filing of GTC's Petition in Docket No. 980498-TP and the prehearing in Docket No. 970808-TL required that Docket No. 980498-TP be removed from consideration in this proceeding to avoid a notice problem. We emphasize that we were not required to address GTC's Petition in Docket No. 980498-TP in the proceeding in this Docket. GTC's Petition was not an issue in this case. As for BellSouth's assertions that our decision in this Docket renders GTC's Petition moot, we shall not make a decision on the status of GTC's Petition in Docket No. 980498-TP in rendering our decision on the Motions for Reconsideration in this Docket. While the subject matter of GTC's Petition in Docket No. 980498-TP is similar to testimony presented in this Docket, GTC's Petition was not specifically addressed in this Docket. Any

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determination on the status of GTC's Petition in Docket No. 980498-TP shall be made in that Docket.

Upon consideration, GTC's Motion for Reconsideration is denied. GTC has not identified any mistake of fact or law that we made in rendering our decision in Order No. PSC-98-1169-FOF-TL.

BELLSOUTH'S AND AT&T'S CROSS-MOTIONS FOR RECONSIDERATION

As with GTC's Motion, we have reviewed BellSouth's and AT&T's Cross-Motions to determine whether the motions identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, we have considered that it is inappropriate to grant a motion for reconsideration "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its Cross-Motion, BellSouth asked that we reconsider our decision to require BellSouth to make a reduction in a specific rate to offset the termination of the subsidy payments. BellSouth argued that we failed to consider that BellSouth has reduced its toll rates by \$31 million on its own initiative. BellSouth also asserted that we failed to consider that we have undertaken actions in the past that have been used to eliminate any potential surplus when a subsidy payment was reduced or terminated. BellSouth argued that access reductions should not be the only reductions considered. Thus, BellSouth asked that we reconsider our decision, because we overlooked these factors.

In its Cross-Motion, AT&T asserted that we erred by not requiring BellSouth to reduce its access charges in order to avoid a windfall. AT&T noted that staff witness Mailhot stated that

payments into the subsidy pool came from access charges. AT&T explained that it is clear that the subsidy funds came from interLATA access charges collected by BellSouth from the IXCs, and that the subsidy funds have always come only from access charges. AT&T further asserted that the access reductions made by BellSouth were not related to the interLATA access subsidy mechanism and never had an impact on it. AT&T explained that the access charges collected by BellSouth to fund the subsidy were independent of the access charges that were reduced.

In addition, AT&T argued that BellSouth's net access revenue will increase by the amount of the terminated subsidy because of the Commission's decision. As such, AT&T stated that the access charges paid by IXCs to BellSouth will provide greater subsidies for BellSouth's other services. AT&T argued that this is unfair, anticompetitive, and contrary to federal and state policy to remove implicit subsidies. For these reasons, AT&T asked us to reconsider our decision and to require BellSouth to reduce its switched access charges.

As previously noted, no responses were filed to the cross-motions.

We addressed BellSouth's reduction to offset the subsidy at pages 13 - 17 of the Order. Specifically, at page 14, we considered BellSouth witness Lohman's assertions that BellSouth had already made significant reductions. The Commission determined, however, that

. . . the discontinuance of the access revenue streams to GTC, absent any rate reduction on the part of BellSouth, will create a windfall for BellSouth.

Order No. PSC-98-1169-FOF-TL at p. 16.

We also noted that in the past we have ". . . required BellSouth to recognize the subsidy reduction in some manner." Id. We determined, therefore, that it was appropriate to require BellSouth to make a reduction in a rate to eliminate any potential windfall. Id. at 17. BellSouth has identified no error in our determination. Instead, BellSouth has simply reargued matters that

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we have already considered. See Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). As such, BellSouth's Cross-Motion is denied.

As for AT&T's assertions that we should have specifically required BellSouth to reduce its access charges, this is also an argument that we have already addressed. At page 14 of the Order, we considered AT&T witness Guedel's assertions that the rate reduction should be aimed at switched access charges. We noted that witness Guedel had conceded that it was possible for the reduction to come from some other area. See Order at p. 14; and Transcript at p. 115. We agreed that it appeared that the IXCs funded the subsidy pool through their use of BellSouth's local network. Based on the evidence, we determined, however, that BellSouth had already made substantial reductions in its access charges, and, therefore, it would be appropriate to allow BellSouth to make the reduction in a rate chosen by BellSouth that would benefit BellSouth's ratepayers as much as possible. AT&T has not identified anything that we overlooked or any mistake we made in rendering Order No. PSC-98-1169-FOF-TL. Upon consideration, AT&T's Cross-Motion is, therefore, denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that GTC, Inc. d/b/a GT Com's Motion for Stay is granted. It is further

ORDERED that BellSouth Telecommunications, Inc.'s request for a modified stay and its Motion to Hold Subsidy Payments Subject to Refund are denied. It is further

ORDERED that GTC, Inc. d/b/a GT Com shall hold the subsidy payments in an escrow account with interest applied in accordance with Rule 25-4.114(4), Florida Administrative Code, from November 17, 1998, the date of our decision on this matter. It is further

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ORDERED that if no Notice of Appeal is timely filed in accordance with the Notice of Further Proceedings or Judicial Review set forth below, then Order No. PSC-98-1169-FOF-TL shall become effective the day following the date indicated below for filing a Notice of Appeal. It is further

ORDERED that GTC, Inc. d/b/a GT Com's Motion for Reconsideration is denied. It is further

ORDERED that BellSouth Telecommunication, Inc.'s Cross-Motion for Reconsideration is denied. It is further

ORDERED that AT&T Communications of the Southern States, Inc.'s Cross-Motion for Reconsideration is denied. It is further

ORDERED that this Docket shall be closed after the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 7th day of December, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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

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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.