FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

JANUARY 15, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, PELLEGRINI, BROWN)
DIVISION OF DIVISION OF COMMUNICATIONS (SIRIANNI, GREER)

RE: DOCKET NO. 960757-TP - PETITION BY METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION RATES, TERMS, AND CONDITIONS, PURSUANT TO THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. 960833-TP - PETITION BY AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. 960846-TP - PETITION BY MCI TELECOMMUNICATIONS CORPORATION AND MCI METRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: JANUARY 20, 1998 - REGULAR - DECISION PRIOR TO HEARING - MOTION FOR RECONSIDERATION OF PREHEARING OFFICER'S ORDER DENYING INTERVENTION

CRITICAL DATES: HEARING DATES - JANUARY 26-28, 1998

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960833R3.RCM

CASE BACKGROUND

On December 16, 1996, in Docket No. 960757-TP, the Commission issued Order No. PSC-96-1531-FOF-TP, its final order in the arbitration proceeding of MFS Communications Company Inc., (MFS) with BellSouth under the Telecommunications Act of 1996 (Act). On

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December 31, 1996, the Commission issued Order No. PSC-96-1579-FOF-TP, its final order in the arbitration proceedings of AT&T Communications of the Southern States, Inc., (AT&T) and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., (MCI) with BellSouth Telecommunications, Inc., (BellSouth) under the Telecommunications Act of 1996 (the Act). (See Docket Nos. 960833-TP and 960846-TP). In this proceeding, the Commission will set permanent rates for a number of network elements for which it set only interim rates in those arbitration orders.

By Order No. PSC-97-1399-PCO-TP, issued November 6, 1997, the prehearing officer in this proceeding granted American Communications Services, Inc., and American Communications Services of Jacksonville, Inc., (ACSI) party status in this proceeding. In that Order, the prehearing officer determined that even though this Commission has limited participation in arbitration proceedings under the Act to the requesting carrier and the incumbent local exchange company, it was reasonable and appropriate to permit ACSI's participation. Following that Order, Intermedia Communications of Florida, Inc. (Intermedia), Time Warner AxS of Florida, L.P. (Time Warner), and Sprint Communications Limited Partnership (Sprint) filed petitions to intervene, arguing that they should also be accorded party status in this proceeding.

After reconsideration of the facts and the law, however, the prehearing officer determined that it was, in fact, inappropriate for ACSI to participate as a party in this proceeding. Therefore, by Order No. PSC-98-0007-PCO-TP, issued January 2, 1998, the prehearing officer reversed Order No. PSC 97-1399-PCO-TP granting intervention to ACSI. On that same day, the prehearing officer issued Order No. PSC-98-0008-PCO-TP denying Intermedia, Time Warner and Sprint intervenor status.

On January 15, 1998, Time Warner filed a Petition for Reconsideration of Motion for Leave to Intervene or, in the Alternative, Motion for Initiation of Generic Docket. Therein, Time Warner asks that the Commission reconsider the prehearing officer's decision to deny Time Warner party status. Time Warner argues that, in accordance with Rule 25-22.039, Florida Administrative Code, it has established that its substantial interests will be affected by the Commission's final decision in this proceeding. Time Warner asserts, therefore, that it should have been allowed to intervene in these proceedings.

This is staff's recommendation on Time Warner's Petition for Reconsideration of Motion for Leave to Intervene or, in the Alternative, Motion for Initiation of Generic Docket.

ISSUE 1: Should Time Warner's Petition for Reconsideration of Order No. PSC-98-0008-PCO-TP be granted?

RECOMMENDATION: No. Time Warner has failed to identify any point of fact or law that the prehearing officer overlooked or failed to consider in rendering Order No. PSC-98-0008-PCO-TP. Furthermore, the prehearing officer's order fully comports with the Act's requirements for participation in an arbitration proceeding and is consistent with prior Commission orders regarding participation in arbitration proceedings. Time Warner's Petition for Reconsideration should, therefore, be denied.

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering her order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

As indicated in the Case Background, on January 15, 1998, Time Warner filed a Petition for Reconsideration of Motion for Leave to Intervene or, in the Alternative, Motion for Initiation of Generic Docket. Time Warner argues that, as a facilities-based provider of local telecommunications services, it has a real, direct, and substantial interest in the outcome of this proceeding. Time Warner asserts that the cost model and pricing methodology used by the Commission in this proceeding, as well as the prices approved, will "dictate" the terms under which it will compete with BellSouth. Time Warner asserts that, therefore, it should be allowed to intervene or alternatively institute a generic proceeding in order to protect its interests in the resolution of those matters and to facilitate their resolution efficiently and judiciously. To deny it intervention in this proceeding, Time Warner argues, is to be inconsistent with the Act's intent to promote competition for telecommunications servicees. Moreover, Time Warner argues that to deny it party status in this proceeding is to contravene the Commission's intervention policy as set forth in Rule 25-22.039, Florida Administrative Code.

Time Warner observes that in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), the court vacated the FCC's pricing rules and held that, under the Act, the state commissions, not the FCC, are authorized to determine the rates involved in implementing local competition. Time Warner believes that the Commission must address what is the appropriate pricing methodology and cost model under the Act as threshold issues in this proceeding. Time Warner argues that the Commission's determination of these threshold issues will affect all local providers seeking interconnection and all local exchange companies. Therefore, Time Warner asserts, it would be "unfair in the extreme" to exclude it from the resolution of these issues in this proceeding and then to hold that it was bound by the Commission's decisions therein.

Time Warner argues, furthermore, that since the issues to be decided in this proceeding are "global legal and policy issues," it would be inefficient to decide them on a case-by-case basis. It argues that the Commission's resources would be more efficiently used if Time Warner, and others, were permitted to participate. Time Warner suggests that that could avoid the need for further arbitrations on these same issues.

Finally, Time Warner argues that, as a competitive provider, its interests and concerns will not be fully represented by the parties to these proceedings. If permitted to participate with party status, Time Warner states that it will bring to light considerations that will not be otherwise expressed, considerations that will aid the Commission's evaluation of the methodologies and cost models proposed by the parties. Time Warner states that it would cooperate to the extent possible with the other alternative local exchange companies in this proceeding to promote judicial efficiency and economy.

Staff believes that the Commission should not reconsider the prehearing officer's decision to deny Time Warner intervention in this proceeding because the prehearing officer clearly expressed the reasons for that decision and Time Warner has not identified any mistake of fact or law contained within Order No. PSC-98-0008-PCO-TP. Time Warner has, therefore, not met the standard for reconsideration set forth in Diamond Cab Co. V. King.

The prehearing officer's reasons for denying Time Warner intervenor status are set forth on pages 2 and 4 of Order No. PSC-98-0008-PCO-TP. Therein, the prehearing officer stated that this

Commission has consistently limited participation in arbitration proceedings under the Act to the requesting carrier and the incumbent local exchange company. Upon review of the Act, the prehearing officer determined that participation should remain limited to the requesting carriers and the incumbent local exchange company. Therefore, the prehearing officer denied Time Warner, as well as Intermedia and Sprint, intervenor status in order to remain consistent with the provisions of the Act and with past Commission practice.

Staff notes that the prehearing officer's decision to deny the petitions to intervene is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established the initial arbitration procedure in Docket No. 960833-TP:

> Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party <u>to the negotiation</u>" may request arbitration. (emphasis added) Similarly Section 252(b)(3) says "a non-petitioning party <u>to a negotiation</u> may respond to the other party's petition" within 25 days. (emphasis added) Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation.

Furthermore, the prehearing officer's decision is clearly consistent with the intent of the Act. Section 252(b)(4)(A) of the Act provides that

> The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response,

if any, filed under paragraph (3).

Staff notes that Paragraph (1) permits a requesting carrier to petition a State commission to arbitrate any issues still open after 135 days of negotiations. Paragraph (3) gives the incumbent local exchange company 25 days to respond to the petition for arbitration. Staff agrees with the prehearing officer that this language reflects a Congressional intent that interconnection agreements should be reached either through negotiations between a requesting carrier and an incumbent local exchange company or through arbitration proceedings litigated before state commissions by the parties to the negotiations. Staff believes that the prehearing officer is also correct that the outcome of arbitration proceedings is an agreement between those parties that is binding only on them. Time Warner will not be bound by the agreement that is ultimately implemented. Furthermore, the prehearing officer's statement that the Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the agreement that results is accurate. As stated by the prehearing officer at page 3 or Order No. PSC-98-0008-PCO-TP, "Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision." It is not, therefore, appropriate for Time Warner to participate as a party in this proceeding. As such, the prehearing officer's order PSC-98-0008-PCO-TP denying Time Warner's, Intermedia's and Sprint's petitions to intervene was correct and appropriate.

Clearly, the prehearing officer thoroughly analyzed and addressed the basis for the petitioners's intervention in this proceeding. Upon that assessment, the prehearing officer determined that Time Warner, as well as Intermedia and Sprint, should not be parties. Time Warner has not identified any misapprehension or mistake of fact or law by the prehearing officer in that assessment. Furthermore, the presence of Time Warner, which was not a party to the original arbitration proceeding, and will not be a party to the ultimate agreements, is at odds with the Act and with past Commission decisions. The only proper parties are AT&T, MCI, MFS (now WorldCom, Inc.) and BellSouth. Staff, therefore, recommends that Time Warner's Petition for Reconsideration be denied.

Staff recommends that it is unnecessary to address Time Warner's motion in the alternative for initiation of a generic

docket. Pursuant to Rule 25-22.036, Florida Administrative Code, that recourse is available to Time Warner should it decide that a generic docket is appropriate to its interests.

ISSUE 2: Should these Dockets be closed?

RECOMMENDATION: No. These Dockets should remain open pending the outcome of the hearing.

STAFF ANALYSIS: These Dockets should remain open pending the outcome of the hearing.