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COMMISSION CLERK

DATE: NOVEMBER 7, 2001
TO: DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)
FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *B/K*
DIVISION OF COMPETITIVE SERVICES (WRIGHT) *W*
RE: DOCKET NO. 980498-TP - PETITION BY GTC, INC. D/B/A GT COM TO TERMINATE INTERLATA ACCESS SUBSIDY AND CONVERT TO PAYMENT OF ACCESS CHARGE REVENUE DIRECTLY TO GTC, INC. D/B/A GT COM.
AGENDA: NOVEMBER 19, 2001 - REGULAR AGENDA - DISMISSAL OF PETITION - INTERESTED PERSONS MAY PARTICIPATE
CRITICAL DATES: NONE
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\LEG\WP\980498CL.RCM

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), for which the Commission established Docket No. 970808-TL. On July 22, 1997, BellSouth filed a revised Petition in that Docket. On August 11, 1997, GTC filed an Answer in opposition to BellSouth's revised Petition. Thereafter, the matter was set for hearing.

On April 6, 1998, GTC filed its Petition to Terminate Access Subsidy and Convert to Payment of Access Charge Revenue Directly to GTC, for which the Commission established Docket No. 980498-TL. 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,

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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 with Docket No. 970808-TL to avoid a notice problem.

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 in Docket No. 970808-TL was granted, and by Order No. PSC-98-0744-PCO-TP, issued May 29, 1998, its petition to intervene in this Docket was granted.

A hearing was held in Docket No. 970808-TL on May 20, 1998. By Order No. PSC-98-1169-FOF-TL, issued August 28, 1998, the Commission rendered its decision on the issues addressed at hearing. By its Order, the Commission 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 the Commission's Order in Docket No. 970808-TL and a Motion for Stay of the Order. Therein, GTC argued that the Commission should reconsider its decision in Order No. PSC-98-1169-FOF-TL, because the Order addressed the subject of this Docket, Docket No. 980498-TP. GTC explained that although these dockets had, ultimately, not remained consolidated for purposes of the hearing, the Commission's Order No. PSC-98-1169-FOF-TL nevertheless resolved the issues in Docket No. 970808-TL in a way that precluded GTC from being able to obtain relief in this Docket, Docket No. 980498-TP.

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.

By Order No. PSC-98-1639-FOF-TL, the Commission granted the Motion for Stay and denied the Motions for Reconsideration. Thereafter, the decision in Docket No. 970808-TL was appealed to the Florida Supreme Court. In a revised opinion issued February 22, 2001, the Supreme Court affirmed the Commission's decision to terminate the subsidy to GTC and reversed the Commission's decision to require BellSouth to reduce rates to offset the termination of the subsidy.

Since April 27, 1999, there has been no activity in Docket No. 980498-TP. Therefore, in view of the Court's decision in Docket No. 970808-TL and the lack of activity in this Docket, staff brings the following recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission, on its own motion, dismiss GTC's Petition and close Docket No. 980498-TP?

PRIMARY RECOMMENDATION: Yes. Staff recommends that the subject of GTC's Petition has been rendered moot by the Commission's decision in Docket No. 970808-TL and the Supreme Court's affirmance of that decision as it pertained to GTC. Therefore, this Petition should be dismissed with prejudice. (KEATING, WRIGHT)

ALTERNATIVE RECOMMENDATION: In the alternative, the Commission should, on its own motion, dismiss this Petition without prejudice, and close the Docket because there has been no activity in the case for over one year. (KEATING)

PRIMARY STAFF ANALYSIS: In its Petition in this Docket, GTC asks that the Commission terminate the access subsidy payment to GTC and allow GTC recoup that lost revenue by increasing its access charges. This proposal was, however, addressed by the Commission in its final decision in Docket No. 970808-TL. In fact, in Order No. PSC-98-1169-FOF-TL, the Commission considered the testimony of staff witness Mailhot, as follows:

Staff's witness Mailhot argued that the interLATA toll bill and keep subsidy should be removed if we find that it is appropriate to rely upon GTC's earnings as a criterion, and GTC's earnings support the elimination of the subsidy. Witness Mailhot asserted that using GTC's earnings as a criterion for removal of the subsidy is consistent with our prior decisions. He also suggested that an alternative may be to terminate the subsidy, allow GTC to increase its access charges, and require BellSouth to reduce its access charges by the amount of the subsidy. As witness Mailhot stated, when the subsidy pool was

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established, the payments made into the pool by each company, including BellSouth, came from its access charges. The witness asserted that, in effect, BellSouth collects access charges for GTC and then passes this revenue on to GTC in the form of subsidy payments. The witness stated that we could have adjusted each company's access charges to eliminate the subsidy system in a generic proceeding, once access charges became nonuniform, but did not. Witness Mailhot recommended, therefore, that we terminate the subsidy to GTC, and allow GTC to increase its access charges, and require BellSouth to reduce its access charges.

Order at pp. 11-12. The Commission agreed that the subsidy payment to GTC should be terminated, but did not agree that GTC should be allowed to increase its access charges. Order at p. 13. In considering GTC's Motion for Reconsideration of that decision, the Commission considered GTC's arguments that the decision in Docket No. 970808-TL improperly pre-judged the outcome of Docket No. 980498-TP. In reaching its decision regarding this argument, the Commission noted that witness Mailhot's testimony was nearly identical to GTC's Petition in Docket No. 980498-TP. See Order No. PSC-98-1639-FOF-TL, issued December 7, 1998. The Commission also explained the connection between the two dockets:

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.

Order No. PSC-98-1639-FOF-TL at pp. 5-6. Although the Commission stated that GTC's Petition in Docket No. 980498-TP had not been

specifically addressed in the decision rendering in Docket No. 970808-TL, the Commission did consider BellSouth's assertions that the Commission's decision had rendered GTC's Petition in Docket No. 980498-TP moot. The Commission did not, however, reach a conclusion as to the status of Docket No. 980498-TP, but concluded that, "Any determination on the status of GTC's Petition in Docket No. 980498-TP shall be made in that Docket." Order at p. 6.

The Commission's decision in Docket No. 970808-TL was appealed to the Florida Supreme Court, and on February 22, 2001, the Court release its revised opinion in the case. Therein, the Court affirmed the Commission's decision to terminate the subsidy to GTC and reversed the Commission's decision requiring BellSouth to reduce rates to reflect the elimination of the subsidy mechanism. GTC, Inc. v. Joe Garcia, 778 So. 2d 923 (Fla. 2000).

The Petition in this Docket, Docket No. 980498-TP, addresses the same proposal that witness Mailhot made to the Commission in Docket No. 970808-TL. The Commission rejected that proposal, concluding that there was insufficient evidence to support it. The Commission also stated that it appeared that the proposal was contrary to Section 364.163, Florida Statutes. Order No. PSC-98-1169-FOF-TL at p. 13. In considering the motions for reconsideration, the Commission also noted in its decision on reconsideration that GTC had only indicated that it supported witness Mailhot's proposal, but did not provide any additional evidence in that Docket to support it, although it had the opportunity to do so. Order No. PSC-98-1639-FOF-TL at p. 5. Because the Petition in this Docket, Docket No. 980498-TP addresses the same proposal addressed in Docket No. 970808-TL, and because GTC had an opportunity to provide evidence advocating that proposal in the proceedings in Docket No. 970808-TL, staff recommends that the Commission, on its own motion, dismiss the petition in this Docket, Docket No. 980498-TP, as having been rendered moot.

ALTERNATIVE STAFF ANALYSIS: In the alternative, pursuant to Rule 1.420(e), Florida Rules of Civil Procedure, any proceeding in which it appears on the face of the record that no action has taken place for over one year shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party or not, after reasonable notice to the parties, unless a stay is approved or either party shows good cause for not dismissing the action. Although there is no similar provision in the Uniform Rules, staff believes that if the Commission were to dismiss this proceeding for

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non-action, it would be consistent with the stated purpose of the Uniform Rules, which is to "secure the just, speedy, and inexpensive determination of every proceeding." Rule 28-106.101, Florida Administrative Code. There has been no action in Docket No. 980498-TP since April 27, 1999. Since that time, staff counsel has been in contact with counsel for GTC regarding the procedural posture of this docket, but to date, no action has been taken. Therefore, staff recommends that the Commission may, on its own motion, dismiss the Petition without prejudice for non-action for over one year. This recommendation is consistent with action taken by the Commission in Order No. PSC-00-1490-FOF-TP, issued August 18, 2000, in Docket No. 980703-TP.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves either of staff's recommendations in Issue 1, this Docket should be closed.
(KEATING)

STAFF ANALYSIS: If the Commission approves either of staff's recommendations in Issue 1, this Docket should be closed because no further action by the Commission will be necessary.