State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: JANUARY 22, 2004

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (SUSAC, ROJAS, TEITZMAN)
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (LEE, DOWDS)

RE: DOCKET NO. 030851-TP - IMPLEMENTATION OF REQUIREMENTS ARISING FROM FEDERAL COMMUNICATIONS COMMISSION'S TRIENNIAL UNE REVIEW: LOCAL CIRCUIT SWITCHING FOR MASS MARKET CUSTOMERS.

AGENDA: FEBRUARY 3, 2004 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUIRED; BUT MAY BE ENTERTAINED IN ACCORDANCE WITH RULE 25-22.0376(5), F.P.C.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030851.RCM

CASE BACKGROUND

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. Unbundled network elements ("UNEs") are those portions of telephone networks that incumbent local exchange companies ("ILECs") must, under applicable federal law, make available to competitive local exchange companies ("CLECs"). In the TRO, as it relates to this docket, the FCC held that whether an ILEC must offer unbundled local circuit switching as a UNE depends upon whether a CLEC would, according to the guidelines established by the FCC, be impaired in the provision of its telecommunications services without such access. The TRO does

not address the issue of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement those provisions of the TRO concerning whether and when CLECs are not impaired without access to unbundled local circuit switching.

On December 15, 2003, AARP (formerly known as American Association of Retired Persons) filed its petition to intervene in this docket. Shortly thereafter, Sprint Communications Limited Partnership and Sprint-Florida, Incorporated (collectively, "Sprint"), BellSouth Telecommunications, Inc. ("BellSouth"), and Verizon Florida, Inc. ("Verizon") each filed a separate response in opposition to AARP's petition on December 23, 2003. On January 2, 2004, Order No. PSC-04-0008-PCO-TP was issued denying AARP's petition to intervene for lack of standing. The Prehearing Officer found AARP does not have standing to intervene in this docket. Specifically, AARP's alleged "injury in fact" is speculative and too remote to establish standing under the Agrico test[1] because the interests asserted by AARP are not the type of interest this proceeding is designed to protect.

On January 12, 2004, AARP filed its Motion for Reconsideration of Order No. PSC-04-0008-PCO-TP. On January 13, 2004, AARP filed a corrected copy of its January 12, 2004, motion. On January 16, 2004, BellSouth filed its response in opposition to AARP's motion for reconsideration.

[1] "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show: 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981).

DISCUSSION OF ISSUES

ISSUE 1: Should AARP's Motion for Reconsideration be granted?

RECOMMENDATION: No. AARP has not identified a point of fact or law which was overlooked or which the Prehearing Officer failed to consider in rendering his decision. Therefore, the Motion for Reconsideration should be denied. **(SUSAC)**

STAFF ANALYSIS:

AARP's Motion for Reconsideration

AARP argues that its members, as consumers of named parties in this docket, have a substantial interest in the outcome of this proceeding. Specifically, AARP states that its members as consumers, have an "interest in seeing that local service competition is fully and fairly developed and that the consumer is intended to be benefitted by the 'unbundling' of telecommunications services," and that this proceeding "generate[s] long-term benefits for all consumers." (see AARP Motion, 6) AARP also cites to three provisions within the TRO that contemplate consumer interest.

Additionally, AARP argues that this docket is very similar to Docket Nos. 030867-TP, 030868-TP, and 030869-TP in which AARP was granted full party status. Like the issues in those dockets, AARP argues that its members are the ultimate beneficiaries from raising residential basic local service rates. AARP further contends that the TRO contemplates that the interests of consumers, such as those represented by AARP, will be represented and protected throughout these proceedings.

Last, AARP argues that it is due equal protection under the law and should not be "held to a higher . . . standard than any of the many telecommunications companies granted party status." (AARP's Motion, 1 and 7).

BellSouth's Response

In short, BellSouth argues that AARP fails to identify a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering his Order. (Response, p. 3, citing

Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962)). BellSouth also states that any interest alleged by AARP bears no direct relationship to the issues in this proceeding, and that AARP's "selective reliance [on TRO provisions] provides no basis that justifies reconsideration of Order No. PSC-04-0008-PCO-TP." (Response, p. 2)

Finally, BellSouth distinguishes this docket from Docket No. 030869-TP. In that docket, BellSouth agreed that its efforts to raise basic local rates would directly impact rate payers, such as AARP's members, thereby establishing an injury in fact of sufficient immediacy to create standing. However, in this docket, BellSouth points out that "none of the issues suggest that current customers of the ILECs will have changes made to their rates." (Response, p. 2)

Standard for Granting Motion for Reconsideration

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See 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. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958)). Also, 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). This standard is equally applicable to reconsideration of a Prehearing Officer's Order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

Staff's Analysis

Having fully considered AARP's motion for reconsideration and BellSouth's response to that motion, staff recommends that AARP's motion be denied for the following reasons.

Under Florida law, the purpose of a motion for reconsideration is not to reargue the entire case, but to bring to the attention of the decision-maker some mistake of fact or law in the decision in the first instance. See Diamond Cab, 146 So.2d at 891. In the case at hand, AARP fails to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering his Order. AARP continues to argue - as it did in its petition to intervene - that its members, and consumers alike, will be adversely affected as a result of this proceeding. This was raised and addressed in the underlying Order. The Prehearing Officer specifically found AARP's interest too speculative to grant standing under the Agrico test.[2] In other words, AARP's substantial number of members does not equate to a substantial interest under the Agrico test.

Next, staff agrees with BellSouth's distinction between this docket and Docket No. 030869-TP, and applies that same reasoning to distinguish Docket Nos. 030867-TP and 030868-TP. Additionally, staff wishes to add that the TRO does not address issues of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement solely those provisions of the TRO concerning whether CLECs are impaired without access to unbundled local circuit switching.

Last, AARP's equal protection argument fails because AARP is not similarly situated to the telecommunications companies that were granted intervention. It is well-established that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), citing, F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920). In the case at hand, AARP is not similarly situated because AARP is a non-profit organization that does not provide, or seek to provide, telecommunications services subject to state or federal law. Therefore, it is clear that the Prehearing Officer applied the same

[2]Prehearing Officer found: 1) "Notably, the FCC did not speak to subscribers' economic interests in the TRO;" and 2)"AARP's alleged interest is a general interest in competition in the local exchange market. AARP's asserted potential injury is not immediate or substantial but, rather, is remote and speculative in nature." Order No. PSC-04-008-PCO-TP, issued on January 2, 2004.

standard of review to AARP's petition and did not unfairly exclude AARP from the proceeding.

Based on the foregoing, staff recommends that AARP's motion for reconsideration be denied. AARP has not identified a mistake of fact or law in the Prehearing Officer's decision that would entitle AARP standing under the appropriate law to intervene in this docket.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Irrespective of whether the Commission approves or denies staff's recommendation in Issue 1, the docket should remain open to ascertain whether a requesting carrier is not impaired by lack of access to incumbent local exchange companies' unbundled local switching. **(SUSAC)**

STAFF ANALYSIS: Staff believes that irrespective of whether the Commission approves or denies staff's recommendation in Issue 1, the docket should remain open to ascertain whether a requesting carrier is not impaired by lack of access to incumbent local exchange companies' unbundled local switching.