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State of Florida



Public Service Commission
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-M-E-M-O-R-A-N-D-U-M-

DATE: JANUARY 23, 2004

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

FROM: OFFICE OF THE GENERAL COUNSEL (BROWN) *WKB DK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS) *[Signature]*

RE: DOCKET NO. 990649B-TP - INVESTIGATION INTO PRICING OF UNBUNDLED NETWORK ELEMENTS (SPRINT/VERIZON TRACK).

AGENDA: 02/03/04 - REGULAR AGENDA - POST-HEARING DECISION ON MOTION FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED, BUT MAY BE ENTERTAINED AT THE DISCRETION OF THE COMMISSION, IN ACCORDANCE WITH RULE 25-22.060, F.A.C.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\990649B.RCM

CASE BACKGROUND

On November 15, 2002, the Commission issued Order No. PSC-02-1574-FOF-TP, its final substantive order in this docket on the pricing of Verizon Florida, Inc.'s (Verizon) Unbundled Network Elements (UNEs). The Order was appealed,¹ and Verizon filed a motion for mandatory stay pending judicial review in which it invoked the terms of Commission Rule 25-22.061(1)(a), Florida Administrative Code. That rule provides as follows;

¹ The order is currently under review by the U.S. District Court for the Northern District of Florida and the Florida Supreme Court.

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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.

AT&T Communications of the Southern States, LLC (AT&T), Florida Digital Network, Inc. (FDN), and WorldCom, Inc. filed a joint response in opposition to Verizon's motion for mandatory stay. The Commission heard oral argument and discussed the motion and response at length at its April 9, 2003, Agenda Conference. Thereafter, the Commission issued Order No. PSC-03-0896-PCO-TP (Stay Order), granting the mandatory stay pending judicial review.

On August 15, 2003, AT&T filed a Motion for Reconsideration of Order Granting Motion to Stay, to which Verizon responded on August 27, 2003. Neither party requested oral argument. This recommendation addresses AT&T's motion and Verizon's response.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny AT&T's Motion for Reconsideration of Order Granting Motion for Stay?

RECOMMENDATION: Yes. AT&T has failed to demonstrate a mistake of fact or law that requires reconsideration of the Commission's decision. (BROWN, DOWDS)

STAFF ANALYSIS:

AT&T presents one ground for reconsideration of the Stay Order. It argues that the Stay Order deviates from the precedent established in a prior Commission order. AT&T contends that the Commission has thereby violated *stare decisis* principles by failing to provide a sufficient factual or policy basis for its determination that Verizon was entitled to a mandatory stay in this case.

Commission Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Docket No. 971478-TP, In re: Complaint of WorldCom Technologies, Inc. against BellSouth for Breach of Terms of Florida Partial Interconnection Agreement (BellSouth Stay Order), denied a mandatory stay in a contract complaint proceeding involving BellSouth's interconnection agreements with certain Competitive Local Exchange Carriers (CLECs). In the BellSouth Stay Order the Commission found that Rule 25-22.061(1)(a), Florida Administrative Code, did not apply to the case, because the order being appealed did not involve the refund of moneys to customers or a decrease in rates to customers, but rather the payment of money to CLECs pursuant to contractual obligations. The Commission found that the CLECs were not "customers" to whom a refund or rate decrease was due. Specifically, the Commission said;

This rule does not apply to this case, because . . . the complainants, competitive telecommunications carriers, are not "customers" for purposes of this rule. The rule is designed to apply to rate cases or other proceedings involving rates and charges to end user ratepayers or consumers, not to contract disputes between interconnecting telecommunications providers. Furthermore, this case does not involve a "refund" or a

"decrease" in rates. It involves payment of money pursuant to contractual obligations.

Order No. PSC-99-0758-FOF-TP, p. 6.

AT&T argues that the determination unequivocally established a construction of the term "customer" in the rule that does not include CLECs under any circumstances, and therefore the Commission could not lawfully conclude that CLECs are Verizon's customers for purposes of a mandatory stay in this case.

Verizon responds that AT&T has raised the same argument it raises in its motion at least twice before in this proceeding, and the Commission has expressly considered and denied the argument, in its deliberations at the April 9, 2003, Agenda Conference, and in the Stay Order. Verizon asserts that AT&T has not met the standard for reconsideration, because it has not identified any point of fact or law that the Commission failed to consider. Verizon argues that the Commission clearly explained the reasonable distinctions it made between the two cases in its Stay Order, and AT&T just does not agree with the Commission's explanation.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its 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 162 (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).

With this standard for reconsideration in mind, staff recommends that AT&T's motion should be denied. The argument AT&T raises in its motion was thoroughly and adequately considered by the Commission in its Stay Order. No point of fact or law was overlooked. AT&T is rearguing matters already addressed. The Commission specifically mentioned its earlier order several times in its Stay Order. At page 3, the Commission described Verizon's analysis of the effect of the BellSouth Stay Order:

Verizon acknowledges that on one previous occasion, this Commission took the opinion that the mandatory stay

provisions in Rule 25-22.061(1)(a), Florida Administrative Code, apply only to orders reducing rates for retail end users. However, Verizon contends that the previous decision is not controlling in this instance, because the previous decision was rendered in an arbitration case involving a contract dispute between carriers, not in a generic ratesetting proceeding.

Order PSC-03-0896-PCO-TP, p. 3.

At page 5, the Commission describes AT&T's and the other CLECs' position on the effect of the BellSouth order;

As to the merits of the request for stay, the CLECs argue that the mandatory stay provisions of Rule 25-22.061(1)(a), Florida Administrative Code, do not apply because the rate decrease at issue in our UNE Order does not involve rates to end use customers. Specifically, the CLECs maintain that Verizon has failed to adequately distinguish the decision in Docket No. 971478-TP, because Verizon did not address our fundamental reason for finding that the mandatory stay provisions were not applicable in that case - that being that competitive carriers are not considered 'customers' for purposes of the rule.

Order No. PSC-03-0896-PCO-TP, p. 5.

Finally, at pages 8-9, the Commission addressed the BellSouth Order in its decision that the mandatory stay rule does apply to this case. The Commission explained that the plain language of the rule did not expressly exclude CLECs as customers, or differentiate between retail and wholesale customers for purposes of the application of the rule in appropriate circumstances. The Commission explained that it had treated CLECs as customers in other cases, and distinguished the earlier decision on its facts, particularly the fact that the earlier case involved a contract dispute, not a generic rate proceeding. The Commission distinguished the two cases this way;

While in this case, we find the mandatory stay provisions applicable, we do not believe that this decision is in direct conflict with our decision in Order No. PSC-99-0758-FOF-TP. In particular, we believe that our previous

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decision was premised largely upon the facts of that case, which was not a proceeding to set rates and charges for end use ratepayers or customers.

Order No. PSC-03-0896-PCO-TP, pp. 8-9.

AT&T's claim that this decision violates *stare decisis* is unfounded. As is clear from the Commission's discussion, the orders are based on different facts and different proceedings that justify different applications of the stay rule. Therefore, in light of the standard of review for reconsideration mentioned above, staff recommends denial of AT&T's motion.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. The docket should remain open pending further proceedings.

STAFF ANALYSIS: The docket should remain open pending further proceedings.