BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for resale invilving local exchange companies and alternative local exchange companies pursuant to Section 364.161, F.S.	) DOCKET NO. 950984-TP) ORDER NO. PSC-96-1160-FOF-TP) ISSUED: September 17, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION FOR RECONSIDERATION AND STAYING EFFECTIVE DATE OF TARIFFS

BY THE COMMISSION:

Background

This matter came to hearing as a result of petitions filed by Metropolitan Fiber Systems of Florida, Inc. (MFS-FL) for unbundling and resale of GTE Florida Incorporated (GTEFL) and United Telephone Company of Florida and Central Telephone Company of Florida (United/Centel) network elements and services. Section 364.161, Florida Statutes, provides that upon request, each local exchange telecommunications company shall unbundle all of its network features, functions, and capabilities, and offer them to any other telecommunications provider requesting them for resale to the extent technically and economically feasible. If the parties to this proceeding are unable to successfully negotiate the terms, conditions, and prices of any feasible unbundling request, the Commission, pursuant to Section 364.162(3), Florida Statutes, is required to set nondiscriminatory rates, terms, and conditions for resale of services and facilities within 120 days of receiving a petition.

By Order No. PSC-96-0811-FOF-TP (the Order), issued June 24, 1996, we decided various issues regarding rates, terms, and conditions for unbundling and resale of GTEFL and United/Centel facilities to MFS-FL. On July 9, 1996, MFS-FL filed a motion for reconsideration of the costing requirements of the Order. On July 22, 1996, GTEFL and United/Centel filed responses to MFS-FL's motion.

Additionally, on July 22, 1996, GTEFL filed a Notice of Administrative Appeal of the Order. On July 24, 1996, GTEFL filed a motion for stay of the Order pending judicial review. As part of the motion to stay, GTEFL requested that we stay the effective date of GTEFL's tariffs filed pursuant to the Order. On August 9, 1996, our Division of Appeals filed a motion to abate GTEFL's appeal on the grounds that the appeal was not ripe, since MFS-FL's motion for reconsideration was pending. The Supreme Court has not yet ruled on the motion to abate.

Standard of Review

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to our attention some material and relevant point of fact or law which was overlooked, or which we failed to consider when we rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla 1st DCA 1981). It is not an appropriate venue for rearguing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

MFS-FL's Motion

MFS-FL makes two main statements in its Motion for Reconsideration. First, MFS-FL states that we should reconsider and modify the costing requirements of the Order. MFS-FL supports this statement with five arguments. First, MFS-FL argues that the incremental cost standards should reflect the costs of an efficient entrant rather than the costs of the incumbent provider. Second, MFS-FL argues that billing and collection, customer contact, and other marketing costs should be excluded from estimates of incremental costs used to set unbundled loop prices. Third, MFS-FL argues that unbundled loop costs and rates should be geographically deaveraged. Fourth, MFS-FL argues that conversion charges should reflect costs rather than the incumbent's existing tariffed rates. Fifth, MFS-FL argues that unbundled rates in this case should be comparable to the unbundled rates ordered for BellSouth Telecommunications, Inc. (BellSouth) in Order No. PSC-96-0444-FOF-TP, issued March 29, 1996. MFS-FL's second main statement is that we should grant consumers a "fresh look". Each statement and argument will be considered in turn.

A. Efficient Provider Costing Theory

MFS-FL states that TSLRIC estimates should be based on an estimate of the incremental costs of an efficient entrant using forward-looking technology rather than the costs of the incumbent provider. MFS-FL asserts that Florida Statutes and the Federal Telecommunications Act require that incremental costs used as the basis for unbundled loops be based on the costs of the most efficient provider and not necessarily the costs of the incumbent provider.

GTEFL and United/Centel state in their responses that MFS-FL's "efficient provider's costs" argument is new. GTEFL and United/Centel state that this argument appears nowhere in the record to date. Further, GTEFL states that the argument contradicts all of MFS-FL's prior testimony and previous argument that the incumbent provider's incremental costs should be used, and that doing so is consistent with Florida Statutes and the Federal Telecommunications Act.

We agree with GTEFL and United/Centel. MFS-FL's argument that the entrant's TSLRIC should be used instead of the incumbent's appears nowhere in the record to date. Evidence that was not in the record cannot be overlooked or not considered.

B. Excluding Billing, Collection and Marketing Costs

MFS-FL's second argument is that billing and collection, customer contact, and other marketing costs should be excluded from estimates of incremental costs used to set unbundled loop prices. MFS-FL's motion states in part:

> The Florida Commission rejects MFS-FL's argument that GTEFL should exclude all billing and collection, customer contact and marketing and spare capacity inventory. Instead, the Commission concludes that '[t]hese types of costs are relevant TSLRIC components because they represent costs that would be avoided in the long run if the LEC did not provide the service.' [Order at p.8] MFS-FL asks that (sic) Commission reconsider this aspect of its Order and eliminate these components from the estimates of incremental costs used to set unbundled loops costs.

MFS-FL itself asserts that we already considered and rejected excluding billing, collection, and marketing costs from incremental cost estimates. Clearly then we did not overlook or fail to consider this matter.

C. Geographical Deaveraging

MFS-FL's third argument is that unbundled loop costs and rates should be geographically deaveraged. As with the second argument, MFS-FL does not dispute that we considered and rejected geographical deaveraging. In the Order, we found that it was premature to require deaveraging of the loop rates, because deaveraging was not an issue to the negotiations in this proceeding. MFS-FL argues that we were wrong in this respect as a matter of law. MFS-FL argues that Section 364.3381, Florida Statutes, requires us to geographically deaverage loop rates because we have "continuing jurisdiction over cross-subsidization issues and the authority to investigate allegations of such practices." MFS-FL argues that an averaged loop rate impermissibly sanctions "cross-subsidization" between high and low cost areas.

GTEFL responds that the concept of cross-subsidization, as reflected in Section 364.3381, Florida Statutes, refers to subsidies flowing from one service to another, not from one area to another. GTEFL states that MFS-FL's reading of the statute is simply wrong.

United/Centel responds that for deaveraging to be properly decided by the Commission, it would have to have been raised as an issue in the negotiation phase. We agree. Section 364.161, Florida Statutes, requires us to arbitrate disputes that the parties could not previously resolve through negotiation. Furthermore, it is apparent, and the parties do not dispute, that we did not overlook or fail to consider geographical deaveraging.

D. Conversion and Termination Liability Charges

MFS-FL's fourth argument is that conversion charges should reflect costs rather than the incumbent's existing tariffed rates. MFS-FL includes in this argument that termination liability charges should be based on costs and not pursuant to existing tariffs. Once again, MFS-FL does not dispute that we already considered and ruled on this issue. We ordered that United/Centel use tariffed rates on an interim basis until it could develop cost studies reflecting nonrecurring conversion charges. MFS-FL does not assert in its motion that we overlooked or failed to consider a point of fact or law which requires reconsideration. We believe that we properly considered and decided this issue.

E. Unbundled Rates Should be Comparable Among LECs

MFS-FL's fifth argument is that unbundled rates in this case should be comparable to the rates ordered for BellSouth in Order No. PSC-96-0444-FOF-TP, issued March 29, 1996. MFS-FL takes issue with the different interim loop prices set for the largest three Florida LECs, and assumes that they should be about the same. MFS-FL reiterates that incremental rates should be based on the efficient provider, not the incumbent.

GTEFL and United/Centel respond that this argument is new and not based on any record evidence. We agree. Evidence that was not in the record cannot be overlooked or not considered.

F. Fresh Look

MFS-FL argues that we should grant consumers a "fresh look." Essentially, MFS-FL argues that we should reconsider our decision that denied MFS-FL's request that United/Centel and GTEFL should permit any customer to convert its bundled service to an unbundled service and assign such service to MFS-FL, with no penalties, rollover, termination or conversion charges to MFS-FL or the customer. Order at p. 29. Once again, MFS-FL does not assert that we overlooked or failed to consider this point. MFS-FL bases its argument that reconsideration is appropriate because we ordered differently on this point in the BellSouth phase of this docket, and other states have granted a "fresh look".

GTEFL and United/Centel responded that MFS-FL's "fresh look" argument is simply its earlier argument against termination penalties with a different name, which we explicitly considered and rejected. Further, GTEFL states that it would be improper to rely on the record in the BellSouth phase of this docket as justification for MFS-FL's "fresh look" policy. United/Centel states that even if the other situations were comparable to the current proceeding, MFS-FL fails to show that our decision is unsupported by the record or erroneously applies the law. We agree with GTEFL and United/Centel with regard to MFS-FL's "fresh look" argument. MFS-FL appears to be rearguing its position that no penalties, rollover, termination or conversion charges should apply to MFS-FL or the customer when a customer converts its bundled service to an unbundled service and assigns such service to MFS-FL.

G. Conclusion

MFS-FL's motion does not show material and relevant facts or points of law that we overlooked or failed to consider when we rendered our decision in the first instance. We note that

reconsideration is not an appropriate venue for rearguing matters which were already considered. All of MFS-FL's arguments are either without basis in the record or are attempts to reargue matters which were already considered. Accordingly, we find it appropriate to deny MFS-FL's motion for reconsideration of Order No. PSC-96-0811-FOF-TP.

Effective Date of GTEFL Tariffs

As stated in the case background, GTEFL filed a Notice of Administrative Appeal of the Order on July 22, 1996. On July 24, 1996, GTEFL filed a motion for stay of the Order pending judicial review. As part of the motion for stay, GTEFL requests that we stay the effective date of GTEFL's tariffs filed pursuant to the Order, until appeal of the Order is concluded.

On August 9, 1996, our Division of Appeals filed a motion to abate GTEFL's appeal on the grounds that the appeal is not ripe, since MFS-FL's motion for reconsideration was pending. The Supreme Court has not yet ruled on the motion to abate. However, it is clear that with a motion for reconsideration pending, the Order is not yet a final order for purposes of appeal. Since the time is not ripe for judicial review, we need not rule on GTEFL's motion for stay pending judicial review.

The Order requires GTEFL to file tariffs within 30 days of the issue date of the Order. Pursuant to the Order, the tariffs shall be effective 15 days following the date that complete and correct tariffs are filed. GTEFL timely filed its tariffs on July 24, 1996. Pursuant to the Order, the tariffs were to become effective August 8, 1996.

Upon issuance of this order, Order No. PSC-96-0811-FOF-TP will be a final order for purposes of appeal. Every indication suggests that GTEFL will appeal the Order once the time becomes ripe. We believe that it would be inappropriate to require GTEFL to have effective tariffs pursuant to the Order until it is a final order for purposes of appeal. Accordingly, on our own motion, we are hereby staying the effective date of GTEFL's tariffs filed pursuant to Order No. PSC-96-0811-FOF-TP until 30 days from the issue date of this order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Metropolitan Fiber Systems of Florida, Inc.'s motion for reconsideration of Order No. PSC-96-0811-FOF-TP is denied. It is further

ORDERED that the effective date of GTE Florida Incorporated's tariffs filed pursuant to Order No. PSC-96-0811-FOF-TP is hereby stayed until 30 days from the issue date of this order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 17th day of September, 1996.

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BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 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.