BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Equal Access Exchange Areas (EAEAs), Toll Monopoly (TMAs), 1+restriction to the Local Exchange Companies (LECs) and elimination of the access discount) DOCKET NO. 880812-TP) ORDER NO. 20843) ISSUED: 3-2-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON
THOMAS M. BEARD
BETTY EASLEY
JOHN T. HERNDON

ORDER DENYING MOTION TO CLOSE DOCKET

BY THE COMMISSION:

I. BACKGROUND

On May 26, 1988, the Florida Interexchange Carriers Association (FIXCA) sent a letter to this Commission urging us to undertake a fundamental reexamination of our policies dealing with 1+ Dialing, Equal Access Exchange Areas (EAEAs), Toll Monopoly Areas (TMAs). This Docket was opened in June, 1988, to consider FIXCA's request. On July 15, 1988, GTE Florida, Inc. (GTEFL) filed a motion to close this Docket. Southern Bell Telephone and Telegraph Company (Southern Bell), ALLTEL Florida, Inc. (ALLTEL), The Florala Telephone Company, Inc. (Florala), Gulf Telephone Company (Gulf), Indiantown Telephone System, Inc. (Indiantown), Northeast Florida Telephone Company, Inc. (Northeast), and St. Joseph Telephone & Telegraph Company (St. Joe) filed responses supporting GTEFL's motion to close the docket. AT&T Communications of the Southern States Inc. (ATT-C), Microtel, Inc. (Microtel), MCI Communications Corporation (MCI), Telus Communications, Inc. (Telus) and FIXCA filed responses in opposition to GTEFL's motion. As discussed in detail below, GTEFL's motion is denied.

II. DISCUSSION

GTEFL's motion relies on three principal arguments: 1) the specific findings of fact and conclusions of law contained in Order No. 16343, issued on July 14, 1986, have not been satisfied because the requisite showing required by Order No. 16343 to modify the toll transmission monopoly has not yet been made by any interested party; 2) this proceeding is an unlawful attempt to modify and abrogate the terms of Order No. 16343 and 3) the factual allegations set forth in FIXCA's letter are in error and not consistent with previous Commission orders concerning the reasons for the creation of EAEAs and the toll transmission monopoly. The LECs which responded in support to GTEFL's motion generally argued that it is premature to launch another investigation into EAEAs, TMAs, phasing out the inferior access discount and restrictive use of 1+ dialing. They submit that circumstances have not changed significantly to warrant another investigation. Staff

DOCUMENT NUMBER-DATE
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disagrees and believes that recent changes that have occurred are significant enough to warrant another investigation. These changes are the deloading of access charges through the CCL reductions and the optional BHMOC reduction, the implementation of intraLATA LEC toll bill and keep, and Commission approval of LEC specific intraLATA toll rates.

A. <u>Requirements of Order No. 16343</u>

With respect to GTEFL's first allegation, it claims that opening this docket is contrary to the terms and conditions of Order No. 16343 because no entity has made a showing of significantly changed technological or regulatory circumstances which would justify an abolition of the TMAs. GTEFL argues that during the last two investigations in Docket No. 820537-TP, Orders Nos. 13750 and 16343, into retention of TMAs, the Commission concluded that TMAs were in the public interest. In addition, GTEFL claims that Order No. 13750 stands for the proposition that certain regulatory changes must occur before intraEAEA transmission competition was appropriate. These changes include: (1) deloading of NTS costs from access charges, (2) implementation of LEC toll bill and keep, (3) repricing of private line and special access services, and (4) changes in regulation. GTEFL also argues that Order No. 16343 requires that, before any review of TMAs may take place, an IXC must make a prima facie showing that these technological and regulatory changes have occurred.

GTEFL seems to be suggesting that only an IXC can make the requisite showing and that, therefore, the initiation of this docket by our Staff to address FIXCA's letter is insufficient to institute proceedings to review our existing regulatory policies. If this is so, then GTEFL reads Order No. 16343 too narrowly. As we stated in the Order:

> The experience of the past several years is instructive as we view the future path of telecommunications regulation. <u>Nothing in this decision precludes</u> any interested party from coming forward with a showing of significantly changed circumstances which would warrant the abolition of TMAs. Technological and regulatory changes may dictate a <u>modification</u> of this decision at some point in the future. (emphasis added).

Allowing an interested party to come forward with a showing of significantly changed circumstances does not preclude the Commission from opening this docket to investigate whether continuation of TMAs etc. is appropriate. We did not intend the above language as, nor can it be, a limit on our authority to open an investigation into TMAs, consistent with our duties and responsibilities pursuant to Chapter 364, Florida Statutes.

In addition, GTEFL has apparently assumed that the purpose of this docket was to abolish TMAs. We note that we have not to our knowledge indicated that we are inclined to abolish toll monopoly areas. This docket was opened merely to consider FIXCA's allegations of changed circumstances and, if proven, to determine whether modification of TMAs is warranted. We would

also note that during the past 18 months the Commission has initiated and/or approved a number of significant changes including LEC-specific intraLATA toll rates, LEC-specific BHMOC rates, optional LEC access charge reductions, and intraLATA LEC toll bill-and-keep. Further, we have also made fundamental changes in the manner in which we regulate Southern Bell.

B. Authority to Modify Orders

GTEFL submits in its Motion that the Order No. 16343 is administratively final and that neither FIXCA's letter nor the initiation of this docket by the Commission staff adheres to the terms of the Order and thus amounts to an unlawful attempt to abrogate the terms and conditions of Order No. 16343. In support of this proposition, GTEFL relies on two cases: Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966) and Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1979). In Peoples Gas the Court held that the Commission could not modify its order some four and one half (4 1/2) years subsequent to its entry, due to its belief that it did not possess the necessary power to initially enter the order. In Austin Tupler the Court ruled that the Commission could not relitigate the dormancy of a certificate some two (2) years after its initial determination that the certificate was dormant without notice, an opportunity for a hearing and a sufficient showing of changed circumstances.

GTEFL points out that in both cases the Supreme Court states that orders of administrative agencies must become final and no longer subject to change or modification and that it is necessary to provide a terminal point in every proceeding at which the decision can be relied upon. Accordingly, GTEFL argues that it has the legal right to rely upon the terms and conditions of Order No. 16343 and that a showing must be made that a change in technology or regulatory conditions has occurred which makes the toll transmission monopoly to be contrary to the public interest.

In response to GTEFL's Motion, Telus basically argues that the Peoples Gas line of cases are inapplicable here and that the opening of a docket to investigate a subject does not change established Commission policy in violation of administrative finality. ATT-C's , MCI's, Microtel's and FIXCA's responses paralleled Telus' arguments that Order No. 16343 provides no threshold requirement for instituting an investigation, only a requirement that there be a showing of significantly changed circumstances before there would be an abolition of the TMAs. According to ATT-C, GTEFL's reading of Order No. 16343 puts the cart before the horse: How can there be a showing of changed circumstances without a proceeding in which testimony can be taken and examined at hearing?

We are unpersuaded by GTEFL's arguments that our initiation of this docket is in any way in violation of the "administrative finality" of Order No. 16343. The Peoples Gas Court expressly addressed our authority to modify our Orders, stating:

> [There can be no] doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings

> initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified. This view accords requisite finality to orders of the commission, while still affording the commission ample authority to act in the public's interest.

The Court expressly reaffirmed its Peoples Gas decision in Austin Tupler. See also Reedy Creek Utilities v. FPSC, 418 So.2d 249 (Fla. 1982).

Based on the Austin Tupler and the People Gas cases, the Commission can modify a previous policy decision as long as the Commission meets the stated requirements:

1) proper notice and hearing; and
2) a specific finding that modification is necessary in the public interest because of changed conditions not present in the previous proceedings.

For the reasons discussed above, we find it appropriate to deny GTEFL's motion to close this docket. This docket is merely an investigation into the policies that were discussed in FIXCA's letter in light of recent changes. The investigation is in no way an attempt to improperly modify or abrogate Order No. 16343. The specific issues are being developed by the parties and will be set for hearing.

We decline to address GTEFL's arguments that the factual allegations set forth in FIXCA's letter are erroneous. The validity of these allegations is more appropriately the subject of the pending hearing in this Docket.

This docket shall remain open pending further proceedings.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that GTE Florida, Inc.'s Motion to Close Docket is denied as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 2nd day of MARCH, 1989.

STEVE TRIBBLE, 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 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 or sewer 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.