BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation regarding the appropriateness of payment for Dial-Around (10XXX, 950, 800) compensation from inter-exchange telephone companies (IXCs) to pay telephone providers (PATS).	DOCKET NO. 920399-TP ORDER NO. PSC-93-1032-FOF-TP ISSUED: July 13, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK

ORDER DENYING MOTIONS FOR RECONSIDERATION, RECONSIDERING IMPLEMENTATION DATE, AND REOPENING RECORD

BY THE COMMISSION:

I. BACKGROUND

By Order No. PSC-93-0070-FOF-TP, issued January 14, 1993, we determined, after hearing, that it was appropriate to implement dial-around compensation for nonLEC payphone providers (NPATS). The compensation applies to all calls using a code the customer dials for the purpose of reaching the long distance company of her choice. For example, compensation would apply to 950-XXXX, 10XXX, 800 calls used to access a carrier, and other calls made specifically to reach the customer's preferred long distance company. On the other hand, compensation would not apply to other 800 calls or calls to voice mail, for example. We found a per call compensation mechanism to be appropriate, but determined that at present such a mechanism is not possible. In the meanwhile, a $3.00 per phone per month compensation amount applies to all nonLEC payphones which do not block access to long distance companies. Inmate payphones in confinement facilities are excluded because they are allowed to block access to all available interexchange carriers (IXCs). This per phone compensation will remain in place until the Federal Communications Commission (FCC) develops a per call mechanism at the federal level. At that time, we believe Florida should also develop an appropriate per call rate of compensation. As presently ordered, compensation will be paid by

all IXCs in Florida which provide operator services and which have more than $50 million in gross annual intrastate revenues. Those IXCs shall contribute to the compensation payment based on their proportionate amount of Florida intrastate revenue. The local exchange companies (LECs) shall submit to those four IXCs monthly data on the number of compensable payphones in their territory. The NPATS, in turn, shall submit bills to the compensating IXCs.

Following issuance of our Order, several pleadings were filed seeking reconsideration of the Order. MCI Telecommunications Corp. (MCI) filed a Petition for Reconsideration (MCI's Petition) and a Request for Oral Argument (MCI's Request); AT&T Communications of the Southern States, Inc. (ATT-C) filed a Motion for Reconsideration (ATT-C's Motion); Transcall America, Inc. d/b/a ATC Long Distance (ATC) filed a Motion for Leave to File Amicus Memorandum (ATC's Motion) and an Amicus Memorandum in Support of Motions for Reconsideration by ATT-C and MCI (ATC's Memorandum); Sprint Communications Company Limited Partnership (Sprint) filed a Response and Joinder in MCI and ATT-C's Motions for Reconsideration (Sprint's Response); finally, the Florida Pay Telephone Association, Inc. (FPTA) filed a Response to Motions for Reconsideration and Amicus Memorandum (FPTA's Response), a Response to ATC's Motion for Leave to File Amicus Memorandum (FPTA's Response to Motion for Leave), a Response to MCI's Request for Oral Argument (FPTA's Response to MCI), and a Motion to Strike Sprint's Response and Joinder in MCI and AT&T's Motions for Reconsideration (FPTA's Motion to Strike).

II. ORAL ARGUMENT

We have determined that it is appropriate to deny MCI's Request for Oral Argument. Rule 25-22.060(1)(f), Florida Administrative Code, provides that oral argument on a request for reconsideration is granted solely at our discretion. We do not believe that oral argument would aid us in our consideration of MCI's Petition. Accordingly, MCI's Request shall be denied.

III. AMICUS MEMORANDUM

ATC has asked that it be allowed to submit a memorandum that supports the post-hearing filings of ATT-C and MCI. ATC admits that it did not intervene in this docket. ATC also acknowledges that its interests were represented before us through its

membership in the Florida Interexchange Carriers Association (FIXCA). We note that FIXCA has not requested reconsideration of our final order.

Upon consideration, we find it appropriate to deny ATC's Motion. Although our rules do not explicitly address so-called "amicus filings," it is obvious that ATC's pleading substantively amounts to no more than an untimely motion for reconsideration filed by a non-party. As FPTA notes in its Response, we have previously denied similar after-the-fact amicus motions. We shall do so here as well.

IV. MOTION TO STRIKE

FPTA filed a Motion to Strike Sprint's Joinder. Sprint's Joinder supports the post-hearing positions taken by MCI and ATT-C. Rule 25-22.060(3)(c), Florida Administrative Code, requires that a motion for reconsideration be filed within 15 days following the issuance of a final order. This portion of the Rule also allows the filing of a response to a motion for reconsideration, so long as that response is filed within 7 days of service of the motion for reconsideration to which the response is directed (with an additional 5 days for service by mail, pursuant to Rule 25-22.028, Florida Administrative Code). To the extent that Sprint's Joinder represents a response to the two motions for reconsideration, it was not filed within the 12 days provided by the Rules and shall be stricken.

In addition, Sprint's pleading substantively amounts to no more than a motion for reconsideration. As such, it is untimely and shall be stricken. Further, to the extent Sprint's Joinder is a request for reconsideration, it does not point to any mistake of law or fact, but merely reargues positions we previously considered and rejected. For all of these reasons, we find no basis to allow the late filing of such a pleading. Accordingly, FPTA's Motion to Strike shall be granted.

V. COSTS

MCI claims that we overlooked or failed to consider the testimony of witnesses Gillan and McCabe when we determined that their predictions that end users would ultimately bear the costs of compensation were speculation on their part. However, these two

witnesses did not substantiate their claims nor testify to any direct knowledge of the plans of the IXCs to deal with these costs. Further, witness Kramer testified that IXCs are willing to pay commissions far in excess of the levels ordered in this docket for identical traffic that is routed to them via presubscription. Accordingly, we do not believe that we overlooked or failed to consider their testimony. Rather, the factors above make it reasonable to conclude that the testimony that IXCs will automatically pass the cost of compensation on to end users as a rate increase is mere speculation at this time. Accordingly, MCI's Petition shall be denied on this point.

VI. POLICY

MCI's Petition claims that we did not take into account that NPATS providers are required by law to provide access to all available IXCs and that it is inappropriate to require IXCs to pay compensation to NPATS providers to encourage their compliance with existing policies.

We disagree with this assertion. First, offering compensation for following existing laws is sometimes desirable, particularly when oversight and enforcement are difficult. Our resources are insufficient to ensure that each of the thousands of paystations in Florida provide access to all available carriers; we can only test a sample. Therefore, with enforcement difficult, it is not unusual for some inducement to comply to be offered. We must stress here that this reason was not a determining factor in our decision to order compensation; it merely does not mitigate it in any way. Our primary reason for ordering compensation was a fairness issue regarding the use of the NPATS' instrument.

Second, there are several instances in other cases where our policies or statutes require carriers to provide services, yet do not require that they be offered at no charge. For example, ATT-C and all LECs are considered carriers of last resort; they must, therefore, provide service to all customers in their serving territories. However, it would hardly be reasonable to expect them to offer the services at no charge.

Based upon the above factors, we see no error or oversight in our analysis on this point. Accordingly, MCI's Petition shall be denied on this factor.

VII. COMPENSATION AMOUNT

MCI argued in its Petition that there was no basis in the record for our decision to order compensation in the amount of $3.00 per phone per month. ATT-C also sought reconsideration on this point. ATT-C and MCI differed only in their recommendations for a compensation level. ATT-C recommended some undefined level significantly below $3.00; MCI argued there was no basis for any compensation amount.

We agree with the parties that there was no direct evidence that specifically pointed to $3.00 per phone per month. The recommended rates ranged from zero to $9.00 per month. MCI apparently believes that we had no authority to design a rate level of our own, given conflicting testimony. We strongly disagree.

This Commission is often faced with conflicting testimony and must choose its own reasonable alternative. A prime example is the testimony offered on return on equity issues in rate cases. The $3.00 figure here was simply a conservative amount based upon the alternatives offered. A middle figure was recommended by witness McCabe: $6.00 per month. However, this was only for high volume phones, not all phones. So, given no information on the split between the number of high and low volume phones, or the level at which to split them, taking witness McCabe's $6.00 per month and cutting it in half to apply to all phones is, we believe, a reasonable approach.

In addition, there is a general understanding from historical traffic patterns of IXCs that approximately twice as much traffic is interstate versus intrastate. This understanding was supported by ATT-C's witness Quaglia, who testified that ATT-C's split was approximately 65 per cent interstate and 35 per cent intrastate. Considering this split in traffic, cutting the FCC's rate of $6.00 in half is also a reasonable approach. We note that this rationale was not expressed in the original order.

ATT-C also argued that we ignored testimony from its witness Quaglia, who stated that the FCC accepted ten as the number of dial-around calls per month, growing to 15 as 10XXX traffic was unblocked (it is currently unblocked in Florida). Witness Quaglia then extrapolated that given the split between intrastate and interstate traffic, intrastate dial-around calls would presently be 5.4, growing to 8. Then, dividing $3.00 by eight calls would yield a "windfall" of profits to NPATS providers. However, witness

Quaglia also testified that the FCC determined that no carrier could accurately determine the number of dial-around calls originated from each pay station.

We disagree with ATT-C on this point. We did not ignore witness Quaglia's testimony. Rather, we evaluated his testimony, along with each other witnesses' testimony, before reaching our own compromise rate level. We see no error of fact or law on this matter. Accordingly, MCI's Petition and ATT-C's Motion shall both be denied on this issue.

VIII. COMPENSATION PAYORS

MCI argues that there was no basis in the record for our decision to include only those carriers providing live or automated operator services and having at least $50 million in gross intrastate annual revenues for compensation payments.

FPTA witness Kramer suggested that carriers serving a negligible share of access lines should be exempt from compensation. This is consistent with the FCC's method of implementation. Witness Scobie suggested that the FCC's method of implementation was appropriate.

Our decision is consistent with what was advocated by these witnesses. The FCC only included the 14 largest interstate carriers, representing over 90% of the total traffic. Trying to emulate this approach, we analyzed regulatory assessment fee data supplied to our accounting division by the carriers themselves. The data clearly showed that carriers in excess of $50 million in intrastate revenues - ATT-C, MCI, ATC, and Sprint - represented 90% of all traffic. The next largest carrier had only $16,000,000 in intrastate revenues, or less than 1/4 of the smallest of the four IXCs included.

No party refuted the use of regulatory assessment fee data nor requested that its use be reconsidered. Rather, MCI's argument centers around a lack of basis in the record for singling out only the four largest carriers. The parties do not dispute that these are the four largest carriers, that they are significantly larger than the other carriers, and that they do represent 90% of the interLATA long distance market in Florida. Accordingly, we find it appropriate to deny MCI's Petition on this factor.

IX. IMPLEMENTATION

We originally ordered payments of dial-around compensation to begin 90 days following the final order in this docket. The main reason for this decision was that federal payments had not yet begun and we wanted to allow time for potential problems to be worked out. Our original decision ordered payments to begin within 90 days following the last action in this docket.

We believe that there are no hindrances remaining in the implementation of dial-around compensation. It is our understanding that payments have already begun at the federal level and that the billing problems have been rectified. We see no incentive for the IXCs to begin payment of compensation before the very end of the 90-day period if our Order stands on this point. Accordingly, we find it appropriate to reconsider our prior decision on our own motion. We shall require that the obligation to pay dial around compensation commence on July 1, 1993. The NPATS providers may bill the IXCs for compensation with the next interstate compensation billing cycle after July 1, 1993.

X. REOPENING OF RECORD

While compiling the documents needed to consider the various post-hearing filings, we became aware that we never actually took official notice of the FCC's Order in the federal dial-around proceeding (released May 8, 1992, in Docket No. 91-35). Up until this point, we have operated under the assumption that the order was in the record. All of the witnesses refer to this order in their testimony. In fact, a number of the witnesses rely upon the order extensively, including references to specific portions of the order in their testimony.

We believe that reopening the record will serve to cure a simple matter of oversight and will in no way prejudice any party to the proceeding. None of the parties has raised this issue in their post-hearing filings. In fact, there is really no debate regarding what it is the FCC has done. Rather, some of the parties don't like what the FCC did or don't think that Florida should do something similar. However, that is a different type of evidentiary concern from the one raised by this action. Here, we are merely attempting to ensure that the record is complete by the inclusion of a document relied upon by all of the witnesses.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that MCI Telecommunications Corp.'s Request for Oral Argument shall be denied for the reasons set forth herein. It is further

ORDERED that Transcall America, Inc. d/b/a ATC Long Distance's Motion for Leave to File Amicus Memorandum is hereby denied for the reasons discussed in the body of this Order. It is further

ORDERED that Sprint Communications Company Limited Partnership's Response and Joinder shall be denied and Florida Pay Telephone Association, Inc.'s Motion to Strike Sprint's Response and Joinder shall be granted for the reasons detailed herein. It is further

ORDERED that MCI Telecommunications Corp.'s Petition for Reconsideration and AT&T Communications of the Southern States, Inc.'s Motion for Reconsideration shall be denied for the reasons set out herein. It is further

ORDERED that we shall reconsider our implementation date on our own motion and set the obligation for dial-around compensation to begin July 1, 1993. It is further

ORDERED that we shall reopen the record in this proceeding for the limited purpose discussed herein. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 13th day of July, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

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by: Kay Flynn
Chief, Bureau of Records

NOTICE OF 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 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 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.