**FLORIDA PUBLIC SERVICE COMMISSION**

 **FLETCHER BUILDING**

 **101 EAST GAINES STREET**

 **TALLAHASSEE, FLORIDA 32399-0850**

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

 **February 23, 1995**

**TO :DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)**

**FROM:DIVISION OF APPEALS (BELLAK)**

 **DIVISION OF COMMUNICATIONS (LEWIS)**

**RE :DOCKET NO. 941190-TI - PROPOSED REVISIONS TO RULE 25-4.118, F.A.C., INTEREXCHANGE CARRIER SELECTION**

**AGENDA:MARCH 7, 1995 - REGULAR AGENDA - RULE PROPOSAL - INTERESTED PERSONS MAY PARTICIPATE**

**RULE STATUS: PROPOSAL MAY BE DEFERRED**

**SPECIAL INSTRUCTIONS: I:\PSC\APP\WP\941190.RCM**

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 **CASE BACKGROUND**

 By petition filed January 10, 1995, AT&T Communications of the Southern States (AT&T or the Company), pursuant to Section 120.54(17) Florida Statutes, and Rule 25-22.016(6)(a), Florida Administrative Code, requested that the Commission conduct a hearing concerning proposed revisions to Rule 25-4.118 F.A.C. and that the hearing be a "draw-out" proceeding conducted pursuant to Section 120.57, Florida Statutes. Those rule revisions concern requirements for documents which are utilized by consumers to change their selection of interexchange carriers.

 Pursuant to Rule 25-22.016(6)(b), the Commission went forward with a Section 120.54(3), Florida Statutes, rulemaking hearing on January 18, 1995 while this petition was pending. AT&T participated in that hearing, but in doing so did not waive its rights to seek a Section 120.57 hearing.

 In its consideration of AT&T's request, the Commission's decision is governed by whether the petitioner asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding [section 120.54(3) rulemaking hearing] does not provide adequate opportunity to protect those interests.

Section 120.54(17), Florida Statutes.

 **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant AT&T's request for a Section 120.57 "draw-out" hearing?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** AT&T has asserted that its substantial interests will be affected by this rulemaking. The Company represents that it advocated the use of consistent state and federal standards with respect to interexchange (IXC) selection before the Commission previously and that the Commission generally adopted that approach in current Rule 25-4.118.

 Now that AT&T has adopted business practices in accord with the present formulation of the IXC carrier selection rule, the Company is concerned that proposed revisions to that rule will necessitate costly changes even though the public has not been harmed by those practices. Moreover, the Company fears that Florida-specific marketing practices may become necessary as a result of the revisions, which would not only be burdensome to the Company, but also to the public, which might be deprived of some of the benefits of interexchange competition as a consequence. Petition, p. 4-5.

 Though the substantial interests of AT&T are, in fact, affected by this rulemaking, a Section 120.57 "draw-out" hearing is only warranted if the Company could not protect its substantial interests without a draw-out. In support of its claim that the Company could not protect its substantial interests absent a draw-out, AT&T notes four main factors:

1.Timing: An FCC rulemaking is currently in progress and AT&T is concerned that action by the Commission may not be consistent with the FCC action, leading to the burdensome need for Florida-specific marketing previously discussed. Petition, p. 5-6.

 2.Lack of Full Commission Participation: AT&T believes that the full Commission or a Commission panel, rather than a hearing officer from the Division of Appeals, should hear this matter because the current rule was initially adopted in the context of a proceeding that involved the Commissioners themselves. Petition, p. 6-7.

 3.Lack of Discovery Rights: AT&T contends that, rather than a quasi-legislative rulemaking hearing, a hearing in which formal discovery takes place will enable the Company to demonstrate that certain IXC's are responsible for consumer complaints and to propose a solution that protects the public interest without unduly restricting the legitimate business activities of other carriers. Petition, p. 7-8.

 4.Lack of Opportunity to Develop Evidence: The Company submits that "the Commission should change or depart from existing standards on which companies have relied only if there is a clear showing, based on substantial evidence of record, that the existing standards are inadequate to protect the public interest and that the newly proposed standards are the least restrictive means of protecting the public". Petition, p. 9. AT&T notes that this result is also consistent with statutory directives, Section 364.01(3)(c) and (d), Florida Statutes, as well.

 The problem with these assertions, from the perspective of this petition, is that they do not demonstrate AT&T's inability to protect its substantial interests without a draw-out. As AT&T's Post Hearing Comments demonstrate, Attachment I, these arguments could be presented, and were, in the ordinary context of rulemaking. As further indicated by staff's post-hearing comments, Attachment II, there is no dispute that an FCC rulemaking process in this area is currently in progress, that some companies' activities have contributed far less than others to these kinds of consumer complaints or that unnecessary impacts on competition should be avoided. It is not these facts that are in dispute, but rather what the best policy should be in light of these facts. Moreover, the full Commission will be required to consider those facts in its review of this rulemaking, and, in effect, will hear from the participants through their contributions to the record.

 Where the matter here concerns a search for the best policy in light of facts which are largely undisputed, staff recommends that a draw-out is unnecessary. In this analysis, the observations of the Court in Adam Smith Enterprises, Inc. v. State, Department of Environmental Regulation, 553 So. 2d 1260, 1273, n. 19, (1st DCA 1989) are pertinent:

Formalized adjudicatory methods are clearly nonessential for purposes of rational rulemaking. There are procedures set forth in Section 120.54 expressly designed to provide the administrator access to all data, criticisms, suggestions, alternatives, and contingencies relevant to his decisions. Adjudicatory methods are in fact insufficient to this task. A rulemaker must typically make and coordinate many empirical conclusions dependent on raw material outside the conventional evidentiary categories of "testimony" and "exhibits". For example, the rulemaker must often draw upon prior experience, expert advice, the developing technical literature, ongoing experiments, or seasoned predictions.

 The foregoing suggests that draw-out proceedings should be reserved for the process of deciding facts that are in dispute, and that the ordinary rulemaking process should be utilized in this case where the question ultimately to be determined is what the best policy is in light of the acknowledged facts.

**ISSUE 2:** Should this docket remain open?

**RECOMMENDATION:** Yes.

RCB

Attachments