

State of Florida



Public Service Commission

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OFFICE PROC

DATE: 09/23/99

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

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, ^{BK}WATTS) ^{CBW}
DIVISION OF COMMUNICATIONS (FAVORS, ^{ILERI}) ^{CRF} ^{CB}

RE: DOCKET NO. 981008-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF AMERICAN COMMUNICATION SERVICES OF JACKSONVILLE, INC. D/B/A E.SPIRE COMMUNICATIONS, INC. AND ACSI LOCAL SWITCHED SERVICES, INC. D/B/A E.SPIRE COMMUNICATIONS, INC. AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. REGARDING RECIPROCAL COMPENSATION FOR TRAFFIC TERMINATED TO INTERNET SERVICE PROVIDERS.

AGENDA: 10/05/99 - REGULAR AGENDA - MOTION FOR STAY - PARTICIPATION BY COMMISSIONERS AND STAFF ONLY - ORAL ARGUMENT NOT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981008ST.RCM

CASE BACKGROUND

On August 6, 1998, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (e.spire) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire requested enforcement of its interconnection agreement with BellSouth regarding reciprocal compensation for traffic terminated to Internet Service Providers. On August 31, 1998, BellSouth filed its Answer and

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Response to e.spire's Petition. An administrative hearing was conducted regarding this dispute on January 20, 1999.

On April 6, 1999, the Commission issued Order No. PSC-99-0658-FOF-TP resolving e.spire's complaint. Therein, the Commission determined: the evidence did not indicate that the parties intended to exclude ISP traffic from the definition of "local traffic" in their Interconnection Agreement; the two million minute differential required by the Agreement was met in March, 1998; the "most favored nations" (MFN) portions of the agreement would be enforced in resolving the dispute over the applicable reciprocal compensation rate for local traffic; and attorney's fees were due to e.spire pursuant to Section XXV(A) of the Agreement. Order at pages 7, 13, 15, and 16, respectively. A portion of the Commission's Order was issued as Proposed Agency Action. In the Proposed Agency Action portion, the Commission also required the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual, available information, or using a proposed methodology if actual information is no longer available. Order at page 17.

On April 21, 1999, BellSouth timely filed a Motion for Reconsideration by the Full Commission of the Commission's Order. On April 26, 1999, BellSouth timely filed a Petition on the PAA portions of Order No. PSC-99-0658-FOF-TP. Subsequently, on May 24, 1999, the parties filed a Joint Motion to Modify Portions of Order No. PSC-99-0658-FOF-TP. By Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, BellSouth's Motion for Reconsideration was denied and the Joint Motion to Modify Portions of the final Order was granted.

On August 20, 1999, BellSouth filed a Motion for Stay of Order No. PSC-99-0658-FOF-TP Pending Appeal. e.spire timely responded to the motion on September 1, 1999. e.spire withdrew portions of its response on the following day. This is staff's recommendation on the Motion for Stay.

DISCUSSION OF ISSUES

ISSUE 1: Should BellSouth's Motion for Stay Pending Appeal be granted?

RECOMMENDATION: Yes. The Commission should grant BellSouth's Motion for Stay of the final portions of Order No. PSC-99-0658-FOF-TP and should stay any further proceedings regarding BellSouth's Protest of the proposed agency action portions of that Order pending the outcome of BellSouth's appeal. The Commission should, however, require BellSouth to maintain the amount at issue in escrow. The escrow account that BellSouth indicates it is already maintaining may be considered sufficient if BellSouth submits a report outlining the precise arrangements of the escrow that it has indicated it is already maintaining to cover the amount at issue. Furthermore, interest should be applied to the amount in escrow in accordance with Rule 25-4.114(4), Florida Administrative Code, from the date of the Commission's decision on the Motion for Stay at its Agenda Conference.

STAFF ANALYSIS:

BellSouth argues that it is entitled to a stay under Rule 25-22.061(2), Florida Administrative Code. BellSouth argues that while there is no legal test applicable to the Commission's decision to stay an Order, the Commission can consider the likelihood that an appeal will be successful, whether a party will suffer irreparable harm if the stay is not granted, and whether the stay will cause irreparable harm or is contrary to the public interest.

BellSouth asserts that it is likely to prevail on appeal, because the Commission's findings in its final order are contrary to the FCC's determinations in FCC Order 99-38. BellSouth also argues that it will suffer irreparable harm if the stay is not granted because it will have to pay e.spire substantial amounts that e.spire may not be able to refund to BellSouth if BellSouth wins on appeal. BellSouth emphasizes that it believes that e.spire's financials reflect net losses. BellSouth further explains that e.spire will not be harmed if the stay is granted because BellSouth will pay e.spire the appropriate amount if

BellSouth's appeal is not successful. BellSouth adds that it should not be required to post a bond because the money at issue has already been escrowed pending the outcome of the appeal.

e.spire argues that the stay should not be granted because BellSouth is not likely to prevail on appeal, BellSouth will not suffer irreparable harm if the stay is not granted, and e.spire will suffer irreparable harm if the stay is granted.

e.spire argues that BellSouth's only argument that it will win on appeal is that the Commission's decision is contrary to the FCC's ISP Order, FCC Order 99-38, issued February 26, 1999. e.spire emphasizes, however, that the FCC clearly indicated in that Order that it would not interfere with state commission findings on whether ISP traffic should be treated as local. Thus, e.spire asserts that BellSouth has not demonstrated a likelihood that it will prevail on appeal.

e.spire also argues that the Commission should not grant the stay simply because BellSouth will otherwise have to pay e.spire. e.spire argues that BellSouth willingly entered into the agreement that serves as the basis for the amount due to e.spire, and, therefore, BellSouth should now have to pay in accordance with the agreement. e.spire further asserts that it will be harmed if BellSouth does not pay the amount that it owes e.spire. e.spire maintains that without the money, its ability to compete with BellSouth will be impaired.

In addition, e.spire asserts that if the stay is granted, BellSouth should be required to submit a report outlining the precise arrangements of the escrow and the amounts in the account that BellSouth refers to in its motion.

Rule 25-22.061(2), Florida Administrative Code, is applicable to this case. That rule provides:

Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to

grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner is likely to prevail upon appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Pursuant to this Rule, the Commission has the discretion to consider matters other than those enumerated within the Rule. In this instance, administrative efficiency should also be considered. See Order No. PSC-98-0793-PCO-EU, issued June 8, 1999, in Docket No. 930885-EU.

The Final Order in this case, Order No. PSC-99-0658-FOF-TP, included a non-final Proposed Agency Action decision, as well as final post-hearing decisions. As noted in the Case Background, the Commission has already addressed BellSouth's Motion for Reconsideration of the final agency action decisions contained in the Order. BellSouth's Protest of the Proposed Agency Action decision, however, remains outstanding. The Proposed Agency Action decision pertained to the method of calculating the amount owed to e.spire by BellSouth. This issue is a derivative of the final agency action decisions contained in Order No. PSC-99-0658-FOF-TP, but it is also essential to the ultimate implementation of the Commission's decision. As such, if Order No. PSC-99-0658-FOF-TP is not stayed during BellSouth's appeal, the Commission will have to proceed to address BellSouth's protest of the proposed agency action decision. Such action will likely entail a hearing, although a limited proceeding might be possible. Staff believes that conducting further proceedings on this issue while an appeal

of the larger issues is pending would be judicially inefficient and would conflict with the federal court's jurisdiction over the case for purposes of the appeal. In the time that it would take to resolve this issue before the Commission, the federal court may be able to reach a decision on the larger issues. The court's decision on the larger issues regarding the language in the agreement will ultimately have some impact on the proposed agency action issue regarding the method of calculating the amount owed, and could negate the need for any further proceedings on the proposed agency action issue. Thus, staff believes that granting the stay is appropriate.

Furthermore, staff notes that Order No. PSC-99-0658-FOF-TP was the first post-hearing decision on the ISP traffic issue to be rendered by the Commission after the FCC issued FCC Order 99-38, wherein the FCC stated that traffic to ISPs ". . . is jurisdictionally mixed and appears to be largely interstate." FCC Order at p. 2. The Commission acknowledged the FCC's statements in Order 99-38, but clearly emphasized that

. . . the current state of the law has no impact on our resolution of this complaint. Based on the plain language of the agreement, the effective law at the time the agreement was executed and the actions of the parties in effectuating the agreement, it is clear to us that the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls.

Order at p. 11. While staff believes that this decision was correct and that an appeal will be unsuccessful, we also believe that it would be inefficient and costly to conduct further proceedings to determine the specific amount due to e.spire while the issue of whether e.spire is due anything is before the court.

Staff acknowledges that in another case involving the issue of reciprocal compensation for ISP traffic the Commission denied a similar request for stay of the final Order pending appeal. By Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Dockets

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Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP, the Commission denied BellSouth's request for a stay of the Commission's Order directing BellSouth to pay reciprocal compensation to WorldCom, Teleport, Intermedia, and MCI. In that case, there was not, however, a separate proposed agency action issue regarding the calculation of the amount owed as there is between e.spire and BellSouth. Therefore, staff does not believe that a decision to stay Order No. PSC-99-0658-FOF-TP and any further proceedings on BellSouth's protest of the proposed agency action decision contained in that Order will conflict with past Commission decisions.

For the foregoing reasons, staff recommends that BellSouth's Motion for Stay Pending Appeal be granted.

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ISSUE 2: Should this Docket be closed?

STAFF RECOMMENDATION: No. This Docket should remain open and should be placed on monitor status pending resolution of BellSouth's appeal of Order No. PSC-99-0658-FOF-TP.

STAFF ANALYSIS: This Docket should remain open and should be placed on monitor status pending resolution of BellSouth's appeal of Order No. PSC-99-0658-FOF-TP.