



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED 11:50 AM
01 MAR 22 AM 11:17
REC'D DIVISION OF RECORDS & REPORTING

DATE: MARCH 22, 2001

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

FROM: DIVISION OF COMPETITIVE SERVICES (KING, DOWDS, HINTON, WATTS)
DIVISION OF LEGAL SERVICES (VACCARO) *IV BK*

RE: DOCKET NO. 991854-TP - PETITION OF BELL SOUTH TELECOMMUNICATIONS, INC. FOR SECTION 252(B) ARBITRATION OF INTERCONNECTION AGREEMENT WITH INTERMEDIA COMMUNICATIONS, INC.

AGENDA: 04/03/2001 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991854.RCM

CASE BACKGROUND

On December 7, 1999, BellSouth Telecommunications Inc. (BST or BellSouth) filed a Petition for Arbitration pursuant to 47 U.S.C. 252(b) of the Telecommunications Act of 1996 (Act) seeking arbitration of certain unresolved issues in the interconnection negotiations between BST and Intermedia Communications, Inc. (Intermedia). BST's petition enumerated ten issues. On January 3, 2000, Intermedia filed its response which contained an additional 38 issues to be arbitrated. At the issue identification meeting, the parties notified Commission staff that some of the 48 issues had been resolved and that many were under "active discussion." Additional issues were resolved prior to hearing. An administrative hearing was held on April 10, 2000 on the remaining issues. Subsequent to the hearing an additional issue was resolved by the parties. By Order No. PSC-00-1519-FOF-TP, issued August 22,

DOCUMENT NUMBER-DATE

03657 MAR 22 01

FPSC-RECORDS/REPORTING

2000, the Commission addressed the remaining issues. By that Order, the parties were required to submit a signed agreement compliant with the Commission's decisions within 30 days of the issuance of the Order. The signed agreement was due on September 21, 2000.

On September 6, 2000, Intermedia timely filed a Motion for Reconsideration and Clarification of Order No. PSC-00-1519-FOF-TP. Intermedia also filed a Request for Oral Argument on its motion. On September 13, 2000, BellSouth timely responded to Intermedia's motion and Request for Oral Argument.

On September 20, 2000, the parties contacted Commission staff and orally requested an extension of time to file the signed agreement, pending the filing of a written request. On September 26, 2000, the parties filed a Joint Motion for Extension of Time requesting until October 4, 2000 to submit the signed agreement. BellSouth filed the agreement on behalf of the parties on October 4, 2000. By Order No. PSC-00-1836-PCO-TP, issued October 6, 2000, the parties' motion was granted.

On January 24, 2001, Counsel for Intermedia filed a letter indicating that the parties had reached an agreement regarding Issue 32. That issue addressed whether the definition of "switched access" in the parties' agreement should include Internet Protocol (IP) telephony. The Commission determined that for the purpose of the parties' agreement, IP telephony should be included in the definition of switched access. Intermedia indicated in its letter that the parties' agreement included a provision which states that the parties have been unable to agree whether "Voice-Over-Internet Protocol" (VOIP, also addressed as "IP telephony") transmissions constitute switched access traffic, and the parties agree to abide by any FCC rules and orders regarding the nature of such traffic and compensation payable for such traffic. Intermedia indicated that the agreement had gone into effect pursuant to Section 252(e)(4) of the Act; therefore, it indicates that it has withdrawn this issue from its motion for reconsideration, based on the understanding that the parties' agreement renders the Commission's decision on this issue a nullity. Staff notes that this issue will be addressed in the Commission's generic reciprocal compensation docket, Docket No. 000075-TP.

On February 28, 2000, counsel for Intermedia contacted legal staff indicating that the parties also resolved an issue contained

in Intermedia's motion for clarification, regarding whether the Commission's decision on Issue 26 required that Attachment 3, Section 1.2.1 of BellSouth's proposed language in the parties' draft agreement should be stricken. Attachment 3, Section 1.2.1 provides, in part, the following:

In order for Intermedia to home its NPA/NXX on a BellSouth Tandem, Intermedia's NPA/NXX(s) must be assigned to an Exchange Rate Center Area served by that BellSouth Tandem and as specified by BellSouth.

Intermedia indicates in its letter that the parties decided against this language, and agreed to language which reflects the Commission's finding in Issue 26 that:

Nevertheless, the parties shall be required to assign numbers within the areas to which they are traditionally associated, until such time when information necessary for the proper rating of calls to numbers assigned outside of those areas can be provided. Final Order at 43.

This recommendation addresses Intermedia's Request for Oral Argument and the remaining issues contained in its Motion for Reconsideration and Clarification.

ISSUE 1: Should the Commission grant Intermedia Communications Inc.'s Request for Oral Argument?

RECOMMENDATION: No. The Commission should deny Intermedia Communications Inc.'s Request for Oral Argument. (VACCARO)

STAFF ANALYSIS: Intermedia states that oral argument on its Motion for Reconsideration and Clarification is warranted, because it is necessary for the Commission's comprehension and evaluation of very complex matters associated with Intermedia's motion, including:

(1) the unsettled state of the law in Florida and elsewhere concerning the proper application of 47 C.F.R. 51.711(a)(3);

(2) the exclusive federal jurisdiction over, and regulatory classification of, Internet Protocol Telephony/VOIP as an enhanced service;

(3) the relationship between BellSouth's tariffed Foreign Exchange Service offering to the unilaterally restrictive language that BellSouth seeks to impose on Intermedia;

(4) the practical and legal implications of the Commission's determination that both Parties should, on an interim basis, assign numbers only within the areas to which they are traditionally associated; and

(5) the spill-over competitive importance of those issues not only to Intermedia but also to all competitive and incumbent carriers operating in the State of Florida.

Intermedia also states that oral argument is warranted so that the Commission may have an opportunity to question the parties directly, which would be useful in making necessary legal and policy determinations with regard to Intermedia's motion, especially in addressing Intermedia's challenge regarding VOIP.

BellSouth states in its response that Intermedia has failed to identify, in its Motion for Reconsideration and Clarification, any point of fact or law overlooked by the Commission; therefore, there is no justification for granting Intermedia's Request for Oral Argument.

Rule 25-22.058(1), Florida Administrative Code, provides that the Commission may grant oral argument, provided, among other things, that the request states "with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." Staff notes that reason number two above is no longer at issue, because of Intermedia's withdrawal of the IP telephony/VOIP issue, nor is the "restrictive language" noted in reason number three (BellSouth's proposed language in Attachment 3, Section 1.2.1 of the draft agreement discussed in the Case Background). Staff believes that the remaining points are adequately addressed in Intermedia's motion. Intermedia's motion contains sufficient argument for the Commission to render a fair and complete evaluation of the merits without oral argument. Therefore, staff recommends that the Commission deny Intermedia's Request for Oral Argument.

ISSUE 2: Should the Commission grant Intermedia Communications Inc.'s Motion for Reconsideration and Clarification?

RECOMMENDATION: No. The Commission should deny Intermedia Communications Inc.'s Motion for Reconsideration and Clarification. (VACCARO, HINTON)

STAFF ANALYSIS: Intermedia asks the Commission to reconsider its decision to deny Intermedia reciprocal compensation at the tandem interconnection rate. Intermedia also requests clarification to determine whether certain BellSouth proposed language should be stricken from the parties' draft interconnection agreement, and whether BellSouth must cease to provide Foreign Exchange Service.

I. Reconsideration Regarding Tandem Switching Rate

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

Intermedia argues that the Commission must reconsider its refusal to accord Intermedia reciprocal compensation at the tandem interconnection rate. Intermedia specifies four reasons to support its claim: 1) The Commission failed to apply FCC Rule 51.711(a)(3) in making its decision and, instead, erroneously relied upon Paragraph 1090 of the FCC's First Report and Order (FCC 96-325) in FCC Docket 96-98; 2) the Commission erroneously required that Intermedia demonstrate similar switch functionality; 3) the Commission committed fundamental error by determining that Intermedia was not entitled to the tandem interconnection rate, because it has only one switch in the local calling area; and 4) the Commission failed to give credit to Intermedia's uncontroverted

showing that its voice switches serve areas geographically comparable to those of BellSouth.

A. Application of FCC Rule 51.711(a)(3)

Intermedia asserts that the correct standard to be applied in determining whether it is entitled to reciprocal compensation at the tandem interconnection rate is clearly articulated in FCC Rule 51.711(a)(3), which states in part:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Intermedia asserts that, "When a rule or statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of construction, and its plain meaning must be given effect." See Starr Tyme, Inc. V. Cohen, 659 So.2d 1064, 1067 (Fla. 1995). Intermedia states that Rule 51.711(a)(3) clearly established geographic comparability as the sole criterion that must be considered regarding the tandem interconnection rate. Rather than apply this standard, Intermedia asserts that the Commission created its own "two-prong" test which required a showing of geographic comparability and similar functionality, based on Paragraph 1090 of FCC 96-325. To avoid fundamental, reversible error, Intermedia states that the Commission must reconsider its decision.

BellSouth states in its response that the Commission noted at page nine of its Final Order that it did consider the appropriate application of Rule 51.711(a)(3). BellSouth also asserts in a footnote that Intermedia suggests that Rule 51.711(a)(3) and paragraph 1090 of FCC 96-325 are in conflict, but Intermedia provides no authority to support that proposition. Finally, BellSouth asserts that the Commission did not reach the legal issue that Intermedia claims it decided in error -- that a "two-prong" test must be applied. BellSouth asserts that the Commission merely found that, as a matter of fact, Intermedia failed to prove either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches.

Staff disagrees with Intermedia's assertion that the Commission established a "two-prong" standard which required that Intermedia prove similar functionality and geographic comparability. It is true that the Commission considered both functionality and geographic comparability in making its determination regarding reciprocal compensation at the tandem interconnection rate. The Commission noted at page 12 of its Final Order that it was presented with these two criteria. After all, both criteria were raised at hearing. Nowhere, however, does the Commission set forth that a specific standard regarding either criterion must be applied to determine the issue. As BellSouth correctly asserts, the Commission merely found that, as a matter of fact, Intermedia failed to prove either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches. In fact, when considering the tandem interconnection rate issue in a subsequent docket, the Commission stated the following:

We have addressed this same issue in the Intermedia/BellSouth Arbitration Order No. PSC-00-1519-FOF-TP, issued in Docket No. 991854-TP. Again we evaluated the geographic and functional comparability but never made a specific finding whether or not both were required for recovery of the tandem switch rate.

Order No. PSC-00-2471-FOF-TP, issued December 21, 2000, in Docket No. 991755-TP, In re: Request for arbitration concerning complaint of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement.

Based upon the foregoing, staff does not believe that the Commission made a mistake of law, because the Commission did apply FCC Rule 51.711(a)(3) in making its decision. The Commission did not create a separate "two-prong" standard based upon paragraph 1090 of FCC 96-325. Further, staff believes that Intermedia is merely attempting to reargue its position on this issue which, under the earlier cited case law, is inappropriate for reconsideration. Therefore, staff recommends that the commission deny Intermedia's motion for reconsideration under this ground.

B. Demonstration of Similar Functionality

Intermedia states that Rule 51.711(a)(3) contains no mention of a required showing of similar switch functionality. Intermedia asserts that because the Commission "had to 'go behind' the plain wording of the FCC's rule to obtain the 'switch functionality' requirement, it was error to require a showing of similar switch functionality." Moreover, Intermedia argues that if the Commission were correct to apply the wording of paragraph 1090 of FCC 96-325, the Commission mistakenly interpreted paragraph 1090 as requiring a "two-prong" test.

BellSouth responds by stating that the Commission merely found that, as a matter of fact, Intermedia failed to prove either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches. BellSouth states that the Commission determined that Intermedia failed to prove it was entitled to reciprocal compensation at the tandem rate based on geographic functionality, but declined to reach the legal issue of whether Intermedia's interpretation of the rule was correct.

Staff notes that Intermedia's arguments are basically the same as those discussed in the previous section. As discussed above, the Commission did apply FCC Rule 51.711(a)(3) in making its decision; however, the Commission did not create a separate "two-prong" standard based upon paragraph 1090 of FCC 96-325. In essence, Intermedia is rearguing its prior reargument of the case. Therefore, staff recommends that the Commission should deny Intermedia's motion for reconsideration on this ground as well.

C. Number of Switches in Local Calling Area

Intermedia asserts that the Commission found that it could not be performing a tandem function and, therefore, could not be entitled to the tandem interconnection rate, because it only "has one local switch in each local calling area." Commission Final Order at 14. Intermedia claims that the Commission erred, because Rule 51.711(a)(3) does not refer to "switches," but "on its face clearly states that the tandem interconnection rate compensation shall be paid when 'the switch' of a carrier other than an ILEC serves a geographic area comparable to the area served by the ILEC's tandem switch." Intermedia also alleges that Paragraph 1090 uses the term "switch" in the singular form. Intermedia argues

that there is no basis for the Commission's finding that the FCC intended to restrict payment of reciprocal compensation at the tandem rate to carriers with more than one switch in the local calling area.

Intermedia states that the FCC's intent, as demonstrated by Paragraph 1090, contemplates competitive carriers using new and innovative technologies to perform a similar function to the ILEC switch. Intermedia further states that implementing a single, large, expensive switch to cover a large calling area is the network architecture most typical of competitive carriers. Intermedia states that the Commission's erroneous interpretation of Rule 51.711(a)(3) means that it will be impossible for any competitor to obtain the tandem interconnection rate unless it mirrors the "antiquated, legacy network design of the incumbent carrier."

BellSouth responds by stating that the Commission's decision was not based on the number of switches Intermedia has in any one area. BellSouth states that the Commission made a finding that Intermedia provided no evidence that its switches function as a local tandem.

Intermedia attempts to frame its argument as a mistake of law, arguing that the Commission failed to consider the FCC's use of the word "switch" in making its determination. Staff believes, however, that Intermedia is simply attempting to reargue its position that Intermedia's single switches perform a tandem switch function. Reargument is inappropriate for reconsideration under Sherwood. Intermedia is simply displeased with the outcome of this case. Further, the Commission made no specific finding that the FCC intended to restrict payment of reciprocal compensation at the tandem rate to carriers with more than one switch in the local calling area. Although the Commission did find that Intermedia's single switches could not perform a tandem function, the Commission's focus went to the tandem function itself, not the number of switches. The Commission found that "a tandem switch functions by connecting one trunk to another trunk as an intermediate switch between two end office switches" Final Order at 13. This is what the Commission determined that Intermedia could not prove. The Commission made that determination with regard to both Intermedia's single switches, as well as Intermedia's two switches in the Orlando area. Final Order at 13.

Based on the foregoing, staff recommends that the Commission should deny Intermedia's motion for reconsideration on this ground.

Finally, staff notes that Intermedia's arguments are immaterial. If the Commission did reconsider its decision on this ground, the outcome would remain the same, because the Commission determined that Intermedia failed to prove geographic comparability under Rule 51.711(a)(3).

D. Evidence Regarding Geographic Comparability

Intermedia argues that the Commission made a fundamental error by refusing to accord proper credit to its showing that Intermedia's switches in Florida are each geographically comparable to the serving area of a single BellSouth tandem switch. Intermedia states that the Commission considered maps depicting the local calling area of Intermedia's switches overlaid against the local calling areas of BellSouth's switches, which created shaded areas that represented geographic comparability of the parties' switches. The Commission was unpersuaded by the maps. Intermedia alleges that the Commission failed to consider Intermedia witness Jackson's testimony that its switches were serving customers depicted in the shaded calling areas. Intermedia asserts that witness Jackson's testimony was uncontroverted, because BellSouth did not attempt to produce any proof that Intermedia does not serve customers in those areas. Intermedia argues that its testimony must be given credence under law.

BellSouth states that Intermedia provided no documentary evidence to substantiate witness Jackson's statements. BellSouth further asserts that Intermedia produced no evidence regarding the number or location of its customers. BellSouth adds that the parties made contradictory claims regarding the areas served by Intermedia's switches. As such, BellSouth argues that Intermedia incorrectly asserts that witness Jackson's statements were uncontroverted. BellSouth states that the Commission simply chose not to accept Mr. Jackson's disputed assertions as true. BellSouth asserts that Intermedia had the burden of proof on this issue, and the Commission simply concluded that it failed to carry that burden.

Staff believes that Intermedia is once more attempting to reargue its case, and reconsideration should therefore be denied. Further, staff disagrees with Intermedia's assertion that the

Commission failed to consider comments made by witness Jackson. At page 13 of its Final Order, the Commission noted witness Jackson's statement that, "as demonstrated by Intermedia, its switches serve a geographic area comparable to that served by BellSouth's tandem switches, Intermedia should be compensated at the composite tandem rate." This statement sums up witness Jackson's testimony on this issue and is no less affirmative than any sentence cited in Intermedia's motion for reconsideration. There is no requirement that the Commission include every comment made by witness Jackson as proof that it considered Intermedia's case. Further, Intermedia is incorrect that witness Jackson's testimony was uncontroverted. As noted at page 14 of the Commission's Final Order, BellSouth witness Varner stated:

Intermedia claims that its switches are capable of serving areas comparable to BellSouth's tandems. However, that finding is insufficient. Any modern switch is capable of doing this. The issue is does it actually serve customers in an area that is comparable. And I submit that Intermedia's switches do not.

The Commission weighed the evidence and determined that BellSouth made a more compelling case. Intermedia had the burden of proof on this issue and failed to satisfy it. There is no point of fact or law that has been overlooked by the Commission. Therefore, staff recommends that the Commission deny reconsideration on this ground.

II. Clarification Regarding, *Inter Alia*, Foreign Exchange Service

Intermedia states that in its determination of Issue 26 in this docket, the Commission agreed with Intermedia that each party should be permitted to establish its own local calling area, and then stated:

Nevertheless, the parties shall be required to assign numbers within the areas to which they are traditionally associated, until such time when information necessary for the proper rating of calls to numbers assigned outside of those areas can be provided. Final Order at 43.

DATE: MARCH 22, 2001

Intermedia calls attention to BellSouth's provision of Foreign Exchange (FX) service, which is defined in BellSouth's tariff as follows:

Foreign Exchange service is exchange service furnished to a subscriber from an exchange other than the one from which the subscriber would normally be served, allowing subscribers to have local presence and two-way communications in an exchange different from their own.

Intermedia requests the Commission to clarify that its determination under Issue 26 also requires that BellSouth cease all provision of FX service.

BellSouth responds by stating that it is unaware of any law or Commission rule providing for a motion for clarification. BellSouth asserts that if Intermedia's request is intended to be treated as a motion for reconsideration, Intermedia raises no point of fact or law overlooked or not considered. BellSouth further argues that Intermedia's request for clarification is actually an attempt to collaterally challenge BellSouth's FX Tariff. BellSouth states that FX service was never a part of the arbitration; therefore, it is improper to raise a new issue at this time. Further, BellSouth states that FX service is not at issue under Issue 26. With FX service, a telephone number is assigned within the local calling area, and dedicated facilities connect the serving central office and the end user's premises. BellSouth states that the service under Issue 26 does not involve dedicated facilities to the end user, and the telephone number is actually assigned outside the local calling area.

Staff notes that the Commission has considered motions for clarification; however, there is no specific standard identified. Parties have filed motions for clarification when the Commission's intent is not readily apparent from its order. See Order No. PSC-00-1242-PCO-WS, issued on July 10, 2000, in Docket No. 000610-WS; and Order No. PSC-97-0822-FOF-GU, issued July 8, 1997, in Docket No. 960547-GU. Therefore, staff does not believe that Intermedia is precluded from filing a motion for clarification in this proceeding. Staff does believe, however, that Intermedia's motion should be denied as discussed below.

Staff agrees that BellSouth's provision of FX service was never an issue in this arbitration. Pursuant to Section 252(b)(4)

DOCKET NO. 991854-TP
DATE: MARCH 22, 2001

of the Act the Commission is only required to arbitrate the issues that were raised in BellSouth's petition for arbitration and Intermedia's response. Therefore, the Commission should not clarify its Final Order to require BellSouth to cease provision of FX service. Based upon the foregoing, staff recommends that the Commission deny Intermedia's Motion for Reconsideration and Clarification.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed. (VACCARO)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, there will be no outstanding matters to address; therefore, this docket should be closed.