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State of Florida



Public Service Commission
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TALLAHASSEE, FLORIDA 32399-0850

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DATE: MARCH 7, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (M. WATTS) MW
DIVISION OF AUDITING AND SAFETY (VANDIVER) V
DIVISION OF ECONOMIC REGULATION (D. DRAPER) DM
OFFICE OF THE GENERAL COUNSEL (ELLIOTT) JAE E.F. TGS ALM

RE: DOCKET NO. 010488-TI - INVESTIGATION AND DETERMINATION OF
METHOD TO CREDIT FLOW-THROUGH REDUCTIONS BY EMERITUS
COMMUNICATIONS, INC. AS REQUIRED BY SECTION 364.163, F.S.

AGENDA: 03/19/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\010488.RCM

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission accept eMeritus Communications, Inc.'s offer of refund and refund calculation of \$13,584.00, plus interest of \$2,250.63, for a total of \$15,834.63, for apparent failure to properly flow-through the 1998 switched access reductions pursuant to Section 364.163(6), Florida Statutes?

RECOMMENDATION: Yes. Staff recommends that the Commission accept the offer of refund and refund calculation of \$13,584.00, plus interest of \$2,250.63, for a total of \$15,834.63, proposed by eMeritus. The one-time refund proposed by eMeritus should be paid during June 2002 to the customers identified by the company. At

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

DOCKET NO. 010488-TI
DATE: March 7, 2002

the end of the refund period, any amount not refundable, including interest, should be remitted to the Commission by July 31, 2002, and forwarded to the Comptroller for deposit in the General Revenue Fund. eMeritus should submit a final report as required by Rule 25-4.114, Florida Administrative Code, Refunds, by July 31, 2002.
(M. WATTS/VANDIVER/ELLIOTT)

STAFF ANALYSIS: In 1998, Chapter 98-277, Section 4, General Laws of Florida, amended Section 364.163(6), Florida Statutes. The amendment modified existing requirements for switched access rate reductions and the flow-through of those reductions to customers.

On June 8, 1998, this Commission issued Order No. PSC-98-0795-FOF-TP implementing the new statutory provisions (June Order). Two local exchange companies (LECs), Verizon Florida Inc. (then known as GTE Florida Incorporated) and Sprint-Florida, Incorporated, were required to make two switched access reductions. The first was 5 percent, to be effective on July 1, 1998, and the second, of 10 percent, was to be effective on October 1, 1998. IXC's were required to flow-through to their customers the benefits of the switched access rate reductions.

Section 364.163(6), Florida Statutes, as amended, required that IXC's meet three flow-through requirements. (1) An IXC's intrastate rates were to be decreased by the amount necessary to return the benefits of the switched access reduction to its customers. (2) An IXC was not permitted to reduce per minute intraLATA toll rates by a percentage greater than the required per minute switched access rate reduction. (3) An IXC was permitted to determine the specific rates to be decreased, provided that both residential and business customers benefitted from the decreases.

For the July 1, 1998, rate reduction, the June Order required the LECs to file their tariffs and supporting documentation no later than June 9, 1998. IXC tariffs and supporting documentation were ordered to be filed no later than June 30, 1998, with a July 1, 1998, effective date.

For the October 1, 1998, reduction, LECs were ordered to file their tariffs and supporting documentation no later than September 1, 1998. All affected IXC's were ordered to file their tariffs and supporting documentation no later than September 30, 1998, to be effective October 1, 1998.

The June Order detailed the required supporting documentation for IXCs. IXCs which paid less than \$20 million in total Florida intrastate switched access charges in 1997 did not need to file supporting documentation; rather, they were required to certify that they paid less than \$20 million and that they had met the statutory flow-through requirements. eMeritus certified in its tariff revision letter that it was one of these companies.

eMeritus filed its tariffs on time for both reductions. Staff reviewed the tariff changes and with certain minor changes found that it was in compliance with the June Order, and, therefore, with Section 364.163(6), Florida Statutes.

Beginning in June 1999, staff initiated audits to verify that affected carriers had implemented the flow-through reductions in accordance with the filings each had submitted in response to Commission Order PSC-98-0795-FOF-TP.

In February 2000 and July 2000, staff issued an original and a supplemental audit report which concluded that eMeritus had not passed through the rate reductions. Staff's audit found that the company was originally charging its USA Savings Plan customers the rates per tariff sheet #38, issued December 19, 1996. In January 1998, it filed a new tariff which increased rates. The company never implemented the rate increase. However, when the company filed its revised tariff pages to comply with the order to reduce rates for the switched access charge reductions, it based the reduction on the January tariff which was never implemented. An example of how these tariff pages compare is shown below using the day rates for one minute for 1-10 miles.

Tariff 12/19/96	Tariff 1/22/98	Tariff 7/1/98	Tariff 10/1/98
.1424	.1700	.1615	.1454

The auditors also sampled several bills to determine whether the revised tariff rates were used and found several inconsistencies. Some bills in September 1998 appear to have been billed the July 1998 rate and others were billed the October 1998 rate. Several times during the audit, the auditors requested a minutes-of-use report in order to quantify the cost impact on customers based on the rates the company charged. The company delayed providing a report and ultimately requested that

DOCKET NO. 010488-TI
DATE: March 7, 2002

alternative means be used to determine the cost impact on customers, as producing the report would be costly.

Staff and representatives of eMeritus conversed several times in an attempt to agree on alternative methods to determine the impact and resolve this issue. On February 18, 2002, the company submitted a letter discussing an offer of settlement which quantified the differences in the tariff rates and the impact on the costs to the customers. (Attachment A) The company no longer provides service to residential customers as it did in 1998 and, therefore, cannot make a refund to those specific customers. It has proposed, however, to issue a one-time refund to its current business customers that have been its customers since 1998. Staff supports this plan because the refunds will go to the company's long-term customers.

In its proposal, eMeritus did not specify an exact payback date and therefore only estimated the interest due. Instead, it proposed a payback schedule that is dependent on the date that the Consummating Order is issued, stating that the one-time credit would appear on customers' bills in the second billing cycle after the Order is issued. Staff estimated that this would occur during June 2002 and calculated the interest accordingly.

Staff recommends that the Commission accept the offer of refund and refund calculation of \$13,584.00, plus interest of \$2,250.63, for a total of \$15,834.63, proposed by eMeritus. The one-time refund proposed by eMeritus should be paid during June 2002 to the customers identified by the company. At the end of the refund period, any amount not refundable, including interest, should be remitted to the Commission by July 31, 2002, and forwarded to the Comptroller for deposit in the General Revenue Fund. eMeritus should submit a final report as required by Rule 25-4.114, Florida Administrative Code, Refunds, by July 31, 2002. The Florida Public Service Commission is vested with jurisdiction over this matter pursuant to Sections 364.163 and 364.285, Florida Statutes.

DOCKET NO. 010488-TI
DATE: March 7, 2002

ISSUE 2: Should this docket be closed?

RECOMMENDATION: If no person, whose substantial interests are affected by the proposed action recommended herein files a protest of the Commission's decision on Issue 1 within the 21 day protest period, the Commission's Order will become final and effective upon issuance of a Consummating Order. The docket should be closed administratively once the refund in Issue 1 is complete and the final report is received and reviewed by staff. (ELLIOTT)

STAFF ANALYSIS: If no person, whose substantial interests are affected by the proposed action recommended herein files a protest of the Commission's decision on Issue 1 within the 21 day protest period, the Commission's Order will become final and effective upon issuance of a Consummating Order. The docket should be closed administratively once the refund in Issue 1 is complete and the final report is received and reviewed by staff.

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YONKIN

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Reply to Tallahassee Office

February 18, 2002

Ms. Blanca Bayo, Clerk
Division of Commission Clerk &
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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Re: Telco Holdings Inc. d/b/a Dial and Save

Dear Ms. Bayo:

During late 1999 and early 2000, Commission Staff performed an audit of Telco Holdings Inc. d/b/a Dial and Save (hereafter "the Company") to determine whether it had effected the flow through of 1998 switched access charge reductions made by GTE-FL and Sprint (United)¹ as required by Florida Statutes and Commission orders. The staff filed its Audit Report on June 20, 2000. The Company has responded to the Audit Report both verbally and in writing. To avoid an unnecessary dispute over the flow through issue, the Company proposes herein to credit to customers a projected total of approximately \$15,784 (\$13,584 plus \$2,200 interest).²

As the Company understands, staff is not opposed to this settlement but does have two basic concerns. First, staff is concerned that the Company has not produced sufficient data to accurately establish the amount to be credited. Next, staff remains concerned that the dearth of data suggests non-responsiveness on the part of the Company. The Company appreciates the Staff's candor in this regard, and welcomes the opportunity to put both concerns to rest.

- AUS _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC _____
- OTH _____

¹ The access charge reductions apply only to that part of Sprint's service territory formerly served by United Telephone Company of Florida.

² The precise amount of interest cannot be determined until the date of credit is known. This interest amount is an estimate based on the credit being issued within four months.

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DATE: March 7, 2002

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 2

Requirements of Section 364.163(6), Florida Statutes

In 1998 the Legislature amended³ Section 364.163(6), Florida Statutes, to modify the then existing requirements for switched access rate reductions and the flow-through of those reductions to Florida's consumers. In a nutshell, each large local exchange company⁴ was required to reduce its intrastate switched access rates by 5 percent on July 1, 1998, and by 10 percent on October 1, 1998. In addition, IXC's receiving these access charge reductions were required to flow the benefits through to their customers. As summarized on page 3 of Commission Order No. PSC-98-0795-FOF-TP, issued on June 28, 1998 (hereafter "1998 Flow Through Order"):

Section 364.163(6), Florida Statutes, as amended, requires that IXC's meet three flow-through requirements. First, an IXC's intrastate rates must be decreased by the amount necessary to return the benefits of the switched access reduction to its customers. Second, an IXC shall not reduce per minute intraLATA toll rates by a percentage greater than the required per minute switched access rate reduction. Third, an IXC may determine the specific rates to be decreased, provided that both residential and business customers benefit from the rate decreases.

Requirements of the 1998 Flow Through Order

As reflected in the text of the Flow Through Order, the 1998 amendment to Section 364.163(6) was the latest of legislative mandated access charge reductions and IXC rate reductions. In response to the earlier 1996 statutory precursor, the Commission "ordered IXC's to provide (it) with substantial documentation to verify their compliance with the flow-through requirements." The Commission concluded in the 1998 Flow Through Order, however, that this requirement was too burdensome for small IXC's:

By this Order, we are modifying the filing requirements for smaller IXC's, in order to reduce their regulatory burden. We find that it is *important in a pro-competitive environment* not to burden smaller IXC's unnecessarily with reporting requirements. ... Accordingly, we conclude that any IXC that paid less than \$20 million in total Florida intrastate switched access charges in 1997 *is relieved of the obligation to file the documentation required herein for larger IXC's*. In lieu of filing the documentation, qualifying IXC's must certify by

³ Chapter 98-277, Section 4, General Laws of Florida.

⁴ LECs with more than 100,000, but fewer than 3 million, basic local telecommunications service access lines in service on July 1, 1995

DATE: March 7, 2002

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 3

letter accompanying their tariff reduction filing that they paid less than \$20 million and that they have met the statutory requirements.⁵

The IXC tariff reductions flowing through the benefits of the 5% and 10% access charge reductions were to be effective on July 1, 1998, and October 1, 1998.

The Audit Report's Exceptions and Opinion

The Audit report noted three exceptions and provided staff's opinion with respect to the Company's compliance with the flow through requirements. These exceptions and the opinion are briefly explained and responded to below. These responses should adequately address staff's two basic concerns. For ease of reference these tariffs will be called the "1998 Flow Through Tariffs."

1. Minutes of Use Report

Exception Number 1:

The Company did not have available to it and could not readily produce the type of use data Staff normally uses in assessing regulatory compliance. Staff requested minutes of use data, which the Company could not provide. Thus the audit exception notes as follows: "These minutes of use were requested on January 6, 2000. Many calls have been made to the Company requesting this information." In effect, the Audit Report criticizes the Company for a lack of responsiveness.

Response:

The Audit Report fails to recognize the Company's status as a small IXC. The Commission specifically relieved the smaller IXCs of the obligation of existing filing requirements to avoid imposing on them an unjustifiable regulatory burden. Ironically, the Staff's data request would in effect have required the Company to retroactively compile analogous reports at an exponentially greater burden. The Company estimated that providing a one-month summary of minutes of use would cost the Company between \$370,000 and \$620,000 (not including office space and equipment). This is 20 to 30 times greater than the highest amount that could arguably be credited without violating the statutory percentage limitation on the rate reduction.

2. Tariffs Not Implemented

Exception Number 2:

The second audit exception notes that in April and May of 1998, the Company was charging for certain calls less than required by existing tariffs. The Company designed and filed the 1998 Flow Through Tariffs on the basis of the existing tariffs, i.e., on its

⁵ Id. (emphasis added).

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 4

approved rates, not on what it had been charging. The Audit Report also notes that if the reduction was properly computed from approved rates, the 1998 Flow Through Tariffs "would have met the requirements of the Commission Order PSC 88-0795-FOF-TP."

Response:

To the extent this exception goes to the issue of flow through compliance, please see item 4 below. With respect to other consequences of charging off-tariff, the Company did not attempt to make itself whole for under-charges either through back billing or prospectively through an offset reflected in the flow through tariffs. Rather, the Company appropriately absorbed the lost revenues due to the under-charging, and made the required tariff revisions based on its approved rates. Moreover, the Company in good faith believed that it was required to proceed in this manner. In this regard, as the Audit report avers, there has been no determination that the Company failed to comply with the Order by applying the reduction to approved tariff rates as opposed to the somewhat lower rates that were charged.

3. Incorrect Plan During September 1998

Exception Number 3:

Audit Exception No. 3 suggests that the Company used an incorrect plan in billing for a call made on September 4, 1998.

Response:

This was a limited exception. The customer apparently was not a pre-subscribed customer, but a casual "dial-around" caller who used the Company's 457 access code. Under the particular circumstances of that call, the plan used to rate the call was permissible. Moreover, this exception is not germane to the main issue of reducing rates to flow through to the customer the benefit of access charge reductions.

4. Audit Opinion

Opinion:

To comply with the 1998 Flow Through Order, the Company filed rate reductions based on its January 22, 1998 tariff. The Audit Report opined that these reductions "would have met the requirements" of the 1998 Flow Through Order had the Company been using the tariff rates. To reiterate, for *interLATA* calls, the Company had been using an earlier rate which was lower than the tariffed rate. Consequently, the Company's "flow-through" rates were lower than its earlier applicable tariffed rates but *in some cases* higher than the rates previously charged. The Audit Report thus concludes that "... (for *interLATA* calls) the company never reduced the actual rates it was charging. This does not appear to be the case for *intraLATA* calls." The Audit Report then opines that

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 5

"Whether the company was in compliance with (the 1998 Flow Through Order) depends on whether the Commission agrees that the reduction should have been from actual rates in effect or approved rates."

Response:

The Commission apparently has adopted the non-rule policy that the starting point for computing the flow-through is the rates actually charged by the Company not the rates contained in the applicable tariff. Without acquiescing in either the correctness or the enforceability of this policy, the Company proposes to credit to customers **\$15,784**. The justification for this amount and the method of credit are addressed below.

The Amount of Credit

The staff's argument for additional flow through is essentially this: the Company allegedly over-charged certain of its customers because the 1998 Flow Through Tariffs were set too high. The customers allegedly overcharged were those who took service under the 1998 Flow Through Tariffs *and* accessed those products through the facilities of GTE-FL and Sprint (United). The amount of the alleged over-charges is the amount of access charge reductions by GTE-FL and Sprint (United) that the Company allegedly failed to flow through to the Florida's consumers. The amount of the credit therefore should be the amount of the alleged over-charges.

As previously indicated, due to data restrictions the credit amount must be estimated. Because the 1998 Flow Through Tariffs applied **statewide**, not just in the territories of GTE-FL and Sprint (United), the estimate of territory specific credit amounts must begin with an estimate of alleged overcharges statewide. After determining the alleged statewide over-charges, the credit amount will be that portion of the statewide total that can be allocated reasonably to originating traffic within the GTE-FL and Sprint (United) service territories.⁶

As explained by the Company (in Ms. Robbin Johnson's letter dated April 25, 2001, transmitting responses to staff's informal data requests and attachments), the estimate of alleged statewide overcharges is **\$32,343**. This amount is conservative in that the assumptions used are designed to overstate the amount of reductions the customers subscribing to the applicable plan would have then received.

⁶ Another consequence results as well. Arguably, the tariff reduction applicable in BellSouth's territory – which was not required - did in fact flow-through to Florida's consumers the benefits of the access charge reduction as required by statute. Nevertheless, this is a case of first impression and the Company prefers a resolution that favors to the extent practicable flow-through to the consumers who reside within the service territories of the ILECs that reduced access charges.

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 6

The next step (which was not addressed in Ms. Johnson's letter) is to allocate \$32,343 between BellSouth on the one hand and GTE-FL and Sprint (United) on the other. The most practical way to do this consistent with statutory intent is on the basis of access lines in place the last quarter of 1998. Based on company specific data on file with the Commission, the three companies had in place during this period approximately 10.5 million access lines, of which some 42% belonged to GTE-FL and Sprint (United).⁷ The credit principal is thus 42% of \$32,343 or \$13,584.

The Company does not believe that it is appropriate to apply interest to this amount. The credit is offered as a settlement to avoid a formal dispute over whether the 1998 Flow Through Tariffs were set at the proper level. Nevertheless, it is the Company's understanding that staff believes interest is both appropriate and required in this matter. To resolve this matter, the company will acquiesce in the application of interest.

Method of Credit

The statute contemplates a rate reduction that returns to the customers the benefits of the access charge reductions – *but not more*. Specifically, the statute prohibits the IXC from imposing a *per-minute rate reduction* that is disproportionate to the access charge reductions. Section 364.163(6), Florida Statutes. Because the amount involved is so small, avoiding a disproportionate rate reduction over any reasonable period is impractical. Thus the Company proposes to effect this "flow-through" by issuing a one-time credit to customers who were with the Company at the time the 1998 Flow Through Tariffs took effect. The Company anticipates that it can issue the one-time credit in the second billing cycle after the Commission approves this proposal, i.e., within 30 to 60 days after the order approving this proposal.

Based on this approach and the principal of \$13,584, the Company estimates that the amount of interest to be included will be approximately \$2,200.00. So the total credit will be approximately \$15,784. There are approximately 475 customers who will receive the credit, which will be approximately \$33.00. The Company is currently determining the specific customers to receive the one-time credit. When the Company is able to determine the date or dates the credits will be issued, it will consult with Staff to determine the applicable interest. The Company will then file with the Commission a supplemental letter stating the details of the credit, i.e., the principal, the interest, the number of customers, the date or dates of the credits, and the notice given to the customers. After the credits are issued, the Company will by letter advise the Commission and address remaining issues, if any.

⁷ Access line totals for 1998: (a) BellSouth – 6,481,986; (b) GTE – 2,368,938; (c) Sprint (United) – 1,619,226; (d) Total for BellSouth, GTE, and Sprint(United) – 10,470,150; (e) Total for GTE and Sprint(United) – 4,416,980.

DATE: March 7, 2002

KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A.

Ms. Blanca Bayo
February 18, 2002
Page 7

Conclusion:

The responses to the exceptions and opinion should address Staff's two basic concerns as noted at the beginning of this letter. First, the Company believes that the explanation provided in Ms. Johnson's letter and above provides adequate justification to conclude that the Company has not understated the credit arguably due, assuming that the Flow Through Tariffs were too high. Moreover, if the credit were computed to be greater, the resulting flow through would likely violate the percentage ceiling in the statute. Second, the lack of data is not due to non-responsiveness but rather to the Company's status as a small IXC and the extraordinary difficulty reconstructing billing reports.

The Company trusts that Staff will find this summary sufficient for the purposes of bringing this matter to a close. The Company appreciates the courtesies extended to it by Staff with respect to the filing of this response.

Sincerely,



Patrick K. Wiggins

PKW:plk

cc: Ms. Melinda Watts

Ms. Robbin Johnson