

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for review of rates	)	DOCKET NO. 860723-TP
and charges paid by PATS providers to	)	ORDER NO. 22022
LECs	)	ISSUED: 10-9-89
	)	

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman  
 THOMAS M. BEARD  
 BETTY EASLEY  
 GERALD L. GUNTER  
 JOHN T. HERNDON

ORDER DENYING MOTION TO RECONSIDER, CLARIFY,  
 OR STAY PORTIONS OF ORDER NO. 21614

BY THE COMMISSION:

BACKGROUND

On August 26, 1988, the following parties entered into a Stipulation to resolve the issues in this docket: Florida Pay Telephone Association, Inc. (FPTA), Southern Bell Telephone and Telegraph Company (Southern Bell), Central Telephone Company of Florida (Centel), GTE Florida Incorporated (GTEFL), United Telephone Company of Florida (United), and AT&T Communications of the Southern States, Inc. (ATT-C). Upon review of this Stipulation, we voted to defer our consideration of the issues addressed in the Stipulation until the September 6, 1988, Agenda Conference.

During the September 6, 1988, Agenda Conference, we voted to reject the Stipulation and continue with the hearing scheduled for September 8 and 9, 1988. However, at that hearing, upon further review of the Stipulation and the issues set forth in the Prehearing Order, we reconsidered our decision to reject the Stipulation. Upon reconsideration we voted to adopt all portions of the Stipulation as resolution of all pending issues except as to those issues identified in paragraphs 3 and 4 of the Stipulation. Accordingly, on October 6, 1988, we issued Order No. 20129 accepting certain portions of the Stipulation. The Order established that the terms of the Stipulation shall remain in effect for a period of two years from September 8, 1988, or until September 8, 1990. As

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ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 2

to those issues identified in paragraphs 3 and 4 of the Stipulation, we received evidence and testimony upon which we made a final determination reflected in Order No. 20610, issued January 17, 1989.

Among other things, Order No. 20610 continued the nonLEC PATS rate cap at the ATT-C direct-distance-dialed (DDD) daytime rate, plus applicable operator/calling card charges, plus the up to \$1.00 PATS surcharge. Additionally, this Order reiterated our policy that all 0- and 0+ intraLATA traffic be routed to the LEC from nonLEC pay telephones, consistent with our prior decisions in Docket No. 871394-TP.

On February 1, 1989, FPTA filed a Motion for Clarification and/or Reconsideration of Order No. 20610. Timely responses to FPTA's motion were filed by GTEFL, Southern Bell and United. FPTA's motion asked us to reconsider or clarify the following portions of Order No. 20610: (1) the historical basis of the \$1.00 surcharge; and (2) the requirement that all 0- and 0+ intraLATA traffic be routed to the applicable LEC from nonLEC pay telephones. All three responses to FPTA's motion urged that it be denied.

By Order No. 21614, issued July 27, 1989, we denied FPTA's motion. An additional portion of Order No. 21614 was a Notice of Proposed Agency Action (PAA) whereby we would: 1) require all LECs to bill, collect, and remit to nonLEC PATS providers the up to \$1.00 surcharge on 0- and 0+ intraLATA LEC-handled calls placed from nonLEC pay telephones, to be done as soon as possible, but no later than January 1, 1990; and (2) change the rate cap for intraLATA calls placed at nonLEC pay telephones from the ATT-C daytime rate, plus applicable operator/calling card charges, plus \$1.00, to the applicable LEC time-of-day rate, plus applicable operator/calling card charges, plus \$1.00. The PAA portion of Order No. 21614 would be effective August 18, 1989, assuming it was not protested.

On August 11, 1989, FPTA filed a document entitled "Motion to Reconsider, Clarify, or Stay Portions of Order No. 21614," along with a Request for Oral Argument on this motion. FPTA's motion asks us to reconsider, clarify or stay that portion of Order No. 21614 that requires all 0- and 0+ intraLATA traffic to be routed to the applicable LEC from nonLEC pay telephones. Timely responses to FPTA's motion were filed by GTEFL, Southern

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 3

Bell and United. All three responses to FPTA's motion urge that it be denied.

FPTA did not protest the PAA portion of Order No. 21614, nor did any other party, so it became final and effective on August 18, 1989, as reflected in our Consummating Order No. 21761, issued August 21, 1989.

On August 25, 1989, FPTA filed with this Commission its Notice of Appeal of Order No. 21614 to the Supreme Court of Florida.

By Order No. 21813, issued August 31, 1989, the Prehearing Officer denied FPTA's Request for Oral Argument. The Prehearing Officer did not believe that oral argument would aid our understanding of the issues in this docket, nor did he believe oral argument would contribute to the expeditious resolution of these proceedings.

#### DISCUSSION

FPTA's motion asks us to reconsider, clarify and/or stay that portion of Order No. 21614 that requires all 0- and 0+ intraLATA traffic to be routed to the applicable LEC from nonLEC pay telephones, to the extent that the disposition of this traffic is not tied to a requirement that the LECs bill and collect on behalf of the PATS providers.

Initially, we note that our rules do not expressly address a party's right to seek clarification of an order. However, Rule 25-22.060, Florida Administrative Code, outlines the procedures applicable to a party seeking reconsideration. Upon review of FPTA's motion, it is clear that what FPTA seeks here amounts to no more than reconsideration because in Section II of its motion FPTA states:

"this Commission misapprehended the facts and circumstances surrounding the simultaneous implementation of the LEC and nonLEC pay telephone provider obligations under paragraph 4 of the 1988 Stipulation."

FPTA Motion, Page 4. Thus, were we to reach the merits of FPTA's motion, our decision would be based upon the standards for judging a motion for reconsideration; that is, whether in

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 4

making our decision, we overlooked or failed to consider some matter. In other words, to be granted reconsideration, FPTA would be required to show that our decision was based upon a mistake of fact or law. This is the standard we would apply, regardless of whether FPTA characterizes its motion as a request for reconsideration, clarification, or a stay pending implementation.

It has been our position all along that we did not tie the disposition of the 0- and 0+ intraLATA traffic to a requirement that the LECs bill and collect on behalf of the nonLEC PATS providers. We believe this was clear in Order No. 20610, issued January 17, 1989, which was a final order. Nevertheless, we entertained FPTA's Motion for Reconsideration and/or Clarification of Order No. 20610 and rejected it, as reflected in Order No. 21614, issued July 27, 1989, where we stated:

FPTA has also asked us to reconsider our requirement that all 0- and 0+ intraLATA traffic be routed to the LECs from nonLEC pay telephones. As grounds for its request, FPTA contends that Order No. 20610 "apparently approved paragraph 4 of the Stipulation". From this "apparent approval," FPTA then reasons that we meant to link a LEC billing and collection requirement to our disposition of this traffic. We are disturbed by FPTA's attempt to advance such an argument. Our reservation of 0- and 0+ intraLATA traffic to the LECs is a matter of long standing policy of this Commission. This has not been a conditional requirement in the past and was not meant to be one in Order No. 20610. We did not overlook or fail to consider anything when we stated this policy in Order No. 20610.

Order No. 21614, at pages 3-4. When the language of FPTA's present motion is considered in light to our decision above, it becomes clear that what FPTA seeks here amounts to no more than another attempt to gain reconsideration of Order No. 20610. Rule 25-22.060(1)(a), Florida Administrative Code, provides in pertinent part:

"The Commission will not entertain any motion for reconsideration of any order which disposes of a

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 5

motion for reconsideration. The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action . . ."

Therefore, we find it appropriate to deny FPTA's present motion, to the extent it purports to seek reconsideration or clarification of Order No. 21614, as a procedurally improper motion, without reaching the merits of FPTA's arguments.

FPTA has also requested stay of our requirement that all 0- and 0+ intraLATA traffic be routed to the applicable LEC from nonLEC pay telephones. On August 25, 1989, FPTA filed its Notice of Appeal of Order No. 21614 to the Supreme Court of Florida. By its present motion, FPTA claims it is entitled to a mandatory stay of Order No. 21614, pending judicial review.

Rule 25-22.061(1)(a), Florida Administrative Code, provides that:

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings.

Notwithstanding FPTA's arguments to the contrary, there is no way our traffic routing requirement can be characterized as either a "refund of moneys to customers" or a "decrease in rates charged to customers." Since neither of the requisite conditions exist, FPTA cannot invoke the mandatory stay provision of Rule 25-22.061(1)(a), Florida Administrative Code.

FPTA also believes we should grant it a discretionary stay of our traffic routing requirement. Our rules do contemplate such a possibility. Rule 25-22.061(2), Florida Administrative Code, provides in pertinent part:

In determining whether to grant a stay, the Commission may, among other things, consider:

(a) Whether the petitioner is likely to prevail on appeal;

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 6

- (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.

We do not, however, believe the facts of this case warrant the issuance of a discretionary stay as requested by FPTA.

FPTA claims it is likely to prevail on appeal. Such a claim by an appellant is hardly novel. FPTA has challenged our traffic routing requirement for all of the following reasons:

- 1) Inconsistent with prior policy and per se discriminatory
- 2) Invalidly promulgated rule amendment
- 3) Unlawful taking of property without just compensation
- 4) Unjustly discriminatory and anticompetitive
- 5) Lack of competent substantial evidence in record to support requirement

If we believed any of the above things were true, we would have granted FPTA the requested relief the first time FPTA requested reconsideration. We believe our actions in respect to this traffic were legally sound and will withstand the scrutiny of judicial review.

FPTA claims it will suffer irreparable harm if a stay is not granted. Based upon our long-standing policy that 0- and 0+ intraLATA traffic should be carried by the LECs, we find it inconceivable that FPTA could be harmed by being required to disgorge itself of traffic it was never entitled to.

Finally, we believe that any further delay in this matter will result in substantial harm and is clearly contrary to the public interest. Order No. 20610, issued January 17, 1989, unequivocally restored traffic to the LECs which had been improperly diverted by the nonLEC PATS providers. We refused to reconsider this matter when we denied FPTA's motion by Order

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 7

No. 21614, issued July 27, 1989. Yet once again we find ourselves being asked to again entertain the identical issue. We believe it is long past time for all parties to this docket to comply with all our existing orders in this docket.

Therefore, based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Pay Telephone Association, Inc.'s Motion to Reconsider, Clarify, or Stay Portions of Order No. 21614 is denied as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission,  
this 9th day of October, 1989.

  
STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

ABG

NOTICE OF FURTHER PROCEEDINGS OR 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

ORDER NO. 22022  
DOCKET NO. 860723-TP  
PAGE 8

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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer 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.