

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition and complaint ) DOCKET NO. 940977-TL  
of McCaw Cellular Communications ) ORDER NO. PSC-95-0130-FOF-TL  
of Florida, Inc. against UNITED ) ISSUED: January 26, 1995  
TELEPHONE COMPANY OF FLORIDA for )  
alleged interconnection )  
overcharges. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman  
SUSAN F. CLARK  
JOE GARCIA  
JULIA L. JOHNSON  
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS  
AND  
NOTICE OF PROPOSED AGENCY ACTION  
ORDER DENYING PETITION AND COMPLAINT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed in Section III of this Order is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. BACKGROUND

By Order No. 20475, issued December 20, 1988, the Commission set forth the rates, terms and conditions of interconnection for paging carriers, private carriers, radio common carriers, and cellular carriers to the networks of the local exchange telephone companies (LECs) in Florida. On reconsideration, by Order No. 20979, issued April 4, 1989, the Commission clarified one of its rulings in Order No. 20475 to state that the time increment used for land-to-mobile traffic and mobile-to-land traffic shall be the same and both shall be measured in the smallest possible time increments. The Order also stated that call attempts would be included in measuring usage.

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Call attempts apply only to originating usage, in this case referring to land-to mobile usage. However, the wording in the order was ambiguous and United Telephone Company of Florida (United) interpreted that order to mean that it should include call attempts on both originating and terminating charges. In order to effect this interpretation, United increased its count of mobile-to-land minutes by approximately 20% to incorporate a proxy for call attempts. United's tariff, which was approved by the Commission on May 4, 1989, authorized that type of measurement for United.

United was the only LEC to interpret the reconsideration order this way. United's practice of including call attempts in both originating and terminating charges was not disputed until McCaw Cellular Communications of Florida, Inc. (McCaw) conducted an internal audit of the usage billed by Florida LECs in 1993. As a result of the audit, McCaw determined that United was charging approximately 20% more in usage for mobile-to-land traffic than was showing up on McCaw's switch tapes. In October 1993, McCaw approached United on this issue but the companies were unable to resolve this matter between them. On September 15, 1994, McCaw filed a petition and complaint with the Commission and United subsequently filed a motion to dismiss on October 19, 1994.

## II. MOTION TO DISMISS

In its motion to dismiss, United claims that its tariff clearly states that it will charge for call attempts on mobile-to-land calls within the LATA; that the tariff comports with the language in Order No. 20979; that the tariff was approved by the Commission on May 4, 1989; and that McCaw made no objection to the tariff when it was filed or after it was approved. United further states that McCaw is required to pay the amounts specified in the tariff and that United is statutorily prohibited from charging other than that amount. Finally, United states that the Commission "has no authority to engage in retroactive ratemaking and, therefore, has no authority to grant the refunds requested by McCaw."

McCaw filed a timely response to United's motion on October 31, 1994, claiming that when the Commission determines that a particular tariff does not conform to a previously issued Commission order, the Commission has the authority to order the LEC to correct the tariff. Further, McCaw argues that United's concept of retroactive ratemaking is not applicable to this case. According to McCaw, the prohibition against retroactive ratemaking

means that all rates must be applied prospectively, and McCaw is simply asking the Commission to make the tariff conform to the original intent of the order.

Upon consideration, we find that McCaw's Petition and Complaint has merit and should not be dismissed. United has been inappropriately charging for call attempts on mobile-to-land usage and McCaw has raised valid questions of fact. Accordingly, we should address the merits of McCaw's Petition and Complaint. Therefore, United's Motion to Dismiss shall be denied.

### III. PETITION AND COMPLAINT

In its Petition and Complaint McCaw correctly states that no other LEC but United interpreted the order to allow it to charge for call attempts or call set-up time on mobile-to-land usage. McCaw further argues that United's mobile interconnection tariff does not properly reflect the Commission's policy decision and that United has improperly charged McCaw for call attempts on mobile-to-land calls. On that basis, McCaw concludes that we should require United not only to amend its tariff on a going forward basis, but also to refund to McCaw, for its mobile-to-land usage, all billings in excess of conversation time, plus interest, with the amount of such a refund subject to a final accounting.

By Order No. PSC-95-0073-FOF-TL, issued January 12, 1994, we approved United's proposal to modify the language in its Mobile Interconnection tariff to change the way in which usage is measured and billed for mobile-to-land traffic. Accordingly, as of January 1, 1995, which is the effective date of the tariff, United will no longer bill for call attempts on mobile-to-land traffic. Therefore, the portion of McCaw's petition that requests the amendment of United's tariff has become moot.

McCaw's request that we order United to refund billings in excess of conversation time is a more difficult problem. The key issue is whether United's tariff, which included call attempts on mobile-to-land calls, was contrary to the plain meaning of Orders Nos. 20475 and 20979. An analysis of the sections of the orders which pertain to the call attempts question reveals that the language is ambiguous and does not clearly state that call attempts will not be included in the calculation of interconnection charges for mobile-to-land traffic. Also, United's tariff, which was approved by the Commission, clearly indicates that call attempts are included in the calculations.

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Upon consideration, we find that McCaw's Petition and Complaint which requests the Commission to order United to refund to McCaw all billings in excess of conversation time shall be denied. We can find no clear error by United which would cause us to order a refund. The modification to the tariff as specified in Order No. PSC-95-0073-FOF-TL is sufficient to resolve this dispute.

Based on the foregoing, it is

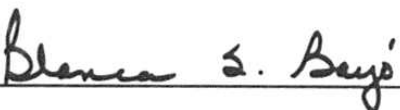
ORDERED by the Florida Public Service Commission that the Motion to Dismiss, filed by United Telephone Company of Florida, is hereby denied. It is further

ORDERED that the Petition and Complaint, filed by McCaw Cellular Communications, is hereby denied as set forth in the body of this order. It is further

ORDERED that Section III of this Order shall become final and effective unless an appropriate petition is filed in accordance with the requirements set forth below. It is further

ORDERED that if no protest is filed, this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 26th day of January, 1995.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

WEW

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 requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action as specified in Section III of this Order, is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on February 16, 1995. the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date 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.

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

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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 wastewater 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.