

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of) DOCKET NO. 920260-TL
the revenue requirements and) ORDER NO. PSC-96-0020-FOF-TL
rate stabilization plan of) ISSUED: January 8, 1996
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY.)
_____)

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION FOR STAY AND MODIFYING IMPLEMENTATION DATE

BY THE COMMISSION:

CASE BACKGROUND

This docket was initiated pursuant to Order No. 25552 to conduct a full revenue requirements analysis and to evaluate the Rate Stabilization Plan under which BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company (BellSouth, Southern Bell or the Company) had been operating since 1988. Hearings were rescheduled several times in an effort to address all of the concerns and issues that arose with the five consolidated proceedings over the ensuing two and a half years.

On January 5, 1994, a Stipulation and Agreement Between Office of Public Counsel (OPC) and Southern Bell was submitted. On January 12, 1994, Southern Bell filed an Implementation Agreement for Portions of the Unspecified Rate Reductions in Stipulation and Agreement Between OPC and Southern Bell (hereinafter referred to as the "Stipulation and Implementation Agreement"). Other parties filed motions in support of the Stipulation and Implementation Agreement. The Commission voted to approve the terms of the settlement at the January 18, 1994 agenda conference. See Order No. PSC-94-0172-FOF-TL. The terms require, among other things, that rate reductions be made to certain Southern Bell services. An unspecified rate reduction of \$25 million was scheduled for October 1, 1995.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

According to the terms of the Stipulation and Implementation Agreement, approximately four months before the scheduled effective dates of the unspecified rate reductions, Southern Bell will file its proposals for the required revenue reductions. Interested parties may also file proposals at that time. Parties who have already received or are scheduled to receive rate reductions for the services to which they subscribe, are generally precluded from taking positions that would benefit themselves.

On May 15, 1995, Southern Bell filed a tariff proposal to introduce Expanded Calling Service (ECS) to satisfy the unspecified 1995 outstanding \$25 million revenue reduction in accordance with the Stipulation. The Communications Workers of America (CWA) and McCaw Cellular, Inc. also filed proposals.

A hearing was held on July 31, 1995 to consider how best to implement the \$25 million revenue reduction. By Order No. PSC-95-1391-FOF-TL issued November 8, 1995 we approved Southern Bell's Extended Calling Service plan detailed in its May 15, 1995 filing, as supplemented by the additional 36 one-way routes, to become effective January 1, 1996.

On November 15, 1995, BellSouth filed a Motion for Modification of Order No. PSC-95-1391-FOF-TL. The motion seeks to advance the implementation date for the approved ECS routes from January 1, 1996, to December 18, 1995. The motion states that "...the order's implementation should be modified because it will constitute a hardship for BellSouth's customers, as well as BellSouth to meet the January 1, 1996 implementation date."

On November 27, 1995, the Florida Interexchange Carriers Association (FIXCA) filed a response to Southern Bell's Motion for Modification. In the response, FIXCA advises that it would file a Notice of Appeal and Motion for Stay of Order No. PSC-95-1391-FOF-TL. FIXCA states: "The Commission should not consider Southern Bell's Motion for Modification, and certainly should not move the ECS implementation date forward, until it rules on FIXCA's Motion for Stay." On November 28, 1995, FIXCA filed a Notice of Appeal and Motion for Stay of Order No. PSC-95-1391-FOF-TL. On November 30, 1995, MCI Telecommunications Corporation (MCI) joined in the Motion for Stay. On December 4, 1995, BellSouth filed a Memorandum in Opposition to FIXCA's Motion to Stay. The Office of Public Counsel also filed a Response in Opposition to FIXCA's Motion for Stay.

The two requests are, in substance, mutually exclusive. This Order addresses both FIXCA's Motion for Stay and Southern Bell's Motion for Modification for Order No. PSC-95-1391-FOF-TL.

I. Florida Interexchange Carriers Association's Motion for Stay of Order No. PSC-95-1391-FOF-TL

Rule 25-22.061(2), Florida Administrative Code, states that the Commission may, among other things, consider three factors in determining whether to grant a stay of a final order pending judicial review:

- (a) Whether the petitioner is likely to prevail on 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.

A. Whether the petitioner is likely to prevail on appeal

FIXCA argues that the Commission "has clearly erred in its interpretation of the new law." The motion on page 3 states "...though FIXCA believes the new law applies to this case, regardless of which law applies, ECS is a non-basic service." FIXCA points out that upon election of price cap regulation, all local exchange company (LEC) services become either basic or non-basic services. FIXCA argues that ECS does not fall into the category of basic service as defined by Section 364.02(2), Florida Statutes, and therefore, is a non-basic service upon election of price cap regulation, regardless of which law applies.

FIXCA also states that the Commission's decision in this case turns on its interpretation of the new telecommunications law. FIXCA states that the Court's review of the Commission's decision will be governed by Section 120.68(9), Florida Statutes, which provides that

If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

- (a) Set aside or modify the agency action, or
- (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

FIXCA argues that the Commission's interpretation of the new law is clearly erroneous and subject to reversal by the Court. First, FIXCA contends that the Commission erred when it found that the prior telecommunications law applies to Southern Bell's ECS proposal, stating that the savings clause could not be clearer on this point. Second, FIXCA asserts that the Commission's interpretation that ECS is a basic service is directly contrary to the statute's plain language. Third, FIXCA argues that the Commission's analysis of the new law and classification of ECS as basic service led it to ignore the imputation mandate of Section 364.051(6)(c), Florida Statutes.

FIXCA contends that the Commission has failed to ensure that competition will continue on the ECS routes. FIXCA states that rather than moving forward to a more competitive telecommunications environment, the Commission Order moves backwards by taking a market that is competitive today and remonopolizing it for the future. FIXCA notes that it never has objected to Southern Bell's ECS proposal. Rather, its position is that the Commission must put resale and interconnection rates in place to comply with the statute's imputation requirements so that competition will continue on these routes.

Southern Bell responds that FIXCA's motion should be denied because it has failed entirely to establish any one of the prerequisites to the granting of a motion for stay. Further, Southern Bell contends that FIXCA's motion reveals that it is attempting to obtain a stay, not just to delay the implementation of Southern Bell's ECS plan, but to prevent implementation of the plan altogether. More specifically, Southern Bell argues that FIXCA asserts that the Commission should stay implementation of the ECS plan and substitute for it the refund mechanism FIXCA advocated at the hearing, and which the Commission rejected.

Southern Bell states that, as legal support for its contention that it is likely to prevail upon appeal, FIXCA cites to nothing more than a string of general authority that a court will reverse an agency's interpretation of law when it is wrong. Southern Bell asserts that FIXCA neglects to even mention the pertinent principles of statutory construction or the standard of review that applies to the Commission's application of these principles. Southern Bell notes that a final order of this Commission reaches the appellate court "clothed with a presumption of correctness and will not be disturbed in the absence of a positive showing that it is erroneous as a matter of law or constitutes an abuse of discretion." Clayton v. Clayton, 275 So. 2d 588, 589 (Fla. 1st DCA 1973).

In its motion Southern Bell analyzes in detail the legal points raised by FIXCA. Southern Bell concludes that FIXCA has done nothing more than disagree with the Commission's holding without setting forth any legal basis to support its notion that the Order is in error.

We believe that we have appropriately exercised our authority pursuant to Chapter 95-403, Laws of Florida. Prior to rendering our decision, we required the parties to brief the impact of the new law before determining the appropriate disposition of the \$25 million rate reduction. Accordingly, it does not appear that FIXCA is likely to prevail on appeal.

B. Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted

FIXCA states that its members are interexchange carriers who currently provide service on some or all of the routes approved for ECS. FIXCA states that currently these are extremely competitive toll routes and that FIXCA members have worked hard to bring the level of competition which exists today to those routes. FIXCA argues that with implementation of ECS, interexchange carrier (IXC) competition will vanish for two reasons. First, while the ECS calls will be dialed on a 7 (intra NPA) or 10 (inter NPA) digit basis, FIXCA asserts that customers of its member IXCs will have to dial at least 11 digits to place the same call. Second, FIXCA states that IXCs cannot begin to match the rate offered by Southern Bell on those routes because Southern Bell rates do not even cover the access charges that IXCs will have to pay Southern Bell for carrying the same traffic. Therefore, FIXCA concludes, its members who have devoted resources to developing customer relationships on these routes will be shut out of the market and thus irreparably harmed. FIXCA further states that once the ECS plan is put in place:

even if the Court later reverses the Commission's decision, carriers who must leave the market as a result of the Commission's decision will have a difficult time returning to the position they were in prior to ECS implementation. Such harm cannot be remedied prospectively. (Motion, page 13)

Southern Bell responds that FIXCA has provided no factual support for the contention that it will suffer irreparable harm in the absence of a stay. FIXCA's support for the contention that implementation of Southern Bell's ECS plan will result in the eradication of competition on the affected routes relates primarily to dialing patterns and the charges that its members pay for

access. Southern Bell states that FIXCA offers nothing to demonstrate that the Commission's finding that there is no cognizable argument that this plan would, as a matter of law, remonopolize the intraLATA (local access and transport area) toll market is unsupported by substantial competent evidence or otherwise an abuse of discretion.

Southern Bell contends that instead, FIXCA simply takes as a given that Southern Bell's ECS plan will necessarily result in competitive damage to FIXCA's members and then leaps to the conclusion that any damage that might occur would be irreparable. FIXCA provides no factual or legal support whatsoever for its contention that its members will be driven from the market by the implementation of ECS or that they could not reenter the market at some subsequent time. Thus, Southern Bell contends that while FIXCA has alleged irreparable harm, it has failed utterly to establish this necessary element.

The Commission heard extensive testimony and considered extensive arguments concerning the competitive implications of Southern Bell's ECS proposal. Competing IXCs are permitted, as Order No. PSC-95-1391-FOF-TL expressly stated, to continue to carry this traffic. Further, a dialing disparity, as complained of in FIXCA's motion, exists today on intraLATA toll routes, until such time as the Court lifts its stay of the Commission's Order in Docket No. 930330-TP. Accordingly, FIXCA has not demonstrated its members are likely to suffer irreparable harm if the stay is not granted.

C. Whether the delay will cause substantial harm or be contrary to the public interest

FIXCA asserts that if the Commission stays its Order, customers will continue to enjoy the benefits of competition, as they do today. FIXCA also states:

During the pendency of the stay, the ratepayers will not be harmed in any way because they will receive the benefit of the Southern Bell settlement via a refund of the \$25 million as a credit to their bills as expressly provided for in the settlement.

FIXCA states that a stay will avoid customer confusion in the event the Commission's decision is reversed. If the decision is stayed, the status quo will be maintained, and Southern Bell's customers will continue to receive a refund on their bills.

FIXCA also notes that this is the Commission's first interpretation of the new telecommunications statutes in several respects: the first interpretation related to the savings clause; one of the first interpretations as to the application of the new law in a particular situation; and the first interpretation as to the appropriate classification of a particular service as basic or non-basic. FIXCA states:

These are extremely important decisions affecting the substantial interests of many parties and upon which there is vast difference of opinion. Before implementation, the Commission would do well to await the Court's decision on whether it has appropriately interpreted the statute.

BellSouth responds on pages 8 and 9 of its motion that

FIXCA's motion should be summarily rejected because it is directly in conflict with the public interest. In both the testimony offered at the hearing, and later in its Brief, FIXCA contended that the Commission should reject BellSouth's ECS plan and, instead, require BellSouth to refund the \$25 million by way of a credit on customers' bills. The Commission, of course, rejected FIXCA's position along with all of the other proposals other than BellSouth's. In doing so, this Commission specifically stated that 'we believe that it is in the public interest to approve BellSouth's ECS plan. All residential and business customers making calls on the ECS routes will benefit by approximately \$48 million annually (unstimulated) from the approval.' (Order, p. 15)

We believe that our decision that Southern Bell's ECS plan is in the public interest was appropriate. Although FIXCA is correct that the \$25 million rate reduction will continue to benefit customers via the credit if we stayed Order No. PSC-95-1391-FOF-TL, this amount is approximately half the benefit of the \$48 million (unstimulated) rate reduction associated with implementation of the ECS plan.

We believe that FIXCA has not demonstrated that a stay of the Commission's Order is appropriate. Therefore, we find that, based on the application of Rule 25-22.061(2), Florida Administrative Code, FIXCA's Motion for Stay of Order No. PSC-95-1391-FOF-TL should be denied.

II. BellSouth's Motion for Modification of Order No. PSC-95-1391-FOF-TL

By Order No. PSC-95-1391-FOF-TL issued November 8, 1995, we approved a January 1, 1996 implementation date for BellSouth's Extended Calling Service plan. On November 15, 1995, BellSouth filed a Motion for Modification of Order No. PSC-95-1391-FOF-TL. The motion seeks to advance the implementation date for the approved ECS routes from January 1, 1996, to December 18, 1995. The motion states that "... (t)he order's implementation should be modified because it will constitute a hardship for BellSouth's customers, as well as BellSouth to meet the January 1, 1996 implementation date." The Company's motion states the following reasons for requesting the earlier effective date:

- 1) to provide customers the benefits from ECS as soon as possible pursuant to the Stipulation;
- 2) to avoid any adverse effects on customer service, possible system outage and delays resulting from year end processing; and
- 3) to allow administrative and systems personnel sufficient time to make year-end reports required by this Commission, the Federal Communications Commission and the Securities and Exchange Commission.

We believe the January 1, 1996 implementation date could cause potential problems, if the ECS conversion and the year-end activities are done simultaneously.

As stated above, FIXCA's Motion for Stay and BellSouth's Motion for Modification are, in substance, mutually exclusive. The timing of FIXCA's request, the due process requirement that all parties be provided a reasonable opportunity to respond to the Motion for Stay, and the appropriateness of considering both requests at the same time, made it impractical to consider BellSouth's Motion before the requested implementation date. Counsel for BellSouth has indicated that January 15, 1996, is the best alternate date for implementation. We believe that BellSouth's Motion for Modification is appropriate and should be granted. Therefore, we find that Order No. PSC-95-1391-FOF-TL is modified to require implementation of the amended ECS plan no later than January 15, 1996.

One of the reasons we approved the January 1, 1996, implementation date was that on that date, alternative local exchange companies (ALECS) could be certificated and begin

ORDER NO. PSC-96-0020-FOF-TL
DOCKET NO. 920260-TL
PAGE 9

competing with local exchange companies (LECS). Delaying, rather than advancing the implementation to avoid potential problems associated with BellSouth's year-end activities is consistent with that purpose.

Order No. PSC-95-1391-FOF-TL, requires Southern Bell to issue a credit for the period October 1, 1995 through December 31, 1995 since the \$25 million rate reduction was not implemented on October 1, 1995. With approval of a modified implementation date, the customer credit shall be extended accordingly. Therefore, the customer credit required by Order No. PSC-95-1391-FOF-TL shall be extended to January 15, 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Motion for Modification of Order No. PSC-95-1391-FOF-TL is granted in part and denied in part. It is further

ORDERED that the Florida Interexchange Carriers Association's Motion for Stay of Order No. PSC-95-1391-FOF-TL is denied. It is further

ORDERED that the customer credit required by Order No. PSC-95-1391-FOF-TL shall be extended to January 15, 1996. It is further

ORDERED that this docket shall remain open to continue to implement the agreement approved in Order No. PSC-94-0172-FOF-TL.

By ORDER of the Florida Public Service Commission, this 8th day of January, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Hugen
Chief, Bureau of Records

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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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.