

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Original

In re: Petition for arbitration
of dispute with BellSouth
Telecommunications, Inc.
regarding call forwarding, by
Telenet of South Florida, Inc.

DOCKET NO. 961346-TP
ORDER NO. PSC-97-0861-FOF-TP
ISSUED: July 17, 1997

The following Commissioners participated in the disposition of
this matter:

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

ORDER DENYING MOTION FOR RECONSIDERATION
AND
EMERGENCY MOTION FOR STAY

BY THE COMMISSION:

BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth had declined to continue selling call forwarding to Telenet, alleging that Telenet was using the service in violation of section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff. Telenet alleged that the tariff section is an anticompetitive restriction and that it had not been able to reach a resale agreement with BellSouth.

BellSouth at first advised Telenet that it would terminate all call forwarding services to Telenet on November 21, 1996. Later, this date was extended to December 5, 1996, in order to provide the parties with time to work out conditions by which the status quo could be preserved until our decision.

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On December 5, 1996, BellSouth filed its answer and response to Telenet's petition and a motion to dismiss. Telenet filed its opposition to BellSouth's motion to dismiss on December 17, 1996. In Order No. PSC-97-0072-FOF-TP, issued January 23, 1997, we denied BellSouth's motion to dismiss. An evidentiary hearing was held on February 12, 1997.

On April 23, 1997, we issued Order No. PSC-97-0462-FOF-TP (Order), in which we ruled that BellSouth may continue to sell its call forwarding services to Telenet subject to section A13.9.1.A.1. Telenet filed a Motion for Reconsideration on May 8, 1997, in which it also requested oral argument. On May 15, 1997, BellSouth filed a Response and Memorandum in Opposition to Motion for Reconsideration.

Following the issuance of Order No. PSC-97-0462-FOF-TP, Telenet resumed talks with BellSouth to reach an appropriate interconnection agreement. On May 23, 1997, however, BellSouth sent a notice of disconnection to Telenet, effective June 13, 1997. On June 11, 1997, Telenet filed an Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP. Subsequently, BellSouth consented to continuing service to Telenet until June 24, 1997. BellSouth filed a response in opposition to the motion for stay on June 18, 1997. We permitted oral argument on the motion for reconsideration at our June 24, 1997, Agenda Conference. Upon consideration, for the reasons set out in detail below, we deny Telenet's motions for reconsideration and for stay of Order No. PSC-97-0462-FOF-TP.

RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which this Commission failed to consider in rendering its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 Fla. 1st DCA 1981). A motion for reconsideration must present to the Commission some such point by reason of which its decision is necessarily erroneous. Atlantic Coast Line R. Co. v. City of Lakeland, 115 So. 669, 680. 1927); Mann v. Etchells, 182 So. 198, 201 (Fla. 1938); Hollywood, Inc. v. Clark, 15 So.2d 175, 180 (Fla. 1943). A motion for reconsideration is not a medium by which a party may simply advise the Commission of its disagreement with the decision, reargue matters presented in

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briefs and in oral argument, or ask the Commission to change its mind as to a matter that has already received its careful attention. Sherwood v. State, 111 So.2d 96, 97-98 (Fla. 3d DCA 1959) (quoting State ex rel Jaytex Realty Co. v. Green, 105 So.2d 817, 818-19 (Fla. 1st DCA 1958)).

As noted, on May 8, 1997, Telenet filed a Motion for Reconsideration of Order No. PSC-97-0462-FOF-TP. The company set forth six grounds on which it based its motion. We address and reject each of these grounds separately below.

(1)

Telenet argued that our decision was in large part based upon application of Section 364.16(3)(a), Florida Statutes, which requires that no alternative local exchange company deliver traffic through a local interconnection arrangement without paying appropriate terminating access charges. Telenet alleged that the question of terminating access charges pursuant to Section 364.16(3)(a), Florida Statutes, was never framed as an issue to be resolved in this proceeding, and, therefore, our consideration of terminating access charges was misplaced.

BellSouth responded that Section 364.16(3)(a), Florida Statutes, was inherently part of our consideration of whether the tariff restriction was appropriate. The tariff restriction prohibits the avoidance of toll charges by use of call forwarding. The statute requires the payment of terminating access charges for delivery of toll traffic by means of a local interconnection arrangement.

We conclude that we correctly applied Section 364.16(3)(a), Florida Statutes, to the facts of this case. We may not, in the general case, validate any telecommunications service that violates any provision of Chapter 364, Florida Statutes. Thus, Telenet cannot be heard to say that terminating access charges was not properly before us. We find, therefore, that our reliance on Section 364.16(3)(a), Florida Statutes, in reaching our decision was not a mistake of law. Accordingly, Telenet's motion for reconsideration on that ground is denied.

(2)

Telenet further argued that there is no local interconnection arrangement between Telenet and BellSouth. Telenet asserted that Section 364.16(3), Florida Statutes, is not implicated in the absence of a local interconnection agreement or arrangement. Telenet maintained that it is simply a customer of call forwarding services, not a discrete network operator seeking connection with BellSouth's switched network. In addition, Telenet asserted that we made no finding that an interconnection arrangement exists between the two companies.

BellSouth responded that, while this Commission found that Telenet had not executed a formal interconnection agreement with BellSouth, we did find that Telenet indeed had an interconnection arrangement with BellSouth by virtue of interweaving its Interactive Voice Response (IVR) switching system and business lines with BellSouth's network and call forwarding service. BellSouth further argued that Telenet raised nothing in its motion that we failed to consider in concluding that there is a local interconnection arrangement between the companies.

We conclude that we did determine that a local interconnection arrangement implicating Section 364.16(3), Florida Statutes, exists between Telenet and BellSouth, and that that determination is sufficiently supported by the record testimony of each company's witness. While that testimony clearly indicates the absence of a formal agreement between the companies, it just as clearly indicates a physical connection between the companies' systems that constitutes an interconnection arrangement. We find that in its motion Telenet did not present persuasive argument suggesting that we overlooked or misunderstood some point of fact that would have caused us to determine that an arrangement between the companies as contemplated by the statute did not exist. Therefore, we find that we did not overlook or misunderstand some point of fact in determining that a local interconnection arrangement exists between Telenet and BellSouth. Accordingly, we deny reconsideration on this ground as well.

(3)

Telenet also argued that we erred in failing to make a finding that the tariff restriction is reasonable. Noting that we found the tariff restriction to be nondiscriminatory, Telenet maintained that we were required to find that the restriction was both reasonable and nondiscriminatory in order to uphold its validity.

BellSouth responded that in determining that the sale of its call forwarding was subject to the tariff restriction, we necessarily found the restriction to be both reasonable and nondiscriminatory.

Under the Telecommunications Act of 1996, 47 U.S.C. 251 et seq., (Act) and Chapter 364, Florida Statutes, we may uphold only those restrictions on resale of services that we find to be reasonable and nondiscriminatory. We conclude that in this case we did find that BellSouth's tariffed call forwarding restriction is both reasonable and nondiscriminatory. We considered the reasonableness of the tariff restriction at length. Our finding that the restriction is reasonable is implicit in our evaluation of the tariff. It cannot be said that we found the restriction to be unreasonable and yet applicable. Telenet's argument that our failure to determine the reasonableness of the restriction requires reconsideration amounts to form over substance and would not result in a different decision. We find that we made no mistake of law. Therefore, we find that we made the required findings that BellSouth's call forwarding use restriction is both reasonable and nondiscriminatory. Accordingly, we deny Telenet's motion for reconsideration on the ground that we did not. We find it appropriate, however, to expressly clarify that we find that the tariff restriction is reasonable as well as nondiscriminatory.

(4)

Telenet also argued that we overlooked our ruling in Order No. PSC-96-1579-FOF-TP, issued in Dockets Nos. 960833-TP, 960846-TP and 960916-TP, concerning restrictions on the resale of services. In that order, we determined that "no restrictions on the resale of services shall be allowed, except for restrictions applicable to the resale of grandfathered services, residential services, and Lifeline/LinkUp services to end users who are eligible to purchase

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such service directly from BellSouth." Telenet maintained that our decision in this proceeding was required to conform with our ruling in Order No. PSC-96-1579-FOF-TP, and that it did not.

BellSouth responded that, our ruling in Order No. PSC-96-1579-FOF-TP notwithstanding, we are authorized by Section 251(c)(4)(B) of the Act and Section 364.161(2), Florida Statutes, to approve reasonable and nondiscriminatory restrictions on the resale of services. BellSouth asserted that our ruling in Order No. PSC-96-1579-FOF-TP is not a controlling precedent in this proceeding.

We concur with BellSouth that our ruling on resale of services restrictions in Order No. PSC-96-1579-FOF-TP is inapplicable in this proceeding. First, our ruling in that order is specific to the parties in Dockets Nos. 960833-TP, 960846-TP and 960916-TP. Second, BellSouth's call forwarding tariff restriction was not placed specifically in issue in those proceedings. Third, it is simply inappropriate to construe our resale restrictions ruling as nullifying a tariff restriction whose effect is to require the use of a resold service in compliance with Florida law. BellSouth's call forwarding tariff restriction tracks Section 364.16(3), Florida Statutes. Our ruling in Order No. PSC-96-1579-FOF-TP is limited to those resale restrictions the elimination of which does not produce an anomalous or unlawful result. Therefore, we reject Telenet's contention that we erred in not applying our ruling on resale restrictions in Dockets Nos. 960833-TP, 960846-TP and 960916-TP to the circumstances of this case. Accordingly, we deny Telenet's motion for reconsideration on this ground.

(5)

Telenet argued that we failed to consider its request that BellSouth be required to unbundle call forwarding. Telenet stated that its objective in bringing this proceeding was to compel BellSouth to unbundle multipath call forwarding, pursuant to Section 364.161(1), Florida Statutes. Telenet maintained that our failure to recognize an unbundling issue was error and requires reconsideration.

BellSouth responded that Telenet declined at the issue identification meeting to add an issue concerning unbundling and pricing of call forwarding services. BellSouth pointed out that,

on BellSouth's motion and over Telenet's objection, the Presiding Officer struck Telenet testimony concerning unbundling and pricing of call forwarding services.

The sole issue before us in this proceeding has been whether BellSouth may continue to sell its call forwarding services to Telenet subject to the present tariff restriction. As BellSouth has argued, Telenet declined to add an issue concerning unbundling and pricing of call forwarding services, or to couch the statement of the issue in those terms. Moreover, upon argument at the hearing, the Presiding Officer found that, in its petition, Telenet had not demanded relief on the basis of an order unbundling BellSouth's call forwarding service. Therefore, we conclude that Telenet's argument that we failed to consider an unbundling issue cannot be sustained. Accordingly, we deny Telenet's motion for reconsideration on the ground that we misapprehended the issue to be arbitrated in this proceeding.

(6)

Last, Telenet argued that our failure to consider an unbundling issue and our reliance on Section 364.16(3)(a), Florida Statutes, violated Telenet's due process rights. In support of its contention that it was not afforded the opportunity to adequately prepare for hearing, Telenet cited Bendix Corp. v. The Federal Trade Commission, 450 F.2d 534 (6th Cir. 1971).

BellSouth responded that Telenet's allegation that we erred in implicating Section 364.16(3)(a), Florida Statutes, in our rationale is baseless. BellSouth asserted that Telenet failed to properly raise an unbundling issue, even though it clearly had the opportunity to do so.

We conclude that Telenet's argument that it was denied due process is flawed. In Bendix, supra, the court held that an agency may not change in midstream the theory upon which it will decide a case without giving reasonable notice of the change and opportunity to present argument under the new theory. Nothing of the kind has occurred in this proceeding. As already stated, we may not, in the general case, validate any telecommunications service that violates any provision of Chapter 364, Florida Statutes. The application of Section 364.16(3)(a), Florida Statutes, to our decision in this

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instance did not depend upon an explicit issue statement bringing it into play. Telenet has known since an early point in its negotiations with BellSouth that BellSouth's objection to Telenet's use of its call forwarding service is based on Telenet's avoidance of access charges in contravention of Florida law. Moreover, as we observed in Order No. PSC-97-0462-TP, Telenet did not advocate that an unbundling issue be raised in this proceeding, consenting instead to our arbitration of the single issue whether BellSouth would be permitted to enforce its tariffed call forwarding use restriction in its dealings with Telenet. Thus, we find that it cannot be said that Telenet has been deprived of due process. Finding that Telenet's due process rights have not been violated in this proceeding, we deny Telenet's motion for reconsideration on that ground.

STAY

On June 11, 1997, Telenet filed an Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP with this Commission. Telenet stated that it received written notice on May 23, 1997, that BellSouth would remove all call forwarding and call transfer features from all Telenet telephone lines effective June 13, 1997. The basis for BellSouth's notice of service termination was our ruling in Order No. PSC-97-0462-FOF-TP that Telenet's use of call forwarding contravenes Section 364.16(3)(a), Florida Statutes. In that Order, as noted above, we further ruled that BellSouth could continue to sell its call forwarding services to Telenet pursuant to section A13.9.1.A.1 of its General Subscriber Service Tariff. Telenet requested that we stay Order No. PSC-97-0462-FOF-TP during the pendency of reconsideration and, if necessary, judicial review. Telenet asserted that a stay is appropriate until it is able to establish a long term relationship with BellSouth either by reaching a negotiated agreement or through continuing litigation. Telenet further requested that we require BellSouth to continue service to Telenet for the duration of the stay.

Section 120.68(3), Florida Statutes, provides that this Commission may grant a stay of its decision upon appropriate terms. Rule 25-22.061(2), Florida Administrative Code¹, provides that:

[A] party seeking to stay a final or non-final order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate under taking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (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;
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Telenet acknowledged that motions for stay are controlled by Rule 25-22.061(2), Florida Administrative Code. Relying on Order No. PSC-96-1403-FOF-WS, issued November 20, 1996, in Docket No. 941121-WS, Telenet asserted, however, that a movant need not prove each of the considerations set forth in the rule, so long as the public is unharmed by the stay.

Telenet asserted, nevertheless, that it would suffer irreparable harm if BellSouth were to terminate service, even

¹While Rule 25-22.061(2), Florida Administrative Code, provides directly for the filing of a motion for stay pending judicial review, we conclude that it is applicable in the circumstances of this case.

temporarily. It alleged that termination of service would completely shut down its system, seriously disrupting its customers, and place in jeopardy its customer goodwill and credibility as an alternative provider of service.

Telenet further asserted that a stay will neither cause substantial harm to BellSouth nor be contrary to the public interest. Telenet maintained that its 250 customers do not represent a significant portion of the number of intra-LATA toll users in the Southeast Florida LATA, where Telenet presently provides service; thus, Telenet's operations affect BellSouth only inconsequentially. Conversely, Telenet maintained that, if we fail to enter a stay, Telenet's customers will be substantially harmed. They will be left with no choice but to take services from BellSouth at substantially higher costs.

Furthermore, Telenet alleged that, in conformance to our encouragement to the parties to work out their differences by good faith negotiations, it has attempted to negotiate an agreement based on relevant parts of the interconnection agreement reached by AT&T Communications of the Southern States, Inc., and BellSouth (the AT&T agreement).² Telenet further alleged that BellSouth has offered the AT&T agreement only with restrictions not contained in that agreement, a position that violates Sections 252(i) and 252(b)(5) of the Act. Telenet contended that it is substantially handicapped in its efforts to reach a negotiated agreement when termination of service appears imminent.

Finally, Telenet contended that the arguments it has put forth in its motion for reconsideration of Order No. PSC-97-0462-FOF-TP are meritorious, and would entitle it to prevail on appeal, if that became necessary. Telenet incorporated those arguments by reference into its motion for stay.

²On June 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C. §252(i), in which it requests this Commission to order BellSouth to allow Telenet to obtain the relevant terms and conditions as are in the AT&T agreement without modification and to continue existing service to Telenet pending decision on its petition.

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In its response in opposition, BellSouth first alleged that Telenet mischaracterizes the legal standard for granting of a stay. BellSouth contended that Order No. PSC-96-1403-FOF-WS cannot be read to hold that one factor alone, e.g., the absence of harm to the public, is sufficient to sustain a motion for stay. BellSouth distinguished the issue in contention in Docket No. 941121-WS from the issue in contention in this docket. In Docket No. 941121-WS, this Commission was faced with an application to add additional service territory. In this docket, we are faced with a Telenet service that we have found contravenes Florida law.

BellSouth contended that Telenet has not shown that it will suffer irreparable harm. By our Order, Telenet is merely being required to operate in compliance with Florida law. BellSouth cited Order No. 22022, issued October 9, 1989, in Docket No. 860723-TP, where this Commission stated that "we find it inconceivable that [the Florida Pay Telephone Association, Inc.,] could be harmed by being required to disgorge itself of [0- and 0+ intraLATA] traffic it was never entitled to."

BellSouth asserted that a stay will not facilitate resolution of the parties' dispute in a reasonable fashion, as Telenet claims. BellSouth maintained that it has offered a resolution by means of a number of options, including an interconnection agreement compliant with Order No. PSC-97-0462-FOF-TP. BellSouth pointed out that it served notice of termination on Telenet only after the companies failed to reach a resolution in the seven weeks following our Order.

BellSouth also disputed that a stay will not cause harm or be contrary to the public interest. It pointed out that it is harmed because it is not receiving access charges to which it is entitled and that the public interest is disserved if Telenet's unlawful manner of operation is unchecked.

Finally, BellSouth contended that Telenet is not likely to prevail on reconsideration. BellSouth asserted that, as it argued in its response to Telenet's motion for reconsideration, Telenet has not met the standard for reconsideration. BellSouth incorporated that response into its response to Telenet's motion for stay. If, however, a stay is granted, BellSouth claimed it must be conditioned on the posting of a bond or other adequate

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security, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code.

The determination of whether a stay of our Order is warranted requires a balancing of factors. Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987). Ordinarily, the party seeking a stay must show a strong or substantial likelihood of success. A mere possibility of success on the merits is not sufficient. Id. We find that our application of Section 364.16(3)(a), Florida Statutes, to the facts of this case is legally sound and would withstand the scrutiny of judicial review. Moreover, this Commission's construction of a statute with whose enforcement and interpretation the Commission is charged is entitled to great weight and an appellate court will not depart from the Commission's construction unless it is clearly unauthorized or erroneous. PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988).

At a minimum, the movant must show serious questions going to the merits, and irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is issued. The probability of success that must be shown is inversely proportional to the degree of irreparable injury that would be incurred absent a stay. Ohio ex rel. Celebrezze, 812 F.2d at 290. We find that Telenet has not shown serious questions going to the merits. Indeed, as set forth above, we have denied Telenet's motion for reconsideration of Order No. PSC-97-0462-FOF-TP on each of the several grounds Telenet advanced in support of its motion. In its motion for stay, Telenet states that it wishes an agreement with BellSouth based on BellSouth's interconnection agreement with AT&T, but that BellSouth, in a discriminatory fashion, requires restrictive language not in that agreement that addresses Order No. PSC-97-0462-FOF-TP. Whether or not the restrictive language BellSouth allegedly requires in an interconnection agreement with Telenet is appropriate, Telenet, in an interconnection agreement with BellSouth, cannot escape the applicability of Section 364.16(3)(a), Florida Statutes.

It may be true that if we do not enter a stay, Telenet will incur harm. If we do enter a stay, however, Telenet would only be avoiding harm by continuing to use BellSouth's call forwarding service in a manner that we have determined to be unlawful.

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Furthermore, we do not accept Telenet's view of the consequences should we decide not to enter a stay. As we noted in Order No. PSC-97-0462-FOF-TP, Telenet can avail itself of several service options that would permit it to remain in business in the near term. Thus, we conclude that Telenet has neither a probability of success on the merits on appeal nor the likelihood of irreparable harm if this matter is not stayed. Therefore, we find it appropriate to deny Telenet's motion for stay.

Finally, we reaffirm our encouragement to both Telenet and BellSouth to find a way to rekindle negotiations leading to an agreement that would permit Telenet to sustain its business on a basis that would be fair to BellSouth.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each and all of the specific findings set forth in the body of this Order are approved in every respect. It is further

ORDERED that Telenet of South Florida, Inc.'s Motion for Reconsideration of Order No. PSC-97-0462-FOF-TP is hereby denied. It is further

ORDERED that Telenet of South Florida, Inc.'s Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP is hereby denied. It is further

ORDERED that this docket shall be closed.

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By ORDER of the Florida Public Service Commission, this 17th
day of July, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 the Commission's final action in this matter may request 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 and/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.

MEMORANDUM

July 15, 1997

RECEIVED

JUL 16 1997
4:50
FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *EMCB*

RE: DOCKET NO. 961346-TP - PETITION FOR ARBITRATION OF DISPUTE WITH BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING CALL FORWARDING, BY TELENET OF SOUTH FLORIDA, INC.

0861-FOF

Attached is an ORDER DENYING MOTION FOR RECONSIDERATION AND EMERGENCY MOTION FOR STAY with attachments, to be issued in the above referenced docket. (Number of pages in Order - 14)

see 2 + 3

CJP/clp
Attachment
cc: Division of Communications (Greer, Sirianni)
I: 961346or.cjp

3/2-AR