

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CNM Networks, Inc. for declaratory statement that CNM's phone-to-phone Internet protocol (IP) telephony is not "telecommunications" and that CNM is not a "telecommunications company" subject to Florida Public Service Commission jurisdiction.

DOCKET NO. 021061-TP
ORDER NO. PSC-02-1858-FOF-TP
ISSUED: December 31, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

Pursuant to section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, CNM Networks, Inc. (CNM) filed a petition for declaratory statement on October 18, 2002. CNM requests that we issue a declaratory statement that phone-to-phone Internet protocol (IP) telephony is not telecommunications under Florida law and therefore, that CNM is not a telecommunications company subject to our certification and tariffing requirements. In the alternative, CNM states that if we believe that we can or should regulate phone-to-phone IP telephony or the companies that provide such service, then CNM requests that we first conduct a generic investigation or rulemaking proceeding to address the issues raised in its petition.

BellSouth Telecommunications, Inc. (BellSouth), Northeast Florida Telephone Company (NEFTC), Sprint-Florida, Inc. (Sprint), ALLTEL Florida Inc. (ALLTEL), Verizon Florida Inc. (Verizon),

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ORDER NO. PSC-02-1858-FOF-TP
DOCKET NO. 021061-TP
PAGE 2

Frontier Communications of the South, Inc. (Frontier), TDS Telecom/Quincy Telephone (TDS), Florida Cable Telecommunications Association (FCTA), ITS Telecommunications Systems, Inc. (ITS), Smart City Telecommunications LLC d/b/a Smart City Telecom (Smart City), and AT&T Communications of the Southern States, LLC and TCG South Florida, Inc. (AT&T) filed petitions/motions for intervention in this docket. On November 19, 2002, CNM filed a Motion to Dismiss the Petitions for Intervention, or in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action. On December 2, 2002, Sprint, NEFTC, ALLTEL, Smart City, Frontier, ITS, TDS, FCTA, Verizon, and BellSouth timely filed responses to CNM's Motion to Dismiss.

We have jurisdiction pursuant to section 120.565, Florida Statutes.

CNM'S PETITION FOR DECLARATORY STATEMENT

CNM states that the Florida statutes at issue are sections 364.01(4)(b) and (e) and 364.02(2), (11), and (12). The company asserts that the Commission orders at issue are In re: Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 Telecommunications Act of 1996, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002, in Docket No. 000075-TP (Phases II and IIA); In re: Investigation into BellSouth Telecommunications, Inc.'s Tariff Filing (02-0057) on Installment Billing, Order No. PSC-02-0255-PAA-TL, issued February 27, 2002, in Docket No. 020086-TL; In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc., Order No. PSC-01-1015-FOF-TP, issued April 24, 2001, in Docket No. 991854-TP; In re: Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order No. PSC-01-0824-FOF-TP, issued March 30, 2001, in Docket No. 000649-TP; and In re: Petition of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Concerning Interconnection and Resale

ORDER NO. PSC-02-1858-FOF-TP
DOCKET NO. 021061-TP
PAGE 3

Under the Telecommunications Act of 1996, Order No. PSC-00-1803-
PHO-TP, issued October 2, 2000, in Docket No. 000649-TP.

CNM states that the Federal statutes at issue are Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"); 47 U.S.C. sections 151, 153(20), (43), (44), and (46), 230(b), and 251. It asserts that the Federal Communications Commission (FCC) orders at issue are: In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272, 11 FCC Rcd 21905 and In the Matter of Federal-State Joint Board and Universal Service (Report to Congress), 13 FCC Rcd 11501.

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

There is case law, however, which states that when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. See, e.g., Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994). We find that any statement by this Commission on phone-to-phone IP telephony would be a statement of general applicability interpreting law and policy which would carry implications for the telecommunications industry statewide. This finding is supported by the large number of telecommunications companies which have requested permission to intervene in this docket.

We find that it would not be proper to address the issue raised in CNM's Petition by way of a declaratory statement. Thus, CNM's Petition for Declaratory Statement is hereby denied. We also find that as the FCC is currently addressing a similar matter, it would be administratively inefficient at this time to grant the alternative relief requested in CNM's petition. We, however, direct our staff to conduct a undocketed workshop to explore the issue of phone-to-phone IP telephony.

ORDER NO. PSC-02-1858-FOF-TP
DOCKET NO. 021061-TP
PAGE 4

CNM'S MOTION OF DISMISS THE MOTIONS/PETITIONS
FOR INTERVENTION

As mentioned above, CNM filed a motion to dismiss the petitions for intervention filed in this docket. By our own motion at our December 17, 2002, agenda conference, we allowed those who filed petitions for intervention to participate in the discussion of CNM's Petition. As we have denied CNM's Petition, the petitions/motions for intervention filed in this docket are moot. Consequently, CNM's Motion to Dismiss is also rendered moot.

No further action is required, and this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that CNM Networks, Inc.'s Petition for Declaratory Statement is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 31st day of December, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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ORDER NO. PSC-02-1858-FOF-TP
DOCKET NO. 021061-TP
PAGE 5

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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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.