

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: SOUTHERN BELL TELEPHONE AND)	DOCKET NO. 870766-TL
TELEGRAPH COMPANY'S Public Packet)	ORDER NO. 21447
Switching Network Tariff (T-87-183)	ISSUED: 6-26-89
filed 6/5/87))	
)	

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 GRANTING STAY

BY THE COMMISSION:

By Order No. 20828, issued March 1, 1989 (the Order), we determined that protocol conversion was, at least in part, an intrastate service subject to our jurisdiction. Accordingly, we ordered Southern Bell Telephone and Telegraph Company (Bell) to file tariffs revisions to provide protocol conversion on a regulated intrastate basis. On March 16, 1989, Bell filed a motion for partial reconsideration and for stay of the Order (the Motion).

To satisfy the requirements for reconsideration, a motion must concisely state grounds in support thereof, see Rule 25-22.060(2), Florida Administrative Code. The grounds stated must bring to our attention some matter of law or fact which we failed to consider or overlooked in our prior decision, Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962), Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). The motion may not be used as an opportunity to re-argue matters previously considered by us, Diamond Cab, supra.

The Motion seeks a stay of the effectiveness of the Order until the U.S. Court of Appeals for the Ninth Circuit (the Court) rules on the Federal Communications Commission's (FCC's) authority to preempt state regulation of enhanced service. In the alternative, the Motion urges that we grant a stay of the Order for a period of up to nine months to allow the company to perform the necessary actions to enable it to offer protocol conversion on a regulated basis.

Bell argues that it cannot comply with both the FCC's and our orders. The Order notes that the Court will soon rule on the issue of the FCC's authority to declare protocol conversion as an enhanced service and to preempt state regulation of enhanced services. Staying the effectiveness of the Order, according to the Motion, will prevent Bell from being forced to violate either the Order or the FCC's directives.

The Motion alleges also that there are numerous tasks that need to be performed prior to Bell's offering of protocol conversion on a regulated basis. First, BellSouth Advanced Networks (BSAN) currently performs all end user billings for

DOCUMENT NUMBER-DATE

06275 JUN 26 1989

FPSC-RECORDS/REPORTING

ORDER NO. 21447
DOCKET NO. 870766-TL
PAGE 2

protocol conversion; these functions must be assumed by Bell. Bell's current billing system is not adequate to meet current protocol conversion customer needs, and thus Bell states that it must utilize BSAN's billing software and purchase new hardware to perform current billing using the existing customer bill format. Additionally, Bell says it must develop procedures for allowing multiple customers to share dial access lines, central office data sets and asynchronous ports, and for measuring and billing their usage. Moreover, Bell claims that it must develop an in-house organization for marketing protocol conversion, for providing customer service and for tracking and monitoring implementation of the protocol conversion on a regulated basis. Bell must also modify existing BSAN customer agreements to reflect the changes in their services.

Additional tasks that must be performed include the design and implementation of a procedure to identify and book all expenses and revenues from protocol conversion provided in Florida separately from all revenues and expenses relating to protocol conversion provided in other states. Bell estimates that it will need nine months to complete these tasks but that a minimum of ninety days is necessary to allow the company to contract with BSAN for the provision of these services until Bell can assume them.

The Motion further contends that the Order mischaracterizes its brief filed in this docket. Bell charges that it simply noted in its brief that the U.S. Court of Appeals for the D.C. Circuit did not explicitly address in its preemption discussion the FCC's preemption of enhanced services as it did the FCC's power to preempt state regulation of CPE. Therefore, the Motion asserts that the company was not arguing that this court had not specifically upheld the FCC's authority to preempt state regulation of enhanced services. Finally, the Motion alleges that the price parity rate structure for access to the PulseLink (packet switching) network that was adopted in the Order is different from that at issue in Docket No. 9804 3-TP.

With respect to the Motion's argument that the Order places the company in the untenable position of having to violate either the FCC's or our orders, Bell has consistently and persistently raised this argument before us. Yet, Bell has made no showing regarding the jurisdiction conflict question that we either overlooked or misapprehended some evidence or argument in reaching our decision in the Order.

The argument that Bell must complete a large number of tasks before it can provide protocol conversion on a regulated basis is raised before us for the first time. At no time during the hearing in this proceeding did Bell present the extensive list of implementation problems it now advances despite a clear opportunity and a great incentive to do so. The extent of the problems advanced by the company in its prior arguments amounted to simple statements that there would be customer confusion for multistate accounts if there were differing regulatory treatments between Florida and other jurisdictions and that the company's accounting procedures would be complicated by the differing jurisdictional

ORDER NO. 21447
DOCKET NO. 870766-TL
PAGE 3

requirements. To the extent that the alleged implementation problems form barriers, Bell's failure to provide this information when it had the perfect forum and opportunity to do so should not be countenanced as a basis for reconsideration. The Motion has failed to identify anything in the record of this proceeding that we overlooked or failed to consider when reaching our decision.

Regarding our alleged mischaracterization of Bell's brief, the relevant portion of the Order states:

More importantly, the Communications Act of 1934 expressly reserves to the states the regulation of purely intrastate telecommunications services. As was argued by Southern Bell in its brief, the D.C. Circuit's decision upholding the FCC's preemption of state regulation of CPE and enhanced services in Computer II addressed only CPE. The basis of the decision was that a piece of CPE could not be practically separated into separate jurisdictions. The Court did not rationalize its decision to uphold preemption of state regulation of enhanced services.

The relevant portion of Bell's brief says:

In that case [Computer II], the U.S. Court of Appeals for the District of Columbia Circuit upheld the FCC's authority to deregulate both enhanced services and CPE. The Court further expressly upheld the FCC's power to preempt state regulation of CPE; however, the Court did not explicitly address the FCC's preemption of enhanced services or the requirement that BOCs provide such services only through separate subsidiaries. Although the Court did not expressly address these issues, the FCC and many other parties have construed this case as supporting the FCC's authority to preempt state regulation of CPE and enhanced services.

We fail to find any mischaracterization of Bell's brief in the language of the Order. Further, any additional explication of Bell's arguments would have no material effect on the basis of our decision.

The Motion's argument that the rate structure established for protocol conversion is materially different from that which is under consideration in Docket No. 880423-TP, regarding Information Services, does not raise any question for us to decide. Bell does not seek any change in the rate structure decision nor does it point to anything that we failed to consider or overlooked in reaching our decision. The Motion merely points out that there may be a difference in the rate structure policy decision made in this docket and the one that we may eventually adopt in the Information Services proceeding.

As set forth in the foregoing discussion of the Motion's arguments, the company has failed to identify any point that we failed to consider or overlooked in reaching our decisions set forth in the Order. Essentially, the company has not asked us

ORDER NO. 21447
DOCKET NO. 870766-TL
PAGE 4

to alter our basic decision to provide protocol conversion on a regulated basis. The Motion has, however, asked that implementation of the Order be stayed either pending the Court's decision or long enough to allow Bell to resolve alleged technical and logistical problems of "gearing-up" to offer protocol conversion on a regulated basis.

We acknowledge that the essence of the jurisdictional conflict existing between us and the FCC, i.e., the limits on the FCC's authority to preempt states' proper regulatory authority, is currently the subject of the appeal of the FCC's Computer Inquiry III decision in the Court. As a result, our jurisdictional challenge to the FCC on the protocol conversion issue now lies within the appellate jurisdiction of the Court. We believe that attempting to alter the status quo while the Court is considering jurisdictional issues is inappropriate. We further believe that our staying the effectiveness of the Order would not grant deference to the FCC but would recognize and defer to the jurisdiction of the Court.

We also note that Bell has filed a "Motion to Preserve the Status Quo" with the Court and that our response is due shortly. The Court's grant of Bell's motion would effectively result in an injunction against us, prohibiting our acting to compel compliance with the Order. Our denial of the Motion's request for a stay under these conditions would create unneeded conflict with the Court at a time when it is in the final stages of the appellate process in this case.

For the reasons explained above, we grant the Motion's request for a stay of the effectiveness of the Order until the Court has ruled on the issue of the FCC's authority to preempt state regulation of protocol conversion. Further, if the Court rules against the FCC on the preemption issue, Bell shall be given 30 days from the date the Court's order becomes final to file tariff revisions consistent with the Order with the service to be in place and offered on a regulated basis within 90 days from the same date.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's request for a stay of the effectiveness of Order No. 20828, issued March 1, 1989, until the U.S. Court of Appeals for the Ninth Circuit has ruled on the issue of the Federal Communications Commission's authority to preempt state regulation of protocol conversion is hereby granted. It is further

ORDERED that, in the event that the U.S. Court of Appeals for the Ninth Circuit rules against the Federal Communications Commission on the preemption issue, Southern Bell Telephone and Telegraph Company shall file, no later than 30 days from the date the Court's order becomes final, tariff revisions consistent with Order No. 20828, issued March 1, 1989, with the service to be offered on a regulated basis within 90 days from the same date. It is further

ORDER NO. 21447
DOCKET NO. 870766-TL
PAGE 5

ORDERED that this docket shall remain open pending the resolution of the appeal in the U.S. Court of Appeals for the Ninth Circuit of the Federal Communications Commission's decision in its Computer Inquiry III proceeding.

By ORDER of the Florida Public Service Commission,
this 26th day of JUNE, 1989.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

DLC

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 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.