BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S Public Packet Switching Network (T-87-183) filed on June 5, 1987	DOCKET NO. 870766-TL
In re: Proposed tariff by SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY to comply with the FCC Memorandum Opinion and Order in Docket No. 88-221 to deregulate customer dialed account recording	DOCKET NO. 881301-TL ORDER NO. 24838 ISSUED: 7/22/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
MICHAEL McK. WILSON

ORDER LIFTING STAY OF ORDERS NOS. 21447 AND 20655

BY THE COMMISSION:

I. BACKGROUND

A. Protocol Conversion

By Order No. 20828, issued March 1, 1989 (the Order) in Docket No. 870766-TL, 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 (Southern Bell) to file tariff revisions tc provide protocol conversion on a regulated intrastate basis. On March 16, 1989, Southern Bell filed a motion for partial reconsideration and for stay of the Order (the Motion).

The Motion sought a stay of the effectiveness of the order until the U.S. Court of Appeals for the Ninth Circuit (the Court) ruled on the Federal Communications Commission's (FCC's) authority to preempt state regulation of enhanced services. In the alternative, the Motion urged that the Commission 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.

By Order No. 21447, the Commission granted the Motion's request for a stay of the effectiveness of the Order until the Court ruled on the issue of the FCC's authority to preempt state regulation of protocol conversion. Further, if the Court ruled against the FCC on the preemption issue, Bell was given 30 days from the date the Court's order became 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.

B. Customer Dialed Account Recording Equipment

On September 22, 1988, Southern Bell filed a proposed tariff revision to deregulate the provisions of its Customer Dialed Account Recording (CDAR) feature, offered as a complement to the bundled ESSX tariff. (Docket No. 881301-TL) CDAR allows an ESSX customer to append a user-defined "account" code to calls made from ESSX stations. Southern Bell proposed to delete from its ESSX tariff all rates and service descriptions associated with CDAR, and to require future customers to purchase this feature as an optional deregulated service from a separate Southern Bell affiliate or subsidiary.

This treatment was proposed in response to a decision by the Federal Communications Commission (FCC) in North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the [Federal Communications] Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, Memorandum Opinion and Order in Docket No. 88-221, 3 FCC.Rcd 4385 (1988) (CDAR Order), authorizing the Bell Operating Companies (BOCs) to continue offering CDAR, but declaring it to be an "enhanced service" and subject to all of the progeny of decisions regarding that category of services. The intended consequence of this decision was that Southern Bell would offer CDAR on a structurally integrated basis and account for it as a nonregulated activity.

By Order No. 20655, the Commission held that CDAR should not be deregulated for intrastate purposes. Southern Bell sought reconsideration of this Order arguing that the Company was placed in the untenable position of violating either the FCC's orders or the Commission's Order. By Order No. 21647 the Commission held Order No. 20655 in abeyance pending the decision before the U.S. Circuit Court of Appeals for the Ninth Circuit in People of the

State of California, et. al., v. FCC, Case Nos. 87-7230, and 88-7183. In conjunction with Order No. 21647, Southern Bell committed to hold its CDAR tariff filing in suspense until the Ninth Circuit ruled. Since there are no current customers, no one has been affected.

C. Ninth Circuit Litigation

In the Ninth Circuit case, the FCC premised its preemption on two arguments. First, it argued that enhanced services were not common carrier services and, therefore, were not included within the purview of Section 2(b)(1) of the Communications Act of 1934 which denies the FCC jurisdiction "with respect to (1) charges, classifications, practices, services facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." The gist of this argument is that enhanced services fall beyond the reach of Section 2(b)(1) because enhanced services, unlike basic telephone services, are not offered on a "common carrier" basis. Second, the FCC argued that its preemption of state-imposed structural separation requirements and some state-imposed nonstructural safeguards is valid because such state regulations cannot feasibly coexist with the Computer III scheme. This argument rests on the "impossibility" exception mentioned by the Supreme Court in its Louisiana PSC decision to the effect that preemption might be valid if it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation."

In addition to its preemption arguments, the FCC also argued that the challenge its preemption of state tariffing of enhanced services is barred by the doctrines of administrative finality and res judicata. Regarding this argument, the FCC claimed that because the validity of its preemption of state tariffing of enhanced services was determined definitively in the Computer II proceeding, administrative finality and res judicata preclude the states from challenging Computer III's continuation of the FCC preemption policy.

On June 6, 1990, the Ninth Circuit Court of Appeals issued its Order. Inter Alia, the Court rejected the FCC's preemption of state regulation of enhanced services. With respect to the FCC's first argument the Court stated:

> We find nothing in the language of the Act to support the cramped reading advanced by the Commission. To the contrary, the broad language of §2(b)(1) makes clear that the sphere of state authority which the statute "fences off from FCC reach or regulation[,] Louisiana PSC, 476 U.S. 370, includes, at a minimum, services that are delivered by a telephone carrier "in connection with" its intrastate common carrier telephone services. . . . As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad "in connection with" language of §2(b)(1) places them squarely within the regulatory domain of the states.

The Court further stated that:

> The extent of the authority to regulate intrastate communications services reserved to the states by §2(b)(1) does not turn on whether the services are provided on a common carrier or non-common carrier basis. The Commission's interpretation of §2(b)(1) would require us to qualify the statute's sweeping language "for or in connection with intrastate communication service by wire or radio on any carrier" by adding the words "which the carrier provides on a common carrier basis." If the Commission advocates such an amendment to the statute, then it must make its case to Congress, not to the courts.

In discussing the "impossibility" argument the Court acknowledged the impossibility exception but noted that:

> [T]he only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication.

The Court further stated that "the FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals." (emphasis in original).

The Court held that the FCC failed to carry its burden of demonstrating that all state-imposed separation requirements would negate the FCC's policy of permitting the structural integration of basic and enhanced services offered on an interstate basis. The Court further held that the FCC failed to support preemption of all inconsistent nonstructural safeguards and all more stringent nonstructural safeguards adopted by the FCC.

Regarding the FCC's argument that the doctrines of administrative finality and res judicata bar challenge to FCC preemption of state tariffing of enhanced services, the Court stated that "This [administrative finality] doctrine does not apply, when an agency itself initiates a new rulemaking proceeding which reopens, and seeks public comment on, issues decided in the previous proceedings." The Court further indicated that, in view of the fact that the FCC had buried its tariffing preemption in a footnote of a reconsideration order issued after the appellants had filed their briefs in the appeal of the Computer II Order, res judicata does not apply in this case because the petitioners did not have a full and fair opportunity to challenge this issue.

II. DISSOLUTION OF THE STAYS

As discussed above, the Ninth Circuit Court of Appeals has overturned the FCC's preemption of state regulation and tariffing of enhanced services. Having resolved the preemption issue the way is now clear for the Commission to implement its decision in Order No. 20828 to require Southern Bell to provide low level protocol conversion in conjunction with its packet switching service on a regulated tariffed basis. Accordingly, we find it appropriate to dissolve the stay of Order 20828. Further, Southern Bell shall file a protocol conversion tariff consistent with the Commission's decision in Order No. 20828. The tariff shall be filed by October 1, 1991.

With respect to the stay of Order No. 20655, we find it appropriate to also dissolve the stay of this Order. Accordingly, Southern Bell to shall resume providing CDAR equipment in accordance with its tariff currently on file.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the respective Stays of Orders Nos. 20828 and 20655 are hereby dissolved. It is further

ORDERED that Southern Bell Telephone and Telegraph Company shall file a protocol conversion tariff by October 1, 1991 as set forth in the body of this Order. It is further

ORDERED that Southern Bell Telephone and Telegraph Company shall resume providing CDAR equipment consistent with its tariff currently on file as set forth in the body of this Order. It is further

ORDERED that these dockets be closed.

By ORDER of the Florida Public Service Commission, this 22nd day of July, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

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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 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.