BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for review of rates and charges paid by PATS providers to LECs.	)	DOCKET NO. 860723-TP
	)	ORDER NO. PSC-92-0008-SPA-TP
	)	ISSUED: 03/03/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER GRANTING PARTIAL STAY OF ORDERS NOS. 24101 AND 25312 PENDING APPEAL

BY THE COMMISSION:

On February 14, 1991, we issued Order No. 24101, our final order after hearing in this docket. That hearing was a comprehensive examination of the pay telephone service (PATS) industry in Florida, both local exchange company (LEC or LPATS) and nonLEC (NPATS). Order No. 24101, among other things, established new end user rate caps for both LPATS and NPATS, and reduced the rates paid by NPATS for interconnection to LEC facilities. A number of parties filed motions for reconsideration of Order No. 24101, which we addressed by Order No. 25312, issued November 12, 1991.

On December 12, 1991, the Florida Pay Telephone Association, Inc. (FPTA) filed its Notice of Appeal of Order No. 24101 to the Supreme Court of Florida, along with a Motion for Stay of Order No. 24101 (Motion) to the Commission. FPTA's Motion focuses on the new end user rate cap levels, although the scope of the requested stay is not clear in the Motion. On December 23, 1991, GTE Florida Incorporated (GTEFL) filed a Response to FPTA's Motion. GTEFL requests that if we grant any part of FPTA's Motion, that we stay all of Order No. 24101; that is, that we maintain the status quo pending the outcome of the appeal, rather than stay only some parts of our Orders.

Commission Rule 25-22.061, Florida Administrative Code, provides in pertinent part:

> (1)(a) When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay

> pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate. (emphasis added)

Thus, this provision of the rule grants an automatic stay, when requested, where the order being appealed imposes a rate reduction on the company. Because of this provision, FPTA is entitled to a stay of the reductions to end user rates prescribed by Order No. 24101. The Rule gives us discretion in fashioning the stay (see underlined portion above), although the stay itself is mandatory for the decrease in end user rate caps.

We believe that all of the requirements established in Orders Nos. 24101 and 25312 are reasonable and appropriate. However, as set forth above, FPTA is entitled to a stay of our reduction in end user rate caps. Aside from this, however, we shall not stay any other portion of our Orders.

Our rules do provide for the possibility of a discretionary stay pending judicial review. Rule 25-22.061 further provides at (2) that:

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

It is this portion of the Rule to which FPTA must turn for a stay of any portion of our Orders other than the reduction of end user rate caps. After considering the above factors, we do not believe that the facts of this case warrant the issuance of a discretionary stay.

FPTA claims that it is likely to prevail on appeal. Such a claim by an appellant is hardly novel. FPTA asserts the following grounds as the reasons it is likely to prevail on appeal:

a. The Commission's decision is an invalidly promulgated rule.

b. The rate cap reduction is arbitrary and capricious.

c. The Commission failed to address the negative impact of its decisions on competitive pay telephone providers.

d. The Orders include findings on factors which were not identified as issues in this proceeding.

These arguments are not new. If we had been persuaded that any of these allegations were correct, we would have granted relief when FPTA requested reconsideration. We believe our actions in Orders Nos. 24101 and 25312 are legally sound and are based upon a weighing of competent substantial evidence of record.

FPTA also claims that its members will suffer irreparable harm if a stay is not granted. However, all of FPTA's arguments in this respect go squarely to the issue of rate caps. Rate caps have been addressed under the automatic stay provision of the Rule; therefore, these assertions have no bearing on a request for a discretionary stay of the other decisions in the Orders.

Finally, FPTA claims that granting a discretionary stay will not be contrary to the public interest. We simply disagree. Our decisions were based upon a thorough and considered weighing of extensive amounts of record evidence. These decisions are in keeping with the public interest and, we believe, should be implemented as scheduled, absent a sufficient showing of good cause to the contrary. FPTA has not made such a showing. Accordingly, we shall only grant a stay of the rate caps and shall not stay any other portions of our Orders.

GTEFL believes we should stay all provisions of our Orders if we stay any parts of our Orders. We do not agree. The Orders encompass many aspects of the PATS industry in Florida, such as special operational terms for confinement facilities, time limits

for local calls, lower interconnection rates, etc. There is no logical or legal basis to stay any provisions other than end user rate caps. Since we found all these provisions to be in the public interest, we believe they should all go into effect as scheduled, except where our rules require the granting of a stay. Therefore, only the caps for end user rates shall be stayed.

FPTA has suggested that the posting of security is inappropriate for the current stay request and we agree. Such a provision would be extremely difficult, if not impossible, to implement given the number of PATS providers and the potential inability of some of those providers to post the required security. In addition, the LECs have indicated that they cannot bill and collect two different levels of end user rate caps for NPATS; therefore, the rate caps must be the same for all providers. For all of these reasons, we shall not require the posting of a bond or corporate undertaking. We believe this authority is found at subsection (1)(b) of Rule 25-22.061, which states:

> In determining the amount and conditions of the bond or corporate undertaking, the Commission may consider such factors as:
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> 1. Terms that will discourage appeals when there is little possibility of success; and
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> 2. A rate of interest that takes into consideration:
>
> a. The use of the money that the stay permits;
>
> b. The prime and other prevailing rates of interest at commercial banks and other potential sources of capital in the amount involved in the appeal.

This provision, we believe, allows us to determine that a bond or corporate undertaking is or is not appropriate and then to fashion terms and conditions for the stay that are in keeping with the public interest. Under our findings here, the amount of bond or corporate undertaking shall be "zero," and the conditions shall be a prospective rate reduction as set forth below.

While we believe that members of the FPTA have every right to state their case to the Supreme Court, we are concerned about the effect on Florida's ratepayers should the appeal fail. Therefore, we shall require all NPATS providers to completely remove the set use fee element from the end user rate caps for a fixed period of time should the FPTA lose its appeal on this issue. While the appeal is pending, all end user rate caps shall remain at the currently authorized levels. Then, if the appeal is not successful, the following shall occur:

1. On a prospective basis, the $.25 surcharge on 0+ and 0- intraLATA and local calls shall be eliminated for a period equal to one-half the time the Order is stayed for appeal;

2. On a prospective basis, the $.25 surcharge on interLATA 0+ and 0- calls shall be eliminated for a period equal to three (3) times the length of time the Order is stayed for appeal.

Removing the set use fee entirely for a period of time after the stay is over to prospectively equal the excess revenue NPATS providers will receive from the higher rates during the appeal will help mitigate the NPATS providers' potential revenue windfall from the stay. In reaching this decision, we have utilized the assumption that the number of operator-assisted local calls is approximately equal to the number of operator-assisted intraLATA calls. We are also disregarding the change from daytime to time-of-day rates for certain classes of calls. We recognize that this remedy is "rough justice." We are aware that there will be some NPATS providers that will not be in business until after the stay, or are presently in business and charging below the rate caps for these calls, and, therefore, will collect no extra revenues. Also, the volume of calls may be different in the two time periods. However, we believe this methodology is a reasonable way to permit the appeal to take its course while also providing some realistic measure of protection to the end users.

Again, although we would like to have all excess revenues retained by the NPATS providers returned to end users, we see no feasible way to hold revenues under bond or order refunds to individual customers. There are over 500 NPATS providers in Florida. Even though all NPATS providers are not requesting a stay of the order, the LECs cannot distinguish among them for purposes of billing surcharges, so the same rate must be charged for all

NPATS providers. Most of these providers cannot afford or cannot obtain a bond for the revenues in question, and a refund to individual customers who used their payphones would be prohibitively difficult. We also wish to emphasize that we have been conservative in our approach to ensure that our remedy is not harsh. Not all excess revenues will be returned to ratepayers, but the great bulk will. Accordingly, LECs shall file replacement pages, if necessary, to reflect these changes in their tariff filings in response to Orders Nos. 24101 and 25312, by the close of business February 7, 1992.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Stay of Order No. 24101 filed by the Florida Pay Telephone Association, Inc., on December 12, 1991, is hereby granted to the extent set forth herein. It is further

ORDERED that all end user rate caps for calls placed from pay telephones shall remain as authorized prior to the issuance of Order No. 24101, pending the outcome of the appeal filed by the Florida Pay Telephone Association, Inc. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 3rd day of MARCH, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

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by: Kay Flynn
Chief, Bureau of Records

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.