FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

August 22, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (EDMONDS) MCB
DIVISION OF COMMUNICATIONS (CHASE, REITH, NORTON) RWD

RE: DOCKET NO. 950984-TP - RESOLUTION OF PETITION(S) TO ESTABLISH NONDISCRIMINATORY RATES, TERMS, AND CONDITIONS FOR RESALE INVOLVING LOCAL EXCHANGE COMPANIES AND ALTERNATIVE LOCAL EXCHANGE COMPANIES PURSUANT TO SECTION 364.161, FLORIDA STATUTES

AGENDA: SEPTEMBER 3, 1996 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF UNLESS ORAL ARGUMENT IS GRANTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950984E.RCM

CASE BACKGROUND

This matter came to hearing as a result of petitions filed by Metropolitan Fiber Systems of Florida, Inc. (MFS-FL) for unbundling and resale of GTE Florida Incorporated (GTEFL) and United Telephone Company of Florida and Central Telephone Company of Florida (United/Centel) network elements and services. Section 364.161, Florida Statutes, provides that upon request, each local exchange telecommunications company shall unbundle all of its network features, functions, and capabilities, and offer them to any other telecommunications provider requesting them for resale to the extent technically and economically feasible. If the parties to this proceeding are unable to successfully negotiate the terms, conditions, and prices of any feasible unbundling request, the Commission, pursuant to Section 364.162(3), Florida Statutes, is required to set nondiscriminatory rates, terms, and conditions for resale of services and facilities within 120 days of receiving a petition.

By Order No. PSC-96-0811-FOF-TP (the Order), issued June 24, 1996, the Commission decided various issues regarding rates, terms, and conditions for unbundling and resale of GTEFL and United/Centel

facilities to MFS-FL. On July 8, 1996, MFS-FL filed a motion for reconsideration of the costing requirements of the Order. On July 22, 1996, GTEFL and United/Centel filed responses to MFS-FL's motion.

Additionally, on July 22, 1996, GTEFL filed a Notice of Administrative Appeal of the Order. On July 24, 1996, GTEFL filed a motion for stay of the Order pending judicial review. As part of the motion to stay, GTEFL requests that the Commission stay the effective date of GTEFL's tariffs filed pursuant to the Order. On August 9, 1996, the Division of Appeals filed a motion to abate GTEFL's appeal on the grounds that the appeal is not ripe, since MFS-FL's motion for reconsideration is pending. The Supreme Court has not yet ruled on the motion to abate.

Standard of Review

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla 1st DCA 1981). It is not an appropriate venue for rearguing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

MFS-FL's Motion

MFS-FL makes two main statements in its Motion for Reconsideration. First, MFS-FL states that the Commission should reconsider and modify the costing requirements of the Order. MFS-FL supports this statement with five arguments. First, MFS-FL argues that the incremental cost standards should reflect the costs of an efficient entrant rather than the costs of the incumbent provider. Second, MFS-FL argues that billing and collection, customer contact, and other marketing costs should be excluded from estimates of incremental costs used to set unbundled loop prices. Third, MFS-FL argues that unbundled loop costs and rates should be geographically deaveraged. Fourth, MFS-FL argues that conversion charges should reflect costs rather than the incumbent's existing tariffed rates. Fifth, MFS-FL argues that unbundled rates in this case should be comparable to the unbundled rates ordered for BellSouth Telecommunications, Inc. (BellSouth) in Order No. PSC-96-0444-FOF-TP, issued March 29, 1996. MFS-FL's second main statement

is that the Commission should grant consumers a "fresh look". Each statement and argument will be considered in turn.

Summary of Issues

In Issue 1, staff recommends that the Commission deny MFS-FL's motion to reconsider and modify the Order. In Issue 2, staff recommends that the Commission, on its own motion, stay the effective date of GTEFL's tariffs filed pursuant to the Order until the order resulting from the instant recommendation is issued. In Issue 3, staff recommends that this docket remain open.

ISSUE 1: Should the Commission grant MFS-FL's motion to reconsider and modify Order No. PSC-96-0811-FOF-TP?

RECOMMENDATION: No. MFS-FL's motion does not show material and relevant facts or points of law that the Commission overlooked or failed to consider when it issued Order No. PSC-96-0811-FOF-TP. Therefore, staff recommends that the motion for reconsideration be denied.

STAFF ANALYSIS: MFS-FL makes five arguments to support its statement that the Commission should reconsider and modify the costing requirements of the Order. In addition, MFS-FL argues that the Commission should grant consumers a "fresh look". Each argument will be considered in turn.

A. Efficient Provider Costing Theory

MFS-FL states that TSLRIC estimates should be based on an estimate of the incremental costs of an efficient entrant using forward-looking technology rather than the costs of the incumbent provider. MFS-FL asserts that Florida Statutes and the Federal Telecommunications Act require that incremental costs used as the basis for unbundled loops be based on the costs of the most efficient provider and not necessarily the costs of the incumbent provider.

GTEFL and United/Centel state in their responses that MFS-FL's "efficient provider's costs" argument is new. GTEFL and United/Centel state that this argument appears nowhere in the record to date. Further, GTEFL states that the argument contradicts all of MFS-FL's prior testimony and previous argument that the incumbent provider's incremental costs should be used, and that doing so is consistent with Florida Statutes and the Federal Telecommunications Act.

Staff agrees with GTEFL and United/Centel. MFS-FL's argument that the entrant's TSLRIC should be used instead of the incumbent's appears nowhere in the record to date. Evidence that was not in the record cannot be overlooked or not considered.

B. Excluding Billing, Collection and Marketing Costs

MFS-FL's second argument is that billing and collection, customer contact, and other marketing costs should be excluded from estimates of incremental costs used to set unbundled loop prices. MFS-FL's motion states in part:

> The Florida Commission rejects MFS-FL's argument that GTEFL should exclude all billing and collection, customer contact and marketing and spare capacity inventory. Instead, the Commission concludes that '[t]hese types of costs are relevant TSLRIC components because they represent costs that would be avoided in the long run if the LEC did not provide the service.' [Order at p.8] MFS-FL asks that (sic) Commission reconsider this aspect of its Order and eliminate these components from the estimates of incremental costs used to set unbundled loops costs.

MFS-FL asserts that the Commission already considered and rejected excluding billing, collection, and marketing costs from incremental cost estimates. Therefore, the Commission did not overlook or fail to consider it.

C. Geographical Deaveraging

MFS-FL's third argument is that unbundled loop costs and rates should be geographically deaveraged. As with the second argument, MFS-FL does not dispute that the Commission considered and rejected geographical deaveraging. In the Order, the Commission found that it was premature to require deaveraging of the loop rates, because deaveraging was not an issue to the negotiations in this proceeding. MFS-FL argues that the Commission was wrong in this respect as a matter of law. MFS-FL argues that Section 364.3381, Florida Statutes, requires the Commission to geographically deaverage loop rates because the Commission has "continuing jurisdiction over cross-subsidization issues and the authority to investigate allegations of such practices." MFS-FL argues that an averaged loop rate impermissibly sanctions "cross-subsidization" between high and low cost areas.

GTEFL responds that the concept of cross-subsidization, as reflected in Section 364.3381, Florida Statutes, refers to subsidies flowing from one service to another, not from one area to another. GTEFL states that MFS-FL's reading of the statute is simply wrong.

United/Centel responds that for deaveraging to be properly decided by the Commission, it would have to have been raised as an issue in the negotiation phase. Staff agrees. Section 364.161, Florida Statutes, requires the Commission to arbitrate disputes that the parties could not previously resolve through negotiation.

Furthermore, it is apparent, and the parties do not dispute, that the Commission did not overlook or fail to consider geographical deaveraging.

D. Conversion and Termination Liability Charges

MFS-FL's fourth argument is that conversion charges should reflect costs rather than the incumbent's existing tariffed rates. MFS-FL includes in this argument that termination liability charges should be based on costs and not pursuant to existing tariffs. Once again, MFS-FL does not dispute that the Commission already considered and ruled on this issue. The Commission ordered that United/Centel use tariffed rates on an interim basis until it could develop cost studies reflecting nonrecurring conversion charges. MFS-FL does not assert in its motion that the Commission overlooked or failed to consider a point of fact or law which requires reconsideration. Staff agrees that the Commission properly considered and decided this issue.

E. Unbundled Rates Should be Comparable Among LECs

MFS-FL's fifth argument is that unbundled rates in this case should be comparable to the rates ordered for BellSouth in Order No. PSC-96-0444-FOF-TP, issued March 29, 1996. MFS-FL takes issue with the different interim loop prices set for the largest three Florida LECs, and assumes that they should be about the same. MFS-FL reiterates that incremental rates should be based on the efficient provider, not the incumbent.

GTEFL and United/Centel respond that this argument is new and not based on any record evidence. Staff agrees. Evidence that was not in the record cannot be overlooked or not considered.

F. Fresh Look

MFS-FL argues that the Commission should grant consumers a "fresh look." Essentially, MFS-FL argues that the Commission should reconsider its decision that denied MFS-FL's request that United/Centel and GTEFL should permit any customer to convert its bundled service to an unbundled service and assign such service to MFS-FL, with no penalties, rollover, termination or conversion charges to MFS-FL or the customer. Order at p. 29. Once again, MFS-FL does not assert that the Commission overlooked or failed to consider this point. MFS-FL bases its argument that reconsideration is appropriate because the Commission ordered differently on this point in the BellSouth phase of this docket, and other states have granted a "fresh look".

GTEFL and United/Centel responded that MFS-FL's "fresh look" argument is simply its earlier argument against termination penalties with a different name, which the Commission explicitly considered and rejected. Further, GTEFL states that it would be improper to rely on the record in the BellSouth phase of this docket as justification for MFS-FL's "fresh look" policy. United/Centel states that even if the other situations were comparable to the current proceeding, MFS-FL fails to show that the Commission's decision is unsupported by the record or erroneously applies the law. Staff agrees with GTEFL and United/Centel with regard to MFS-FL's "fresh look" argument. Staff believes that MFS-FL is simply trying to reargue its position that no penalties, rollover, termination or conversion charges should apply to MFS-FL or the customer when a customer converts its bundled service to an unbundled service and assigns such service to MFS-FL.

G. Conclusion

MFS-FL's motion does not show material and relevant facts or points of law that the Commission overlooked or failed to consider when it rendered its decision in the first instance. Staff notes that reconsideration is not an appropriate venue for rearguing matters which were already considered, according to the appropriate standard of review. All of MFS-FL's arguments are either without basis in the record or are attempts to reargue matters which were already considered. Accordingly, based on the above, staff recommends that the Commission deny MFS-FL's motion for reconsideration of Order No. PSC-96-0811-FOF-TP.

ISSUE 2: Should the Commission, on its own motion, stay the effective date of GTEFL's tariffs, filed pursuant to Order No. PSC-96-0811-FOF-TP, until the order resulting from the instant recommendation is issued?

RECOMMENDATION: Yes. Since Order No. PSC-96-0811-FOF-TP is not yet a final order for purposes of appeal, the Commission should, on its own motion, stay the effective date of the tariffs until the issue date of the order resulting from the instant recommendation.

STAFF ANALYSIS: As stated in the case background, GTEFL filed a Notice of Administrative Appeal of the Order on July 22, 1996. On July 24, 1996, GTEFL filed a motion for stay of the Order pending judicial review. As part of the motion for stay, GTEFL requests that the Commission stay the effective date of GTEFL's tariffs filed pursuant to the Order, until appeal of the Order is concluded.

On August 9, 1996, the Division of Appeals filed a motion to abate GTEFL's appeal on the grounds that the appeal is not ripe, since MFS-FL's motion for reconsideration is pending. The Supreme Court has not yet ruled on the motion to abate. However, it is clear that the Order is not yet a final order for purposes of appeal. Since the time is not ripe for judicial review, the Commission need not rule on GTEFL's motion for stay pending judicial review.

The Order requires GTEFL to file tariffs within 30 days of the issue date of the Order. Pursuant to the Order, the tariffs shall be effective 15 days following the date that complete and correct tariffs are filed. GTEFL timely filed its tariffs on July 24, 1996. Pursuant to the Order, the tariffs were to become effective August 8, 1996.

When the order resulting from the instant recommendation is issued, Order No. PSC-96-0811-FOF-TP will be a final order for purposes of appeal. Every indication suggests that GTEFL will appeal the Order once the time becomes ripe. Staff believes that it would be inappropriate to require GTEFL to have effective tariffs pursuant to the Order until it is a final order for purposes of appeal. Accordingly, Staff believes that the Commission should, on its own motion, stay the effective date of GTEFL's tariffs filed pursuant to the Order until the issue date of the order resulting from the instant recommendation.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to address any other requests for unbundling or resale.

STAFF ANALYSIS: This docket should remain open to address any other requests for unbundling or resale.