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

FEBRUARY 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CULPEPPER, BROWN)
DIVISION OF COMMUNICATIONS (SHELFER, NORTON, GREER)

RE: DOCKET NO. 960838-TP - PETITION BY METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH CENTRAL TELEPHONE COMPANY OF FLORIDA AND UNITED TELEPHONE COMPANY OF FLORIDA CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: MARCH 4, 1997 - REGULAR AGENDA - POST HEARING DECISION - PARTIES DID NOT REQUEST ORAL ARGUMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960838RN.RCM

CASE BACKGROUND

On February 8, 1996, Metropolitan Fiber Systems of Florida, Inc., now known as MFS Communications Company, Inc. (MFS) began negotiations with Central Telephone Company of Florida and United Telephone Company of Florida (Sprint). On July 17, 1996, MFS filed with the Commission a petition requesting arbitration with Sprint under the Telecommunications Act of 1996 (the Act). Following negotiations, three substantive issues remained to be arbitrated: reciprocal compensation rate and arrangement for local call termination; the appropriate rate for unbundled loops, including 2-wire and 4-wire analog grade and 2-wire ISDN digital grade; and the appropriate rates, terms, and conditions for billing, collection, and rating of information services traffic. To resolve these issues, a hearing was conducted on September 19 and 20, 1996.

On August 8, 1996, the Federal Communications Commission (FCC) released its First Report and Order in CC Docket No. 96-98 (FCC Order). The Order established the FCC's requirements for interconnection, unbundling and resale based on its interpretation of the Act. The Commission appealed certain portions of the FCC Order, and requested a stay of the order pending that appeal. On

October 15, 1996, the Eighth Circuit Court of Appeals granted a stay of the FCC's rules implementing Section 252(i) and the pricing provisions of the Act.

On December 16, 1996, the Commission issued Order No. PSC-96-1532-FOF-TP, resolving the issues in MFS' petition for arbitration with Sprint. In that Order, the Commission directed the parties to file a written agreement memorializing and implementing its arbitration decision within 30 days of issuance of the Order. On December 31, 1996, MFS filed a Motion for Reconsideration. On January 10, 1997, Sprint timely filed a Response to Motion for Reconsideration. On January 14, 1997, the parties filed a Joint Motion for Stay of a Portion of the Commission's Order on Petition for Arbitration, in which they requested that the Commission defer the requirement to file a written agreement pending disposition of MFS' motion for reconsideration. This is staff's recommendation to grant the parties' joint motion and deny MFS' motion for reconsideration.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the parties' Joint Motion for Stay of a Portion of the Commission's Order on Petition for Arbitration?

RECOMMENDATION: Yes. The Commission should grant the parties' joint motion for stay of a portion of Order No. PSC-96-1532-FOF-TP and permit the parties to file a written agreement memorializing and implementing its arbitration decision within 30 days of the disposition of the Motion for Reconsideration.

STAFF ANALYSIS: The parties state in their motion for stay that if they file an agreement reflecting the Commission's arbitration decision before the Commission addresses MFS' motion for reconsideration, if the Commission grants MFS' motion, they would have to file another agreement reflecting the reconsidered decision. They suggest that it would be more administratively efficient to file the agreement after the decision on the motion for reconsideration, when they would be certain of what the agreement should contain. They ask that they be permitted to file the agreement 30 days after the Commission makes its decision on reconsideration. Staff believes that this request is reasonable and recommends that the motion for stay should be granted.

ISSUE:2 Should MFS Communications Company, Inc.'s Motion for Reconsideration of Commission Order No. PSC-96-1532-FOF-TP be granted?

RECOMMENDATION: No. MFS has failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-96-1532-FOF-TP. MFS' motion should, therefore, be denied.

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies some material and relevant point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters which have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

In its motion, MFS states that it seeks reconsideration of the Commission's decisions on geographic deaveraging of unbundled loop rates and compensation for call transport set forth in Order No. PSC-96-1532-FOF-TP. MFS asserts that the Commission misinterpreted its obligation under the Act to require geographically deaveraged loop rates and to institute reciprocal compensation for call transport. Each issue is addressed below.

Geographic Deaveraging

MFS asserts that the Commission ignored the Act's requirement that geographically deaveraged loop rates should be instituted. MFS further asserts that it presented the only evidence by which geographic deaveraging could be accomplished; thus, the Commission was obligated to apply MFS' method of deaveraging. MFS adds that the Commission ignored the fact that MFS sought only to set interim rates. Any dissatisfaction with such interim rates, asserts MFS, could have been remedied by reopening the record or ordering a true-up of interim rates.

MFS also argues that loop rates must be deaveraged in spite of the Eighth Circuit's stay of the FCC Order and rules. MFS states that the Act requires cost-based pricing. MFS argues that the Commission was, therefore, required to either apply MFS' deaveraging method or explain how the Commission would fulfill its obligation to set cost-based rates. MFS asserts that the Commission took neither action.

MFS states that the Commission also failed to consider the fact that neither party disagreed that deaveraging was necessary. MFS states that Sprint only disagreed that the FCC Order required deaveraged interim rates.

Furthermore, MFS asserts that the Commission must clarify its decision on geographic deaveraging. In doing so, MFS states that the Commission must explain when and how it will consider any cost studies Sprint develops for establishing permanent loop rates.

Sprint responds by stating that the Commission correctly decided not to require Sprint to establish geographically deaveraged rates because the Act permits, but does not require, geographic deaveraging. Also, Sprint argues that the Commission was correct in its decision because the FCC pricing rules have been stayed by the Eighth Circuit. In addition, Sprint asserts that the Commission made the appropriate decision because the only methodology submitted by the parties was based upon insufficient cost data and produced absurd results for some of Sprint's wire centers.

Sprint argues that MFS is incorrect that the Act requires geographic deaveraging. Sprint states that the Act does require cost-based rates, but that does not mean that rates which are not geographically deaveraged are not cost-based. Sprint asserts that such an assumption could lead to senseless results. Sprint, however, adds that neither it nor the Commission should take the position that loops should never be deaveraged.

Sprint also argues that MFS should not have relied on the stayed FCC Order. Nevertheless, Sprint asserts that the Commission did, in fact, recognize the potential for geographically deaveraged rates. In so doing, the Commission ordered Sprint to develop TELRIC studies by which permanent loop rates will be set that can be deaveraged on cost.

In addition, Sprint asserts that the Commission correctly rejected MFS' petition because neither the FCC proxy rates nor the rates produced by MFS' methodology are cost-based. Thus, Sprint argues that the Commission was correct to ignore those rates as interim rates subject to true-up.

As it pertains to geographic deaveraging, staff does not believe that MFS' motion has set forth a basis upon which a motion for reconsideration should be granted.

First, staff does not believe that the Commission's different interpretation of the Act's provisions on deaveraging indicates that the Commission ignored or failed to consider some material point of fact or law regarding this case. The Commission did, in fact, clearly explain its reasoning for not requiring geographic deaveraging. See Order at 8. The fact that MFS' interpretation of the Act and the Commission's interpretation are divergent does not indicate a material legal or factual basis for reconsideration of the Commission's Order.

Second, the FCC pricing rules and order have been stayed. The Commission was not, therefore, required to rely upon the stayed provisions. As such, the Commission was free to consider all of the available evidence of record in an effort to determine the best way to derive cost-based rates. The Commission determined that there was insufficient evidence to deaverage the proxy rate for the pertinent geographic zones. Thus, the Commission determined that the proxy rate should not be deaveraged. The Commission stated that Sprint should, however, continue to develop TELRIC studies in order to obtain sufficient cost data whereby permanent rates can be established and deaveraged based on cost. In reaching this finding, the Commission clearly considered all relevant information. It did not ignore or fail to consider any material point of fact or law.

Finally, the Commission determined that geographic deaveraging of the interim proxy rates was inappropriate because the only methodology presented by the parties was "not based on sufficient cost data. . ." and produced an "absurd result." See Order at 8. Although neither party contested the necessity for deaveraging, deaveraged rates were not stipulated by the parties. The Commission, therefore, had to set rates based on the evidence presented. In doing so, the Commission was not required to accept a methodology based on insufficient data and producing a bizarre result. The Commission clearly considered all relevant information. It did not ignore or fail to consider any material point of fact or law.

Reciprocal Compensation for Call Transport

MFS asserts that the Commission misapplied the Act to call transport compensation and ignored the fact that Sprint had already agreed that MFS' facility would be treated as equal to Sprint's facility. MFS asserts, therefore, that the Commission set non-reciprocal compensation for call transport that is inconsistent with the Act.

MFS argues that the parties had already agreed that MFS' and Sprint's facilities were equal. MFS states that Sprint had agreed to pay MFS a premium tandem switching rate in addition to the charge for call termination. MFS argues that the Commission, therefore, only had to decide whether MFS was entitled to reciprocal compensation for call transport. Under the Act, MFS asserts that the Commission's answer should have been "yes."

Citing FCC Order 96-325 at Paragraph 1090, MFS argues that the FCC Order presumes that the compensation arrangements between incumbent LECs and non-incumbent LECs will be symmetrical and reciprocal. MFS states that the only exception in the FCC Order applies to local transport and termination. MFS states that it did not request that this exception be applied. MFS, therefore, argues that it is entitled to a reciprocal transport rate.

In addition, MFS argues that the Commission ignored that MFS and Sprint had already agreed that reciprocal termination and switching charges are appropriate. MFS asserts that the Commission improperly based its ruling upon MFS' network architecture, rather than upon Sprint's and MFS' use of equivalent facilities. MFS argues that the Commission should reconsider its decision in light of the Act and the agreement between Sprint and MFS on termination and switching charges.

Sprint, however, argues that MFS' argument is marred by the fact that the Act does not require Sprint to compensate MFS for a function that MFS does not provide. Sprint further asserts that MFS' argument fails because the portions of the FCC Order upon which MFS relies have been stayed. Sprint adds that MFS is simply "rehashing" arguments that MFS previously set forth in its pleadings, testimony, and briefs.

Sprint argues that the Commission correctly interpreted the Act to require reciprocal compensation only if the competitive LEC incurs the cost of providing the function for which it seeks compensation. Sprint asserts that MFS has tried to maneuver around this point by arguing that Sprint had already agreed to pay a premium tandem switching rate in addition to the call termination charge. Sprint argues, however, that it had agreed to that premium rate only because it believed that the FCC Order and rules required it. Now that the FCC Order and rules have been stayed, Sprint has filed a Motion to Reject that portion of the Partial Interconnection Agreement. Sprint asserts that it agreed to reciprocal rates for tandem switching based on the rules in effect at the time, but that circumstances have changed. Sprint,

therefore, argues that MFS should not rely on Sprint's prior agreement on tandem switching to buttress its argument.

Staff believes that the Commission correctly interpreted Section 252(d)(2)(A)(i) of the Act to require reciprocal compensation only if MFS provides the equivalent facility to that provided by Sprint. See Order at 5. The Commission examined the record presented and found that MFS does not perform a transport function. The Commission, therefore, found that MFS is not entitled to compensation for transport. Staff does not believe that the Commission is obliged to require reciprocal transport charges simply because the parties had agreed to reciprocal charges for other functions. MFS has identified no other material point of fact or law which is pertinent to this issue.

MFS has not identified any factual or legal basis for its Motion for Reconsideration. Its motion falls short of the standard set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). Based on the foregoing, staff recommends that MFS' Motion for Reconsideration of Order No. PSC-96-1532-FOF-TP be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending completion of the arbitration process.

STAFF ANALYSIS: This docket should remain open pending completion of the arbitration process.