

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

JUNE 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *CF MCB*  
DIVISION OF COMMUNICATIONS (SIRIANNI) *MFS* *DA*

RE: DOCKET NO. 961346-TP - PETITION FOR ARBITRATION OF  
DISPUTE WITH BELL SOUTH TELECOMMUNICATIONS, INC.,  
REGARDING CALL FORWARDING, BY TELENET OF SOUTH FLORIDA,  
INC.

AGENDA: JUNE 24, 1997 - REGULAR AGENDA - POST-HEARING DECISION -  
EMERGENCY MOTION FOR STAY - THIS ITEM SHOULD BE  
CONSIDERED FOLLOWING ITEM 41.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\961346.RCM

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CASE BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth declined to continue selling call forwarding to Telenet, alleging that Telenet uses the service in violation of section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff. Telenet alleged that the tariff provision is an anticompetitive restriction and that it had not been able to reach a resale agreement with BellSouth.

BellSouth at first advised Telenet that it would terminate all call forwarding services to Telenet on November 21, 1996. Later, this date was extended to December 5, 1996, in order to provide the

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parties with time to work out conditions by which the status quo could be preserved until the Commission's decision.

On December 5, 1996, BellSouth filed its answer and response to Telenet's petition and a motion to dismiss. Telenet filed its opposition to BellSouth's motion to dismiss on December 17, 1996. In Order No. PSC-97-0072-FOF-TP, issued January 23, 1997, the Commission denied BellSouth's motion to dismiss. An evidentiary hearing was held on February 12, 1997.

On April 23, 1997, the Commission issued Order No. PSC-97-0462-FOF-TP, in which it ruled that BellSouth may continue to sell its call forwarding services to Telenet subject to section A13.9.1.A.1. Telenet filed a Motion for Reconsideration on May 7, 1997. On May 15, 1997, BellSouth filed a Response and Memorandum in Opposition to Motion for Reconsideration.

Following the issuance of Order No. PSC-97-0462-FOF-TP, Telenet resumed talks with BellSouth to reach an appropriate interconnection agreement. On May 23, 1997, however, BellSouth sent a notice of disconnection to Telenet, effective June 13, 1997. On June 11, 1997, Telenet filed an Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP. In subsequent discussions with staff, BellSouth consented to continuing service to Telenet until June 24, 1997. Staff advised BellSouth that it intended to bring recommendations to the Commission at the June 24, 1997, agenda conference on Telenet's motions for reconsideration and emergency stay. BellSouth filed a response in opposition to the motion for stay on June 18, 1997. This recommendation addresses Telenet's motion for stay<sup>1</sup>.

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<sup>1</sup> In Item 41, staff has recommended that the Commission deny Telenet's motion for reconsideration.

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**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Telenet of South Florida, Inc.'s Emergency Motion for Stay?

**RECOMMENDATION:** No. The Commission should deny Telenet of South Florida, Inc.'s Emergency Motion for Stay. (PELLEGRINI, SIRIANNI)

**STAFF ANALYSIS:** On June 11, 1997, Telenet filed an Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP. Telenet stated that it received written notice on May 23, 1997, that BellSouth would remove all Call Forwarding and Call Transfer features from all Telenet telephone lines effective June 13, 1997. The basis for BellSouth's notice of service termination is the Commission's ruling in Order No. PSC-97-0462-FOF-TP that Telenet's use of call forwarding contravenes Section 364.16(3)(a), Florida Statutes. In that Order, the Commission further ruled that BellSouth could continue to sell its call forwarding services to Telenet pursuant to section A13.9.1.A.1 of its General Subscriber Service Tariff. Telenet has moved for reconsideration of that Order on several grounds. Staff filed a recommendation on June 12, 1997, that the Commission deny Telenet's Motion for Reconsideration. Telenet requested that Order No. PSC-97-0462-FOF-TP be stayed during the pendency of reconsideration and, if necessary, judicial review. Telenet asserted that a stay is appropriate until it is able to establish a long term relationship with BellSouth either by reaching a negotiated agreement or through continuing litigation. Telenet further requested that the Commission require BellSouth to continue service to Telenet for the duration of the stay.

Section 120.68(3), Florida Statutes, provides that the Commission may grant a stay of its decision upon appropriate terms. Rule 25-22.061(2), Florida Administrative Code<sup>2</sup>, provides that:

[A] party seeking to stay a final or non-final order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay

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<sup>2</sup>While Rule 25-22.061(2), Florida Administrative Code, provides directly for the filing of a motion for stay pending judicial review, staff believes it is applicable in the circumstances of this case.

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pending review may be conditioned upon the posting of a good and sufficient bond or corporate under taking, other conditions, or both. 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;
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Telenet acknowledges that motions for stay are controlled by Rule 25-22.061(2), Florida Administrative Code. Relying on Order No. PSC-96-1403-FOF-WS, issued November 20, 1996, in Docket No. 941121-WS, Telenet asserts, however, that a movant need not prove each of the considerations set forth in the rule, so long as the public is unharmed by the stay.

Telenet asserts that it would suffer irreparable harm if BellSouth were to terminate service, even temporarily. It alleges that termination of service would completely shutdown its system, seriously disrupting its customers, and place in jeopardy its customer goodwill and credibility as an alternative provider of service.

Telenet further asserts that a stay will neither cause substantial harm to BellSouth nor be contrary to the public interest. Telenet maintains that its 250 customers do not represent a significant portion of the number of intra-LATA toll users in the Southeast Florida LATA, where Telenet presently provides service; thus, Telenet's operations affect BellSouth only inconsequentially. Conversely, Telenet maintains, if the Commission fails to enter a stay, Telenet's customers will be substantially harmed. They will be left with no choice but to take services from BellSouth at substantially higher costs.

Furthermore, Telenet alleges that, in conformance to the Commission's encouragement to the parties to work out their

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differences by good faith negotiations, it has attempted to negotiate an agreement based on relevant parts of the interconnection agreement reached by AT&T Communications of the Southern States, Inc., and BellSouth (the AT&T agreement)<sup>3</sup>. Telenet further alleges that BellSouth has offered the AT&T agreement only with restrictions not contained in that agreement, a position that violates Sections 252(i) and 252(b)(5) of the Act. Telenet contends that it is substantially handicapped in its efforts to reach a negotiated agreement when termination of service appears imminent.

Finally, Telenet contends that the arguments it has put forth in its motion for reconsideration of Order No. PSC-97-0462-FOF-TP are meritorious, and would entitle it to prevail on appeal, if that became necessary. Telenet incorporates those arguments by reference into its motion for stay.

In its response in opposition, BellSouth first alleges that Telenet mischaracterizes the legal standard for granting of a stay. BellSouth contends that Order No. PSC-96-1403-FOF-WS cannot be read to hold that one factor alone, e.g., the absence of harm to the public, is sufficient to sustain a motion for stay. BellSouth distinguishes the issue in contention in Docket No. 941121-WS from the issue in contention in this docket. In Docket No. 941121-WS, the Commission was faced with an application to add additional service territory. In this docket, the Commission is faced with a Telenet service that the Commission has found contravenes Florida law.

BellSouth contends that Telenet has not shown that it will suffer irreparable harm. By the Commission's Order, Telenet is merely being required to operate in compliance with Florida law. BellSouth cites Order No. 22022, issued October 9, 1989, in Docket No. 860723-TP, where the Commission stated that "we find it inconceivable that [the Florida Pay Telephone Association, Inc.,] could be harmed by being required to disgorge itself of [0- and 0+ intraLATA] traffic it was never entitled to."

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<sup>3</sup>On June 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C §252(i), in which it requests the Commission to order BellSouth to allow Telenet to obtain the relevant terms and conditions as are in the AT&T agreement without modification and to continue existing service to Telenet pending the Commission decision on its petition.

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BellSouth asserts that a stay will not facilitate resolution of the parties' dispute in a reasonable fashion, as Telenet claims. BellSouth maintains that it has offered a resolution by means of a number of options, including an interconnection agreement compliant with Order No. PSC-97-0462-FOF-TP. BellSouth points out that it served notice of termination on Telenet only after the companies failed to reach a resolution in the seven weeks following the Commission's Order.

BellSouth also disputes that a stay will not cause harm or be contrary to the public interest. It points out that it is harmed because it is not receiving access charges to which it is entitled and that the public interest is disserved if Telenet's unlawful manner of operation is unchecked.

Finally, BellSouth contends that Telenet is not likely to prevail on reconsideration. BellSouth asserts that, as it argued in its response to Telenet's motion for reconsideration, Telenet has not met the standard for reconsideration. BellSouth incorporates that response into its response to Telenet's motion for stay. If a stay is granted, BellSouth claims it must be conditioned on the posting of a bond or other adequate security, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code.

The determination of whether a stay of the Commission's Order is warranted requires a balancing of factors. Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987). Ordinarily, the party seeking a stay must show a strong or substantial likelihood of success. A mere possibility of success on the merits is not sufficient. Id. Staff believes that the Commission's application of Section 364.16(3)(a), Florida Statutes, to the facts of this case is legally sound and would withstand the scrutiny of judicial review. Moreover, the Commission's construction of a statute with whose enforcement and interpretation the Commission is charged is entitled to great weight and an appellate court will not depart from the Commission's construction unless it is clearly unauthorized or erroneous. PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988).

At a minimum, the movant must show serious questions going to the merits and irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is issued. The probability of success that must be shown is inversely proportional to the degree of irreparable injury that would be incurred absent a stay. Ohio ex rel. Celebrezze, 812 F.2d at 290. Staff believes

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Telenet has not shown serious questions going to the merits. Indeed, staff has recommended that the Commission should deny Telenet's motion for reconsideration of Order No. PSC-97-0462-FOF-TP on each of the several grounds Telenet advanced in support of its motion. In its motion for stay, Telenet states that it wishes an agreement with BellSouth based on BellSouth's interconnection agreement with AT&T, but that BellSouth, in a discriminatory fashion, requires restrictive language not in that agreement that addresses Order No. PSC-97-0462-FOF-TP. Whether or not the restrictive language BellSouth allegedly requires in an interconnection agreement with Telenet is appropriate, Telenet, in an interconnection agreement with BellSouth, cannot escape the applicability of Section 364.16(3)(a), Florida Statutes.

It may be true that if the Commission does not enter a stay, Telenet will incur harm. If the Commission does enter a stay, however, Telenet would only be avoiding harm by continuing to use BellSouth's call forwarding service in a manner that the Commission has determined to be unlawful. Furthermore, staff does not accept Telenet's view. As the Commission noted in Order No. PSC-97-0462-FOF-TP, Telenet can avail itself of several service options that would permit it to remain in business in the near term. Order at 11-12. Thus, staff believes that Telenet has neither a probability of success on the merits on reconsideration or appeal nor the likelihood of irreparable harm if this matter is not stayed. Staff recommends, therefore, that the Commission deny Telenet's motion for stay.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. If the Commission approves staff's recommendation in Issue 1, this docket should be closed.  
(PELLEGRINI)

**STAFF ANALYSIS:** If the Commission approves staff's recommendation in Issue 1, this docket should be closed.