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MEMORANDUM

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *PE MCB*
DIVISION OF COMMUNICATIONS (SIRIANNI) *MCS SAS for WDH*

RE: DOCKET NO. 970730-TP - PETITION FOR RELIEF UNDER 47
U.S.C. §252(i) OF TELENET OF SOUTH FLORIDA, INC.

AGENDA: 08/05/97 - REGULAR AGENDA - EMERGENCY MOTION FOR STAY AND
MOTION TO DISMISS - PARTY HAS REQUESTED ORAL ARGUMENT ON
EMERGENCY MOTION FOR STAY - DECISION PRIOR TO HEARING -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\970730R2.RCM

CASE BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition in Docket No. 961346-TP for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth charged that Telenet was using call forwarding in violation of Section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff (GSST). Telenet alleged that the tariff provision was an anticompetitive restriction. On April 23, 1997, the Commission issued Order No. PSC-97-0462-FOF-TP, in which it ruled that BellSouth may sell its call forwarding services to Telenet subject to Section A13.9.1.A.1. By Order No. PSC-97-0861-FOF-TP, issued July 17, 1997, the Commission denied Telenet's motions for reconsideration and stay of Order No. PSC-97-0462-FOF-TP.

On June 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C. §252(i), and this docket was opened to address Telenet's new petition. Telenet alleges that BellSouth has refused to extend to Telenet BellSouth's interconnection agreement with AT&T Communications of the Southern States, Inc., (AT&T agreement) under the same terms and conditions.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

On July 3, 1997, Telenet filed an Emergency Motion for Stay and a Request for Oral Argument on Emergency Motion for Stay, again seeking stay of Order No. PSC-97-0462-FOF-TP. BellSouth filed a response in opposition on July 10, 1997. As of this date, Telenet has not filed a notice of appeal of Order No. PSC-97-0462-FOF-TP. In its opposition to BellSouth's motion to dismiss (below), Telenet states that it intends to appeal the Commission's final order in the arbitration docket.

On July 8, 1997, BellSouth filed a Motion to Dismiss the Petition for Relief Under 47 U.S.C. §252(i) of Telenet of South Florida, Inc. Telenet filed a response in opposition on July 22, 1997.

In this recommendation, staff addresses Telenet's motion for stay and request for oral argument, as well as BellSouth's motion to dismiss.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the request of Telenet of South Florida, Inc., for oral argument on its emergency motion for stay?

RECOMMENDATION: No. The Commission should not grant the request of Telenet of South Florida, Inc., for oral argument on its emergency motion for stay. Oral argument will not aid the Commission in comprehending and evaluating the issue for which oral argument is requested. (PELLEGRINI, SIRIANNI)

STAFF ANALYSIS: On July 2, 1997, Telenet filed a request for oral argument on its second emergency motion for stay of Order No. PSC-97-0462-FOF-TL. In its request, Telenet states that oral argument will aid the Commission in evaluating the merits of its emergency motion for stay, because resolution of the motion requires the Commission to understand the proceeding in Docket No. 961346-TP and the interplay of Florida law and the Telecommunications Act of 1996. In Docket No. 961346-TP, the Commission ruled that BellSouth may sell its call forwarding services to Telenet subject to the tariff restriction that the services cannot be used to avoid the payment of applicable toll charges. In its motion for emergency stay, however, Telenet barely alludes to the proceeding in Docket No. 961346-TP, which it labels an "unrelated" proceeding. Neither does it state, let alone develop, its theory of the interplay of state and federal telecommunications laws.

In its response, BellSouth states that it believes oral argument is unnecessary, but it does not object to it.

Rule 25-22.058(1), Florida Administrative Code, provides that a request for oral argument must state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Staff believes that Telenet has fully stated its case for stay of Order No. PSC-97-0462-FOF-TP in its motion and that no useful purpose is served by oral argument. Indeed, Telenet advances essentially the same rationale in its motion for stay as it advanced in a similar motion in Docket No. 961346-TP--a motion that the Commission denied. Thus, staff recommends that the Commission deny Telenet's request for oral argument on its emergency motion for stay.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

ISSUE 2: 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 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C. §252(i) with this Commission. Telenet states in its petition that it seeks an interconnection agreement with BellSouth upon the same terms and conditions of BellSouth's interconnection agreement with AT&T, and that BellSouth refuses to extend such an agreement to Telenet. Subsequently, on July 2, 1997, Telenet filed an Emergency Motion for Stay of Order No. PSC-97-0462-FOF-TP. Telenet asserts that a stay of the Commission's order is necessary to preserve the Commission's jurisdiction because BellSouth threatens to terminate call forwarding services to Telenet while Telenet's petition for relief under 47 U.S.C. §252(i) is pending before the Commission. Telenet asserts that BellSouth threatens this action on the strength of the Commission's ruling in Order No. 97-0462-FOF-TP that Telenet's use of BellSouth's call forwarding services violates Section 364.16(3)(a), Florida Statutes. Telenet's theory is that termination of service will put Telenet out of business, rendering moot its §252(i) petition. As yet Telenet has not asked for judicial review of Order No. PSC-97-0462-FOF-TP. Telenet has advised staff, however, that it intends to momentarily file with the court a notice of appeal and emergency motion for stay.

In its response, BellSouth argues that termination of call forwarding services need not result in putting Telenet out of business.

Staff believes that Telenet's §252(i) petition is properly before the Commission for resolution pursuant to the Act and Section 364.01(4), Florida Statutes. A disturbance to the business relationship between Telenet and BellSouth will not draw the Commission's jurisdiction into question. Accordingly, staff believes it is not necessary for the Commission to enter a stay of its order to preserve its jurisdiction to determine Telenet's rights in this proceeding.

In addition, Telenet contends, as it did in Docket No. 961346-TP, that it satisfies the criteria set forth in Rule 25-22.001(2), Florida Administrative Code, for the entry of a stay. Section 120.68(3), Florida Statutes, provides that this Commission may

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

grant a stay of decision upon appropriate terms. Rule 25-22.061(2), Florida Administrative Code¹, 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 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.

Relying on Order No. PSC-97-0064-FOF-TP,² in which Telenet argues the Commission found that Section 252(i) requires local exchange carriers to provide any interconnection, service or network element to a requesting telecommunications carrier on the same terms and conditions provided in any approved agreement, Telenet asserts that it is likely to prevail on the merits of its petition. Telenet also asserts that if BellSouth terminates

¹While Rule 25-22.061(2), Florida Administrative Code, provides directly for the filing of a motion for stay pending judicial review, staff believes that it is applicable in the circumstances of this case, because of the apparent imminence of an appeal of Order No. PSC-97-0462-FOF-TP.

²Dockets Nos. 960847-TP and 960980-TP. In Re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., for Arbitration of Certain Terms and Conditions with GTE Florida Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

service, it would suffer the loss of all of its business, an injury that would be irreparable. Because it is paying BellSouth for call forwarding services at tariffed rates, Telenet contends the harm to BellSouth with the status quo maintained is not "substantial or noticeable." Telenet also argues that a stay is in the public interest, because disconnection of the services would disrupt Telenet's customers and subject them to substantially higher-priced services in the alternative. Finally, Telenet argues that it is entitled to a stay on equitable considerations, because, in first extending the AT&T agreement to Telenet without substantive change and then revising the agreement to contain new restrictive language to which Telenet objects, BellSouth has not negotiated in good faith.

BellSouth maintains, as it also did in Docket No. 961346-TP, that Telenet has not demonstrated that it satisfies any of the applicable criteria. First, BellSouth asserts that it proposes to disconnect call forwarding services to Telenet because the Commission has found that Telenet's use of the services was unlawful; therefore, Telenet should not be heard to claim a harm by being foreclosed from carrying traffic it is not entitled to carry. Second, BellSouth argues that it is harmed because it does not receive access charges from Telenet to which it is entitled. Finally, BellSouth charges that Telenet does not support its contention that it is likely to prevail, because all that Telenet argues in effect is that it may escape the Commission's order by entering into an AT&T-like interconnection agreement.

In Order No. PSC-97-0861-FOF-TL, the Commission denied Telenet's emergency motion for stay in Docket No. 961346-TP, concluding "that Telenet has neither a probability of success on the merits on appeal nor the likelihood of irreparable harm if the matter is not stayed." Circumstances have not changed. Staff recommends, therefore, that the Commission for the same reasons once again deny Telenet's emergency motion for stay.

Staff notes that BellSouth has advised Telenet that it now intends to disconnect Telenet's service on July 24, 1997.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

ISSUE 3: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion to Dismiss Telenet of South Florida, Inc.'s Petition for Relief Under 47 U.S.C. §252(i)?

RECOMMENDATION: No. The Commission should deny BellSouth Telecommunications, Inc.'s Motion to Dismiss Telenet of South Florida, Inc.'s Petition for Relief Under 47 U.S.C. §252(i). (PELLEGRINI, SIRIANNI)

STAFF ANALYSIS: On June 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C. §252(i) with this Commission. Telenet states in its petition that it seeks an interconnection agreement with BellSouth upon the same terms and conditions of BellSouth's interconnection agreement with AT&T.³ Telenet alleges that BellSouth, however, requires an interconnection agreement with Telenet to contain the restrictions of Section A13.9.1.A.1.⁴ This, Telenet contends, is discriminatory and in violation of 47 U.S.C. §252(i). Telenet requests that the Commission require BellSouth to make available its interconnection agreement with AT&T in pertinent part upon the same terms and conditions. On July 8, 1997, BellSouth filed a motion to dismiss Telenet's petition. Telenet filed a response in opposition on July 22, 1997.

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which the Commission may grant the relief requested. All allegations in the petition should be taken as though true, and considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968);

³By Order No. PSC-97-0724-FOF-TP, issued June 19, 1997, and amended by Order No. PSC-97-0724A-FOF-TP, issued June 26, 1997, the Commission approved the interconnection agreement between BellSouth and AT&T.

⁴Section A13.9.1.A.1 of BellSouth's GSST tariff provides that:

Call forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment in whole or in part of message toll charges that would regularly be applicable between the station originating the call and the station to which the call is transferred.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963). Applying this standard, staff believes that Telenet's petition does state a cause of action for which relief can be granted, and BellSouth's motion to dismiss should be denied.

On March 31, 1997, pursuant to Section 364.161(1), Florida Statutes, Telenet formally requested BellSouth "to unbundle its network features, functions, and capabilities, as well as access to signaling databases, systems and routing processes, including but not limited to those relating to Call Forwarding services, and offer them to Telenet." On April 5, 1997, BellSouth apparently proposed its interconnection agreement with AT&T as the basis for negotiation with Telenet. When Telenet expressed interest in that agreement, BellSouth, on May 14, 1997, presented a draft agreement tailoring the AT&T agreement to those provisions applicable to Telenet. The draft agreement contained language that would require resold services to be used in the manner specified in BellSouth's tariffs. Telenet complains that this is not a use restriction incumbent upon AT&T, is therefore discriminatory, and subjects Telenet to GSST Section A13.9.1.A.1. Telenet alleges that the inclusion of this language violates both 47 U.S.C. §252(i) and the Commission's finding at page 60 in Order No. PSC-96-1579-FOF-TP, issued December 31, 1996, in Docket No. 960833-TP,⁵ that "no restrictions on the resale of services shall be allowed, except for restrictions applicable to the resale of grandfathered services, residential services, and Lifeline/Linkup services to endusers who are eligible to purchase such service directly from BellSouth."

In its motion to dismiss, BellSouth asserts that the Commission resolved this matter in Order No. PSC-97-0462-POF-TP, in which the Commission found that BellSouth may sell call forwarding services to Telenet subject to Section A13.9.1.A.1 of its GSST. BellSouth observes that the Commission determined that, while Telenet may have a different local calling area than BellSouth, Telenet, nonetheless, was required to pay applicable access charges pursuant to Section 364.16(3)(a), Florida Statutes.⁶

⁵In Re: Petition by AT&T Communications of the Southern States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996.

⁶Section 364.16(3)(a), Florida Statutes, provides that:

No local exchange telecommunications company

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

BellSouth claims that what Telenet contends is that under the AT&T agreement Telenet would be permitted to offer its customers call forwarding services in the very manner this Commission found unlawful in the arbitration docket, Docket No. 961346-TP, that is, to carry calls across exchange boundaries in violation of Section 364.16(3)(a), Florida Statutes. BellSouth asserts that in the first place this contention fails on its face, because Telenet cannot escape the effect of the Commission's order regarding its use of call forwarding by entering into an interconnection and resale agreement, especially one that does not contemplate the service in question here, such as the AT&T agreement. Secondly, BellSouth observes that the AT&T agreement requires BellSouth and AT&T to implement the agreement in a way comporting with applicable law; thus, Telenet would be prevented from using call forwarding services in the way it wishes under the AT&T agreement.

In its opposition to BellSouth's motion to dismiss, Telenet maintains that under Section 252(i) it has an "absolute right" to take the AT&T Agreement on the same terms and conditions. It alleges that BellSouth, however, has offered a version of the AT&T agreement that contains a number of material differences. Telenet points once again to the Commission's ruling in Order No. PSC-96-1579-FOF-TP at pages 57 and 60, rejecting BellSouth's claim that any use or user restrictions in its relevant tariffs should apply to the resale of retail services. Telenet requests that the Commission for these reasons deny BellSouth's motion to dismiss.

Staff believes that in its petition seeking relief pursuant to Section 252(i), Telenet states a cause of action for which the Commission may grant a remedy. Telenet's petition was appropriately filed with the Commission pursuant to Rule 25-22.036, Florida Administrative Code. The relief Telenet seeks is the Commission's determination that under Section 252(i) it is permitted to take the AT&T agreement on the same terms and conditions. In its petition, Telenet makes the prima facie case that, under Section 252(i), it has requested that BellSouth make available to Telenet the AT&T agreement on the same terms and conditions and that BellSouth has offered a version of that agreement that contains different terms

or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

and conditions. This issue differs from the one the Commission arbitrated in favor of BellSouth in Docket No. 961346-TP, to wit, whether BellSouth could sell its call forwarding services to Telenet subject to tariff restriction. For these reasons, staff recommends that BellSouth's motion to dismiss be denied.

Staff observes that if the Commission adopts staff's recommendation, BellSouth may file an answer to Telenet's petition within 10 days of the issuance of the order denying the motion, pursuant to Rule 25-22.037(2)(a), Florida Administrative Code.

DOCKET NO. 970730-TP
DATE: JULY 24, 1997

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 3, this docket should remain open.
(PELEGRINI)

STAFF ANALYSIS: In Issue 3, staff recommends that the Commission deny BellSouth's motion to dismiss Telenet's petition on the ground that the petition states a cause of action for which relief from this Commission is available. Thus, if the Commission approves staff's recommendation, this docket should remain open to address the merits of Telenet's petition.