

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

JANUARY 15, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, PELLEGRINI, BROWN) *MLB* *B/K* *Q*
DIVISION OF DIVISION OF COMMUNICATIONS (SIRIANNI, GREER) *M/S* *S/G* *W*

RE: DOCKET NO. 960757-TP - PETITION BY METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION RATES, TERMS, AND CONDITIONS, PURSUANT TO THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. 960833-TP - 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.

DOCKET NO. 960846-TP - PETITION BY MCI TELECOMMUNICATIONS CORPORATION AND MCI METRO ACCESS TRANSMISSION SERVICES, 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.

AGENDA: JANUARY 20, 1998 - REGULAR AGENDA - DECISION PRIOR TO HEARING - PETITION FOR RECONSIDERATION OF PREHEARING OFFICER'S ORDER DENYING INTERVENTION

CRITICAL DATES: January 26-28, 1998 - HEARING DATES

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960833RC.RCM

CASE BACKGROUND

On December 16, 1996, in Docket No. 960757-TP, the Commission issued Order No. PSC-96-1531-FOF-TP, its final order in the arbitration proceeding of MFS Communications Company Inc., (MFS) with BellSouth under the Act. On December 31, 1996, the Commission

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DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

issued Order No. PSC-96-1579-FOF-TP, its final order in the arbitration proceedings of AT&T Communications of the Southern States, Inc., (AT&T) and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., (MCI) with BellSouth Telecommunications, Inc., (BellSouth) under the Telecommunications Act of 1996 (the Act). (See Docket Nos. 960833-TP and 960846-TP). In this proceeding, the Commission will set permanent rates for a number of network elements for which it set only interim rates in those arbitration orders.

By Order No. PSC-97-1399-PCO-TP, issued November 6, 1997, the prehearing officer in this proceeding granted American Communications Services, Inc., and American Communications Services of Jacksonville, Inc., (ACSI) party status in this proceeding. Following that Order, several other carriers filed petitions to intervene, arguing that they should also be accorded party status in this proceeding.

In Order No. PSC-97-1399-PCO-TP, the prehearing officer determined that even though this Commission has limited participation in arbitration proceedings under the Act to the requesting carrier and the incumbent local exchange company, it was reasonable and appropriate to permit ACSI's participation. ACSI had argued that a number of the network elements at issue in this proceeding were also in ACSI's interconnection agreement with BellSouth and that those rates were also interim in nature. After reconsideration of the facts and the law, however, the prehearing officer determined that it was, in fact, inappropriate for ACSI to participate as a party in this proceeding. Therefore, by Order No. PSC-98-0007-PCO-TP, issued January 2, 1998, the prehearing officer reversed Order No. PSC 97-1399-PCO-TP granting intervention to ACSI.

On January 12, 1998, ACSI filed a Petition for Reconsideration and Request for Expedited Ruling. Therein, ACSI asks that the Commission reconsider the prehearing officer's decision to reverse the order granting ACSI party status. ACSI argues that, in accordance with Rule 25-22.039, Florida Administrative Code, it has established that its substantial interests will be affected by the Commission's final decision in this proceeding. ACSI asserts, therefore, that it should not have been arbitrarily dismissed from this case once it had been granted party status.

DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

ISSUE 1: Should ACSI's Petition for Reconsideration of Order No. PSC-98-0007-PCO-TP be granted?

RECOMMENDATION: No. ACSI has failed to identify any point of fact or law that the prehearing officer overlooked or failed to consider in rendering Order No. PSC-98-0007-PCO-TP. Furthermore, the prehearing officer's order fully comports with the Act's requirements for participation in an arbitration proceeding and is consistent with prior Commission orders regarding participation in arbitration proceedings. ACSI's Petition for Reconsideration should, therefore, be denied.

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering her order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

As indicated in the Case Background, on January 12, 1998, ACSI filed a Petition for Reconsideration and Request for Expedited Ruling. ACSI argues that it established its right to intervene in this proceeding in accordance with Rule 25-22.039, Florida Administrative Code. ACSI asserts, therefore, that it should not have been arbitrarily dismissed from this case once it had been granted party status.

Specifically, ACSI argues that it had previously set forth in its Petition to Intervene and Supplement to Petition to Intervene that the Commission will be establishing permanent rates for several network elements for which interim rates were set in the arbitration proceedings. ACSI again asserts that some of those same rates are also in the ACSI/BellSouth agreement, and that those rates will be affected by the Commission's ultimate determination in this proceeding.

In addition, ACSI argues that having been granted intervention, it had proceeded to participate in good faith, but then, without prior notice, its party status was revoked. ACSI states that it is unaware of any other similar such occurrence. ACSI argues, therefore, that it should be allowed to continue to participate in this proceeding as a party.

DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

Staff believes that the Commission should not reconsider the prehearing officer's decision to reverse the previous order granting ACSI intervention in this proceeding because the prehearing officer clearly expressed the reasons for reversing that Order and ACSI has not identified any mistake of fact or law contained within that Order. Furthermore, there is no prohibition against a prehearing officer reconsidering and reversing a previous order based upon a reassessment of the facts, law, and pleadings presented. ACSI has, therefore, not met the standard for reconsideration set forth in Diamond Cab Co. V. King.

The prehearing officer's reasons for reversing Order No. PSC-97-1399-PCO-TP are set forth on pages 2 through 5 of Order No. PSC-98-0007-PCO-TP. Therein, the prehearing officer stated that this Commission has consistently limited participation in arbitration proceedings under the Act to the requesting carrier and the incumbent local exchange company. Upon review of the Act, the prehearing officer determined that participation should remain limited to the requesting carrier and the incumbent local exchange company. Therefore, the prehearing officer reversed Order No. PSC-97-1399-PCO-TP in order to remain consistent with the provisions of the Act and with past Commission practice.

Staff notes that the prehearing officer's decision to revoke ACSI's party status is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established the initial arbitration procedure in Docket No. 960833-TP:

Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration. (emphasis added) Similarly Section 252(b)(3) says "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days. (emphasis added) Section 252(b)(4) requires

DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation.

Furthermore, the prehearing officer's decision is clearly consistent with the intent of the Act. Section 252(b)(4)(A) of the Act provides that

The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

Staff notes that Paragraph (1) permits a requesting carrier to petition a State commission to arbitrate any issues still open after 135 days of negotiations. Paragraph (3) gives the incumbent local exchange company 25 days to respond to the petition for arbitration. Staff agrees with the prehearing officer that this language reflects a Congressional intent that interconnection agreements should be reached either through negotiations between a requesting carrier and an incumbent local exchange company or through arbitration proceedings litigated before state commissions by the parties to the negotiations. The prehearing officer is also correct that the outcome of arbitration proceedings is an agreement between those parties that is binding only on them. In this instance, ACSI will not be bound by the agreement that is ultimately implemented. Furthermore, staff believes that the prehearing officer's assessment that the Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the agreement that results is accurate. As stated by the prehearing officer at page 3 of Order No. PSC-98-0007-PCO-TP, "Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision." ACSI was, therefore, not ever properly a party in this proceeding. As such, the prehearing officer's order reversing the prior mistaken decision to allow ACSI to intervene was correct and appropriate.

DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

Clearly, the prehearing officer thoroughly analyzed and addressed the basis for ACSI's intervention in this proceeding. Upon that reassessment, the prehearing officer determined that ACSI should not be a party. ACSI has not identified any misapprehension or mistake of fact or law by the prehearing officer in that reassessment. Furthermore, the presence of ACSI, which was not a party to the negotiations and the arbitration proceeding, and will not be a party to the ultimate agreements, is at odds with the Act and with past Commission decisions. The only proper parties are AT&T, MCI, MFS (now WorldCom, Inc.) and BellSouth.¹ Staff, therefore, recommends that ACSI's Petition for Reconsideration be denied.

¹ACSI withdrew from the initial proceeding before the Commission issued its arbitration order.

DOCKETS NOS. 960757-TP, 960833-TP, 960846-TP
DATE: JANUARY 15, 1998

ISSUE 2: Should these Dockets be closed?

RECOMMENDATION: No. These Dockets should remain open pending the outcome of the hearing.

STAFF ANALYSIS: These Dockets should remain open pending the outcome of the hearing.