

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

May 14, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (SIMMONS) *SAS RNT*
DIVISION OF LEGAL SERVICES (BROWN, DAVIS) *MB (used)*

RE: DOCKET NO. 980647-TL - PROCEDURES FOR DATA-GATHERING FOR LEGISLATIVE REPORTS

AGENDA: 5/19/98 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: REPORTS TO LEGISLATURE DUE FEBRUARY 15, 1999

SPECIAL INSTRUCTIONS: NONE

BACKGROUND

On April 29, 1998, the Legislature passed HB 4785, without amendment. The bill was presented to Governor Chiles on May 12, 1998. As of the date of filing this recommendation, the bill had not become law. On May 12, 1998, GTE Florida Incorporated filed a Petition for Establishment of Hearing Procedures. (See Attachment A). In view of the pressing need to address all matters relating to the Legislature's mandates in HB 4785 expeditiously in order to meet the bill's February 1999 deadlines, staff has filed this recommendation on an emergency basis.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTE Florida Incorporated's Petition for Establishment of Hearing Procedures?

RECOMMENDATION: No, the Commission should dismiss the Petition on its own motion. The Petition requests a formal evidentiary hearing for the report on the "relationships among costs and charges associated with providing basic local exchange services, intrastate access and other services provided by local exchange telecommunications companies" and for the report on a "fair and

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reasonable basic local residential service rate." HB 4785 does not provide for formal evidentiary hearings for all of these studies. The bill only requires a formal evidentiary hearing for the determination and report on the total forward-looking costs of providing basic local telecommunications services.

STAFF ANALYSIS: On May 12, 1998, GTE Florida Incorporated (GTE) filed a Petition for Establishment of Hearing Procedures. In its petition, GTE asserts there are five reports required of the Commission:

Report 1: The forward-looking cost of providing basic local service using a cost proxy model (for large LECs) to be selected by the Commission after notice and opportunity for hearing.

Report 2: The amount of support necessary to provide residential basic local service to low-income (i.e., Lifeline) customers.

Report 3: The relationships among the costs and charges associated with providing basic local exchange service, intrastate access, and other services provided by local exchange telecommunications companies.

Report 4: The fair and reasonable basic local residential service rate considering affordability, the value of service, comparable basic local rates in other states, and the cost of providing basic service in Florida, including the proportionate share of joint and common costs.

Report 5: Information and policy recommendations on issues associated with telecommunications companies serving customers in multi-tenant environments. The legislation prescribes workshops for consideration of these issues.

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GTE states that it is "most interested in defining the procedures for Reports 1, 3 and 4." GTE states "There is no doubt that a hearing must be held to choose the proxy model and determine basic local service costs, as required for Report 1, above." GTE also states that these reports "will require the most complex and voluminous submissions." GTE refers to a data request from the Division of Communications seeking information on proxy model inputs, and seeks the issuance of a procedural schedule before these preparatory efforts go further.

The Petition continues at page 4:

GTE believes the legislation also contemplates a hearing for Report 4, as well, on the fair and reasonable basic rate. The companies are to submit cost data and analysis by August 1. The legislation prescribes that "all intervenors" shall have access to this information "for the purpose of verifying the submitted cost data and analysis." As reflected in Commission Rule 25-22.039, intervention is a concept associated with the hearing process.

GTE argues that there is no feasible way to address all the contentious issues that will arise regarding the verification of cost data without a hearing and its attendant due process protections. GTE suggests that the Commission could efficiently combine the hearing for Report #4 with the cost proxy hearing for Report #1, since both must address the cost of providing local service.

With respect to Report #3, concerning the relationships among costs for basic, access and other services, GTE again argues that report cannot be made without a hearing because of the complex interrelationships between costs and subsidies the Commission must address. GTE goes on to say at page 5:

A hearing is the only way to assure a comprehensive presentation of these data and to air fully all of the issues that the

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Legislature will need to consider next year. The Legislature must rely on the Commission, as the expert agency, to verify and synthesize all of the information it will need to make its universal service funding decisions. The Legislature cannot assure itself that the Commission report reflects comprehensive and accurate information in the absence of an evidentiary hearing. Unsworn comments and un-cross-examined assertions are certainly not an adequate or appropriate basis for legislative deliberations on funding of universal service, a matter that will affect all of the telephone subscribers of this State.

Staff appreciates GTE's interest in expeditiously addressing the requirements of the bill should it become law. Staff disagrees, however, with GTE's view of what the bill requires.

The legal maxim of "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, is applicable in interpreting this bill. The Legislature in Section 1 of the bill, Section 364.025(4)(b), clearly and directly requires that the Commission:

shall determine and report to the President of the Senate and the Speaker of the House of Representatives the total forward-looking cost, based upon the most recent commercially available technology and equipment and generally accepted design and placement principles, of providing basic local telecommunications service on a basis no greater than a wire center basis using a cost proxy model to be selected by the Commission after notice and opportunity for hearing.

Thus, the Commission should schedule a hearing on this report since the language is clear on the face of the bill.

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When we review the other portions of the bill requiring studies, however, there is no such language requiring the Commission to determine and report after notice and opportunity for hearing. Section 1, paragraph (4)(d) requires the Commission to "determine and report" the amount of support necessary to provide residential basic local service to low income customers (Report #2). There is no language in this paragraph stating any requirement for notice and opportunity for hearing.

Specifically, in Section 2(1) of the bill, the Legislature uses the following language regarding the study of the relationships among costs and charges (Report #3):

(1) The Legislature has determined that charges for intrastate switched access and other services may be set above costs and may be providing an implicit subsidy of residential basic local telecommunications service rates in this state. Therefore, the Public Service Commission shall, by February 15, 1999, study and report to the President of the Senate and the Speaker of the House of Representatives the relationships among the costs and charges associated with providing basic local service, intrastate access, and other services provided by local exchange telecommunications companies. (Emphasis supplied.)

Similarly, paragraph (2)(a) of Section 2, regarding fair and reasonable residential basic local telecommunications service rates (Report #4) requires the Commission to "report" its conclusions ... (Emphasis supplied.) This provision does require the Commission to hold at least one public hearing in each LEC's service territory, but those public hearings are specifically to "elicit public testimony about such rates." This requirement for public testimony does not equate to a formal evidentiary hearing in staff's opinion.

Section 5 of the bill (Report #5) requires that the Commission "study" ... and shall report its conclusions regarding issues

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associated with telecommunications companies serving customers in multi-tenant environments. Here too there is no language requiring notice and opportunity for hearing. If the Legislature had intended the other reports to be based on information adduced at a formal evidentiary hearing, it would have used the express language for all the required reports. Instead, it used that language for only the first enumerated report, the cost model report.

Further, staff believes GTE's arguments that hearings are required because the Commission "will make findings and recommendations" in the reports and that substantial interests will be affected by the studies are incorrect. The studies will not affect substantial interests. They will not have the force and effect of law. At the conclusion of these studies, no company will be ordered to file a tariff complying with the study results. The reports will be presented to the Legislature for their subsequent use in deciding what actions may or may not be taken in the future.

When the language in a statute is plain on its face, one does not look behind that plain language to determine legislative intent. Staff recommends that the language is very clear here, and it means that the Commission should hold a formal hearing only to determine the total forward-looking cost of providing basic local telecommunications service using a cost proxy model. Staff would note, however, that a specific Senate amendment to HB 4785, which would have required a formal hearing on the reasonable rate study, was debated on the Senate floor and was defeated. (Report #4) There were strong statements from the bill's sponsors in the House and the Senate during the debates that the bill did not contemplate a formal hearing and that this was only a study. Legislative intent aside, in view of the plain meaning of the language in the statute and the express requirement of notice and opportunity for hearing for the cost proxy study, we recommend that GTE's request for a formal hearing on the other studies should be dismissed.

The bill creates a very heavy workload, all of which must be completed and reported to the Legislature by February 15, 1999. All actions in this process must be expedited, and time periods for various activities must necessarily be truncated in order for the Commission to comply with the mandated reporting date.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, the docket should be closed. The effective date of the order should be the date the bill becomes law. Before that time, the decision in the order would merely be advisory, since there is no statute in effect at this time.

STAFF ANALYSIS: Yes, the docket should be closed. The effective date of the order should be the date the bill becomes law. Before that time, the decision in the order would merely be advisory, since there is no statute in effect at this time.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Procedures for Data-Gathering)
for Legislative Reports)
_____)

Docket No. 980647-TL
Filed: May 12, 1998

**GTE FLORIDA INCORPORATED'S
PETITION FOR ESTABLISHMENT OF HEARING PROCEDURES**

As the Commission knows, this year's Florida Legislature adopted a bill significantly revising Chapter 364 of the Florida Statutes. While the Governor has not yet acted on the bill, it is expected to become law very soon. The new law will require the Commission to study and report to the Legislature on a number of complex matters by February 15, 1999. The Commission's studies will, in turn, require local exchange companies (LECs), including GTE Florida Incorporated (GTE), to generate and produce large amounts of data in a compressed time frame.

GTE believes the legislation requires hearings in association with the study process for the reports. This expectation is consistent with Commission practice (reflected in Florida Statutes section 120.569 and 120.57) affording a hearing when a party's substantial interests will be affected and when there are disputed issues of material fact. Both criteria apply in this case. In the reports, the Commission will make findings and recommendations regarding, among other things, GTE's costs of providing local service, the "fair and reasonable" rate for that service, and the nature and level of interservice and intercustomer subsidy flows associated with GTE's services. These findings and recommendations will be the basis for legislative action next year on local rates and the establishment of a universal service fund. In addition, it is self-evident that all of the material facts the Commission must determine--GTE's costs of providing service, the

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relationships between its various costs and charges, etc.—will be disputed, given the involvement of the Office of Public Counsel and intervenors such as competitive local exchange companies.

Even though the new legislation itself contemplates hearings, in the event that Commission procedures do or will require parties to specifically ask for a hearing on these matters, this is GTE's request for such hearings. GTE believes this request is appropriate now because the study and reporting process will severely tax the resources of both the Commission and the regulated companies. Early clarification of procedural details will allow companies to begin preparing and formatting testimony and other information in a way that is appropriate to the proceedings in which it will be submitted. GTE believes this certainly will benefit all parties involved. In particular, it will leave the Commission as much time as possible for substantive deliberations and drafting the mandatory reports.

As noted, this hearing request is consistent with the terms of legislation. There are five reports the Commission must submit:

Report 1: The forward-looking cost of providing basic local service using a cost proxy model (for large LECs) to be selected by the Commission after notice and opportunity for hearing.

Report 2: The amount of support necessary to provide residential basic local service to low-income (i.e., Lifeline) customers.

Report 3: The relationships among the costs and charges associated with providing basic local exchange service, intrastate access, and other services provided by local exchange telecommunications companies.

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Report 4: The fair and reasonable basic local residential service rate considering affordability, the value of service, comparable basic local rates in other states, and the cost of providing basic service in Florida, including the proportionate share of joint and common costs.

Report 5: information and policy recommendations on issues associated with telecommunications companies serving customers in multi-tenant environments. The legislation prescribes workshops for consideration of these issues.

GTE is most interested in defining the procedures for Reports 1, 3 and 4, which will require the most complex and voluminous submissions.

There is no doubt that a hearing must be held to choose the proxy model and determine basic local service costs, as required for Report 1, above. GTE understands the Commission Staff had, in fact, drafted a tentative schedule for the hearing process relatively early in the legislative process (Fiscal Impact Statement and Implementation Schedule on Bill No. PCB UCO 98-03, dated April 10, 1998 ("April 10 Schedule").) Likewise, Commission Staff recently issued a universal service data request seeking information about proxy model inputs. (Letter from W. D'Haeseleer, Director, Div. of Comm., to B. Menard, Reg. Director, April 28, 1998.) The data request is intended to prepare for Commission submissions to the FCC "as well as preparatory efforts related to a possible intrastate mechanism." (Letter at 1.) Before these preparatory efforts go further, GTE believes it would be beneficial to issue a procedural schedule. The time periods allocated to each activity could track those contemplated in the Commission's April

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10 Schedule submitted to the Legislature. The hearing process under that Schedule would take about 7 months. A reasonable start date for the proceeding (triggered by issuance of a Notice of Hearing and Prehearing) might be June 1.

GTE believes the legislation also contemplates a hearing for Report 4, as well, on the fair and reasonable basic rate. The companies are to submit cost data and analysis by August 1. The legislation prescribes that "all intervenors" shall have access to this information "for the purpose of verifying the submitted cost data and analysis." As reflected in Commission Rule 25-22.039, intervention is a concept associated with the hearing process. In addition, based on GTE's past experience in arbitration and other proceedings, the cost "verification" opportunity the legislation affords intervenors will be very contentious. The inevitable involvement of the Office of Public Counsel in this case will further assure the contested nature of the fair and reasonable rate determination. Based on the language of the new statute, and given the need for the Legislature to receive the most complete and accurate information possible, there is no feasible way to address the issues for this report without a hearing. The hearing would include prefiled testimony, the opportunity for cross-examination, and other customary procedural due process protections. In consideration of the relatively short time frame for completing all the reports, GTE suggests that this hearing might be consolidated with the above-discussed hearing on the cost of service and choice of a proxy model. This would be the most efficient approach since both proceedings must, under the terms of the legislation, address the cost of providing basic local service.

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The determinations underlying Report 3, concerning the relationships among the costs and charges for basic, access, and other services, cannot practically be made except through the hearing process. The reporting directive will require the Commission to examine and fully document complex matters of interservice and intercustomer subsidies. These subsidies are at the heart of the universal service funding question the Legislature must resolve in its next session. Identification of the nature and level of subsidy flows to basic local service will be critical to devising an appropriate universal service funding framework. Moreover, explicit funding issues cannot plausibly be considered apart from the "fair and reasonable" basic rate determination the Commission must make for Report 4. The only way the Legislature can fully understand the subsidization issue (as well as its link to universal service funding) is for the Commission to gather as much relevant data as possible from all interested parties. A hearing is the only way to assure a comprehensive presentation of these data and to air fully all of the issues that the Legislature will need to consider next year. The Legislature must rely on the Commission, as the expert agency, to verify and synthesize all of the information it will need to make its universal service funding decisions. The Legislature cannot assure itself that the Commission report reflects comprehensive and accurate information in the absence of an evidentiary hearing. Unsworn comments and un-cross-examined assertions are certainly not an adequate or appropriate basis for legislative deliberations on funding of universal service, a matter that will affect all of the telephone subscribers of this State. Again, consolidation with the proceedings underlying Reports 1 and 4 might be the most efficient approach, since the Commission will, for Report 3, need to consider some of the

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same cost and associated information submitted in those other proceedings.

For all the reasons discussed in this filing, GTE asks the Commission to expeditiously establish hearing schedules to gather the information necessary for the above-listed Reports required by the new legislation..

Respectfully submitted on May 12, 1998.

By:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Petition for Establishment of Hearing Procedures were sent via U. S. mail on May 12, 1998 to the following:

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Florida Public Service Commission
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Tallahassee, FL 32399-0850

Office of Public Counsel
111 W. Madison St., Room 812
Tallahassee, FL 32399-1400



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