



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** November 5, 1998

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

**FROM:** DIVISION OF LEGAL SERVICES (B. KEATING) *bk MCB*  
 DIVISION OF AUDITING AND FINANCIAL ANALYSIS (WRIGHT, HACKNEY) *fw*  
 DIVISION OF COMMUNICATIONS (AUDU) *A* *MA* *mk* *1998*

**RE:** DOCKET NO. 970808-TL - PETITION OF BELL SOUTH TELECOMMUNICATIONS, INC. TO REMOVE INTERLATA ACCESS SUBSIDY RECEIVED BY ST. JOSEPH TELEPHONE & TELEGRAPH COMPANY.

**AGENDA:** 11/17/98 - REGULAR AGENDA - MOTIONS FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\970808FR.RCM

### CASE BACKGROUND

On July 1, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition to Remove InterLATA Access Subsidy received by St. Joseph Telephone and Telegraph Company, which is now GTC, Inc. (GTC). On July 22, 1997, BellSouth filed a revised Petition. On August 11, 1997, GTC filed an Answer in opposition to BellSouth's revised Petition. By Order No. PSC-98-0639-PHO-TL, issued May 7, 1998, AT&T's petition to intervene was granted.

A hearing was held in this Docket on May 20, 1998. By Order No. PSC-981169-FOF-TL, issued August 28, 1998, the Commission rendered its decision on the issues addressed at hearing. By its Order, the Commission determined that the interLATA access subsidy

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to GTC should be terminated, and that BellSouth should file a tariff to reflect a reduction in a specific rate to offset the terminated subsidy payment to GTC. On September 11, 1998, GTC filed a Motion for Reconsideration of the Commission's Order and a Motion for Stay of the Order. On September 21, 1998, BellSouth filed its Response and Cross-Motion for Reconsideration and Motion to Hold the Subsidy Payments Subject to Refund. On September 23, 1998, AT&T filed its Response to GTC's Motion for Reconsideration and a Cross-Motion for Reconsideration. No responses to the Cross-Motions were filed. This is staff's recommendation on these post-hearing motions.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** How should the Commission resolve GTC's Motion for Stay, BellSouth's request for a modified stay, and BellSouth's Motion to Hold Subsidy Payments Subject to Refund?

**RECOMMENDATION:** Staff recommends that the Commission should grant GTC's Motion for Stay, deny BellSouth's Request for a modified Stay, and deny BellSouth's Motion to Hold Subsidy Payments Subject to Refund. Staff recommends that the Commission should require GTC to hold the subsidy payments in an escrow account subject to refund, with interest applied in accordance with Rule 25-4.114(4), Florida Administrative Code, from the date of the Commission's decision on these motions at its Agenda Conference. Order No. PSC-98-1169-FOF-TL should be stayed pending final judicial review. If no Notice Of Appeal is timely filed in response to the Commission's Order from this Recommendation, Order No. PSC-98-1169-FOF-TL should become effective the day after the date for filing a Notice of Appeal. (B. KEATING, WRIGHT)

**STAFF ANALYSIS:** GTC argues that it is entitled to a stay of Order No. PSC-98-1169-FOF-TL pending the resolution of the motions for reconsideration and any subsequent appeal pursuant to Rule 25-22.061(1)(a), Florida Administrative Code. GTC states that the Commission's Order is the equivalent of an access rate decrease for GTC to its IXC customers and will deprive GTC of \$1,223,000 a year. GTC indicates that it will post a bond during the effective period of the stay.

BellSouth argues that it should not be required to continue making subsidy payments to GTC. BellSouth does, however, ask that it be allowed to hold the subsidy payments subject to refund pending the Commission's decision on the motions for reconsideration and any subsequent judicial review. BellSouth also asks that the Commission stay the provisions in the Order requiring it to file a tariff reducing a specific rate. BellSouth argues that this will protect the parties and the customers. Thus, BellSouth asks for a modification of the stay requested by GTC and that its Motion to Hold Subsidy Payments Subject to Refund be granted.

Rule 25-22.061(1)(a), Florida Administrative Code, states that

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

Generally, a motion for stay under Rule 25-22.061, Florida Administrative Code, is filed and addressed after judicial review of the Commission's Order has actually been requested. See Order No. PSC-95-1590-FOF-EI, issued in Docket No. 950110-EI, on December 27, 1995. Staff does, however, acknowledge that it is likely an appeal will be filed in this case. Staff also notes that unless Order No. PSC-98-1169-FOF-TL is stayed, the rate reduction and subsidy termination will become effective immediately. Practically speaking, if Order No. PSC-98-1169-FOF-TL is not stayed and is later rejected by the appellate court, in whole or in part, the Commission would likely find it very difficult to make the parties whole again, particularly BellSouth. Staff recommends, therefore, that the Order be stayed in its entirety so that the status quo is maintained. Thus, staff recommends that GTC's Motion be granted, and BellSouth's motion be denied. BellSouth's suggested "modified" stay and Motion to Hold Subsidy Payment Subject to Refund does not maintain the status quo, because BellSouth would no longer be making the subsidy payment to GTC. Staff further recommends that the stay remain in effect pending the Commission's Order from this recommendation and the final outcome of judicial review, if any. If a Notice Of Appeal is not timely filed, Order No. PSC-98-1169-FOF-TL should become effective the following day.

For these reasons, staff recommends that the Commission should grant GTC's Motion for Stay, deny BellSouth's request for a modified stay, and deny BellSouth's Motion to Hold Subsidy Payments Subject to Refund. GTC should be required to hold the subsidy payments in an escrow account with interest applied in accordance with Rule 25-4.114(4), Florida Administrative Code, from the date of the Commission's decision on these motions at its Agenda Conference.

**ISSUE 2:** Should the Commission grant GTC's Motion for Reconsideration?

**RECOMMENDATION:** No. GTC has failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-98-1169-FOF-TL. GTC's motion should, therefore, be denied. (B. KEATING)

**STAFF ANALYSIS:** The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that 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). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its Motion, GTC asks the Commission to reconsider its decision in Order No. PSC-98-1169-FOF-TL, because the Commission's Order addresses the subject of Docket No. 980498-TP. GTC states that on April 6, 1998, it filed a Petition to Terminate Access Subsidy and Convert to Payment of Access Charge Revenue Directly to GTC, Inc., Docket No. 980498-TP. GTC states that at one point in this proceeding, Dockets Nos. 970808-TP and 980498-TP were consolidated for consideration. These dockets were, however,

separated prior to hearing. GTC argues that the Commission's Order No. PSC-98-1169-FOF-TL nevertheless resolves the issues in Docket No. 970808-TL in a way that precludes GTC from being able to obtain relief in Docket No. 980498-TP.

GTC states that Order No. PSC-98-1169-FOF-TL requires BellSouth to reduce a specific rate by \$1,223,000. GTC notes, however, that it has asserted in its Petition in Docket No. 980498-TP that BellSouth should make a \$1,223,000 reduction in access charges. GTC explains that once BellSouth has made this reduction in one rate, it cannot be required to make the same reduction to its access charges. GTC argues, therefore, that the Commission erred by not considering the existence of GTC's Petition in Docket No. 980498-TP in rendering Order No. PSC-98-1169-FOF-TL. GTC believes that it has, therefore, been deprived of due process.

In its Response, BellSouth states that the Commission's decision in Order No. PSC-98-1169-FOF-TL renders GTC's Petition in Docket No. 980498-TP moot. BellSouth notes that it filed its Petition to Remove InterLATA Access Subsidy Received by GTC on July 1, 1997. GTC did not file its petition regarding this matter until approximately ten months later, and only six weeks prior to the hearing in Docket No. 970808-TL. BellSouth states that an issue was, however, identified in Docket No. 970808-TL regarding the disposition of funds if the subsidy was terminated. BellSouth asserts that GTC could have filed testimony in Docket No. 970808-TL regarding this issue, rather than filing a separate petition. GTC did not, and the issue was decided. BellSouth argues that GTC failed to take advantage of the process for addressing this matter. Thus, BellSouth states that GTC has not identified any basis for the Commission to reconsider its Order on this point.

AT&T states that GTC has not identified any mistake of fact or law made by the Commission in rendering Order No. PSC-98-1169-FOF-TL. AT&T agrees that the Commission's decision does appear to have an impact on GTC's Petition in Docket No. 980498-TP, but states that GTC had the opportunity to fully address the access charge issue in this Docket.

At pages 11-13 of Order No. PSC-98-1169-FOF-TL, the Commission addressed staff witness Mailhot's suggested alternative that the subsidy payments be terminated, that GTC be allowed to increase its access charges, and that BellSouth be required to reduce its access charges by the amount of the subsidy. Staff notes that witness Mailhot's proposal was nearly identical to GTC's proposal in its Petition in Docket No. 980498-TL. While GTC stated that it supported witness Mailhot's proposal in this case, GTC did not

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provide additional evidentiary support. The Commission ultimately decided that there was not enough evidence in the record to support witness Mailhot's proposal. See Order at pp. 12-13. GTC has not identified any mistake of fact or law in this decision.

Staff notes that Docket No. 980498-TP was not originally filed for consideration in conjunction with Docket No. 970808-TL, although the Dockets were briefly consolidated for consideration. The short period of time, however, between the filing of GTC's Petition in Docket No. 980498-TP and the prehearing in Docket No. 970808-TL required that Docket No. 980498-TP be removed from consideration in this proceeding to avoid a notice problem. Staff emphasizes that the Commission was not required to address GTC's Petition in Docket No. 980498-TP in the proceeding in this Docket. GTC's Petition was not an issue in this case. As for BellSouth's assertions that the Commission's decision in this Docket renders GTC's Petition moot, staff suggests that the Commission should not decide the status of GTC's Petition in Docket No. 980498-TP in rendering its decision on the Motions for Reconsideration in this Docket. While the subject matter of GTC's Petition in Docket No. 980498-TP is similar to testimony presented in this Docket, GTC's Petition was not specifically addressed in this Docket. Staff recommends that any determination on the status of GTC's Petition in Docket No. 980498-TP should be made in that Docket.

Based on the foregoing, staff recommends that GTC's Motion for Reconsideration be denied. GTC has not identified any mistake of fact or law made by the Commission in rendering its decision in Order No. PSC-98-1169-FOF-TL.

**ISSUE 3:** How should the Commission resolve BellSouth's and AT&T's Cross-Motions for Reconsideration?

**RECOMMENDATION:** The Commission should deny BellSouth's and AT&T's cross-motions for reconsideration. BellSouth and AT&T have failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-98-1169-FOF-TL. The cross-motions for reconsideration should, therefore, be denied. (B. KEATING)

**STAFF ANALYSIS:** As set forth in the previous issue, the proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that 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). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its Cross-Motion, BellSouth asks that the Commission reconsider its decision to require BellSouth to make a reduction in a specific rate to offset the termination of the subsidy payments. BellSouth argues that the Commission failed to consider that BellSouth has reduced its toll rates by \$31 million on its own initiative. BellSouth also believes that the Commission failed to consider that other Commission actions have, in the past, been used to eliminate any potential surplus when a subsidy payment was reduced or terminated. BellSouth argues that access reductions should not be the only reductions considered. Thus, BellSouth asks that the Commission reconsider its decision, because it overlooked these factors.

In its Cross-Motion, AT&T asserts that the Commission erred by not requiring BellSouth to reduce its access charges in order to avoid a windfall. AT&T notes that staff witness Mailhot stated that payments into the subsidy pool came from access charges. AT&T explains that it is clear that the subsidy funds came from interLATA access charges collected by BellSouth from the IXCs, and



that the subsidy funds have always come only from access charges. AT&T further asserts that the access reductions made by BellSouth were not related to the interLATA access subsidy mechanism and never had an impact on it. AT&T states that the access charges collected by BellSouth to fund the subsidy were independent of the access charges that were reduced.

In addition, AT&T argues that BellSouth's net access revenue will increase by the amount of the terminated subsidy because of the Commission's decision. As such, AT&T states that the access charges paid by IXCs to BellSouth will provide greater subsidies for BellSouth's other services. AT&T argues that this is unfair, anticompetitive, and contrary to federal and state policy to remove implicit subsidies. For these reasons, AT&T asks the Commission to reconsider its decision and to require BellSouth to reduce its switched access charges.

As noted in the case background, no responses were filed to the cross-motions.

The Commission addressed BellSouth's reduction to offset the subsidy at pages 13 - 17 of the Order. Specifically, at page 14, the Commission considered BellSouth witness Lohman's assertions that BellSouth had already made significant reductions. The Commission determined, however, that

. . . the discontinuance of the access revenue streams to GTC, absent any rate reduction on the part of BellSouth, will create a windfall for BellSouth.

Order No. PSC-98-1169-FOF-TL at p. 16.

The Commission also noted that in the past it has ". . . required BellSouth to recognize the subsidy reduction in some manner." Id. The Commission determined, therefore, that it was appropriate to require BellSouth to make a reduction in a rate to eliminate any potential windfall. Id. at 17. BellSouth has identified no error in the Commission's determination. Instead, BellSouth simply reargues matters already considered by the Commission. See 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). Staff recommends that BellSouth's Cross-Motion be denied.

As for AT&T's assertions that the Commission should have specifically required BellSouth to reduce its access charges, this is also an argument that has already been addressed by the



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Commission. At page 14 of the Order, the Commission considered AT&T witness Guedel's assertions that the rate reduction should be aimed at switched access charges. The Commission noted that witness Guedel had conceded that it was possible for the reduction to come from some other area. See Order at p. 14; and Transcript at p. 115. The Commission agreed that it appeared that the IXCs funded the subsidy pool through their use of BellSouth's local network. Based on the evidence, the Commission determined, however, that BellSouth had already made substantial reductions in its access charges, and, therefore, it would be appropriate to allow BellSouth to make the reduction in a rate chosen by BellSouth that would benefit BellSouth's ratepayers as much as possible. AT&T has not identified anything that the Commission overlooked or any mistake made by the Commission in rendering Order No. PSC-98-1169-FOF-TL. Staff recommends, therefore, that AT&T's Cross-Motion be denied.

**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** The docket should be closed after the time for filing an appeal has run. (B. KEATING)

**STAFF ANALYSIS:** The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.