

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: MARCH 18, 1999

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

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MCB*
DIVISION OF COMMUNICATIONS (MARSH) *LSQ For AEM*

RE: DOCKET NO. 971478-TP - COMPLAINT OF WORLDCOM TECHNOLOGIES, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF FLORIDA PARTIAL INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996, AND REQUEST FOR RELIEF.

DOCKET NO. 980184-TP - COMPLAINT OF TELEPORT COMMUNICATIONS GROUP INC./TCG SOUTH FLORIDA AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF INTERCONNECTION AGREEMENT UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996, AND REQUEST FOR RELIEF.

DOCKET NO. 980495-TP - COMPLAINT OF INTERMEDIA COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF FLORIDA PARTIAL INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996 AND REQUEST FOR RELIEF.

DOCKET NO. 980499-TP - COMPLAINT BY MCI METRO ACCESS TRANSMISSION SERVICES, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF APPROVED INTERCONNECTION AGREEMENT BY FAILURE TO PAY COMPENSATION FOR CERTAIN LOCAL TRAFFIC.

AGENDA: 03/30/99 - REGULAR AGENDA - POST-HEARING DECISION - MOTION FOR STAY PENDING APPEAL - NO ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\971478.RCM

DOCUMENT NUMBER-DATE

03684 MAR 22 99

FPSC-RECORDS/REPORTING

CASE BACKGROUND

On October 15, 1998, BellSouth Telecommunications, Inc. (BellSouth) filed a Notice of Appeal of Commission Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, in the complaint dockets referenced above. BellSouth has appealed the Commission's decision to the United States District Court for the Northern District of Florida, pursuant to 47 U.S.C. section 252(e)(6). In Order No. PSC-98-1216-FOF-TP, the Commission determined that BellSouth was required by the terms of its interconnection agreements to pay reciprocal compensation to WorldCom Technologies, Inc. (WorldCom), Teleport Communications Group, Inc. (TCG), Intermedia Communications, Inc. (Intermedia), and MCImetro Access Transmission Services, Inc. (MCI) for the transport and termination of calls to Internet Service Providers (ISPs). At the time BellSouth filed its Notice of Appeal with the Commission, it also filed a Motion for Stay Pending Appeal of Order No. PSC-98-1216-FOF-TP. WorldCom, TCG, Intermedia and MCI filed a Joint Response in Opposition to the motion for stay on October 28, 1998. No party filed a request for oral argument. This is staff's recommendation to deny the motion for stay.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny BellSouth's Motion for Stay Pending Appeal?

RECOMMENDATION: Yes. BellSouth's Motion for Stay Pending Appeal does not demonstrate that a stay pending appeal is warranted. The Commission should deny the motion. If the Commission decides to grant the motion, however, it should order BellSouth to place all monies due to all complainants in these consolidated dockets in escrow pending a final determination of the case.

STAFF ANALYSIS: BellSouth contends that it is entitled to an automatic stay pending judicial review pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, because the Commission's order on appeal "involves a refund of moneys to customers." In the alternative, BellSouth contends that the Commission should grant its motion pursuant to Rule 25-22.061(2), Florida Administrative Code, because it has raised serious questions, acknowledged by the

Commission in its Order, about the jurisdictional nature of ISP traffic. BellSouth also contends that it will be irreparably harmed if the Commission requires it to pay the complainants charges for transport and termination of traffic to ISPs, because millions of dollars are at stake. BellSouth suggests that it may not be able to recoup some of the payments to the complainants if it ultimately prevails on appeal. BellSouth argues that the delay in implementation of the Commission's order will not be contrary to the public interest or cause substantial harm to the complainants, because BellSouth has already placed monies due to WorldCom under the Order in escrow, and will be able to return the amounts owed to the other complainants as well, when the appeal is final. Finally, BellSouth contends that it will not be necessary for the Commission to require BellSouth to post a bond or issue some other corporate undertaking as a condition of the stay, as Rules 25-22.061(1)(a) and 25-22.061(2) permit.

The Complainants urge the Commission to deny the motion for stay for three reasons. First, they claim that the Commission does not have authority to grant a stay pending review of a case in the Federal District Court. Second, they argue that if the Commission determines that it does have the authority to grant a stay, BellSouth is clearly not entitled to one under Rule 25-22.061(1)(a), Florida Administrative Code, because the refund in question here is not due to "customers", as the rule contemplates. Third, they contend that BellSouth is not entitled to a stay pursuant to the discretionary stay available under Rule 25-22.061(2), Florida Administrative Code. They argue that BellSouth is not likely to prevail on appeal, and will not suffer irreparable harm if the stay is not granted. They contend that further delay will harm the development of competition and the public interest.

Authority to Grant a Stay Pending Appeal

The Telecommunications Act of 1996, at 47 U.S.C. section 252(e)(6), provides that determinations of state commissions made under the provisions of section 252 are reviewable in an appropriate Federal District Court. BellSouth has appealed the Commission's order to the District Court of the Northern District of Florida. Relying on a recent decision by the 7th Circuit that the District Court for the Northern District of Illinois should not have granted a stay of the Illinois Commerce Commission's ISP

reciprocal compensation order¹, the complainants argue, somewhat obliquely, that because BellSouth must seek an injunction in the District Court, rather than a stay, to delay the effectiveness of this Commission's order there, the Commission somehow loses authority to grant a stay of the order itself. Staff does not agree that this is so. The Commission's rules provide for a stay of its decisions under certain circumstances, and both Florida appellate rules and Federal appellate rules provide that a party may seek a stay from the lower tribunal of an order on appeal, whether the lower tribunal is an administrative agency or a lower court. See Section 120.68(3), Florida Statutes, Rule 9.010, Florida Rules of Appellate Procedure, and Rule 18, Federal Rules of Appellate Procedure. While staff does not believe that the Commission should grant a stay of its Order No. PSC-98-1216-FOF-TP, staff does believe that the Commission has the authority to do so.

Rules 25-22.061(1)(a) and 25-22.061(2), Florida Administrative Code

Rule 25-22.061(1)(a), Florida Administrative Code, provides;

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.

BellSouth relies upon this rule as authority for an automatic stay of the Commission's decision interpreting the local traffic transport and termination provisions of its interconnection agreements with the complainants. This rule does not apply to this case, because, contrary to BellSouth's assertion, the complainants, competitive telecommunications carriers, are not "customers" for purposes of this rule. The rule is designed to apply to rate cases

¹ Illinois Bell Telephone Company v. WorldCom Technologies, Inc., 157 F.3d 500 (7th Cir. Sept. 23, 1998).

or other proceedings involving rates and charges to end user ratepayers or consumers, not to contract disputes between interconnecting telecommunications providers. Furthermore, this case does not involve a "refund" or a "decrease" in rates. It involves payment of money pursuant to contractual obligations.

Rule 25-22.061(2), is applicable to this case. That rule provides:

Except as provided in subsection (1), a party seeking to stay a final or nonfinal 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 undertaking, 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 upon appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

In its motion, BellSouth claims that it has raised issues of serious portent regarding the appropriate treatment of ISP traffic. BellSouth's fundamental point is that if ISP traffic is jurisdictionally interstate, then the transport and termination of that traffic is not subject to the local traffic reciprocal compensation provisions of its interconnection agreements with the complainants. The question of whether BellSouth is reasonably likely to prevail on that point on appeal is not all that clear.

At the time Order No. PSC-98-1216-FOF-TP was issued, and at

the time this motion for stay and response were filed, the FCC had not decided whether it would consider ISP traffic interstate traffic, or whether such traffic would be subject to reciprocal compensation under the local interconnection provisions of the Act. The Commission addressed the uncertainty regarding the FCC's characterization of ISP traffic in detail in its Order, and decided that the issue was not critical to its decision. Basing its decision on traditional principles of contract construction, the Commission decided that the language of the interconnection agreements, the intent of the parties, and the state of Federal and State law at the time the agreements were executed showed that ISP traffic was local traffic for purposes of reciprocal compensation under the agreements. The Commission said:

Regardless of what the FCC ultimately decides, it has not decided anything yet, and we are concerned here with an existing interconnection agreement, executed by the parties in 1996. Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside.

Order No. PSC-98-1216-FOF-TP, page 9.

On February 26, 1999, the FCC issued Order 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 98-68. In that Order, the FCC declared that it considered ISP traffic to be jurisdictionally interstate. It did not decide, however, whether ISP traffic should be treated as interstate traffic for purposes of local interconnection agreements. It issued a NPRM inviting comments on that issue. It also declared that it considered this determination to be prospective only, and specifically stated that its decision should not affect existing interconnection agreements or decisions by state commissions and Federal courts. The FCC stated:

[I]n the absence of any contrary Commission rule, parties entering into interconnection

agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. . .

While to date the Commission has not adopted a specific rule governing this matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

Order 99-38 at pages 15-17.

As mentioned above, BellSouth based its argument that it is likely to prevail on appeal on the fact that the FCC would determine that ISP traffic was jurisdictionally interstate. While the FCC has now done that, its firm assertion that the determination is prospective and should not affect existing interconnection agreements convinces staff that BellSouth is now less likely to prevail on appeal rather than more likely to prevail on appeal.

With regard to BellSouth's assertion that it will suffer irreparable harm if it must comply with the Commission's order at this time, and its concomitant assertion that there will be no harm to the public interest if the stay is granted, staff adopts the reasoning of the 7th Circuit Court of Appeals when it denied Ameritech's motion for stay in Illinois Bell:

In this case the cost of false negatives ("irreparable injury," to use the traditional term) are negligible. Ameritech can easily recover the money if it prevails on appeal. All of the other carriers are solvent, and Ameritech can recoup by setoff in the ongoing reciprocal-compensation program. . . . Even if Ameritech pays the market cost of capital during the period of delay, so that the other carriers are indifferent between money now and money later, delay impedes the ability of the Illinois Commerce Commission to implement a policy of reciprocal compensation. Delay effectively moves regulatory power from the state commission to the federal court (or to Ameritech, which can determine when orders take effect). Although such transfers may be of little moment one case at a time they are disruptive when repeated over many cases - and the struggle in the communications business between the Baby Bells and their rivals is a repeat-play game in markets, agencies, and courts alike.

Illinois Bell Telephone Company v. WorldCom Technologies, 157 F.3d 500, 503.

Conclusion

The harm to the development of competition from further delay is the discernible harm in this case. Harm to the development of competition is harm to the public interest. Therefore, staff recommends that BellSouth's Motion for Stay Pending Appeal should be denied. If the Commission decides to grant the motion, however, it should order BellSouth to hold all monies due to all parties under the interconnection agreements at issue in escrow, as BellSouth is currently doing for WorldCom, so that the treatment of the money in question will be treated the same for all.

DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
DATE: MARCH 18, 1999

ISSUE 2: Should these dockets be closed?

RECOMMENDATION: Yes. These dockets should be closed.

STAFF ANALYSIS: There are no further actions to be taken in this case pending the outcome of the appeal to the Federal District Court. Therefore, the case will be placed in litigation status, and the dockets should be closed.