

State of Florida



Public Service Commission

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RECORDS AND REPORTING

DATE: NOVEMBER 18, 1999

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

FROM: DIVISION OF APPEALS (HELTON) *Walt DES*
 DIVISION OF COMMUNICATIONS (FAVORS) *CRF*
 DIVISION OF LEGAL SERVICES (CALDWELL) *Quinn BK*

RE: DOCKET NO. 991414-TP - PETITION BY GTE FLORIDA INCORPORATED FOR DECLARATORY RULING CONCERNING ORDER PSC-99-1477-FOF-TP.

AGENDA: 11/30/99 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: DECEMBER 16, 1999 - PURSUANT TO SECTION 120.565, F.S., A DECLARATORY STATEMENT MUST BE ISSUED WITHIN 90 DAYS OF THE PETITION BEING FILED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\991414.RCM

CASE BACKGROUND

GTE Florida Incorporated (GTE) filed a Petition for Declaratory Ruling, or, in the alternative, a Petition for Clarification of Order No. PSC-99-1477-FOF-TP. GTE seeks a declaration concerning the Commission's Order on Arbitration of Interconnection Agreement entered in Docket No. 980986-TP - In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against GTE Florida Incorporated for breach of terms of Florida partial interconnection agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief. Intermedia Communications Inc. (Intermedia) filed a response in opposition to GTE's petition.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTE Florida Incorporated's petition for declaratory ruling?

RECOMMENDATION: No, the Commission should decline answering GTE's petition for declaratory ruling since the question presented is in effect a contract dispute between GTE and Intermedia. In addition, the Commission should deny GTE's alternative request for clarification of Order No. PSC-99-1477-FOF-TP, since it is untimely.

STAFF ANALYSIS: GTE seeks a declaratory ruling, which, in effect, is a petition for declaratory statement pursuant to Section 120.565, Florida Statutes. Under Section 120.565(1), Florida Statutes:

Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

GTE seeks a declaration that GTE may use the contractual tandem-switching rate to compensate Intermedia for Internet-bound traffic under Order No. PSC 99-1477-FOF-TP (the Order), issued July 30, 1999. The issue before the Commission in the Order was whether GTE and Intermedia were required to compensate each other for transport and termination of traffic to Internet Service Providers (ISPs) under their Interconnection Agreement. Order No. PSC-99-1477-FOF-TP, p. 2. The Commission concluded that the parties should compensate each other under the terms of the Interconnection Agreement. *Id.* at 10. The Commission did not specify which Interconnection Agreement rate should be applied to Internet-bound traffic because that was not an issue in Docket No. 980986-TP.

Concerning the question raised by GTE here, Intermedia filed a response in opposition to GTE's petition. Even though Intermedia is not a party to this docket, the Commission may consider Intermedia's comments, especially since Intermedia is a party to the Interconnection Agreement. Intermedia argues that GTE's petition should be denied because it is improper under Rule 28-105.001, Florida Administrative Code.

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For the reasons discussed below, staff recommends that the Commission decline to answer GTE's petition. GTE is improperly seeking to have the Commission resolve a matter that was never at issue in the Order. In effect, GTE is seeking a unilateral resolution to a contract dispute. The question of what Interconnection Agreement rate should apply to Internet-bound traffic involves material issues of disputed fact, which may not be resolved in a declaratory statement proceeding. According to Rule 25-105.003, no Section 120.57(1) hearing involving disputed issues of material fact may be held when considering a declaratory statement. The Commission should decline to answer GTE's petition since it is really an attempt to have the Commission resolve GTE's dispute with Intermedia.

In a footnote, GTE requests the Commission to clarify the Order in the event the Commission determines that the request for declaratory ruling is improper. The Commission should also deny GTE's alternative request. As noted in the Notice of Further Proceedings or Judicial Review at the end of the Order, Rule 25-22.060 requires requests for reconsideration to be filed within 15 days of issuance of the order. The time for seeking reconsideration had expired before GTE filed its petition. It appears GTE's request for clarification is an untimely attempt to circumvent the Commission's procedural rules. GTE's request to clarify the Order should also be denied.

Moreover, GTE has appealed the Order to both the Florida Supreme Court and the United States District Court for the Northern District of Florida. It is questionable whether the Commission should or could act on GTE's petition in the face of ongoing litigation. See Suntide Condominium Association, Inc. v. Division of Land Sales, Condominiums and Mobile Homes, Department of Business Regulations, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987) (It is "an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties.").

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

STAFF ANALYSIS: If the Commission answers the petition, a final order can be issued and the docket closed.