

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by GTE Florida
Incorporated for declaratory
ruling concerning Order PSC-99-
1477-FOF-TP.

DOCKET NO. 991414-TP
ORDER NO. PSC-99-2439-FOF-TP
ISSUED: December 13, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER DENYING PETITION FOR DECLARATORY RULING

BY THE COMMISSION:

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 our 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.

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

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30, 1999. The issue before us 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. We concluded that the parties should compensate each other under the terms of the Interconnection Agreement. *Id.* at 10. We 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, we 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.

For the reasons discussed below, we deny GTE's petition. GTE is improperly seeking to have us 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. We deny GTE's petition since it is really an attempt to have us resolve GTE's dispute with Intermedia.

In a footnote, GTE requests us to clarify the Order in the event we determine that the request for declaratory ruling is improper. We 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 our procedural rules.

Finally, 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 we should or could act on GTE's petition in the face of ongoing litigation. See *Suntide Condominium Association, Inc. v. Division of Land Sales,*

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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.").

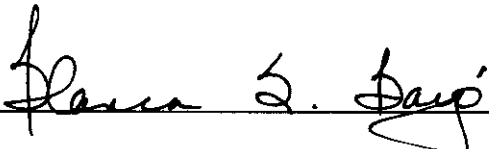
It is therefore

ORDERED that the Florida Public Service Commission denies GTE Florida Incorporated's Petition for Declaratory Ruling as discussed above. It is further

ORDERED that GTE Florida Incorporated's alternative Petition for Clarification of Order No, PSC-99-1477-FOF-TP is denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 13th day of December, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.