

State of Florida



Public Service Commission

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RECORDS AND REPORTING

DATE: JANUARY 6, 2000

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

FROM: DIVISION OF LEGAL SERVICES (FORDHAM) *FF PK*
DIVISION OF COMMUNICATIONS (FAVORS, *PK* KENNEDY, KING, OLLILA) *WKS* *WKS* *WKS*

RE: DOCKET NO. 990149-TP - PETITION BY MEDIAONE FLORIDA TELECOMMUNICATIONS, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: JANUARY 18, 2000 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990149re.RCM

CASE BACKGROUND

On December 1, 1995, the Florida Public Service Commission (Commission) approved a stipulated agreement between MediaOne Florida Telecommunications, Inc., (MediaOne) and BellSouth Telecommunications, Inc. (BellSouth), providing for interconnection services between the two companies. That agreement expired on January 1, 1998, but the parties mutually agreed to extend the contract pending finalization of a successor agreement. Negotiations for a successor agreement failed, and on February 9, 1999, MediaOne filed a Petition for Arbitration, seeking the assistance of the Commission in resolving the remaining issues.

At a June 22, 1999, Prehearing Conference it was determined that many of the issues had been resolved by the parties, and the Prehearing Officer determined that one of the issues was not within

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the jurisdiction of the Commission. There were several issues, however, which were not resolved, and those issues were addressed at the July 9, 1999 Hearing. Final Order PSC-99-2009-FOF-TP was issued on October 14, 1999, setting forth the findings of the Commission.

On October 29, 1999, MediaOne filed a Motion for Reconsideration and Request to file Supplemental Authority, and on November 12, 1999, a Motion to Stay Proceedings. MediaOne cited, as a basis for its Motion, a news media account of findings by the Federal Communications Commission (FCC), which could be construed as being inconsistent with two of the findings by this Commission in this docket. On November 10, 1999, BellSouth filed its response to the MediaOne Motion.

The first finding for which MediaOne asked for reconsideration was that concerning Calling Name (CNAM) database. The Commission had found insufficient evidence to conclude that CNAM was a UNE. The second issue for which MediaOne asked for reconsideration was the finding concerning Network Terminating Wire (NTW). The Commission had found that NTW should not be priced as a UNE, and that MediaOne's proposal for accessing NTW was inappropriate. In addition, in its Motion, MediaOne asked for clarification of the Commission's Order as it relates to BellSouth's proposal to require MediaOne to install a network interface device (NID) whenever it uses BellSouth NTW to serve a customer.

On the afternoon of January 5, 2000, MediaOne filed a second request to file supplemental authority. The authority requested is a recent Order from Georgia, with a different holding than that of this Commission. BellSouth has not had a chance to respond to that request. This will be addressed at Agenda.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant MediaOne's request to file supplemental authority in support of its Motion to Reconsider?

RECOMMENDATION: No. The Commission should not grant MediaOne's request to file supplemental authority in support of its Motion to Reconsider. **(Fordham)**

STAFF ANALYSIS:

MediaOne

MediaOne argues that the proposed FCC order will significantly impact the Commission's decision in considering MediaOne's Motion for Reconsideration. These assertions are based on a news release of the proposed Order. MediaOne commits to provide the Commission with a copy of the Order as soon as it is issued.

BellSouth

BellSouth responds that the FCC Order will not be effective until 120 days after publication in the Federal Register (FCC Order, Par. 526). During this time period parties may file comments, and the Order may be modified. Even if it is not modified, given the proposed scope and content of the Order, it will almost certainly be appealed. If it is appealed, and a stay is granted (as occurred the last time that Rule 319 was appealed), then the order will have no legal effect until a final decision on appeal is rendered. BellSouth argues that this Commission should not reverse its well-reasoned decision based on an FCC Order that could change, and that will not be in effect for at least four months, and perhaps much longer.

Staff Analysis

Staff agrees that the FCC action is not a final order, and there is no realistic way of predicting when it may become final. From an historical perspective, the probability is great that the FCC Order will be stayed, pending a most certain appeal. Also, if the Commission adopts staff's recommendation in Issue 2, then there would be no purpose served by the filing of supplemental authority. This issue would then become moot. The Commission's decisions in this case were based on the evidence in the record at the time of the decision. Staff believes it is unnecessary to reopen the

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record for this supplemental authority of such uncertain status. Accordingly, staff recommends that the Commission deny MediaOne's request to file supplemental authority.

ISSUE 2: Should the Commission grant MediaOne's Motion for Reconsideration and clarification?

RECOMMENDATION: The Commission should not reconsider its findings that the price at which CNAM database service is offered should be market-based, and that NTW should not be priced as a UNE. MediaOne has failed to demonstrate that the Commission overlooked or failed to consider a point of fact or law in rendering its decision in this case.

The Commission should, however, grant MediaOne's request and clarify Order No. PSC-99-2009-FOF-TP ordering that MediaOne is not required to install a condominium NID within a MDU residence when the first pair of NTW is provided by BellSouth for MediaOne's use and that MediaOne be required to install a condominium NID when technical circumstances dictate. **(Fordham, Kennedy, Ollila)**

STAFF ANALYSIS:

MediaOne

In its Motion, MediaOne is urging the Commission to reconsider the Final Order in this docket wherein the Commission found that CNAM is not a UNE. MediaOne reports that, in a September 15, 1999 finding, the FCC reconsidered section 51.319 of its rules, which established the network elements to be offered on an unbundled basis by the incumbent local exchange carriers. Though the FCC Order had not been issued at the time MediaOne filed its Motion for Reconsideration, the FCC's news release reported that CNAM will be listed as a UNE in rule 51.319. MediaOne further asks that the Commission order BellSouth to demonstrate its costs of providing that service so that the Commission can determine the appropriate charge for CNAM access.

MediaOne also requests that the Commission reconsider its decision regarding network terminating wire in three respects, and clarify one other matter. First the Commission is asked to reconsider its determination that NTW is not to be priced as a UNE. Also, MediaOne asks that the Commission reconsider its determination that MediaOne's proposed means of accessing NTW is not technically feasible, as well as its finding that MediaOne's proposal is unrealistic. MediaOne argues that BellSouth's current willingness to provide access to its NTW cannot negate the fact that NTW meets the standard for treatment as a UNE. MediaOne disagrees with the Commission's finding that "network reliability, integrity, and security could be impaired by giving competitors

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open access to BellSouth's terminals and wiring." Finally, MediaOne asks that the Commission clarify the Final Order as it relates to BellSouth's proposal to require MediaOne to install a network interface device whenever it utilizes NTW to serve a customer.

BellSouth

BellSouth responds that the standard for a motion for reconsideration is well-settled. A sustainable motion for reconsideration must identify a point of fact or law that was overlooked or that 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). Also, 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) (emphasis added). BellSouth states that MediaOne has failed to meet this standard regarding CNAM and NTW. BellSouth argues that MediaOne has not identified an error made by this Commission at all, but instead premises its request on a press release by the FCC, which could be read to indicate that the FCC will determine that CNAM and NTW are UNEs. BellSouth urges that MediaOne has raised nothing on reconsideration that is new, or that can otherwise serve as a basis to disturb this Commission's well-supported evidentiary rulings. Clearly, argues BellSouth, MediaOne's reargument regarding CNAM and NTW fails to satisfy the legal requirements for reconsideration.

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). (emphasis added) Staff believes that MediaOne has not met the burden required for reconsideration of this decision.

CNAM Database

MediaOne's Motion is, again, based entirely on a press release issued by the FCC after the Commissions's hearing concluded. The release could be read to contradict the two Commission decisions for which relief is requested. Although the FCC order memorializing what the news release reports has now been issued, it may not be final for months. If it is stayed, pending appeal, it could even be much longer before it is final. Based on historical observations, it is most likely that the Order will be appealed. There is, obviously, the possibility that the pertinent part may never become final.

In the event the pertinent portions of the FCC Order become final, there are provisions for addressing changes in the law. MediaOne may petition BellSouth for negotiations regarding that specific portion of their Agreement. In the event there is not a successful conclusion to those negotiations, the parties could petition the Commission for arbitration of that one issue. Accordingly, staff recommends that the Commission should not reconsider its decision. Nothing MediaOne has raised identifies a point of fact or law overlooked by the Commission in rendering its decision on this issue.

Network Terminating Wire

In addition to requesting that the Commission now find that NTW is a UNE, and priced accordingly, MediaOne has asked for reconsideration of the actual procedures to be used in accessing BellSouth's NTW. Again, MediaOne has not met the legal burden for reconsideration of this issue. The same legal burden discussed in CNAM, above, exists here. Accordingly, NTW should not now be found to be a UNE. Regarding the procedures for accessing NTW, MediaOne, in its Motion, is not posing any argument or testimony not heard at the Hearing. Accordingly, that finding, also, should not be

revisited because MediaOne has failed to identify a point of fact or law overlooked by the Commission in rendering its decision.

Clarification on NID installation for MDUs

In Order No. PSC-99-2009-FOF-TP, the Commission concluded that BellSouth should be required to relinquish the first NTW pair and make it available to MediaOne, unless BellSouth is using the first pair of NTW to serve the same MDU resident. Based on this conclusion, the Commission noted that most, if not all, of MediaOne's issues regarding the NID appeared to be resolved based on the technical implication of the decision regarding the NTW. Making the first NTW pair available for MediaOne's use obviates the need for MediaOne to install a NID. However, MediaOne could still elect to install its own NID. The Commission's decision to order BellSouth to relinquish the first NTW pair to MediaOne was in recognition that customers would be inconvenienced by BellSouth's policy and MediaOne could benefit from significant cost avoidance. (Order at page 18)

Upon review of MediaOne's request for clarification of Order No. PSC-99-2009-FOF-TP as it relates to the NID, staff agrees that clarification is required. Although the Commission clearly stated that MediaOne must be allowed to use BellSouth's NTW first pair, unless BellSouth is using it, the Commission's assessment of the impact of that decision on the NID issue is not clearly stated. Accordingly, it should be clarified that whether or not MediaOne will be required to install a NID within a given MDU residence depends upon the unique technical circumstances of that particular MDU residence.

Therefore, staff recommends that the Commission should grant MediaOne's request and clarify Order No. PSC-99-2009-FOF-TP, ordering that MediaOne is not required to install a condominium NID within a MDU residence when the first pair of NTW is provided by BellSouth for MediaOne's use and that MediaOne be required to install a condominium NID when technical circumstances dictate.

ISSUE 3: Should the Commission grant MediaOne's request for stay of its Order?

RECOMMENDATION: Staff recommends that the stay be denied, but that the time for filing the agreement in accordance with Order No. PSC-99-2009-FOF-TP should be extended. If the Commission approves staff's recommendation, the parties should be required to file their agreement memorializing the Commission's decision in Order No. PSC-99-2009-FOF-TP , as clarified herein, within 15 days of the issuance of the Commission's Order resulting from this recommendation. **(FORDHAM)**

STAFF ANALYSIS:

MediaOne

On November, 12, 1999, MediaOne filed its Motion to Stay Proceedings, citing ambiguity in the law as to whether the Motion for Reconsideration, in effect, stays the implementation of the Final Order. The Final Order directs the parties to submit written agreements implementing the findings of the Order within 30 days. MediaOne feels strongly that its Motion for Reconsideration is well founded, and that relief may be granted. Accordingly, it would serve no purpose for the parties to expend time and resources negotiating final written agreements, which may be altered as a result of the Motion for Reconsideration.

BellSouth

BellSouth believes that there is no ambiguity, and that the Motion for Reconsideration does not stay the effectiveness of the Final Order. The basis for this opinion of BellSouth is the criteria set forth in rule 25-22.061, Florida Administrative Code, regulating stays pending appeals. BellSouth asserts that the criteria should be no different in a matter pending decision on a Motion for Reconsideration. Moreover, BellSouth feels that MediaOne has not established any likelihood that the findings in the Final Order will be disturbed.

Staff Analysis

Rule 25-22.060(c), Florida Administrative Code, states in pertinent part:

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A final order shall not be deemed rendered For the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order.

Although the rule clearly states that the filing of a motion for reconsideration does not automatically stay the Commission's final order, MediaOne has formally requested a stay so that the parties will not have to file their agreement memorializing the Commission's final decision until the Commission renders its decision on the issues raised in MediaOne's Motion for Reconsideration. Staff recommends that the stay be denied, but that the time for filing the agreement in accordance with Order No. PSC-99-2009-FOF-TP should be extended. If the Commission approves staff's recommendation, the parties should be required to file their agreement memorializing the Commission's decision in Order No. PSC-99-2009-FOF-TP , as clarified herein, within 15 days of the issuance of the Commission's Order resulting from this recommendation.

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ISSUE 4: Should this Docket be closed?

RECOMMENDATION: No. the docket should remain open pending approval of the agreements submitted in compliance with the Final Order.
(FORDHAM)

STAFF ANALYSIS: No. the docket should remain open pending approval of the agreements submitted in compliance with the Final Order.
(FORDHAM)