

State of Florida



Public Service Commission

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DATE: JANUARY 6, 2000

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

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) BK. mad
DIVISION OF COMMUNICATIONS (FAVORS, ILERI) J

RE: DOCKET NO. 981008-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF AMERICAN COMMUNICATION SERVICES OF JACKSONVILLE, INC. D/B/A E.SPIRE COMMUNICATIONS, INC. AND ACSI LOCAL SWITCHED SERVICES, INC. D/B/A E.SPIRE COMMUNICATIONS, INC. AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. REGARDING RECIPROCAL COMPENSATION FOR TRAFFIC TERMINATED TO INTERNET SERVICE PROVIDERS.

AGENDA: JANUARY 18, 2000 - REGULAR AGENDA - MOTION FOR STAY - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981008R2.RCM

CASE BACKGROUND

On August 6, 1998, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (e.spire) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire requested enforcement of its interconnection agreement with BellSouth regarding reciprocal compensation for traffic terminated to Internet Service Providers. On August 31, 1998, BellSouth filed its Answer and Response to e.spire's Petition. An administrative hearing was conducted regarding this dispute on January 20, 1999.

On April 6, 1999, the Commission issued Order No. PSC-99-0658-FOF-TP resolving e.spire's complaint. Therein, the Commission

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

determined: the evidence did not indicate that the parties intended to exclude ISP traffic from the definition of "local traffic" in their Interconnection Agreement; the two million minute differential required by the Agreement was met in March, 1998; the "most favored nations" (MFN) portions of the agreement would be enforced in resolving the dispute over the applicable reciprocal compensation rate for local traffic; and attorney's fees were due to e.spire pursuant to Section XXV(A) of the Agreement. Order at pages 7, 13, 15, and 16, respectively. A portion of the Commission's Order was issued as Proposed Agency Action. In the Proposed Agency Action portion, the Commission also required the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual, available information, or using a proposed methodology if actual information is no longer available. Order at page 17.

On April 21, 1999, BellSouth timely filed a Motion for Reconsideration by the Full Commission of the Commission's Order. On April 26, 1999, BellSouth timely filed a Petition on the PAA portions of Order No. PSC-99-0658-FOF-TP. Subsequently, on May 24, 1999, the parties filed a Joint Motion to Modify Portions of Order No. PSC-99-0658-FOF-TP. By Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, BellSouth's Motion for Reconsideration was denied and the Joint Motion to Modify Portions of the final Order was granted.

On August 20, 1999, BellSouth filed a Motion for Stay of Order No. PSC-99-0658-FOF-TP Pending Appeal. e.spire timely responded to the motion on September 1, 1999. e.spire withdrew portions of its response on the following day.

On September 28, 1999, e.spire filed a request for oral argument. On October 1, 1999, BellSouth filed its response to the request. This is staff's recommendation on the Motion for Stay and the request for oral argument.

This recommendation was deferred from the November 30, 1999, Agenda Conference, to allow staff to respond to Commissioners' queries about the propriety of requiring e.spire to secure the money due to it pursuant to Order No. PSC-99-0658-FOF-TP pending the outcome of Federal court proceedings in this case. This is staff's revised recommendation addressing the points raised at the November 30, 1999, Agenda Conference.

DISCUSSION OF ISSUES

ISSUE 1: Should e.spire's Request for Oral Presentation be granted?

RECOMMENDATION: Yes. Staff recommends that the request be granted. In view of the questions raised at the November 30, 1999, Agenda Conference, and addressed herein, staff believes that oral argument will assist the Commission in rendering its decision on this matter, particularly as it relates to whether e.spire should be required to provide some type of security for the amount due.

STAFF ANALYSIS: In its request, e.spire concedes that Rule 25-22.0021, Florida Administrative Code, does not generally provide an opportunity for parties to address the Commission on post-hearing matters. e.spire emphasizes, however, that under subsection (2) of the rule, parties may make presentations when the Commission is considering a new matter not addressed at the hearing. e.spire notes that the Motion for Stay was not a subject at hearing; therefore, e.spire argues that it would be appropriate to allow the parties to make presentations regarding this issue.

BellSouth argues that under Rule 25-22.058(1), Florida Administrative Code, e.spire should have filed its request for oral argument at the time that it filed its response to BellSouth's Motion. BellSouth further asserts that e.spire's presentation would add nothing to the Commission's understanding of the issues.

e.spire argues that Rule 25-22.0021, Florida Administrative Code, should be applied, and therefore, the parties should be allowed to make oral presentations on the motion, because the motion was not a matter addressed at hearing. Staff disagrees. Although Rule 25-22.0021(2), Florida Administrative Code, does state that parties may be permitted to address the Commission regarding new matters not addressed at hearing, staff believes this provision was intended to address situations in which the Commission has elected to consider new, substantive, matters or evidence that could impact the Commission's final decision in a case. Staff does not believe this provision was intended to apply to post-hearing procedural motions, such as motions for reconsideration or stay, because these types of motions are clearly contemplated steps in the administrative process and do not present "new matters" for the Commission's consideration.

However, at the November 30, 1999, Agenda Conference, questions were raised regarding whether or not e.spire should be required to secure the amount due to it pursuant to the

Commission's post-hearing order pending the outcome of the Federal proceedings in this case. Neither party raised this issue in its pleadings regarding the stay, and as such, they have not had an opportunity to address this issue. Therefore, staff recommends that it would be beneficial to the Commission to allow the parties to make oral presentations on this matter, particularly as it relates to whether e.spire should be required to secure the amount due and the manner in which such security should be provided.

ISSUE 2: Should BellSouth's Motion for Stay Pending Appeal be granted?

RECOMMENDATION: No. The Commission should deny BellSouth's Motion for Stay of the final portions of Order No. PSC-99-0658-FOF-TP and the proposed agency action portions of that Order. BellSouth's Motion for Stay Pending Appeal does not demonstrate that a stay pending appeal is warranted. Furthermore, staff recommends that the Commission should not require e.spire to provide security for the amount due to it under Order No. PSC-99-0658-FOF-TP as a condition of denying BellSouth's request for a stay. If, however, the Commission believes that some sort of security is necessary, staff recommends that it may be appropriate to require e.spire to hold the amount in an escrow account with interest accrued in accordance with Rule 25-4.114(4), Florida Administrative Code, or to obtain a letter of credit, or a surety bond, whichever is least expensive for the company.

Furthermore, if the Commission decides to grant the motion for stay, it should order BellSouth to hold all monies due to e.spire under the interconnection agreement at issue in escrow, pending the outcome of the appeal. Since BellSouth has already indicated that it has established an escrow account for these monies, it should be required to advise the Commission as to the type of account and that interest on the amount will accrue as provided for in Rule 25-4.114(4), Florida Administrative Code.

STAFF ANALYSIS:

BellSouth argues that it is entitled to a stay under Rule 25-22.061(2), Florida Administrative Code. BellSouth argues that while there is no legal test applicable to the Commission's decision to stay an Order, the Commission can consider the likelihood that an appeal will be successful, whether a party will suffer irreparable harm if the stay is not granted, and whether the stay will cause irreparable harm or is contrary to the public interest.

BellSouth asserts that it is likely to prevail on appeal, because the Commission's findings in its final order are contrary to the FCC's determinations in FCC Order 99-38. BellSouth also argues that it will suffer irreparable harm if the stay is not granted because it will have to pay e.spire substantial amounts that e.spire may not be able to refund to BellSouth if BellSouth wins on appeal. BellSouth emphasizes that it believes that e.spire's financials reflect net losses. BellSouth further explains that e.spire will not be harmed if the stay is granted because BellSouth will pay e.spire the appropriate amount if BellSouth's appeal is not successful. BellSouth adds that it should not be required to post a bond because the money at issue has already been escrowed pending the outcome of the appeal.

e.spire argues that the stay should not be granted because BellSouth is not likely to prevail on appeal, BellSouth will not suffer irreparable harm if the stay is not granted, and e.spire will suffer irreparable harm if the stay is granted.

e.spire argues that BellSouth's only argument that it will win on appeal is that the Commission's decision is contrary to the FCC's ISP Order, FCC Order 99-38, issued February 26, 1999. e.spire emphasizes, however, that the FCC clearly indicated in that Order that it would not interfere with state commission findings on whether ISP traffic should be treated as local. Thus, e.spire asserts that BellSouth has not demonstrated a likelihood that it will prevail on appeal.

e.spire also argues that the Commission should not grant the stay simply because BellSouth will otherwise have to pay e.spire. e.spire argues that BellSouth willingly entered into the agreement that serves as the basis for the amount due to e.spire, and, therefore, BellSouth should now have to pay in accordance with the agreement. e.spire further asserts that it will be harmed if BellSouth does not pay the amount that it owes e.spire. e.spire

maintains that without the money, its ability to compete with BellSouth will be impaired.

In addition, e.spire asserts that if the stay is granted, BellSouth should be required to submit a report outlining the precise arrangements of the escrow and the amounts in the account that BellSouth refers to in its motion.

Analysis

REQUEST FOR STAY

Rule 25-22.061(2), Florida Administrative Code, 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.

BellSouth claims that it is likely to prevail on appeal; therefore, the Commission should grant the stay. BellSouth maintains that the Commission's analysis of the parties' agreement is flawed, not only as to the intent of the parties, but the underlying law and facts, as well.

In the Commission's Order denying BellSouth's Motion for Reconsideration of the Commission's final order in this case, Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, the Commission

DOCKET NO. 981008-TP
DATE: JANUARY 6, 2000

addressed BellSouth's claims that the Commission had failed to properly apply the law and that the FCC's Order 99-38 clearly indicates that the FCC categorizes traffic to ISPs as interstate traffic. Therein, the Commission stated that:

First, we disagree with BellSouth's assertion that FCC Order 99-38 indicates that the FCC has always believed that traffic to ISPs should be treated as jurisdictionally interstate traffic. In FCC Order 99-38, the FCC actually stated that ". . . ISP-bound traffic is jurisdictionally mixed. . . ." FCC Order 99-38 at ¶ 19.

Order at p. 12. The Commission also noted that the FCC further stated that they:

. . . find no reason to interfere with state commission findings as to whether reciprocal compensations of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

Order at p. 13, citing FCC Order 99-38 at ¶ 21. Furthermore, the Commission emphasized that the FCC clearly stated that in instances where parties have included this traffic in their interconnection agreements, the parties will be bound by those agreements, as interpreted and enforced by the state commissions. Order at p. 13, citing FCC Order 99-38 at ¶ 21. Staff believes that these statements by the FCC in its Order 99-38 clearly indicate that the Commission's interpretation of the parties' intent when they entered into this agreement is likely to survive on appeal.

BellSouth also claims that it will suffer irreparable harm if it must comply with the Commission's order, but that there will be no harm to the public interest if the stay is granted. The 7th Circuit Court of Appeals addressed a similar argument 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. Staff believes that the same rationale is applicable in this case. The public interest in maintaining the robust development of competition will be harmed if the Commission grants BellSouth's request for a stay.

Staff notes that in another case involving the issue of reciprocal compensation for ISP traffic the Commission denied a similar request for stay of the final Order pending appeal. By Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Dockets Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP, the Commission denied BellSouth's request for a stay of the Commission's Order directing BellSouth to pay reciprocal compensation to WorldCom, Teleport, Intermedia, and MCI.

DISPOSITION OF MONIES PENDING OUTCOME OF FEDERAL PROCEEDING

As noted above, at the November 30, 1999, Agenda Conference, questions were raised regarding whether or not e.spire should be required to secure the amount due to it pursuant to the Commission's post-hearing order pending the outcome of the Federal proceedings in this case, if the Commission decided to deny BellSouth's request for a stay. In response, staff has prepared additional legal analysis on the Commission's authority to require e.spire to secure the amount due to it under Order No. PSC-99-0658-FOF-TP as a condition of denying BellSouth's request for a stay. The Commission's Division of Auditing and Financial Analysis has also provided assistance on the options available if the Commission does decide to require e.spire to post some type of security.

Staff believes that the Commission has the authority to require e.spire to post some type of security for the amount due to it, if it so chooses. Again, Rule 25-22.061(2), Florida Administrative Code, is applicable. The rule provides that in response to a motion for stay, the Commission has ". . . authority to grant, modify, or deny such relief." Staff believes that this phrase should be construed broadly. Thus, staff believes that the Commission can modify the relief requested by BellSouth by denying the stay of the application of the Order, but requiring e.spire to secure the monies paid out pursuant to the Order pending the outcome of the federal proceedings. Subsection 4 of Rule 25-22.061, Florida Administrative Code, seems to provide additional support for the Commission's authority to require some of type of security or otherwise ensure that the monies can be repaid as a condition of denying the stay. This subsection states

When a stay or vacation of a stay is conditioned upon the posting of a bond or corporate undertaking, the Commission may at the time it grants the stay or vacation of the stay, set the rate of interest to be paid by the utility or company in the event that the Court's decision requires a refund to customers. [emphasis added]

Although a stay has not actually been implemented in this case to trigger vacation of the stay, when read with subsection 2 of this same rule, it appears that the rule contemplates that the Commission can provide the relief that it sees fit when a stay is requested pending appeal. It seems only logical that if a bond or corporate undertaking may be required for vacation of a stay, then the same may be required as a condition of a denial of a request for stay. As such, staff believes that the Commission has the authority to allow a corporate undertaking or require some other form of security as a condition of denying a request for a stay.

However, staff does not believe that the Commission should require e.spire to provide any security for monies paid by BellSouth pursuant to Order No. PSC-99-0658-FOF-TP as a condition of denying the stay. Staff believes this would be inappropriate because requiring security would be inconsistent with past Commission orders on this same subject and would send a conflicting message to the federal court about the Commission's confidence in its decisions on the underlying issues in this case, as well as a prior Commission decision on similar issues, which is also awaiting a ruling by the federal court.

Staff believes the Commission should not require e.spire to secure the monies due to it pursuant to Order No. PSC-99-0658-FOF-TP. In a past Commission case where similar issues of reciprocal compensation for ISP traffic were addressed and in which BellSouth also requested a stay, the Commission denied the stay and did not require the non-moving parties to post any security for monies due pursuant to the Commission's post-hearing order. See Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Dockets Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP. Staff believes that to require otherwise in this case might be viewed as some indication that either the Commission's confidence in its decision on the underlying issues in this case is somewhat lesser than in the prior decision, or that the Commission's overall approach and interpretation of agreement disputes involving issues of reciprocal compensation for ISP traffic and the definition of "local traffic" may be shifting. Staff believes that this would send an unnecessarily conflicting message to the federal court that should be avoided. The Commission has already decided in Order No. PSC-99-0658-FOF-TP that e.spire is due reciprocal compensation from BellSouth for traffic to ISPs. It should not impose additional requirements that indicate otherwise, and that may further impair competition by hindering e.spire's ability to compete.

Furthermore, staff is concerned that requiring security from a smaller company like e.spire in this situation would send an undesirable message that the Commission is willing to impose additional financial requirements on smaller companies that it would not otherwise impose on larger companies in the identical situation. This would be particularly troubling in this instance since it is BellSouth that has challenged the Commission's post-hearing order, not e.spire. Staff emphasizes that it is normally the appellant who has to post a bond to secure money at issue in a case--not a creditor who has won a judgment.

If, however, the Commission believes that some sort of security is necessary, staff recommends that it may be appropriate to require e.spire to hold the amount in an escrow account with interest accrued in accordance with Rule 25-4.114(4), Florida Administrative Code, or to obtain a letter of credit, or a surety bond, whichever is least expensive for the company.

Conclusion

Based on the foregoing, staff recommends that BellSouth's Motion for Stay Pending Appeal should be denied. BellSouth has failed to demonstrate any likelihood that it will prevail on appeal and has not shown that it will suffer irreparable harm if it must

DOCKET NO. 981008-TP
DATE: JANUARY 6, 2000

comply with the Commission's Order. The greater harm will likely result if the stay is granted, because e.spire's ability to compete will be impaired. Furthermore, staff recommends that the Commission should not require e.spire to secure the amount due to it under Order No. PSC-99-0658-FOF-TP as a condition of denying BellSouth's request for a stay. Staff believes this would be inappropriate, because requiring security would be inconsistent with past Commission orders on this same subject and would send a conflicting message to the federal court about the Commission's confidence in its decisions on the underlying issues in this case, as well as a prior Commission decision on similar issues, which is also awaiting a ruling by the federal court. If, however, the Commission believes that some sort of security is necessary, staff recommends that it may be appropriate to require e.spire to hold the amount in an escrow account with interest accrued in accordance with Rule 25-4.114(4), Florida Administrative Code, or to obtain a letter of credit, or a surety bond, whichever is least expensive for the company.

If, however, the Commission decides to grant the motion for stay, it should order BellSouth to hold all monies due to e.spire under the interconnection agreement at issue in escrow, pending the outcome of the appeal. Since BellSouth has already indicated that it has established an escrow account for these monies, it should be required to advise the Commission as to the type of account and that interest on the amount will accrue as provided for in Rule 25-4.114(4), Florida Administrative Code.

ISSUE 3: Should this Docket be closed?

STAFF RECOMMENDATION: No. This Docket should remain open pending resolution of BellSouth's appeal of Order No. PSC-99-0658-FOF-TP and the Commission's resolution of BellSouth's protest of the proposed agency action portion of that Order.

STAFF ANALYSIS: This Docket should remain open pending resolution of BellSouth's appeal of Order No. PSC-99-0658-FOF-TP and the Commission's resolution of BellSouth's protest of the proposed agency action portion of that Order.