

State of Florida



Public Service Commission

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DATE: DECEMBER 5, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (CIBULA)
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (MOSES, CASEY, FULWOOD, KELLY, VICKERY)
OFFICE OF MARKET MONITORING & STRATEGIC ANALYSIS (WATTS)

RE: DOCKET NO. 021061-TP - PETITION OF CNM NETWORKS, INC. FOR
DECLARATORY STATEMENT THAT CNM'S PHONE-TO-PHONE INTERNET
PROTOCOL (IP) TELEPHONY IS NOT "TELECOMMUNICATIONS" AND
THAT CNM IS NOT A "TELECOMMUNICATIONS COMPANY" SUBJECT TO
FLORIDA PUBLIC SERVICE COMMISSION JURISDICTION.

AGENDA: 12/17/02 - REGULAR AGENDA - DECISION ON DECLARATORY
STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S
DISCRETION

CRITICAL DATES: 01/16/03 - BY STATUTE, ORDER MUST BE ISSUED BY
THIS DATE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021061.RCM

CASE BACKGROUND

Pursuant to section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, CNM Networks, Inc. (CNM) filed a petition for declaratory statement on October 18, 2002. CNM requests that the Commission issue a declaratory statement that phone-to-phone Internet protocol (IP) telephony is not telecommunications under Florida law and therefore, that CNM is not a telecommunications company subject to the Commission's certification and tariffing requirements. In the alternative, CNM states that if the Commission believes that it could or should regulate phone-to-phone IP telephony or the companies that provide

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such service, then CNM requests that the Commission first conduct a generic investigation or rulemaking proceeding to address the issues raised in its petition.

BellSouth Telecommunications, Inc. (BellSouth), Northeast Florida Telephone Company (NEFTC), Sprint-Florida, Inc. (Sprint), ALLTEL Florida Inc. (ALLTEL), Verizon Florida Inc. (Verizon), Frontier Communications of the South, Inc. (Frontier), TDS Telecom/Quincy Telephone (TDS), Florida Cable Telecommunications Association (FCTA), ITS Telecommunications Systems, Inc. (ITS), Smart City Telecommunications LLC d/b/a Smart City Telecom (Smart City), and AT&T Communications of the Southern States, LLC and TCG South Florida, Inc. (AT&T) filed petitions/motions for intervention in this docket. On November 19, 2002, CNM filed a Motion to Dismiss the Petitions for Intervention, or in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action. On December 2, 2002, Sprint, NEFTC, ALLTEL, Smart City, Frontier, ITS, TDS, FCTA, Verizon, and BellSouth timely filed responses to CNM's Motion to Dismiss.

CNM's Petition for Declaratory Statement, the petitions/motions for intervention, and CNM's Motion to Dismiss are the subject of this recommendation. The Commission has jurisdiction to consider this matter pursuant to section 120.565, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant CNM's requested declaratory statement?

RECOMMENDATION: No. In lieu of issuing the requested declaratory statement, the Commission should grant the alternative relief requested in CNM's Petition for Declaratory Statement and open a generic docket to consider the issues raised by CNM's petition and the issue of phone-to-phone IP telephony in general. This docket should be consolidated with the generic docket. (CIBULA, MOSES, CASEY, FULWOOD, KELLY, VICKERY, WATTS)

STAFF ANALYSIS: As stated in the case background, CNM requests that the Commission issue a declaratory statement that phone-to-phone IP telephony is not telecommunications under Florida law and therefore, that CNM is not a telecommunications company subject to the Commission's certification and tariffing requirements. In the alternative, CNM states that if the Commission believes that it could or should regulate phone-to-phone IP telephony or the companies that provide such service, then CNM requests that the Commission first conduct a generic investigation or rulemaking proceeding to address the issues raised in its petition.

CNM states that the Florida statutes at issue are sections 364.01(4)(b) and (e) and 364.02(2), (11), and (12), Florida Statutes. The company asserts that the Commission orders at issue are In re: Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 Telecommunications Act of 1996, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002, in Docket No. 000075-TP (Phases II and IIA); In re: Investigation into BellSouth Telecommunications, Inc.'s Tariff Filing (02-0057) on Installment Billing, Order No. PSC-02-0255-PAA-TL, issued February 27, 2002, in Docket No. 020086-TL; In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc., Order No. PSC-01-1015-FOF-TP, issued April 24, 2001, in Docket No. 991854-TP; In re: Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order No. PSC-01-0824-FOF-TP, issued March 30, 2001, in Docket No. 000649-TP; and In re:

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Petition of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order No. PSC-00-1803-PHO-TP, issued October 2, 2000, in Docket No. 000649-TP.

CNM states that the Federal statutes at issue are Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"); 47 U.S.C. sections 151, 153(20), (43), (44), and (46), 230(b), and 251. It asserts that the Federal Communications Commission (FCC) orders at issue are: In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272, 11 FCC Rcd 21905 and In the Matter of Federal-State Joint Board and Universal Service (Report to Congress), 13 FCC Rcd 11501.

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) 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.

There is case law, however, which states that when the result is an agency statement of general applicability interpreting law or policy, declaratory statement proceedings are inappropriate. See, e.g., Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994). Staff believes that any statement by the Commission on phone-to-phone IP telephony would be a statement of general applicability interpreting law and policy which would carry implications for the telecommunications industry statewide. This belief is supported by the large number of telecommunications companies which have requested permission to intervene in this docket.

Thus, staff recommends that in lieu of issuing the requested declaratory statement, the Commission should grant CNM the alternative relief requested in its petition and open a generic docket to consider the issues raised by CNM's petition and the issue of phone-to-phone IP telephony in general. Staff further recommends that this docket should be consolidated with the generic

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docket. Staff envisions that both a staff workshop and a Commission workshop would be held in the consolidated dockets to consider the phone-to-phone IP telephony issue.

ISSUE 2: Should the Commission grant CNM's Motion to Dismiss the Petitions for Intervention, or in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action?

RECOMMENDATION: The Commission should grant CNM's alternative request to conduct a generic proceeding. The petition/motions for intervention filed by BellSouth, NEFTC, Sprint, ALLTEL, Verizon, Frontier, TDS, FCTA, ITS, Smart City, and AT&T in this docket should be granted. CNM's Motion to Dismiss the Petitions for Intervention and its request to stay this matter pending FCC action should be denied. (CIBULA, MOSES, CASEY, FULWOOD, KELLY, VICKERY, WATTS)

STAFF ANALYSIS: BellSouth, NEFTC, Sprint, ALLTEL, Verizon, Frontier, TDS, FCTA, ITS, Smart City, and AT&T filed petitions/motions for intervention in this docket. On November 19, 2002, CNM filed a Motion to Dismiss the Petitions for Intervention, or in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action. On December 2, 2002, Sprint, NEFTC, ALLTEL, Smart City, Frontier, ITS, TDS, FCTA, Verizon, and BellSouth timely filed responses to CNM's Motion to Dismiss.

CNM's Motion to Dismiss

In support of its Motion to Dismiss the petitions for intervention, CNM states that none of the petitioners seeking intervention have attempted to identify a constitutional, statutory or agency rule that entitles them to intervene in this matter. Further, CNM states that none of the petitioners have demonstrated how the question of whether the phone-to-phone IP telephony offered by CNM constitutes "telecommunications" and thus, whether CNM is a "telecommunications company" subject to the Commission's jurisdiction affects the substantial interests of each of the petitioners.

CNM, however, also states that if the Commission believes that the substantial interests of the petitioners will be affected by a determination in this docket, that "such a determination could only amount to a broad agency policy or rule." If such is the case, the company requests, as an alternative to its Motion to Dismiss, that the Commission should conduct a generic proceeding.

CNM also indicates that AT&T Corp. (AT&T) filed a petition with the FCC on October 18, 2002, which CNM states raises the kind of issues that many of the petitioners for intervention stated are raised by CNM's Petition for Declaratory Statement. CNM states that since the FCC has already scheduled the AT&T petition for comments, the Commission should alternatively stay CNM's Petition for Declaratory Statement, as such a stay would "afford the entire industry with the opportunity to address these very complex issues in a systematic and unified manner."

Responses to CNM's Motion to Dismiss

Sprint

In its response, Sprint states that it should be granted intervention. It asserts that it meets both prongs of the test on intervention set forth Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), in that: 1) it will suffer an injury in fact which is of sufficient immediacy to entitle it to participate in this proceeding; and 2) that its injury is of the type or nature that the proceeding is designed to protect.

Under the first prong of the Agrico test, Sprint states a declaration by the Commission will govern Sprint's relationship with CNM as well as any other similarly situated providers of IP telephony services or interexchange providers using CNM to terminate its long distance traffic to Sprint. Sprint also asserts that it will be affected in a broader sense through the impact of CNM's obligations relative to the industry as a whole. The company states that customer relations and service issues could be affected by any Commission determination on CNM's regulatory classification.

Sprint states that the interpretation of Chapter 364 that CNM is requesting could "completely eviscerate the fundamental underpinnings of the chapter." Thus, it asserts that it meets the second prong of the Agrico test.

Moreover, the company states that it should be allowed to participate to present arguments on the propriety of CNM's request for a declaratory statement in this instance. Sprint asserts that because CNM has not materially distinguished its services from other phone-to-phone IP telephony service offered by similarly situated providers, its petition for declaratory statement is

actually an attempt to obtain a generic ruling from the Commission. Sprint argues that this is not the proper use of the declaratory statement vehicle under the law. Thus, Sprint states that CNM's petition for declaratory statement should be denied.

Sprint further asserts that CNM mischaracterizes Florida and Federal law on phone-to-phone IP telephony and states that the Commission should not formulate a conclusion on CNM's petition without a thorough investigation of the issues presented and an analysis of the potential impacts on the telecommunications industry. Sprint is in agreement with CNM that a generic proceeding would be the appropriate forum for determining the issues raised by CNM's petition if the Commission believes that IP telephony issues should be addressed at this time.

Sprint concludes that it does not believe that the Commission has the authority to stay CNM's petition until the FCC resolves the AT&T petition because the Commission must abide by the 90 day statutory deadline to either grant or deny a petition for declaratory statement set forth by section 120.565, Florida Statutes. It states that to ensure the timely resolution of the issues arising from IP telephony and to provide certainty to the industry as to how such traffic should be compensated on an intrastate basis, the Commission should initiate the generic proceeding suggested by CNM. Sprint cautions, however, that any generic proceeding should not delay or stay complaints filed with the Commission regarding intercarrier compensation to specific IP telephony service arrangements that may subsequently be brought to the Commission for resolution.

NEFTC, ALLTEL, Smart City, Frontier, ITS, and TDS

NEFTC, ALLTEL, and Smart City filed a joint response to CNM's Motion to Dismiss. Frontier, ITS, and TDS adopted the joint response. These respondents state that they are entitled to participate in this proceeding because their substantial interests are subject to determination and will be affected by Commission action in this docket. The respondents state that one of the major underpinnings of CNM's petition for declaratory statement is that once the Commission decides that IP telephony is a telecommunications service, then reciprocal compensation must apply to IP telephony as required by federal law. They assert that CNM incorrectly assumes that reciprocal compensation is the applicable compensation, and that if IP telephony is interexchange, then

access is due. They state that CNM does not take into account who would be due compensation for terminating its traffic and who would be denied compensation if the Commission declares that CNM is not a telecommunications company. They assert that if CNM is providing IP telephony in Florida, then all ILECs in Florida have a stake in this proceeding.

The respondents state that they cannot support CNM's alternative request for relief if it means that the Commission would institute a generic proceeding and then hold that proceeding in abeyance until the FCC rules on AT&T's petition. They argue that stopping the proceeding will allow CNM to provide IP telephony service without regulation and without paying the requisite compensation to the local telephone companies for an indefinite period of time and prevent the Commission from pursuing any proceeding against CNM for providing telecommunications service without a certificate. They state, however, that if CNM would be willing to cease providing IP telephony service in Florida pending the resolution of the issue or pay the requisite compensation during the interim, then the respondents would support holding this matter in abeyance.

FCTA

In its response, FCTA states that it has been granted intervention into numerous Commission dockets including Docket No. 000075-TP, which CNM cites as support for its conclusion that reciprocal compensation does not apply to its phone-to-phone IP telephony service. It further states that cable telephony is a key component of the cable industry's business strategy in the coming years. Moreover, it argues that its members are ALECs which pay and receive intercarrier compensation, including reciprocal compensation and access charges; thus, a determination by the Commission in this proceeding will have a substantial impact on its members.

FCTA states that a declaratory statement by the Commission in this proceeding will necessarily amount to a broad agency policy and provide statutory construction that will apply to an entire class of persons. It asserts that when such is the case, the law requires that a declaratory statement not be issued. FCTA states that the issues raised in CNM's petition would be more properly addressed in a generic proceeding, which would also permit the identification of all relevant related issues.

FCTA further states that "only a ruling by the FCC can provide the necessary leadership and uniform national policy that can provide guidance to the states." Thus, it states that the Commission should stay the generic proceeding pending the FCC's decision on AT&T's petition.

Verizon

Verizon states that it has met the standard for intervention under Rule 28-106.205, as its interests will be affected through this proceeding. It further states that because CNM is actually seeking a broad determination that IP telephony is not telecommunications subject to Commission regulation, CNM's petition is not proper for a declaratory ruling. Verizon states that it does not oppose this matter being set for a generic investigation or rulemaking.

BellSouth

BellSouth states that its request for intervention should be granted as it meets both prongs of the Agrico test. It asserts that it has an injury in fact in that it has an economic interest in the regulation of IP telephony. The company further asserts that any interpretation by the Commission will have a substantial affect on reporting and payment access charges and reciprocal compensation, as well as the Commission's ability to regulate telecommunications companies.

BellSouth agrees that a generic proceeding is the appropriate vehicle for the issues raised by CNM's petition. It disagrees, however, that the Commission should stay CNM's petition for declaratory statement until the FCC resolves AT&T's petition. It argues that if CNM believes that the FCC's decision on AT&T's petition would be dispositive of its petition filed here at the Commission, then CNM should withdraw its petition.

The company concludes that if the Commission denies CNM's Motion to Dismiss and allows it to intervene, it requests that it have the opportunity to file motions on issues raised in CNM's petition for declaratory statement, regardless of how the case is styled. BellSouth states that any such motions would be premature at this time.

Analysis

As discussed in Issue 1, staff believes that any statement by the Commission on phone-to-phone IP telephony will be a statement of general applicability interpreting law and policy which will carry implications for the telecommunications industry statewide. Thus, in accordance with our recommendation in Issue 1, staff recommends that the Commission should grant CNM the alternative relief requested in its motion and open a generic docket to consider the issues raised by CNM's petition and the issue of phone-to-phone IP telephony in general.

Further, CNM's Motion to Dismiss the Petitions for Intervention should be denied and the petitions/motions for intervention that have been filed by BellSouth, NEFTC, Sprint, ALLTEL, Verizon, Frontier, TDS, FCTA, ITS, Smart City, and AT&T in this docket should be granted. As staff is recommending that this docket be consolidated with the generic docket, these parties will then be able to participate in the a generic docket without the necessity of refiling a petition for intervention.

Staff does not believe that it is necessary to hold this matter in abeyance until the conclusion of the FCC action on the AT&T petition. In its petition before the FCC, AT&T is asking for a declaration that its phone-to-phone IP telephony services over the Internet are exempt from the access charges applicable to circuit switched interexchange calls; whereas, CNM is asking the Commission for a declaration that it is not a telecommunications provider subject to the Commission's jurisdiction. The issues are similar but not identical. Thus, staff recommends that CNM's alternate request to stay this matter pending FCC action should be denied.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open and should be consolidated with the generic docket as discussed in Issue 1. (CIBULA)

STAFF ANALYSIS: This docket should remain open and should be consolidated with the generic docket as discussed in Issue 1.