State of Florida

Public Service Commission

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DATE: MARCH 6, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (B. KEATING, KNIGHT)
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (DOWDS, KING, BROWN)
DIVISION OF ECONOMIC REGULATION (LEE, LESTER)

RE: DOCKET NO. 990649B-TP - INVESTIGATION INTO PRICING OF UNBUNDLED NETWORK ELEMENTS. (SPRINT/VERIZON TRACK)

AGENDA: 03/18/03 - REGULAR AGENDA - MOTION FOR STAY OF FINAL ORDER - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\990649BSTAY.RCM

CASE BACKGROUND

The Federal Telecommunications Act of 1996 (Act) made sweeping changes to the regulation of telecommunications common carriers in this country. Of particular importance, it provided for the abolition nationwide of the incumbent local exchange carriers' monopolies over the provision of local exchange service. The Act envisioned three strategies for firms to enter the local exchange services market: (1) through resale of the incumbent's services; (2) via pure facilities-based offerings, thus only requiring a competitor to interconnect with the incumbent's network; and (3) through a hybrid involving the leasing of unbundled network elements (UNEs) of the incumbent's network facilities, typically in conjunction with network facilities owned by the entrant.

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This Commission's proceeding was initiated on December 10, 1998, when a group of carriers, collectively called the Competitive Carriers, filed their Petition for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that the Commission set deaveraged unbundled network element (UNE) rates.

On August 18, 2000, Order No. PSC-00-1486-PCO-TP was issued granting Verizon Florida Inc.'s (formerly GTEFL) Motion to Bifurcate and Suspend Proceedings, as well as Sprint's Motion to Bifurcate Proceedings, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony. By Order No. PSC-01-2132-PCO-TP, issued October 29, 2001, the issues were established and the Docket was divided into 990649A-TP, in which filings directed towards the BellSouth track would be placed, and 990649B-TP, in which filings directed towards the Sprint-Verizon track would be placed. An administrative hearing was held on April 29-30, 2002.

By Order No. PSC-02-1574-FOF-TP, issued November 15, 2002, the Commission rendered its final decision regarding UNE rates for Verizon. On December 2, 2002, AT&T and MCI WorldCom filed a Motion for Reconsideration. Shortly thereafter, on December 16, 2002, Verizon filed a Notice of Appeal to the Florida Supreme Court, as well as a Response in Opposition to the Motion for Reconsideration. Verizon also filed a Motion for Mandatory Stay Pending Judicial Review. On December 30, 2002, AT&T, MCI WorldCom, and FDN filed a joint Response in Opposition to the Motion for Stay, as well as a Request for Oral Argument.

On January 8, 2003, the Commission filed a Motion to Dismiss or Abate with the Supreme Court, asking that the Court abate its proceedings regarding Verizon's appeal to allow the Commission to address the pending Motion for Reconsideration. On January 23, 2003, Verizon filed its response with the Court, indicating that it does not oppose the request for abatement, as long as the Commission grants its request for a mandatory stay pending appeal. To date, the Court has not ruled upon the Motion to Dismiss or Abate.

Due to the unusual procedural and jurisdictional posture of this case, staff had delayed bringing a recommendation to the Commission in the hope that the Court would rule expeditiously on the Motion to Dismiss or Abate. That ruling was not, however, forthcoming and the resulting delay produced uncertainty as to the

status of the Commission's Order and the approved UNE rates in view of the pending Motions and Verizon's appeal.[1] Thus, staff believes that it has become necessary to bring a recommendation at this time for the Commission's consideration regarding Verizon's Motion for Mandatory Stay Pending Judicial Appeal. This recommendation addresses only the Motion for Stay, the associated responses, and the Request for Oral Argument.

DISCUSSION OF ISSUES

ISSUE 1: Should the Request for Oral Argument filed by AT&T, MCI WorldCom, and FDN be granted?

RECOMMENDATION: Yes, staff recommends that oral argument be granted, because it appears that it may assist the Commission in rendering its decision in this matter. Staff recommends that oral argument be limited to 10 minutes per side. **(KEATING)**

STAFF ANALYSIS: AT&T, WorldCom, and FDN filed their request pursuant to Rule 25-22.058, Florida Administrative Code, asking that oral argument be granted because this is only the second time that a mandatory stay has been requested in a case involving wholesale rates applicable in intercarrier contracts.

Verizon did not respond to the Request for Oral Argument.

Staff recommends that oral argument may be beneficial in this instance and may assist the Commission in addressing the issue before it. Therefore, staff recommends that the Request for Oral Argument be granted. Staff further recommends that oral argument be limited to 10 minutes per side.

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[1] On March 3, 2003, the Court stayed its proceedings to allow the Commission to address the pending Motion for Reconsideration.

ISSUE 2: Should the Commission grant Verizon's Motion for Mandatory Stay Pending Judicial Review?

RECOMMENDATION: No. Staff recommends that the mandatory stay provisions of Rule 25-22.061(1)(a), Florida Administrative Code, pursuant to which Verizon is seeking a mandatory stay, are inapplicable in this situation. **(KEATING)**

STAFF ANALYSIS:

I. Verizon's Motion

Verizon asks that the Commission grant its request for a mandatory stay in accordance with the provisions of Rule 25-22.061(1)(a), Florida Administrative Code, which states:

> When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

Verizon maintains that the Rule only requires the Commission to see that Verizon posts a bond sufficient to cover rate true-ups should Verizon lose on appeal.

Verizon argues that the Commission's UNE Order clearly fits both prerequisites for a mandatory stay, those being that: 1) the Order decreases Verizon's rates; and 2) the rates are charged to Verizon customers. Verizon asserts that by the clear language of the rule, Verizon is entitled to a stay, because the UNE Order lowered Verizon's UNE rates that are charged to Verizon's ALEC customers.

Verizon acknowledges that on one previous occasion, the Commission took the opinion that the mandatory stay provisions in Rule 25-22.061(1)(a), Florida Administrative Code, apply only to

orders reducing rates for retail end users.[2] However, Verizon contends that the previous decision is not controlling in this instance, because the previous decision was rendered in an arbitration case involving a contract dispute between carriers, not in a generic ratesetting proceeding.

Verizon further contends that if, however, the Commission believes that its previous rationale is applicable, and that the reference to "customers" in Rule 25-22.061(1)(a), Florida Administrative Code, refers only to end users, that interpretation is incorrect and does not conform with the unambiguous language in the rule.[3] Verizon emphasizes that the courts will not imply a meaning or limitation that the plain language of the rule does not supply.[4] Verizon contends that nothing in Rule 25-22.061(1)(a), Florida Administrative Code, suggests that the meaning of "customer" should be limited.

Verizon also argues that the Commission has not consistently interpreted the mandatory stay provision to apply only in cases involving decreases in rates to end use customers. Verizon contends that in Order No. PSC-98-1639-FOF-TP, issued December 7, 1998, in Docket No. 970808-TL, the Commission granted GTC's request for a stay, pursuant to Rule 25-22.061(1)(a), Florida

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[2]*See* Complaint of WorldCom Technologies, Inc. Against BellSouth for Breach of Terms of Florida Partial Interconnection Agreement, Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Docket No. 971478-TP.

[3]*Citing* Arbor Health Care Co. v. State of Florida, et al., 654 So. 2d 1020, 1021(Fla. 1st DCA 1995); Legal Environmental Asst. Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1083 (Fla. 1994)(rejecting agency's interpretation of rule that "conflict[ed] with the plain meaning of the regulation"); and Woodley v. Dept. of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1stDCA)(agency construction of rule that contradicts unambiguous language is erroneous and cannot stand.)

[4]*Citing* Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002); Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993); and James Talcott, Inc. v. Bank of Miami Beach, 143 So. 2d 657, 659(Fla. 3rd DCA 1962).

Administrative Code, of the requirements of an Order allowing BellSouth to terminate interLATA access subsidy payments to GTC. Verizon contends that the Commission did not discuss the fact that the "customer" in the case was another carrier, not an end user.

Finally, Verizon adds that a staff memorandum summarizing the rule when it was first proposed does not indicate any intent to differentiate between retail end user customers and wholesale customers.[5]

For all these reasons, Verizon asks that its request for a mandatory stay be granted.

II. AT&T, FDN, WorldCom (ALECs) Response

A. Mandatory Stay Provision

In opposition to Verizon's request, the ALECs contend that Verizon's appeal of the Commission's decision is premature, because AT&T and WorldCom filed a timely Motion for Reconsideration, which is currently pending before the Commission. The ALECs contend that pursuant to Rule 9.020(h), Florida Rules of Appellate Procedure, a final order is not deemed rendered for purposes of appeal until the Commission has disposed of all timely motions for reconsideration. Because the appeal is premature, according to the ALECs, so is the request for stay.

As to the merits of the request for stay, the ALECs argue that the mandatory stay provisions of Rule 25-22.061(1)(a), Florida Administrative Code, do not apply because the rate decrease at issue in the Commission's UNE Order does not involve rates to end use customers. Specifically, the ALECs maintain that Verizon has failed to adequately distinguish the decision in Docket No. 971478-TP, because Verizon did not address the Commission's fundamental reason for finding that the mandatory stay provisions were not applicable in that case - - that being that competitive carriers are not considered "customers" for purposes of the rule.

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[5]*Citing* Memorandum to Susan Clark, Assoc. Gen. Counsel, from Research and Management Studies, Docket No. 810355-PU, Oct. 19, 1981.

The ALECs further contend that the Commission has been consistent in its interpretation of the applicability of the mandatory stay provisions, contrary to Verizon's assertions. The ALECs point out that in Order No. PSC-98-1639-FOF-TL, in which the Commission granted GTC's request for stay of the Order allowing BellSouth to terminate access subsidy payments to GTC, the Commission was not presented with a contested interpretation of Rule 25-22.061(1)(a), Florida Administrative Code, because BellSouth had also requested a stay of the Commission's Order pursuant to the same rule provision. While GTC requested a stay due to the Commission's decision to terminate the subsidy mechanism and BellSouth's payments to GTC, BellSouth sought a stay of the Commission's decision to the extent that it required BellSouth to institute rate reductions to its end users to offset any windfall resulting from termination of the subsidy payments and the mechanism. The ALECs emphasize that in rendering its decision on the requests for stay, the Commission stated that it was important to maintain the status quo in that case pending resolution of any appeal. The Commission indicated that, otherwise, it would have difficulty making the parties whole, especially BellSouth, since BellSouth would be making rate reductions to end users. Thus, the ALECs contend that the Commission's rationale for granting the stay in that case pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, was consistent with its subsequent interpretation of the Rule.

The ALECs also argue that the Commission's interpretation of the mandatory stay provision is reasonable. In support of this assessment, the ALECs refer to the Florida Supreme Court's decision in Lee County Electric Cooperative, Inc. v. Jacobs, 820 So. 2d 297 (Fla. 2002), wherein the Court affirmed a Commission decision that "rate structure" as used in Chapter 366, Florida Statutes, means "retail" rate structure, not rate schedules between utilities. The ALECs contend that, similarly, the Commission's previous interpretation that the references to "customers" in Rule 25-22.061(1)(a), Florida Administrative Code, means "end use" customers, not other carriers, is entirely reasonable and sustainable, and should be applied in this case as well.

The ALECs maintain that the Commission's prior interpretation of the mandatory stay provision is consistent with the purpose of the rule in the context in which it was adopted. The ALECs explain that the Rule was adopted in 1981 when all carriers were under rate of return regulation. In that environment, if a carrier were

delayed in implementing a rate increase or required to make a rate decrease, the ALECs contend that the carrier would have been at great risk of being unable to recover its losses from the general body of ratepayers after final disposition of the appeal. Thus, the mandatory stay provision of Rule 25-22.061, Florida Administrative Code, was implemented to ensure that the carrier remained whole in case the Commission was reversed on appeal. The ALECs emphasize that at the time of the Rule's adoption, the Commission had no jurisdiction over intercarrier rates; thus, the reference to "customers" contained therein could only have meant to "end use" customers.

In addition, the ALECs argue that the Commission's prior interpretation of the Rule reflects "sound regulatory policy." Opposition at p. 6. They argue that, "Application of the mandatory stay rule in a situation involving a decrease in UNE rates paid by competitive carriers is not necessary to protect any regulated revenue requirement and would serve only to further delay the development of competition." Id. They note that in Order No. PSC-99-0758-FOF-TP, the Commission acknowledged that "Harm to the development of competition is harm to the public interest." Order at p. 8.

Based on the foregoing, the ALECs contend that the request for mandatory stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, should be denied because the mandatory stay provision is not applicable to situations involving intercarrier rates.

B. Discretionary Stay

The ALECs also argue that Verizon should not be granted a discretionary stay pursuant to Rule 25-22.061(2), Florida Administrative Code, primarily because Verizon did not request a discretionary stay pursuant to that subsection of the Rule. They note that should Verizon seek a stay pursuant to this subsection at some later date, they reserve the right to respond to such a request. The ALECs note that pursuant to Rule 25-22.061(2), Florida Administrative Code, Verizon would have to demonstrate that it would likely prevail on appeal; that it would suffer irreparable harm should the UNE Order remain in effect; and that delay would cause substantial harm to the public interest. The ALECs note that the same considerations which they believe support denying a

mandatory stay would also support denying any request for a discretionary stay.

C. Conditions for Stay

In the event that the Commission does grant Verizon's request for a stay, the ALECs request that the Commission require Verizon to post a bond sufficient to protect the competitive carriers from competitive damage resulting from the delayed implementation of the lower UNE rates. They note that they do not believe that the established rates are low enough to truly be considered appropriately cost-based; thus, even complete implementation of the Commission's UNE Order will not fully facilitate competition in the manner contemplated by Chapter 364 and the federal Telecommunications Act. Nevertheless, they believe that delay in implementing the somewhat lower rates established by the Commission will impair their ability to compete and obtain market share in an environment where competition is still developing. Should the stay be granted, they therefore believe that the amount of security established should be "some multiple of the amount calculated by comparing the existing UNE rates to the new rates ordered by the Commission. . . ." Opposition at 8. They add that the security should be provided in the form of a bond or cash escrow, not a corporate undertaking.

III. Staff Analysis

While the ALECs argue that Verizon's Motion for Mandatory Stay is premature because Verizon's appeal is premature, staff notes that Verizon's appeal is nevertheless still pending before the Supreme Court. Thus, because the appeal is still pending before the Court and at some point will proceed whether abatement is granted or not, staff believes it appropriate for the Commission to proceed to address the Motion for Stay.

Staff believes that the Commission's previous interpretation in Order No. PSC-99-0758-FOF-TP that Rule 25-22.061(1)(a), Florida Administrative Code, is inapplicable to situations that do not involve refunds or decreased rates to end use customers, is also an interpretation that is entirely applicable to this case. As succinctly stated in Order No. PSC-99-0758-FOF-TP, ". . . competitive telecommunications carriers, are not 'customers' for purposes of this rule." Order at p. 6. Staff agrees with the ALECs that Verizon has failed to adequately distinguish the

Commission's rationale in Order No. PSC-99-0758-FOF-TP from the situation at hand. While the UNE Order does not deal specifically with contractual disputes between interconnecting carriers, the rates approved in the Commission's UNE Order will ultimately be incorporated in intercarrier contracts. These rates apply only in the wholesale context and do not pertain to end use customers.

Furthermore, staff believes that the crux of the Commission's decision in Order No. PSC-99-0758-FOF-TP to deny BellSouth's request for a stay was not that the issue before it involved contractual disputes between carriers, as argued by Verizon; rather, that Rule 25-22.061(1)(a), Florida Administrative Code, was simply not designed to apply to any rate or refund matters between carriers. Thus, since the rates approved in the UNE Order are wholesale rates applicable only between carriers, staff believes that the mandatory stay provision of Rule 25-22.061(1)(a), Florida Administrative Code, is inapplicable.

Staff also emphasizes that the Commission's decision in Order No. PSC-98-1639-FOF-TP, which involved termination of the interLATA subsidy payments to GTC, is not inconsistent with this interpretation of Rule 25-22.061(1)(a), Florida Administrative Code. As noted by the ALECs, in that Order, the Commission addressed two competing requests for stay that were both filed pursuant to the mandatory stay provision. While the Commission ultimately determined that GTC's request was the more appropriate in its effect of maintaining the status quo, the Commission clearly gave great weight to the fact that BellSouth would be required to implement a rate reduction to its end use customers if the Order were not stayed. Order at p. 3. Thus, the Commission's decision in that case can be reconciled with its later interpretation of the Rule as set forth in Order No. PSC-99-0758-FOF-TP. It is also noteworthy that the Commission was not asked in that case to address whether Rule 25-22.061(1)(a), Florida Administrative Code, is applicable in the wholesale context.

Staff also finds persuasive the ALECs' arguments regarding the environment in which Rule 25-22.061(1)(a), Florida Administrative Code, was promulgated. The fact that the Rule was developed before the Commission even had authority to address matters involving intercarrier compensation certainly lends support to the Commission's previous interpretation that "customers," as referenced in the Rule, means "retail" or "end use" customers.

Finally, while staff agrees with Verizon that courts will overturn an agency's interpretation of a rule if it conflicts with the unambiguous language of the rule, staff also emphasizes that courts nevertheless give an agency's interpretation of its rules great deference and will only overturn that interpretation if the conflict between language and interpretation is clear. As stated by the Court in Pan American World Airways, Inc. v. Florida Public Service Commission:

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Department of Business Regulation, 276 So.2d 823 (Fla.1973). The same deference has been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration. State Department of Commerce, Division of Labor v. Matthews Corporation, 358 So.2d 256 (Fla. 1st DCA 1978).

Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983). Staff believes that the Commission's previous interpretation that Rule 25-22.061(1)(a), Florida Administrative Code, applies only when refunds or reductions in rates to end use customers are at issue is applicable to Verizon's request for stay at issue here. Further, the interpretation that the Rule is inapplicable to the wholesale context is not clearly at odds with the language of the Rule. Staff, therefore, recommends that Verizon's Motion for Mandatory Stay Pending Judicial Review be denied.

Since Verizon has not requested a stay pursuant to subsection 2 of the Rule, staff has not included an analysis based on that provision. Staff notes, however, that in order to obtain relief pursuant to Rule 25-22.061(2), Florida Administrative Code, Verizon must affirmatively demonstrate that it would likely prevail on appeal; that it would suffer irreparable harm should the UNE Order remain in effect; and that delay would cause substantial harm to the public interest.

Staff notes that if the Commission does determine that the stay should be granted, Verizon should be required to provide

adequate security as a condition of the stay. It is staff's belief that Verizon Florida's revenue from UNE charges is a small percentage of the company's total revenue. The amount to be secured is the incremental UNE revenue. Verizon Communications and Verizon Florida have A+ bond ratings according to Standard and Poor's. Bonds rated BBB and above are considered investment grade, i.e., high quality. Therefore, staff believes Verizon has sufficient financial capability to support a corporate undertaking.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No. This Docket should remain open pending resolution of the Motion for Reconsideration and the pending appeal. **(KEATING, KNIGHT)**

STAFF ANALYSIS: This Docket should remain open pending resolution of the Motion for Reconsideration and the pending appeal.