

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION
CLERK

DATE: March 1, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Gervasi) *RG SMC*
 Division of Economic Regulation (McNulty) *WOM*
 Division of Regulatory Analysis (Beard, Casey) *CSB AK [Signature]*

RE: Docket No. 120043-TP – Proposed amendment of Rule 25-4.160, F.A.C.,
 Operation of Telecommunications Relay Service.

AGENDA: 03/13/12 – Regular Agenda – Rule Proposal – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

RULE STATUS: Proposal May Be Deferred

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120043.RCM.DOC

Case Background

Rule 25-4.160, Florida Administrative Code (F.A.C.), Operation of Telecommunications Relay Service, implements certain statutory requirements of the Telecommunications Access System Act (TASA), enacted in 1991 and contained in sections 427.701 – 427.708, Florida Statutes (F.S.). TASA establishes a system whereby the citizens of Florida who are deaf, hard of hearing, and/or speech impaired have access to basic telecommunications services at a cost no greater than that paid by other telecommunications services customers. See section 427.702, F.S.

Section 427.704(4)(a), F.S., requires the Commission to establish a cost recovery mechanism for the implementation and maintenance of a statewide telecommunications system that provides access to telecommunications relay services by persons who are deaf, hard of

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hearing, and/or visually impaired. Among other things, it provides that to fund the telecommunications access system, the Commission shall require all local exchange telecommunications companies (LECs) to impose a monthly surcharge on an individual access line basis, except that the TASA surcharge may not be imposed upon more than 25 basic telecommunications access lines per account bill rendered. Section 427.705(5), F.S., requires the LECs to remit the moneys collected through the surcharge to the telecommunications access system administrator on a monthly basis, in a manner as prescribed by the Commission.¹

Rule 25-4.160(3), F.A.C., expressly excludes federal and state agencies from paying the monthly surcharge that the LECs are otherwise required to impose on their local exchange subscribers to fund the telecommunications access system. This recommendation addresses whether the Commission should propose to amend the rule to clarify that county agencies are also excluded from paying the TASA surcharge.

The Commission's Notice of Development of Rulemaking was published on October 7, 2011, in Volume 37, Number 40, of the Florida Administrative Weekly. No rule development workshop was requested. The Commission has jurisdiction pursuant to Sections 120.54, 350.127(2), and 427.704(8), F.S.

¹ The Commission designated Florida Telecommunications Relay, Inc., as the administrator of the telecommunications access system. See Rule 25-4.150, F.A.C.

Discussion of Issues

Issue 1: Should the Commission propose the amendment of Rule 25-4.160, F.A.C., Operation of Telecommunications Relay Service?

Recommendation: Yes, the Commission should propose the amendment of Rule 25-4.160, F.A.C., as set forth in Attachment A of this recommendation. (Gervasi, Beard, Casey)

Staff Analysis: As stated in the case background, Rule 25-4.160(3), F.A.C., expressly excludes federal and state agencies from paying the monthly surcharge that the LECs are otherwise required to impose on their local exchange subscribers to fund the telecommunications access system. In the years following the promulgation of the rule, it has come to the Commission's attention that some confusion exists as to whether the LECs should be collecting the TASA surcharge from county agencies, or whether county agencies are excluded from paying the surcharge because counties are political subdivisions of the state.²

Staff believes that because counties are political subdivisions of the state, Rule 25-4.160(3), F.A.C., implicitly excludes county agencies from paying the TASA surcharge. Article VIII, Section 1(a), of the Florida Constitution provides, in relevant part, that "[t]he state shall be divided by law into political subdivisions called counties." Nevertheless, to eliminate any further confusion on the matter, staff recommends that along with federal and state agencies, county agencies should also be expressly excluded from paying the TASA surcharge, as shown on Attachment A, page 6, lines 17-18.

Staff notes that although there is no case law on the matter of the TASA surcharge, the exclusion of federal, state, and county agencies from paying it appears to be well grounded in the law. Upon finding that "[i]n general, the terms 'tax' and 'taxes' have been defined as burdens or charges which are imposed by the legislative power on persons or property to raise money for public purposes," the Office of the Attorney General opined that the "911" fee authorized under section 365.171, F.S., appears to be in the nature of a tax. Attorney General Opinion 87-29.

The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority, the contribution being of a proportionate character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes and not as payment for some special privilege granted or service rendered.

Id. By analogy, the TASA surcharge also appears to be in the nature of a tax because it has those same characteristics. And federal, state and county agencies are immune from taxation. See S.R.A., Inc. v. Minnesota, 327 U.S. 558, 561 (1946) (finding that under an implied constitutional immunity, the property and operations of the federal government must be exempt from state

² See, e.g., Docket No. 070263-TP, In Re: Petition by AT&T Florida for Declaratory Statement regarding 911 Fee and TASA charges to Florida Counties and Agencies. The Commission deferred a ruling in that docket upon finding that further discussion between the staff, the company, and other interested persons was warranted.

control in tax, as in other matters); FDOR v. City of Gainesville, 918 So. 2d 250, 255 (Fla. 2005) (finding that the state and counties are immune from taxation).³

Also, as shown on Attachment A, page 6, line 5, staff recommends that the rule be amended to refer to persons who are deaf or hard of hearing, as opposed to “hearing impaired.” According to the National Association of the Deaf’s webpage, this terminology is the overwhelming preference of people who are deaf or hard of hearing. “Hearing impaired” was a well-meaning term that is not accepted or used by many deaf and hard of hearing people. Moreover, the World Federation of the Deaf voted in 1991 to use “deaf and hard of hearing” as an official designation. See <http://www.nad.org/issues/american-sign-language/community-and-culture-faq>.

Statement of Estimated Regulatory Costs

The Florida Administrative Procedure Act encourages an agency to prepare a Statement of Estimated Regulatory Costs (SERC). Section 120.54(3)(b), F.S. An agency must prepare a SERC if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after implementation of the rule, and shall consider the impact of the rule on small businesses, small counties, and small cities. Id.

Section 120.541(2)(a), F.S., requires a SERC to include an economic analysis showing whether the rule, directly or indirectly, is likely to: 1) have an adverse impact on economic growth, private sector job creation, employment, or investment; 2) have an adverse impact on business competitiveness; or 3) increase regulatory costs; in excess of \$1 million in the aggregate within five years after the implementation of the rule. Section 120.541(3), F.S., requires that if the adverse impact or regulatory costs of the rule exceed any of those criteria, the rule shall be submitted to the President of the Senate and Speaker of the House, and may not take effect until it is ratified by the Legislature.

The SERC prepared by staff is included as Attachment B to this recommendation. It indicates that economic growth, private job sector employment, investment, and business competitiveness are not expected to be adversely impacted during the five-year period following implementation of the rule because the intent of the rule is to eliminate the TASA surcharge to county agencies. It also indicates that the regulatory costs imposed on counties will be decreased when county agencies are no longer billed the TASA surcharge by those telecommunications companies that currently bill and collect them from county agencies. Moreover, based on the SERC, the rule amendment will not require legislative ratification.

Attachment B also contains the estimated number of individuals and entities likely to be required to comply with the rule, the estimated cost of implementing and enforcing the rule, the estimated transactional costs likely to be incurred by individuals and entities required to comply with the rule, and an analysis of the impact on small businesses, small counties, and small cities. Section 120.541(2)(b)-(e), F.S., requires that a SERC include these considerations.

³ Unlike counties, municipalities are not subdivisions of the state and are therefore subject to taxation absent a specific statutory exemption. Id.

Docket No. 120043-TP
Date: March 1, 2012

Issue 2: Should this docket be closed?

Recommendation: Yes, if no requests for hearing or comments are filed, the rule amendments as proposed should be filed for adoption with the Secretary of State and the docket should be closed. (Gervasi)

Staff Analysis: Unless comments or requests for hearing are filed, the rule as proposed may be filed with the Secretary of State without further Commission action. The docket may then be closed.

1 **25-4.160 Operation of Telecommunications Relay Service.**

2 (1) For intrastate toll calls received from the relay service, each local exchange and
3 interexchange telecommunications company billing relay calls shall discount relay service
4 calls by 50 percent off of the otherwise applicable rate for a voice nonrelay call except that
5 where either the calling or called party indicates that either party is both deaf or hard of
6 hearing and visually impaired, the call shall be discounted 60 percent off of the otherwise
7 applicable rate for a voice nonrelay call. The above discounts apply only to time-sensitive
8 elements of a charge for the call and shall not apply to per call charges such as a credit card
9 surcharge. In the case of a tariff which includes either a discount based on number of minutes
10 or the purchase of minutes in blocks, the discount shall be calculated by discounting the
11 minutes of relay use before the tariffed rate is applied.

12 (2) When a local exchange telecommunications company passes a call to the Florida relay
13 service provider, it shall also forward the calling party's originating telephone number if the
14 calling party's central office has that capability.

15 (3) To fund the telecommunications access system established under Part II of Chapter 427,
16 F.S., all local exchange telecommunications companies shall impose a monthly surcharge on
17 all local exchange telecommunications company subscribers, excluding federal, ~~and state, and~~
18 county agencies, on an individual access line basis, except that such surcharge shall not be
19 imposed upon more than 25 basic telecommunications access lines per account bill rendered.

20 (a) A local exchange telecommunications company shall consider an account bill rendered in a
21 manner consistent with its billing practices for other telecommunications services.

22 (b) Except as otherwise provided by law, the surcharge billed by the local exchange
23 telecommunications companies is not subject to any sales, use, franchise, income, municipal
24 utility, gross receipts, or any other tax, fee, or assessment, nor shall it be considered revenue of
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CODING: Words underlined are additions; words in ~~struck-through~~ type are deletions from existing law.

1 the local exchange telecommunications companies for any purpose.
2 (c) All local exchange telecommunications companies shall include the surcharge as a part of
3 the local service charge that appears on the customer's bill except that the surcharge may be
4 itemized if a company monthly itemizes all local service charges. However, the local
5 exchange telecommunications company shall itemize the surcharge on the initial bill to the
6 subscriber and itemize it at least once annually. The local exchange telecommunications
7 company may deduct and retain 1 percent of the total surcharge amount collected each month
8 to recover the billing, collecting, remitting, and administrative costs attributed to the
9 surcharge. All moneys received by the local exchange telecommunications company, less the
10 authorized amount retained, shall be submitted so as to be received by the Administrator
11 within fifteen days after the end of the previous month. Each local exchange
12 telecommunications company shall follow the same procedures for collecting this surcharge as
13 for collecting for other regulated telecommunications services.
14 (4) For purposes of this part, the term "local exchange telecommunications company" shall be
15 defined in Section 427.703(7), F.S. The term shall include shared tenant service providers and
16 competitive local exchange companies.

17 *Rulemaking Authority 350.127(2), 427.704(8) FS. Law Implemented 427.704(4), (5) FS.*

18 *History—New 9-16-92, Amended 4-8-98, XX-XX-XX.*

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DATE: February 10, 2012
TO: Rosanne Gervasi, Senior Attorney, Office of the General Counsel
FROM: William B. McNulty, Economic Analyst, Division of Economic Regulation
RE: Statement of Estimated Regulatory Costs for Proposed Rule Amendment to Rule 25-4.160, F.A.C., Operation of Telecommunications Relay Service

Summary of Rule

Rule 25-4.160, Florida Administrative Code (F.A.C.), Operation of Telecommunications Relay Service establishes the discounts which apply to intrastate toll calls received from the telecommunications relay service (TRS) and requires local exchange telecommunications companies to fund the discounts by imposing monthly surcharges on local exchange telecommunications company subscribers. Section (3) of the rule states "all local exchange telecommunications companies shall impose a monthly surcharge on all local exchange telecommunications company subscribers, excluding federal and state agencies, on an individual access line basis, except that such surcharge shall not be imposed on more than 25 basic telecommunications access lines per account bill rendered."

The draft rule would specifically add county agencies to the list of entities exempt from the section of the rule which requires the imposition of the monthly TRS surcharge.

Economic Analysis Showing Whether the Rule Is Likely to Have an Adverse Impact on Either Economic Growth or Business Competitiveness In Excess of \$1 Million Within 5 Years.

Subparagraph 120.541(2)(a)1, F.S., requires an economic analysis showing whether the draft rule directly or indirectly is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of \$1 million in the aggregate within 5 years after the implementation of the rule. Similarly, Section 120.541(2)(a)2 requires an economic analysis showing whether the draft rule directly or indirectly is likely to have an adverse impact on business competitiveness in excess of \$1 million in the aggregate within 5 years after the implementation of the rule. Since the intent of the rule is to eliminate the TRS surcharge to county agencies, economic growth, private job sector employment, private sector investment, and business competitiveness are not expected to be adversely impacted during the five year period following implementation.

Economic Analysis Showing Whether the Rule Is Likely to Increase Regulatory Costs In Excess of \$1 Million Within 5 Years

Subparagraph 120.541.(2)(a)3, F.S., requires an economic analysis showing whether the draft rule directly or indirectly is likely to increase regulatory cost, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after the implementation of the rule. Since the intent of the rule is to eliminate the TRS surcharge to county agencies, regulatory costs should decrease. The regulatory costs imposed on counties by telecommunications companies will be decreased when the county agencies are no longer billed the TRS surcharge. Not all local exchange telecommunications companies have been imposing the surcharge on county agencies in recent years. Local exchange telecommunications companies which bill and collect the surcharge from county agencies and remit the surcharge revenue to the Administrator are likely to incur reduced regulatory costs if the draft rule is enacted since these administrative activities would be eliminated.

Estimated Number of Entities Required to Comply and General Description of Individuals Affected

Subparagraph 120.541.(2)(b), F.S., requires a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals anticipated to be affected by the rule. The number of telecommunications companies which are required to comply with the rule as of November 22, 2011 included 10 incumbent local exchange companies (ILECs) and 301 competitive local exchange companies (CLECs).

On November 30, 2011, staff issued data requests to each of the ten ILECs and to ten CLECs. Responses were received from seven ILECs and six CLECs. In response to the data requests, the ILECs reported TRS surcharge collections from county agencies of \$6,498 in 2010. The CLECs reported TRS surcharge collections from county agencies of \$26 in 2010. The 2011-12 Florida Telecommunications Relay Service (FTRS) Budget includes total revenue of \$9,638,400. Based on the responses to staff's data request, it appears that the impact of the draft rule on TRS surcharge revenue is de minimus.

The draft rule's expected impact on hearing and/or visually impaired individuals in the state appears to be minimal or non-existent. The FTRS is fiscally sound, with a surplus of \$16,381,224 as of September 30, 2011. The elimination of the small amount of TRS revenue collected from county agencies under the current rule is not expected to have a significant impact on the viability of the fund to provide the relay services by FTRS to hearing and/or visually impaired individuals in the state.

Rule Implementation and Enforcement costs and Impact on Revenues For The Agency and Other State and Local Government Entities

Subparagraph 120.541(2)(c), F.S., requires a good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues. Since the draft rule would

eliminate the TRS surcharge on county agencies served by regulated companies, there is not expected to be any cost to the Commission of implementing and enforcing the draft rule change. TRS surcharge revenues are not subject to Regulatory Assessment Fees (RAFs), so Commission funding (revenues) would not be impacted by the draft rule change. Local government entities will only be advantaged by not having to pay the TRS surcharge.

Estimated Transactional Costs to Individual and Entities

Subparagraph 120.541(2)(d), F.S., requires a good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. Under the draft rule, local exchange companies would not be required to bill and collect the TRS surcharge from county agencies and remit the same (less 1 percent) to the FTRS, local government agencies would not be required to pay the surcharge to the companies, and the Commission would not be required to monitor the related billing, collecting, and remitting activities of the telecommunications companies related to the surcharge. Thus, transactional costs to individuals and entities would decrease rather than increase under the draft rule.

Impact On Small Businesses, Small Cities, Or Small Counties

Subparagraph 120.541.(2)(e), F.S., requires an analysis of the impact of the proposed changes on small businesses as defined by Section 288.703, F.S., and an analysis of the impact on small counties and small cities as defined in Section 120.52, F.S. The draft rule is expected to have no impact on small businesses. The elimination of the TRS surcharge on counties will reduce expenses to counties rather than impose additional expenses. Several of the larger telecommunication companies do not currently bill and collect the TRS surcharge from county agencies. The overall impact to counties is expected to be de minimus.

Additional Information Deemed Useful By The Agency

None.

cc: Braulio Baez
Beth Salak
Dale Mailhot
Marshall Willis