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Subject: Docket No. 120208 - FCTA's Comments of the FCTA on the Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc.

Attachments: Docket No. 120208 FCTA Comments.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact David Konuch at the number below. Thank you.

A. The person responsible for this electronic filing is:

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B. The docket title is: In Re: Docket No. 120208 – Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc.

C. This document is filed on behalf of the Florida Cable Telecommunications Association, Inc.

D. This document has a total of 15 pages.

E. Description of document: Comments of the Florida Cable Telecommunications Association on the Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc.

Thank you,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc.
_____/

Docket No. 120208

Date: February 4, 2013

COMMENTS OF THE FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION ON THE PETITION TO INITIATE RULEMAKING TO REVISE AND AMEND RULE 25-22.0365, F.A.C. BY COMPETITIVE CARRIERS OF THE SOUTH, INC.

Florida Cable Telecommunications Association, Inc. ("FCTA") hereby submits its comments on In re: Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc. ("CompSouth"), in response to the Commission Staff's request for comments at its November 15, 2012 Workshop.

INTRODUCTION AND BACKGROUND

FCTA represents cable telephony providers throughout the state of Florida who provide, by and large, the only facilities-based mass market telephony competition to Florida's incumbent local exchange companies ("ILECs"). FCTA members Atlantic Broadband, Advanced Cable, Bright House Networks, Comcast, Cox, and Mediacom in the aggregate serve nearly two million residential telephony customers in Florida. FCTA's member companies also provide video, Internet access, enterprise telephony and other services to millions of Floridians.

In this era of telecommunications deregulation, the Commission's ability to preserve a competitive marketplace serves as its main tool for ensuring quality, availability, and reasonable prices for telephony services provided by telecommunications companies over which the Commission possesses jurisdiction. Against this backdrop, CompSouth proposes

revisions to Rule 25-22.0365, designed to speed up the resolution of intercarrier disputes that could leave customers without service.

At the Workshop, parties explored the following issues, among others: Should the definition of "immediate and negative effect on a customer" proposed by CompSouth be further limited? How quickly should a "super expedited" dispute actually be resolved?[1] Should the prehearing officer have great discretion in determining whether to take a case on the expedited docket, or should there be limiting standards? Is a more expedited process, *i.e.*, one that would resolve complaints earlier than 120 days even needed?

Improving intercarrier dispute resolution will further the Commission's consumer protection mission. FCTA believes the expedited dispute resolution rules can – and should – be improved, but differ with CompSouth over the exact methodology. FCTA proposes the following:

- Rule 25-22.0365(3)'s pre-filed testimony requirement serves an important "gatekeeping" function and should be retained.
- The Commission should adopt clear standards for when expedited dispute resolution will be granted.
- The definition of "immediate and negative impact on a customer" should be narrowed by requiring the prehearing officer to ask whether the conduct results in the customer not receiving service, or a prospective customer is prevented from switching to a new provider as a result of the conduct. If the answer to either question is "yes," the "super expedited" treatment should be granted.

[1] FCTA suggests use of the term "super expedited" for proceedings lasting less than 120 days. The existing 120 day period already available under 25-22.0365 would be traditional "expedited."

- Any intercarrier dispute within the purview of 364.16 should be eligible for expedited dispute resolution; however, billing disputes should not be eligible for expedited treatment, unless they meet other anticompetitive criteria for intercarrier disputes under Section 364.16.
- The time limit for decision in "super expedited" proceedings should be 60 days from the pre-hearing officer's decision to take the case, which would be rendered 14 days after the initial pre-filing of testimony.
- Proposed language in the draft rule encouraging parties to "follow applicable terms" of their agreements is vague and should be deleted.

ANALYSIS

I. Rule 25-22.0365(3)'s Pre-filed Testimony Requirement Serves an Important "Gatekeeping" Function and Should Be Retained.

To obtain expedited treatment, Rule 25-22.0365 requires a complainant to file a request for expedited proceeding, along with direct testimony and exhibits and simultaneously serve same on the opposing party. Rule 25-22.0365(3). For non-expedited proceedings, a complainant need not pre-file testimony and exhibits. Rather, a complainant can file first and develop the evidentiary record later. Other than decision time, pre-filing represents the main difference between expedited and the traditional complaint process.

Under current law, pre-filing exists at the main check against potentially frivolous complaints against carriers. Absent the pre-filing requirement, with financial and customer service interests at stake, what provider would not choose to obtain a decision as quickly as possible? Absent the extra effort required by pre-filing, parties would have an incentive to seek expedited rulings for every dispute, rather than just the exceptional ones.

Expedited proceedings place extra demands on the decisionmakers and the parties because they must perform the same amount of work in a much shorter time. Therefore, parties should invoke the expedited process only in time-sensitive cases. The extra effort and expense of pre-filing ensures parties will invoke the expedited process sparingly.

The pre-filing requirement serves two important functions. First, pre-filing of testimony enables quick resolution of the dispute, because it enables the party filing the complaint to begin developing a record from the day of filing. This is essential to meeting the accelerated time limits contained in the rule. Second, the pre-filing requirement serves a "gatekeeping" function. It requires anyone seeking to invoke expedited rulemaking to expend some resources, rather than seeking to invoke the expedited process for every dispute. The pre-filing requirement makes it more likely that parties will only use the expedited process in exceptional cases. Accordingly, the Commission should retain Rule 25-22.0365's pre-filing requirement.

II. The Commission Should Adopt Clear Standards for When Expedited Dispute Resolution Will be Granted.

To date, the current expedited complaint process has never been successfully invoked. The reason may be that, no clear standards exist for its exercise. As a result, the expense of pre-filing may be wasted. With clear standards, pre-filing becomes a better bet for the complaining company, giving plaintiff and defendant more certainty. As a result, the existence of clear standards and a further expedited timeline could act as a further deterrent against anti-competitive conduct by providers.

Rule 25-22.0365 already enables parties to obtain Commission resolution of disputes within 120 days – more quickly than a typical, non-expedited complaint. CompSouth proposes to create a super expedited dispute resolution track, which would yield a decision in less than 120 days, for disputes involving an "immediate and negative effect on a

customer." Proposed rule p. 5, lines 3-6. That definition "includes, but is not necessarily limited to, any out-of-service or any impeded service condition which significantly hinders the customer's ability to utilize the service within design parameters." *Id.*

CompSouth's proposed definition of "immediate and negative effect on a customer," which "includes, but is not necessarily limited to, any out-of-service or any impeded service condition which significantly hinders the customer's ability to utilize the service within design parameters," can and should be more narrowly tailored. As it is the trigger for super expedited dispute resolution, *i.e.*, resolution in less than 120 days, it should be limited to instances where the customer is either out of service as a result of the dispute, or a prospective customer is prevented from switching to a new provider because of the dispute.

"Significantly hinders," especially when combined with "includ[ing] but not limited to" is broad language, and greatly expands the universe of disputes potentially eligible for expedited treatment. Requiring individual pre-hearing officers to determine whether an action "significantly hinders" a customer's ability to do something may be problematic, and not every decisionmaker may interpret this phrase the same way. "Significantly hinder" would require case law to aid in its interpretation. Yet, no such case law currently exists to guide decisionmakers. With no clear idea of the possible outcome, use of a vague term like "significantly hinder" makes the expense of pre-filing potentially a bad investment of resources.

Use of a broad, vague term could make it less likely that parties would seek expedited resolution, or make it less likely to be granted. In contrast, clear standards make it more likely that a case will be placed on the docket will deter anticompetitive conduct and brinkmanship. Parties who know unlawful conduct can be swiftly and formally addressed will be far less likely to engage in it.

A. Definition of "Immediate and negative impact on a customer" Should Be Narrowed By Requiring The Prehearing Officer to Ask Whether The Conduct Results in the Customer Not Receiving Service or Unable to Switch to a New Provider As a Result of the Conduct at Issue.

Rather than an untested definition, FCTA proposes clear standards for expedited proceedings. Specifically, as it is the trigger for super expedited dispute resolution, *i.e.*, resolution in less than 120 days, it should be limited to instances where the customer is either out of service as a result of the dispute, or a prospective customer is prevented from switching to a new provider because of the dispute.

The pre-hearing officer – who under current law decides whether a proceeding should be expedited, should answer the two questions above when presented with a request for expedited dispute resolution. If the answer to either question is "yes," then expedited treatment should be granted. FCTA has attached proposed draft rules for how the process might work as Exhibit 1 hereto.

Such a standard covers the most important competitive disputes, while excluding less time sensitive disputes. It would cover call blocking, an obvious candidate for expedited dispute resolution, as well as the 2008-09 OSS dispute between AT&T and CLECs, which resulted in numerous orders not going through and customers not being switched to new providers – which created chaos in the marketplace until the issues were corrected and demanded immediate attention by the parties and the Commission.[2] Moreover, such a standard is firmly grounded in the statute, as Ch. 364.16(6) provides that any dispute within "this section [364.16]" is eligible for expedited resolution.[3]

B. Any intercarrier dispute within the purview of 364.16 should be eligible for expedited dispute resolution.

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[2] Numerous filings in Docket No. 000121A-TP, relating to AT&T's April 2008 OSS software release, outline the history of that OSS dispute.

[3] The current proposed draft cites to 364.05(a)(3) as setting standards for what disputes can be expedited, but this section no longer exists. The legislature consolidated all intercarrier dispute provisions, including the former 364.05(a)(3) to Chapter 364.16 when it revised Chapter 364 during deregulation in 2011 with H.B. 1231.

Any intercarrier dispute within the purview of 364.16 should be eligible for expedited dispute resolution, and any dispute resulting in a customer outage or inability to switch to a new provider should be eligible for super expedited treatment. The Commission should have this tool, as resolution of intercarrier disputes is now the main way the Commission addresses price and service quality of providers as a result of deregulation. Moreover, the legislature in 2011 moved the expedited dispute resolution language into 364.16. The statute is very clear on this point and provides that, "Upon petition, the commission may conduct a limited or expedited proceeding to consider and act upon any matter under this section [364.16]." F.S. 364.16(6).

C. Billing Disputes Should Not Be Eligible For Super Expedited Treatment, Unless They Meet Other Anticompetitive Criteria For Intercarrier Disputes Under Section 364.16

However, a billing dispute should not be eligible for super expedited dispute resolution, unless it violates other provisions of Chapter 364.16. Thus, a dispute like the BHN-Verizon access charge dispute from a few years ago would involve a competitive issue, and not purely a billing dispute, so it would have been eligible for expedited resolution, as it called for an interpretation of Chapter 364 between two competitors requiring an interpretation of relevant statues. Because it did not result in customers failing to receive service, however, the Bright House Networks-Verizon dispute over access charges would not have qualified for super expedited, less than 120 day resolution.

In contrast, a dispute where company merely refuses to pay another customer and threatens to disconnect, or actually disconnects for non-payment, without raising issues of unfair competition or other issues pursuant to Chapter 364.16 would not be eligible for expedited treatment. The Commission's role is to resolve competitive disputes to ensure

fair competition. It is not a collection agency. Therefore, the Commission's scarce resources should be focused on resolving competitive disputes, and not purely collection matters.

III. The time limit for decision in "super expedited" proceedings should be 60 days from pre-hearing officer's decision to take the case, which would be rendered 14 days after the initial pre-filing of testimony.

CompSouth's proposal left blank the time limit for "super expedited" dispute resolution. At the workshop, no one weighed in with a specific proposal for how quickly a decision should be rendered. However, 60 days is the target time frame for decision under the FCC's "rocket docket," which shows resolving a dispute within that time is possible.[4] Sixty days also should be consistent with the Florida Administrative Procedure Act, which requires 14 days advance notice for a hearing.

The FCC's "rocket docket" calls for decision 60 days from the date that the FCC decides a dispute may be placed on the docket. Prior to that time, the FCC staff engages in mediation with the parties, and submission of data on the dispute. *See* 47 C.F.R. § 1.730(b). Without that preparation and mediation time, which the FCC expressly incorporated into its rules, *id.*, meeting the 60 day deadline would be difficult. Similarly, the 60 days for the Commission would be from the pre-filing of the testimony, and after the pre-hearing officer decides a dispute is eligible, as otherwise it would be too difficult for the parties and the Commission itself to make a decision within the time limit.

Current law requires parties to pre-file testimony, and the defendant to reply within 7 days. The prehearing officer should have 7 days to decide whether or not the case belongs

[4] 47 C.F.R. § 1.730 sets forth the FCC's accelerated complaint, *i.e.*, "rocket docket" rules. Like current rule 25-24.0365, the FCC's rule provides the Staff with discretion in setting a schedule for resolving disputes. 47 C.F.R. § 1.730(c). However, the FCC's web site states the accelerated docket "is designed to lead to a written staff-level decision within 60 days from the filing of the complaint." *See http://www.fcc.gov/encyclopedia/market-disputes-resolution-division*, visited Feb. 4, 2012. FCTA's undersigned counsel served as a mediator at the FCC's Enforcement Bureau during 1998-99 working on Accelerated Docket cases.

on the "super expedited" docket, *i.e.*, 7 days after pre-filing of the testimony. Because the pre-hearing officer will be applying clear, simple standards, seven days should be sufficient time to make a decision on whether to accept a case for expedited resolution.

IV. Proposed language in the draft rule encouraging parties to "follow applicable terms" of their agreements should be omitted from the final rule.

Proposed language on Page 5, lines 8-9 of the draft stating that parties are "encouraged to follow applicable terms of any agreements between the companies for dispute resolution" should not be included in the final rule. Several parties at the workshop appeared to agree that this language "encouraging" parties to follow "applicable terms" of agreements was vague and could be omitted from the final rule, and FCTA agrees with that approach.

CONCLUSION

Requiring the investment of pre-filed testimony and exhibits is essential to deter frivolous or non-time-sensitive expedited claims, and to ensure that the Commission has a sufficient record before it quickly enough to meet an "expedited" schedule. Narrowing the "super expedited" track to disputes where a customer is either out of service or cannot timely switch to a new provider ensures that the Commission can fulfill its most important function of ensuring a level playing field for competitors, and that only the most pressing disputes will be eligible for super expedited treatment. The 60 day time for decision is reasonable, as the FCC has shown it can be done through its own "rocket docket." In essence, for disputes where a customer is out of service, the time for decision and resolution would be cut in half from 120 days to 60 days. This will serve as a powerful incentive for

parties to resolve their dispute through a settlement, or if not, result in the quickest possible formal resolution of the dispute.

Respectfully submitted this 4th day of February, 2018.

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EXHIBIT 1

25-22.0365 Expedited Dispute Resolution Process for Telecommunications Companies.

(1) The purpose of this rule is to establish an expedited process for resolution of disputes between telecommunications companies ("companies").

(2) To be considered for an expedited proceeding, the companies involved in the dispute must have attempted to resolve their dispute informally.

(3) To initiate the expedited dispute resolution process, the complainant company must file with the Commission a request for expedited proceeding, direct testimony, and exhibits, and must simultaneously serve the filing on the other company involved in the dispute. The request for expedited proceeding is in lieu of the petition required by Rule 28-106.201, F.A.C. At least seven days prior to filing the request, the companies shall first conduct an informal meeting with the Commission staff for the purpose of discussing the matters in dispute, the positions of the parties, possible resolution of the dispute, any immediate customer-impacting effects from the dispute, any unique or exigent circumstances for the dispute, anticipated discovery needs, and anticipated case schedule. Any agreements resulting from such informal staff meeting will be in writing and, if deemed necessary by staff, approved by the Commission.

(4) The request for expedited proceeding must include:

(a) The name, address, telephone number, facsimile number and e-mail address of the complainant company and its representative to be served, if different from the company;

(b) A statement of the specific issue or issues to be litigated and the complainant company's position on the issue or issues;

(c) The relief requested;

(d) A statement attesting to the fact that the complainant company attempted to resolve the dispute informally; and

(e) An explanation of why the use of this expedited process is appropriate. The explanation of why use of the expedited process is appropriate shall include a discussion of the

following:

1. The number and complexity of the issues;

2. The policy implications that resolution of the dispute is expected to have, if any;

3. The topics on which the company plans to conduct discovery, including a description of the nature and quantity of information expected to be exchanged;

4. The specific measures taken to resolve the dispute informally; and

5. Any other matter the company believes relevant to determining whether the dispute is one suited for an expedited proceeding.

(5) Any petition for intervention shall provide the information required by paragraphs (4)(a)-(c) and (e) as it applies to the intervener.

(6) The request for expedited proceeding shall be dismissed if it does not substantially comply with the requirements of subsections (2), (3) and (4), above. The first dismissal shall be without prejudice.

(7) The respondent company may file a response to the request. The response must be filed within 14 days of the filing of the request for expedited proceeding.

(a) The response shall include the name, address, telephone number, facsimile number and e-mail address of the respondent and the respondent's representative to be served, if different from the respondent.

(b) The response to the request may include any information that the company believes will help the Prehearing Officer decide whether use of the expedited dispute resolution process is appropriate. Such information includes, but is not limited to:

1. The respondent's willingness to participate in this process;

2. Statement of the specific issue or issues to be litigated from the respondent's perspective, and the respondent's position on the issue or issues;

3. A discussion of the topics listed in subparagraphs (4)(b)-(e)1.-5. above.

(8) No sooner than 14 days after the filing of the request for expedited proceeding, but

promptly thereafter, the Prehearing Officer will decide whether use of the expedited proceeding is appropriate. The decision will be based on the factors provided in Section 364.058(3), Florida Statutes, the materials initially filed by the complainant company and, if a response is filed, the materials included in the response.

(9) Super Expedited Dispute Resolution Track. Disputes with an immediate and negative effect on a customer will be scheduled for hearing and disposition no later than 60 days after the Pre-hearing Officer determines a case is suitable for super expedited treatment. For purposes of this rule, an "immediate and negative effect on a customer" means that, as a result of the dispute, the customer is either a) out of service, such as would occur for example with call blocking or disruption in operations support systems; or b) the dispute prevents a prospective customer from switching to a new provider, such as a disruption in OSS or PC freeze that effectively prevents a customer from switching providers or failure to expeditiously port a customer's telephone number or account information.

(10) All Other Expedited Complaints. Unless otherwise provided by an order of the Prehearing Officer, based on the unique circumstances of the case, the schedule for all other expedited cases ~~case~~ will be as follows:

(a) Day 0 – request for expedited proceeding, direct testimony and exhibits are filed;

(b) Day 14 – deadline for filing a motion to dismiss, and a response to the request for expedited proceeding;

(c) Day 21 – deadline for filing a response to the motion to dismiss, if one is filed; and, deadline for filing petitions to intervene, and intervenor testimony and exhibits;

(d) Day 42 – deadline for the Commission staff to file testimony;

(e) Day 56 – deadline for the respondent to file rebuttal testimony.

(10) The Prehearing Officer shall decide whether post-hearing briefs will be filed or if closing arguments will be made in lieu of post-hearing briefs. In making this decision the

Prehearing Officer will consider such things as the number of parties, number of issues, complexity of issues, preferences of the parties, ~~and~~ the amount of testimony stipulated into the record, and the presence of any immediate and negative effects on a customer.

(11) The Commission shall make a decision on disputes involving an immediate and negative effect on a customer within 60 days of the Pre-hearing Officer's decision that a case is suitable for super expedited resolution. The Pre-Hearing Officer shall make his or her decision concerning suitability for super expedited treatment within 7 days of receipt of rebuttal briefs. For all other expedited proceedings, the Commission shall resolve the dispute within 120 days of the complainant company's filing of the request for expedited proceeding, direct testimony and exhibits.

(12) Responses to discovery requests shall be made within 15 days of service of the discovery requests, unless the Prehearing Officer decides otherwise based on the presence of any immediate and negative effects on a customer or the unique circumstances of the case.

(13) Service of all documents on the parties shall be by e-mail, facsimile or hand delivery. An additional copy shall be furnished by hand delivery, overnight mail or U.S. mail if the initial service was by e-mail or facsimile. Filing of all documents with the Commission shall be by hand delivery, overnight mail or any method of electronic filing authorized by the Commission.

(14) The applicability of this rule to the proceeding will be reassessed as factors affecting the complexity of the case, number of issues, ~~or~~ number of parties or immediate and negative effects on a customer change during the proceeding.

(15) Once the Prehearing Officer has determined that use of an expedited proceeding is appropriate, nothing in this rule shall prevent the Prehearing Officer from making a later determination that the case is no longer appropriate for an expedited proceeding based on the number of parties, number of issues or the complexity of the issues, or based on the removal of all immediate and negative effects on a customer. Nothing in this rule shall prevent the

Commission from initiating an expedited proceeding on its own motion.

Rulemaking Authority 350.127(2), 364.16(6) FS. Law Implemented 364.16~~(6)~~ FS. History–New 8-19-04, amended

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.