State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: January 6, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Banks, B. Keating)
Division of Competitive Markets & Enforcement (Simmons)

RE: Docket No. 000075-TP – Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.

AGENDA: 01/18/05 – Regular Agenda – Post-Hearing Decision – Participation Limited to Commissioners and Staff

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\000075.RCM.DOC

Case Background

On January 21, 2000, this docket was established to investigate the appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the federal Telecommunications Act of 1996 (the Act). A hearing was held on July 5, 2001, covering issues associated with non-ISP reciprocal compensation matters. On December 5, 2001, the Commission reached decisions on all but two issues, and for these, staff was directed to schedule a one-day hearing to gather more evidence. This supplemental hearing was held on May 8, 2002, and the Commission rendered decisions on the remaining two issues at the August 20, 2002 Agenda Conference. On September 10, 2002, the Final Order on Reciprocal Compensation was issued, then later amended by Order No. PSC-02-1248A-FOF-TP, issued on September 12, 2002. Several motions for reconsideration or, in the alternative, motions for stay pending appeal were filed on September 25, 2002. These motions were denied by Order No. PSC-03-0059-FOF-TP, issued January 8, 2003.

All ILECs except for BellSouth Telecommunications, Inc. filed appeals of Order No. PSC-02-1248-FOF-TP with the Supreme Court of Florida (the Court) regarding the Commission's decision establishing a default local calling area, to apply in the event parties cannot agree on this issue in negotiations for their interconnection agreement.[1] This issue was one of the two addressed at the supplemental hearing held on May 8, 2002. In addition, AT&T Communications of the Southern States, LLC and TCG South Florida filed a cross-appeal regarding the Commission's decision establishing qualifying criteria for a CLEC to be compensated at the tandem interconnection rate. On September 15, 2004, the Court affirmed the Commission's determination regarding compensation at the tandem interconnection rate, but remanded the case for further proceedings with respect to the default local calling area. The Court found that the record did not contain competent, substantial evidence that the Commission's choice of default, the originating carrier's retail local calling area, was the most competitively neutral option.

This recommendation addresses what action the Commission should take in response to the Court's remand. Staff believes that the Commission has jurisdiction to specify rates, terms, and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, the FCC's rules and orders, and Sections 364.161 and 364.162, Florida Statutes, so long as not otherwise inconsistent with the FCC rules and orders and the Act. Further, staff believes that Section 120.80 (13)(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act.

[1] Within the local calling area used for purposes of intercarrier compensation, reciprocal compensation rates apply for termination of calls. Outside the local calling area, access charges, which are significantly more expensive than reciprocal compensation rates, apply for termination of calls.

Discussion of Issues

Issue 1: Should the Commission eliminate the default local calling area established in Order No. PSC-02-1248-FOF-TP and close this docket?

Recommendation: Yes. **(SIMMONS, BANKS)**

Staff Analysis: As mentioned in the Case Background, the Supreme Court of Florida, per a decision issued September 15, 2004, remanded the case to the Commission for further proceedings with respect to the default local calling area. In its decision, the Court affirmed that the Commission had the jurisdiction to establish a default provision pursuant to state and federal law. However, while finding adequate support for the conclusion that the chosen default was administratively feasible, the Court found that there was not "competent, substantial evidence that it is the most competitively neutral option," and thus remanded this matter to the Commission. (2004 Fla. Lexis 1519, p. 30)

When the Commission considered the default local calling area issue at the August 20, 2002 Agenda Conference, staff presented two recommendations. The primary staff recommendation was not to designate a default local calling area, while the alternative staff recommendation was to establish the originating carrier's retail local calling area as the default. In reviewing the record at that time, most of the testimony focused on the options of using the ILEC's retail local calling area or the LATA as the default. There was limited testimony on the option of using the originating carrier's retail local calling area; however, this option seemed more competitively neutral than the other two choices. Neither primary nor alternative staff supported use of the ILEC's retail local calling area or the LATA, since the record demonstrated that both of these options were not competitively neutral. However, alternative staff believed that it was important for the Commission to establish a default local calling area for purposes of reciprocal compensation. At the time, there was concern that this issue was becoming too commonplace in arbitration cases filed with this Commission. For the sake of administrative efficiency, alternative staff favored setting a default.

The Commission approved the alternative staff recommendation, and this decision was memorialized in Order No. PSC-02-1248-FOF-TP, issued September 10, 2002. In this order, the Commission stated that there was a need to establish a default definition for the sake of efficiency, and that the chosen default should be as competitively neutral as possible, thereby encouraging negotiated solutions. The Commission selected the originating carrier's retail local calling area as the default local calling area for purposes of reciprocal compensation, on the basis that this option was more competitively neutral than the other alternatives presented. (Order No. PSC-02-1248-FOF-TP, pp. 53-55)

In view of the remand from the Court, the Commission must now revisit the matter. The Court ultimately concluded that while there was competent, substantial evidence to support the administrative feasibility of using the originating carrier's local calling area as the default, the Court also found that there was insufficient evidence to conclude that such a default was the

most competitively neutral option.[2] Given this finding, staff recommends that the Commission make a new determination based upon the existing record. Because the prior proceedings were extensive and yet did not result in sufficient clarity on this issue, staff suggests that further proceedings to address this issue would not be fruitful. Thus, based upon the existing record, staff recommends that the Commission find that there is insufficient record evidence to support any default. Staff notes, from a practical standpoint, that there no longer appears to be a compelling need for a default. Prior concerns that the issue of the applicable local calling area would continue to arise in arbitration cases in the absence of a default have proven to be unfounded.

For all of the above reasons, staff recommends that the Commission eliminate the default local calling area established in Order No. PSC-02-1248-FOF-TP and close this docket.

[2] The Court also found that there was competent, substantial evidence to support the Commission's finding that neither the use of the LATA-wide calling area, nor the use of the ILEC's local calling area as a default would be competitively neutral.