

State of Florida



Public Service Commission

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

DATE: March 27, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Miller, Cibula)
Division of Competitive Markets & Enforcement (Mailhot, Salak)

RE: Docket No. 080159-TP – Joint petition to initiate rulemaking to adopt new rule in Chapter 25-24, F.A.C., amend and repeal Rules in Chapter 25-4, F.A.C., and amend rules in Chapter 25-9, F.A.C., by Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Embarq Florida, Inc., Quincy Telephone Company d/b/a TDS Telecom, and Windstream Florida, Inc.

AGENDA: 04/08/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: April 14, 2008 (the Commission must grant or deny the petition by this date)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080159.RCM.DOC

Case Background

On March 14, 2008, Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida, Embarq Florida, Inc., Quincy Telephone Company d/b/a/ TDS Telecom and Windstream Florida, Inc., (jointly referred to herein as “Petitioners”) filed a petition to initiate rulemaking pursuant to Section 120.54(7), Florida Statutes (F.S.), and Rules 28-103.006 and 25-22.017(2), Florida Administrative Code (F.A.C.). The Petitioners request that the Commission initiate rulemaking to amend and repeal rules in Chapter 25-4, F.A.C., amend rules in Chapter

25-9, F.A.C., and adopt a new rule, “in order to update the Commission’s rules to reflect Florida’s highly competitive telecommunications market.”

Section 120.54(7), F.S., states that any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule. Staff notes that the Petitioners are all regulated by the Commission.

The Petitioners state that consumers will be better served by a regulatory environment that fosters continued investment in infrastructure and further development of technological innovations, while preserving important consumer safeguards. The Petitioners assert that, with the increasing use of wireless, cable telephony, and Voice over Internet Protocol (VoIP), many of the current rules are no longer warranted.

Specifically, the Petitioners state that technological innovations have enabled intermodal telecommunications technologies to provide multiple competing services using several different platforms (voice, video and data), resulting in increased choices for customers. They point out that several states¹ have made “necessary updates” to their telecommunications regulations.

The petition states that 99.8% of Florida households have access to at least two wireless carriers; 94% of Florida households are passed by cable systems; and 99.8% of households passed by cable systems can subscribe to broadband. “The intense intermodal competition that has developed in the Florida telecommunications industry calls for a reevaluation of industry regulation,” according to the petition.

The Petitioners state that the Commission has statutory authority to make the changes. The Petitioners cite to Section 364.01(4), F.S., which directs the Commission to encourage competition, and Section 120.74, F.S., which instructs all agencies to review their rules every two years to delete obsolete or unnecessary rules.

Section 120.54(7), F.S., requires that, in response to a petition to initiate rulemaking, “the agency shall initiate rulemaking proceedings under [Chapter 120], otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.” This recommendation addresses the Petition to Initiate Rulemaking. The Commission has jurisdiction pursuant to Sections 120.54 and 364.01, F.S.

¹ The Petitioners list Alabama, Mississippi, Indiana, North Carolina, Virginia and Texas.

Discussion of Issues

Issue 1: Should the Commission grant the Petition to Initiate Rulemaking filed by Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida, Embarq Florida, Inc., Quincy Telephone Company d/b/a/ TDS Telecom and Windstream Florida, Inc.?

Recommendation: Yes. The Commission should grant the Petition and Initiate Rulemaking. (Miller, Cibula, Salak, Mailhot)

Staff Analysis: Section 120.54(7)(a), F.S., requires a petitioner requesting the initiation of rulemaking to “specify the proposed rule and action requested.” In accordance with Section 120.54(7)(a), the Petitioners request that the Commission initiate rulemaking to: (1) adopt Rule 25-4.008, F.A.C.,² as set forth in Attachment A.; (2) amend Rules 25-4.017, 25-4.0174, 25-4.0175, 25-4.0178, 25-4.022, 25-4.034, 25-4.040, 25-4.067, 25-4.079, 25-9.034, and 25-9.044, F.A.C., as set forth in Attachment B; and (3) repeal Rules 25-4.006, 25-4.007, 25-4.019, 25-4.024, 25-4.039, 25-4.046, and 25-4.116, F.A.C., as set forth in Attachment C.

Request to Adopt Rule

Petitioners request that the Commission initiate rulemaking to adopt new Rule 25-4.008, F.A.C. The rule language proposed by Petitioners is appended to this recommendation as Attachment A.

Under the new rule, the Petitioners propose a test, which if met, would allow a telecommunications company to operate under “streamlined regulation,” as opposed to the Commission’s current rules. Specifically, if the telecommunications company demonstrates that two-thirds of its Florida access lines are in a competitive market, it will be allowed to operate under streamlined regulation. Petitioners point out that, under the proposed rule language, rate-of-return regulated telecommunications companies would not be eligible for streamlined regulation.

Subsection (1) of the proposed rule language states that the test to determine streamlined regulation would be based on a market defined, at the telecommunications company’s option, as a Metropolitan Statistical Area, an exchange, the company’s service territory, or such other basis as submitted by the company. The test to determine a competitive market would be: (a) the presence of at least three local service access alternatives (e.g. wireline, wireless, broadband, cable, or other technology) within the market; and (b) whether two-thirds or more of the households in the market have access to at least three different providers (the telecommunications company plus two other providers) using any local service access alternative. As stated above, companies meeting the test would be eligible for streamlined regulation.

² They refer to it as 25-24, F.A.C. However, staff has reviewed the rule and think it would fit best as new Rule 25-4.008, F.A.C., if adopted.

Subparagraph (3)(d) of the proposed rule language would allow substantially affected persons to protest the Commission's grant of streamlined regulation. Subparagraph (3)(d) also allows the telecommunications company to protest the Commission's denial of its application.

As set forth in subsection (4) of the proposed rule language, telecommunications companies qualifying for streamlined regulation would no longer be subject to 28 rules in Chapter 25-4, F.A.C.; 13 rules in Chapter 25-9, F.A.C.; and all the rules in Chapter 25-14, F.A.C. The Petitioners assert that requirements set forth in these rules "are not necessary or appropriate in a competitive telecommunications environment" and "should no longer be applied to that market or company."

In support of their request to initiate adoption of Rule 25-4.008, F.A.C., the Petitioners state:

Competition in Florida's telecommunications markets brings innovation, investment, choice, and quality services at market rates. Customers of telecommunications services are best served by competition where competitors are able to compete fairly without unnecessary regulatory constraints and requirements. Thus, where the appropriate "competitiveness" standard is met, competition will effectively discipline the market and the Commission should provide streamlined regulation.

They further state that the proposed rule should be adopted "to ensure that regulated telecommunications companies operating in competitive markets are not subject to more onerous or costly regulatory requirements than apply to competitive providers operating on intermodal platforms, such as wireless, cable telephony, or VoIP."

The petition includes an affidavit of William E. Taylor, Vice President of NERA Economic Consulting, Inc. He concludes that the competition tests in the proposed rule are economically sound and will benefit Florida telecommunications consumers. He states that, under the new rule, the Commission would apply the competition tests on a market-by-market basis to determine whether sufficient competition exists to streamline regulation by eliminating specific regulations. "These tests would ensure that no single competitor could exercise market power to the detriment of consumers or other competitors, so that rules whose justification depends upon the presence of market power would no longer be necessary." He urges that the telecommunications companies should be allowed to request streamlined regulation for any geographic area subject to competition. A Report by Dr. Taylor and Dr. Harold Ware on "Intermodal Competition in Florida Telecommunications" is also included in the petition.

Request to Amend Rules

As stated above, the Petitioners are also requesting that the Commission initiate rulemaking to amend a number of rules. The requested rules amendments are appended to this recommendation as Attachment B.

Petitioners request that Rules 25-4.017, 25-4.0174, 25-4.0175, 25-4.0178, and 25-9.044, F.A.C., be amended to reflect that the rules only apply to rate-of-return regulated local exchange telecommunications companies. The Petitioners state that it is not their intent “to change the impact of these rules, but merely to clarify the companies to which they apply.” Petitioners also request that Rules 25-4.022, 25-4.040, 25-4.067, 25-4.079, and 25-9.034, F.A.C., be “updated to eliminate unnecessary or obsolete phrases or to provide clarification.”

Request to Repeal Rules

Petitioners also request that the Commission initiate the repeal of a number of rules. The requested rule repeals are appended to this recommendation as Attachment C.

Petitioners state that Rule 25-4.006, F.A.C., should be deleted as obsolete because “the rule assumes only one certificate holder per territory, which is not the case in today’s telecommunications market.” They also state that Rule 25-4.007, F.A.C., which allows companies to apply to the Commission for an interpretation of its rules, should be repealed because it is preempted by Section 120.565, F.S., which governs requests for declaratory statements. Petitioners assert that Rules 25-4.019 and 25-4.116, F.A.C., should be deleted because they are simply a restatement of existing statutes.

Petitioners state that Rules 25-4.024, 25-4.039, and 25-4.046, F.A.C., should be repealed because, “in a competitive environment, the issues covered in such rules are best handled on a complaint basis.” In regard to Rule 25-4.046, the Petitioners acknowledge that “the Commission would continue to have oversight jurisdiction over cross-subsidization, predatory pricing or other similar anticompetitive behavior in accordance with Section 364.3381, F.S.”

Conclusion

There have been major changes in the telecommunications industry in the past several years, which may warrant exploration of changes to our rules. Thus, staff recommends that the Petition to Initiate Rulemaking should be granted.

Staff notes that granting the Petition to Initiate Rulemaking does not mean that the Commission is required to adopt, amend, and/or repeal the rules set forth in the Petition to Initiate Rulemaking. Nor does it mean the Commission will have to adopt the rule language proposed by the Petitioners. Initiation of rulemaking merely begins a process whereby the Commission, the Petitioners, and all other interested persons may submit input on whether and/or how the Commission should ultimately change its rules. Staff anticipates holding staff workshops initially to make sure we understand the impacts of the rule changes, the statutory basis, the implementation, and the impact on consumers, and then following up with Commission workshops. Staff will return at a later date with a recommendation on whether or not the Commission should propose the adoption, amendment, and/or repeal of the rules set forth in the Petition to Initiate Rulemaking.

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Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open to proceed with the rulemaking process. (Miller)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should remain open to proceed with the rulemaking process.