

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

April 4, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (HELTON) *Max DES*
DIVISION OF COMMUNICATIONS (GRISWOLD) *JS*
DIVISION OF ADMINISTRATION (SEWELL) *JM*

RE: DOCKET NO. 960191-TL - PETITION FOR DECLARATORY STATEMENT, OR ALTERNATIVELY, FOR WAIVER OF PENALTY IMPOSED FOR LATE PAYMENT OF REGULATORY ASSESSMENT FEES BY BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: 4/16/96 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\APP\WP\960191TL.RCM

CASE BACKGROUND

Pursuant to Sections 350.113(3) and 364.336, Florida Statutes, and Rule 25-4.0161(2), Florida Administrative Code, BellSouth Telecommunications, Inc.'s (BellSouth or the company's) regulatory assessment fee for the last six months of 1995 was due on January 30, 1996. However, BellSouth did not remit its fee to the Commission until January 31, 1996, which was one day late. According to the company, although a \$2,075,381.80 check was ready on January 30, the fee was not mailed or delivered due to "an unusually heavy workload" and "a number of illnesses that resulted in absences of office personnel." (Petition p. 2) On the morning of January 31, 1996, when it was discovered that the fee had not been filed, it was hand delivered to the Commission. By letter dated February 5, 1996, the Commission notified the company that since its regulatory assessment fee was late, penalty and interest in the amount of \$124,522.91 was due in accordance with Section 350.113(4), Florida Statutes.

DOCUMENT NUMBER-DATE

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On February 16, 1996, pursuant to Rule 25-22.036, Florida Administrative Code, BellSouth filed a Petition for Declaratory Statement, or Alternatively, for Waiver of Penalty concerning its regulatory assessment fee. BellSouth seeks a declaration that it "has 'substantially complied' with [Rule 25-4.0161] and that no penalty and assessment of interest is appropriate. Alternatively, BellSouth requests that the Commission find that any tardiness is excusable under the circumstances, and so minimal that it would be inequitable to assess a penalty" (Petition p. 5)

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's petition for declaratory statement?

RECOMMENDATION: Yes, the Commission should grant BellSouth's petition for declaratory statement, but should decline to make the declaration requested by BellSouth. Instead, the Commission should declare that under the facts and circumstances of this case BellSouth filed its regulatory assessment fee late and must pay the resulting penalty and interest mandated by statute and the Commission's rule.

STAFF ANALYSIS: Section 350.113(3), Florida Statutes, provides that "[e]ach regulated company under the jurisdiction of the commission . . . shall pay to the commission within 30 days following the end of each 6-month period . . ." a regulatory assessment fee. Section 364.336, Florida Statutes, establishes the maximum fee the Commission may charge and reiterates that it is due "within 30 days following the end of each 6-month period . . ." Furthermore, Rule 25-4.0161(2), Florida Administrative Code, and the regulatory assessment form incorporated into the rule by reference state that the fee is due each January 30 for the period July 1 through December 31 for the preceding year. Finally, the Commission complied with the requirement in Section 350.113(4) by notifying BellSouth of the due date at least 45 days prior to the fee being due.

In addition, Section 350.113(4), Florida Statutes, mandates that if a regulatory assessment fee is paid late, the Commission must charge a penalty plus interest:

If any regulated company fails to pay the required fee by such date, the commission shall estimate the amount of fee due from such information as it may be able to obtain from any source and shall add 5 percent of such amount to the fee as a penalty if the failure is for not more than

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30 days, with an additional 5 percent for each additional 30 days or fraction thereof during the time in which the failure continues, not to exceed a total penalty of 25 percent. The Commission shall collect the fee and penalty, plus interest and all costs of collection, from the regulated company. However, no penalty shall be added to the fee if a return is made and the fee is paid before the date fixed in the notice given by the commission.

(Emphasis added.) The Commission's Rule 25-4.0161(5) states "[t]he delinquency of any amount due to the Commission from the company pursuant to the provisions of s. 350.113, F.S., and this rule, begins with the first day after any date established as the due date either by operation of this rule or by an extension pursuant to this rule."

BellSouth argues that the facts here are similar to the facts before the Commission in In re: Request for ruling or, in the alternative, petition for declaratory statement or other appropriate action regarding penalty imposed by Florida Public Service Commission for late payment of regulatory assessment fees by GTE Florida Incorporated, Order No. PSC-95-0364-FOF-TL, 95 F.P.S.C. 3:429 (1995), amended by Order No. PSC-95-0364A-FOF-TL, 95 F.P.S.C. 4:1 (1995). However, the GTEFL decision involved very different circumstances. In that case, the regulatory assessment fee in question was due on a Saturday and GTEFL hand delivered it to the Commission the following Monday. The Commission found that GTEFL timely paid its fee. It reasoned "[t]he rule is silent as to the appropriate procedure when the due date falls on a Saturday. We believe that Rule 25-4.0161, F.A.C., permits a utility to file its regulatory assessment fee and report on the following Monday when the due date is a Saturday." 95 F.P.S.C. 4:2.

In the instant case, there is no question that the regulatory assessment fee was due Tuesday, January 30, 1996, and that BellSouth filed the fee one day late. Therefore, BellSouth's reliance on the GTEFL decision is unfounded.

The Company also argues that no penalty or interest should be assessed here because the "prompt remedying" of this "isolated incident" caused no damage. (Petition p. 4) BellSouth also asserts that "by hand-delivering the fee the morning of January 31, 1996, BellSouth ensured that the Commission received the fee earlier than it would have if BellSouth had postmarked and mailed it the day before (and, thereby, technically complied with the rule)." (Petition p. 4) According to the company, the \$124,522.91

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penalty and interest is "simply an inequitable amount for it to be penalized for a marginal tardiness in the filing of the fee."

The Commission, however, does not have the discretion to waive or decrease the penalty and interest assessed for the late payments of regulatory assessment fees. In re: Request for waiver of penalty and interest added to regulatory assessment fees for 1989, by St. George Island Utility Company, Ltd. in Franklin County, Order No. 24290, 91 F.P.S.C. 3:695, 696 (1991) ("Neither the Florida Statutes nor the Commission Rules provide the Commission with any discretion to waive fees, penalties or interest.") If the Legislature had intended for the Commission to have the discretion to waive penalties and interest, it would have specifically provided that authority as it has done for the Department of Revenue. Section 212.12(4), Florida Statutes.

Accordingly, staff recommends the Commission declare that under the facts and circumstances of this case, BellSouth filed its regulatory assessment fee late and must pay the penalty and interest required by Section 350.113(4), Florida Statutes, and Rule 25-4.0161(5), Florida Administrative Code.

ISSUE 2: Should the Commission waive the penalty assessed against BellSouth for paying its regulatory assessment fee one day late?

RECOMMENDATION: No. If the Commission accepts staff's recommendation in Issue 1, this issue is rendered moot.

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, it will have found that the Commission does not have the authority to waive penalties and interest when a regulated company inadvertently pays its regulatory assessment fee one day late. Therefore, BellSouth's request for the Commission to waive the penalty in this case would be rendered moot.

ISSUE 3: Should this docket be closed?

STAFF RECOMMENDATION: Yes, the docket should be closed after the Commission issues its order disposing of this matter and expiration of the time provided for reconsideration.

STAFF ANALYSIS: In declaratory statement proceedings the Commission may close the docket upon issuance of the order and expiration of the time provided for reconsideration.