

State of Florida



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** NOVEMBER 16, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYLOR)

**FROM:** DIVISION OF LEGAL SERVICES (FORDHAM) *C.L.F.*  
DIVISION OF COMPETITIVE SERVICES (KENNEDY) *REK*

**RE:** DOCKET NO. 990362-TI - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST GTE COMMUNICATIONS CORPORATION FOR APPARENT VIOLATION OF RULE 25-4.118, F.A.C., LOCAL, LOCAL TOLL, OR TOLL PROVIDER SELECTION.

**AGENDA:** NOVEMBER 28, 2000 - REGULAR AGENDA - MOTION FOR RECONSIDERATION OF ORDER OF PREHEARING OFFICER - PARTIES MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\990362R2.RCM

### CASE BACKGROUND

- November 23, 1995 - GTE Communications Corporation (GTE) received Certificate Number 4080 in order to operate as an interexchange telecommunications company in Florida.
- March 18, 1999 - Staff opened this docket to investigate apparent unauthorized carrier change complaints against GTE.
- May 26, 1999 - Staff met with GTE to discuss concerns with the number of consumer complaints being received about unauthorized carrier changes.

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FPSC-RECORDS/REPORTING

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- December 15, 1997 - September 30, 1999 - Commission staff received 209 complaints against GTE that have been determined to be apparent unauthorized carrier changes.
- November 23, 1999 - GTE submitted its settlement offer in lieu of proceeding with the show cause process.
- December 16, 1999 - GTE requested a deferral of its proposed settlement offer from the December 21, 1999 Agenda Conference in order to submit a revised settlement offer.
- December 16, 1999 - GTE submitted its revised settlement offer. (Attachment A, Pages 6-10)
- January 6, 2000 - Staff filed its recommendation to address GTE's revised settlement offer.
- January 14, 2000 - The Office of Public Counsel (OPC) filed a notice of intervention.
- January 18, 2000 - Staff requested this item be deferred from the January 18, 2000 Agenda Conference in order to allow OPC time to determine if it intended to pursue further action in this case as an intervenor.
- July 26, 2000 - This Commission issued a Notice of Proposed Agency Action Order approving a settlement offered by GTE.
- August 16, 2000 - OPC protested the Commission's PAA Order, and requested that this Docket be set for evidentiary hearing.
- October 6, 2000 - This Commission issued Order No. PSC-00-1835-PCO-TI establishing the procedure for the conduct of this Docket.
- October 16, 2000 - OPC filed a Motion for Reconsideration of Order Establishing Procedure. The Motion was timely filed.
- No responses to the Motion for Reconsideration were filed.

JURISDICTION

The Commission has jurisdiction under Section 364.285, Florida Statutes. Also, pursuant to Section 364.603, Florida Statutes, the Commission is authorized to promulgate rules to prevent the unauthorized changing of a subscriber's telecommunications service. Rule 25-4.118, Florida Administrative Code, was promulgated by the Commission setting forth the guidelines for toll provider selection and authorizing the Commission to enforce those guidelines.

DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant the Office of Public Counsel's Motion for Reconsideration of Order Establishing Procedure?

**RECOMMENDATION:** No. The Commission should deny the Office of Public Counsel's Motion for Reconsideration of Order Establishing Procedure. (FORDHAM)

**STAFF ANALYSIS:** The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

OPC has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. The Motion for Reconsideration is, actually, requesting that an issue be added which was not identified in its Protest. In fact, the sentence which OPC claims was omitted was never an operative part of the protested Order but, rather, only dicta,

expressing acknowledgment by GTE of the fact stated therein. An analysis of the PAA, the Protest and the Motion for Reconsideration finds little relationship between the three documents. Accordingly, it is recommended that the Motion for Reconsideration be denied.

On October 16, 2000, OPC filed a Motion for Reconsideration of Order Establishing Procedure. In its Motion, OPC argues that its August 16, 2000 Protest addressed only the portion of the PAA Order regarding the amount of the fine and that all other elements of the settlement offer in the PAA should remain binding on GTE. The specific provision of the PAA Order that OPC argues should remain binding is "GTE understands that acceptance of this settlement offer does not in any way preempt, preclude or resolve any matters under review by any other State agencies or departments." The preliminary issues contained in the Order Establishing Procedure are as follows:

1. (a) During the time period of December 15, 1997 through September 30 1999, did GTE Communications Corporation, (n/k/a Verizon Select Services, Inc.) willfully violate Rule 25-4.118, Florida Administrative Code, which prohibits unauthorized carrier changes?  
  
(b) If so, how many willful violations were there, and what is the appropriate action, penalty, and/or fine amount to be imposed by the Commission for any such violations?

As background, staff notes that the first paragraph of OPC's August 16, 2000 Protest of the PAA states:

Pursuant to Rules 25-22.029 and 28-106.201, Florida Administrative Code, the Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, file this petition to protest Proposed Agency Action Order No. PSC-00-1348-PAA-TI issued July 26, 2000, and request an evidentiary hearing under section 120.57, Florida Statutes (1999).

In the body of the Protest, OPC primarily addresses the amount of the fine, but nowhere within the document does it limit its protest to any specific portion of the Order. In its Protest, however, OPC does identify the following specific issues:

**DISPUTED ISSUES OF MATERIAL FACT, POLICY, AND LAW**

15. Petitioner submits the following disputed issues of material fact, policy, and law for resolution in a hearing conducted under section 120.57, Florida Statutes (1999):

a. Did GTE willfully violate rule 25-4.118, Florida Administrative Code, by changing the presubscribed interexchange carrier of customers without the customers' authorization?

b. If so, in how many instances did GTE willfully violate this rule?

c. Are there matters in extenuation or aggravation concerning these willful violations? If so, what are they?

d. What fine, if any, should the Commission impose for these willful violations of the Commission's rule?

In its Protest, OPC did not request that the language regarding other agencies' jurisdiction over matters under review be made an issue in the case. There was, in fact, no reference to the jurisdiction of other agencies anywhere within the Protest. Therefore, staff believes that the issues identified in the Order Establishing Procedure, identify all issues raised in the Protest.

Chapter 120.80(13)(b), Florida Statutes, provides:

Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed agency action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Since the requested language regarding other agencies' jurisdiction was not specifically identified, one could argue that under Chapter 120.80(13)(b), Florida Statutes, that matter is deemed stipulated. Accordingly, that issue may not now be raised for the first time in the Motion for Reconsideration. However, staff believes that no

argument can rise to this level of consideration because, as staff stated earlier, the statement appears to be dicta only.

Additionally, GTE's settlement offer contained the following provision: "This offer is made with the express understanding that staff will recommend that the Florida Public Service (FPSC) approve the settlement without modification at its December 21, 1999 agenda conference." (Emphasis added) Clearly, it was the intent of GTE that the settlement offer be accepted in its entirety, or not at all. This Commission did exactly what OPC requested and set the matter for an evidentiary hearing. The Protest stayed implementation of the entire PAA. The protest, thus, returns the docket to the posture it was in prior to the submission of the settlement offer. Therefore, staff believes that OPC has failed to show that the Commission made a mistake of fact or law.

Notwithstanding the preceding analysis, staff believes that this Commission may not appropriately make a finding regarding the legal standing of another governmental agency to take action against an entity over which that agency also otherwise has jurisdiction. So even had the issue been specifically identified in OPC's Protest, it is not one over which the Commission has any jurisdiction. So for all the reasons stated, staff recommends that OPC's Motion for Reconsideration be denied.

In paragraph 4 of the Motion for Reconsideration, OPC further requests, that in the event the Commission fails to reconsider and include in the Procedural Order the requested language, that it be made an issue in the case. Staff believes that "making it an issue in the case" would be tantamount to granting OPC's Motion and is not appropriate. The only issues which should be addressed in this docket are those relating to the rules violations which gave rise to the establishment of this docket.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. The Docket is presently set for hearing and should remain open pending the outcome of the hearing. (FORDHAM)

**STAFF ANALYSIS:** Based on the Protest filed by OPC, this docket was set for hearing. Accordingly, it should remain open pending the outcome of the hearing.