BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.	DOCKET NO. 030851-TP ORDER NO. PSC-04-0343-FOF-TP ISSUED: April 2, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING EXTENSION OF TIME TO FILE RESPONSE, DENYING AARP'S MOTION FOR RECONSIDERATION AND GRANTING INTERVENTION

BY THE COMMISSION:

I. Background

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. Unbundled network elements ("UNEs") are those portions of telephone networks that incumbent local exchange companies ("ILECs") must, under applicable federal law, make available to competitive local exchange companies ("CLECs"). In the TRO, as it relates to this docket, the FCC held that whether an ILEC must offer unbundled local circuit switching as a UNE depends upon whether a CLEC would, according to the guidelines established by the FCC, be impaired in the provision of its telecommunications services without such access. The TRO does not address the issue of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement those provisions of the TRO concerning whether and when CLECs are not impaired without access to unbundled local circuit switching.

On December 15, 2003, AARP (formerly known as American Association of Retired Persons) filed its petition to intervene in this docket. Shortly thereafter, Sprint Communications Limited Partnership and Sprint-Florida, Incorporated (collectively, "Sprint"), BellSouth Telecommunications, Inc. ("BellSouth"), and Verizon Florida, Inc. ("Verizon") each filed a separate response in opposition to AARP's petition on December 23, 2003. On January 2, 2004,

Order No. PSC-04-0008-PCO-TP was issued denying AARP's petition to intervene for lack of standing. The Prehearing Officer found AARP does not have standing to intervene in this docket, because AARP's alleged "injury in fact" is speculative and too remote to establish standing under the Agrico test, and AARP's interests are not the type of interests this proceeding is designed to protect.

On January 12, 2004, AARP filed its Motion for Reconsideration of Order No. PSC-04-0008-PCO-TP. On January 13, 2004, AARP filed a corrected copy of its January 12, 2004, motion. On January 16, 2004, BellSouth served its response in opposition to AARP's motion for reconsideration by e-mail on all parties. However, the response was apparently not properly filed. Upon being made aware of this error, BellSouth filed its Response, along with a Motion for Extension of Time to File Response in Opposition, on January 28, 2004.

This Order addresses BellSouth's Motion for Extension of Time and AARP's Motion for Reconsideration of the Order denying it intervention in this proceeding.

II. BellSouth's Motion for Extension of Time

A. Motion

BellSouth contends that no party has been prejudiced by its inadvertent failure to file its Response in Opposition, because it served all the parties, as well as staff counsel, with a copy of its Response by e-mail. BellSouth asks, therefore, that we grant the requested extension of time and consider its Response in Opposition when we address AARP's Motion for Reconsideration.

B. Decision

Upon consideration, we hereby grant BellSouth's Motion for Extension of Time. No party has been prejudiced by the untimely filing of BellSouth's Response. Not only was the pleading timely served on all parties by e-mail, but the delayed filing did not impair any party's ability to respond, because our rules do not contemplate any pleadings filed in reply to a response to a motion. Thus, we have considered BellSouth's Response in Opposition in rendering our decision on AARP's Motion for Reconsideration.

III. AARP's Motion

AARP argues that its members, as consumers of named parties in this docket, have a substantial interest in the outcome of this proceeding. Specifically, AARP states that its members as consumers, have an ". . . interest in seeing that local service competition is fully and fairly developed and that the consumer is intended to be benefited by the 'unbundling' of telecommunications services," and that this proceeding "generate[s] long-term benefits for all consumers." See AARP Motion at p. 6. AARP also cites to three provisions within the TRO that

it argues demonstrate that the FCC contemplated that the interests of consumers, such as those represented by AARP, will be represented and protected throughout these proceedings.[1]

In addition, AARP argues that it is due equal protection under the law and should not be ". . . held to a higher . . . standard than any of the many telecommunications companies granted party status." See AARP's Motion at pp. 1 and 7.

IV. Standard for Granting Motion for Reconsideration

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that we overlooked or failed to consider in rendering our Order. See 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. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958)). Also, 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). This standard is equally applicable to reconsideration of a Prehearing Officer's Order. See Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

V. Decision

Having fully considered AARP's motion for reconsideration and BellSouth's response to that motion, we deny AARP's motion. AARP has failed to identify a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering his Order.

Under Florida law, the purpose of a motion for reconsideration is not to reargue the entire case, but to bring to the attention of the decision-maker some mistake of fact or law in the decision in the first instance. See Diamond Cab, 146 So.2d at 891. In the case at hand, AARP fails to do so, and instead, reargues that its members, as well as other consumers, will be adversely affected as a result of this proceeding. This argument was specifically addressed in the underlying Order, wherein the Prehearing Officer concluded that AARP met neither prong of the test for standing set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981). We find no error in the Prehearing Officer's rationale or conclusion that AARP has not met the test for standing set forth in Agrico.[2] Thus, AARP's Motion for Reconsideration is denied.

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[1]Additionally, AARP argues that this docket is very similar to Docket Nos. 030867-TP, 030868-TP, and 030869-TP in which AARP was granted full party status.

[2] Likewise, we are not persuaded by AARP's equal protection argument. It is well-established that the Equal Protection Clause ". . .is essentially a direction that all persons similarly situated should be treated alike." Cleburne

Upon further consideration, however, we shall allow AARP to intervene in this proceeding. While we agree that AARP has not identified an error in the Prehearing Officer's application of the law to AARP's Petition, we find that in this somewhat unique proceeding AARP should be allowed to participate as a party. Thus, consistent with our authority under Section 120.52(12)(c), Florida Statutes, to allow intervention on a discretionary basis, AARP shall be granted full party status.

It is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Extension of Time to File Response in Opposition is granted. It is further

ORDERED that AARP's Motion for Reconsideration is denied. It is further

ORDERED that AARP is granted intervention in this docket. All parties to these proceedings shall furnish copies of all testimony, exhibits, pleadings and other documents that are hereinafter filed in these proceedings to:

Michael B. Twomey, Esquire
P.O. Box 5256
Tallahassee, FL 32314-5256
E-mail:miketwomey@talstar.com

It is further

ORDERED that in accordance with Rule 25-22.039, Florida Administrative Code, AARP takes the case as it finds it.

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v. Cleburne Living Center, Inc., 473 U.S. 432, 439; 87 L. Ed. 2d 313; 105 S.Ct. 3249 (1985); *citing* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415; 64 L.Ed. 989; 40 S.Ct. 560 (1920). In the case at hand, AARP is not similarly situated to other parties that had previously been granted intervention, because AARP is a non-profit organization that does not provide, or seek to provide, telecommunications services subject to state or federal law. Nevertheless, it is clear that the Prehearing Officer applied the appropriate standard of review to AARP's petition.

By ORDER of the Florida Public Service Commission this 2nd day of April, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

JLS/bk

Concurring Opinion

Commissioner Charles M. Davidson concurs in this decision to the extent set forth below:

While I agree with the majority's conclusion that AARP did not meet the standard for reconsideration of Order No. PSC-04-0008-PCO-TP, I am troubled by the decision to, nevertheless, allow AARP to intervene as a party. As I read Section 120.52(12)(c), Florida Statutes, if an agency intends to allow persons, who are not otherwise eligible, to intervene in agency proceedings, the agency must first establish rules to that effect. In the absence of such an agency rule, it is possible that we have exceeded our authority by allowing AARP to intervene in spite of our determination that AARP does not meet the requirements for intervention. I have an additional, lingering concern that our use of Section 120.52(12)(c), Florida Statutes, to allow intervention in this case may have unintended consequences for future cases and be misused outside the context of this unique proceeding. In light of our decision herein, I can only hope that my concern ultimately proves to be unfounded.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.