BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition and complaint of Harris Corporation against BellSouth Telecommunications, Inc. concerning complex inside wiring.	DOCKET NO. 951069-TL ORDER NO. PSC-97-0894-PCO-TL ISSUED: July 29, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION FOR STAY FILED BY BELLSOUTH TELECOMMUNICATIONS, INC.

BY THE COMMISSION:

A. Background

On September 7, 1995, the Harris Corporation (Harris) filed a Petition and Complaint against BellSouth Telecommunications, Inc. (BellSouth) alleging that BellSouth has been unlawfully charging for wiring on the Harris Semiconductor Complex. Harris requested an expedited proceeding for:

(a) the immediate termination of BellSouth Corporation's practice of charging Harris for inside wiring; and

(b) a refund of those charges unlawfully made, plus interest.

BellSouth filed its Answer to the Petition and Complaint on September 28, 1995. The hearing for this matter was scheduled for May 22, 1996. The parties stipulated to continuing the hearing and with the approval of the Chairman, the hearing was rescheduled to

August 2, 1996. On August 1, 1996, the parties filed a Joint Motion to Accept Stipulation of Facts and for Informal Hearing pursuant to Section 120.57(2), Florida Statutes. Based on the fact that the parties reached agreement on the material facts, and with the approval of the Chairman, the Prehearing Officer granted the Motion by Order No. PSC-96-0984-PCO-TL, issued on August 1, 1996. The parties were directed to file briefs of no more than sixty (60) pages and reply briefs of no more than thirty (30) pages on the following issues:

1. What is the proper legal characterization of the facilities in question?

2. Does/has BellSouth's treatment of these facilities violate(d) any FCC and/or FPSC rules or orders or any federal or Florida statutes?

3. Is the Petitioner entitled to relief? If so, what relief should be granted to the Petitioner?

After considering the briefs of the parties, and recommendations of staff, we issued Order No. PSC-97-0385-FOF-TL (Order) on April 7, 1997. We held that the facilities at issue are complex inside wire and that on a going forward basis, BellSouth could no longer charge Harris the tariffed rate for the use of the facilities. We also held that since it appeared BellSouth had not violated any Florida or Federal rules or regulations, BellSouth would not be required to refund charges previously assessed to Harris for the use of the facilities.

On April 18, 1997, Harris filed a Notice of Appeal of the Order. BellSouth filed a Motion for Stay of Order Pending Judicial Review with this Commission on May 2, 1997, and a Cross Appeal on May 5, 1997.

B. Rule 25-22.061(1)(a), Florida Administrative Code

First, BellSouth seeks a stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code. The Rule provides:

> When the Order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay will be conditioned upon

> the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

BellSouth asserts that the Commission's Order involves a decrease in rates. According to BellSouth, because the Order decreases the rates, it is not necessary to show that BellSouth is likely to prevail on the merits, that it has suffered irreparable harm or that the stay is not contrary to the public interest.

BellSouth argues that the Order mandates a decrease in charges to customers for intrasystem facilities, i.e., those connecting various buildings on a customer's side of a PBX. Prior to the Order, BellSouth states, BellSouth charged Harris approximately $2000.00 per month for the facilities. BellSouth states that other similarly situated customers pay comparable charges dependent on the facilities used. BellSouth argues "[t]he Order essentially mandates that BellSouth may no longer charge these customers for such facilities." BellSouth concludes that its rates for intrasystem facilities "have been decreased from the recurring charge corresponding to the number of lines the customer has, in Harris' case, $2,000.00 per month, to zero."

Harris argues that BellSouth is not entitled to a Stay under Rule 25-22.061(1)(a), Florida Administrative Code for several reasons. First, Harris argues the Final Order did not involve a reduction in rates. According to Harris, we did not order a rate reduction; rather, we ordered that a rate or charge be discontinued because it had been incorrectly applied and there no longer is any cost recovery justification for the imposition of a charge.

Second, Harris argues that BellSouth mischaracterizes the Final Order by arguing that the Order has general applicability, applies to all similarly situated customers who pay comparable charges for similar facilities and, therefore, "... essentially mandates that BellSouth may no longer charge these customers for such facilities." Harris argues BellSouth is wrong and that the Final Order is based on a specified set of facts, unique to Harris, and applies only to Harris.

Third, Harris argues that BellSouth's attempt to secure a stay under Rule 25-22.061(1)(a), Florida Administrative Code, is inconsistent with the intent and purpose of the Rule. Harris states that the Rule was promulgated at a time when BellSouth was subject to traditional rate base, rate of return regulation.

According to Harris, the rule has no application to the new BellSouth. Harris states that BellSouth elected price regulation under Chapter 364, Florida Statutes, effective January 1, 1996. Harris argues that by making that election, BellSouth gave up its right to maintain the protections available to a rate base, rate of return regulated utility. One of those protections, Harris asserts, is the right to a mandatory stay under Rule 25-22.061(1)(b), upon posting adequate security, where the Commission orders a rate reduction, a fact that is not present in the instant case.

Upon consideration we find that BellSouth's Motion pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, should be denied. We did not order a rate reduction to the subscriber body, as contemplated by Rule 25-22.061(1)(a), Florida Administrative Code; rather, we ordered the elimination of a charge that is no longer necessary and that supports our previous decision. We decided, by Order No. 20162, issued on October 13, 1988, to eliminate the lease charge on complex station lines on January 1, 1989 coinciding with the full recovery of Account 232, Station Connections. Once full recovery was achieved customers would be entitled to use the facilities free of charge. Since BellSouth did not transfer these facilities to Account 232, it is unclear from the record whether or not BellSouth recovered its investment in the facilities. Nevertheless, eight years have passed since recovery would have been achieved by booking these facilities to Account 232, and we recognized that BellSouth is continuing to recover its investment through normal accounting treatment as outside plant cables in Account 242.3. See Order No. PSC-97-0385-FOF-TL at pp 21 - 22. Thus, our decision balanced BellSouth's right to recover its investment in the facilities, and Harris' ability to use the facilities at issue free of charge once full recovery is achieved.

We note that this docket involves facts entirely different from those instances where we have ordered a utility to decrease certain rates for services it charges customers in general, under rate of return regulation. BellSouth argues that "... the Order mandates a decrease in charges to customers for intrasystem facilities, i.e., those connecting various buildings on a customer's side of a PBX." We disagree. This docket involves BellSouth charging one customer for the use of facilities that have been deregulated and where we, consistent with the FCC's actions, have found that the charge is no longer necessary. Further, we note that BellSouth's statement that its rates for intrasystem facilities have been decreased from the recurring charge

corresponding to the number of access lines the customer has, does not support its motion, particularly in view of the fact that there is no record evidence on the number of access lines involved. Based on the foregoing, we find that Rule 25-22.061(1)(a), Florida Administrative Code, is inapplicable, and deny BellSouth's Motion based on that Rule.

C. Rule 25-22.061(2), Florida Administrative Code

BellSouth seeks, in the alternative, a stay pursuant to Rule 25-22.061(2), Florida Administrative Code. That Rule provides:

> Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions or both. In determining whether to grant a stay, the Commission may, among other things, consider:
>
> (a) Whether the petitioner is likely to prevail on appeal;
> (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
> (c) Whether the delay will cause substantial harm or be contrary to the public interest.

BellSouth believes it will prevail on appeal for the following reasons: 1) the facilities in question were installed under regulation and remain under regulation; and 2) BellSouth is properly charging Harris for the use of the facilities under tariff. BellSouth argues that it will suffer irreparable harm if a stay is not granted because the Commission has essentially mandated that BellSouth provide the use of these facilities to Harris for free. According to BellSouth, it will not be able to recover its losses if our Order is eventually overturned. BellSouth argues the harm to the public if a stay is granted will be inconsequential.

BellSouth argues that it seeks to preserve the status quo pending appeal. BellSouth states that if a stay is granted, BellSouth will collect the monies involved subject to refund. If

the appeal is favorable to Harris, BellSouth will refund the monies involved. If a stay is not granted and BellSouth is vindicated on appeal, BellSouth argues that it will not be allowed to retroactively bill the customers involved even if the customers can be located. Thus, BellSouth concludes, there will be no harm caused to the customers involved or to the general public if a stay is granted.

Harris argues that the Commission should not issue a discretionary stay under Rule 25-22.061(2), Florida Administrative Code. According to Harris, BellSouth has failed to demonstrate that a stay is appropriate, much less necessary under the factors set forth in the Rule.

Harris takes issue with BellSouth's contention that BellSouth will prevail on appeal because the facilities in question were installed under regulation and remain under regulation. According to Harris, BellSouth's disagreement with our determination on this issue is irrelevant, and provides no basis for BellSouth's assertion that it will prevail on appeal.

Harris argues that we would be authorized under GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996), to retroactively impose the charges at issue on Harris should BellSouth prevail on appeal. Harris, therefore, concludes that BellSouth sustains no risk of harm by pursuing its appeal without a Commission ordered stay.

Harris concludes that we should not grant a stay of the Final Order. If, however a stay is granted, Harris argues that it must be conditioned on the posting of a bond or other adequate security to insure that Harris is held harmless in the event the Commission's order is affirmed according to Rule 25-22.061(2), Florida Administrative Code.

Upon consideration, we find BellSouth's Motion for a discretionary stay should also be denied. First, with respect to whether BellSouth is likely to prevail on appeal, BellSouth simply advances the same arguments it made during the Section 120.57(2), Florida Statutes, proceeding: 1) the facilities in question were installed under regulation and remain under regulation; and 2) BellSouth is properly charging Harris for the use of the facilities. Rule 25-22.061(2), Florida Administrative Code, provides that the Commission may consider those items enumerated therein when considering whether to grant a stay. BellSouth does not point to anything outside of its original assertions that would

assist this Commission in determining whether BellSouth is likely to prevail on appeal. BellSouth simply disagrees with our decision.

Second, with respect to whether the petitioner has demonstrated that he is likely to suffer irreparable harm, BellSouth states that the Commission has mandated that Harris be able to use the facilities free, and that BellSouth will not be able to recover its losses if the Commission's Order is overturned. We agree with Harris that we would be authorized under GTE Florida, Inc. v. Clark, 668 So.2d 971 (Fla. 1996), to retroactively impose the charges at issue on Harris should the Supreme Court determine that our Order is erroneous. Accordingly, we do not believe BellSouth will suffer irreparable harm.

Since BellSouth has not demonstrated that it will likely prevail on appeal, and it appears the company will not suffer irreparable harm, BellSouth's Motion for Stay filed pursuant to Rule 25-22.061(2), Florida Administrative Code is denied.

D. Bond Requirement

BellSouth argues that no bond should be required because granting a stay will not prejudice Harris or the general public. BellSouth asserts that Harris will not be prejudiced by a stay because it has appealed the Commission's Order, thereby indicating that it feels the Commission erred. Further, BellSouth asserts that it will collect the tariffed charges involved from Harris and other similarly situated customers in Florida subject to refund. Thus, BellSouth states, upon the ultimate determination of this matter, BellSouth can make the appropriate disposition of these funds.

Harris concludes that the Commission should not grant a stay of the Final Order. If, however a stay is granted, Harris argues that it must be conditioned on the posting of a bond or other adequate security according to Rule 25-22.061(1)(a), Florida Administrative Code.

We find that since we are denying BellSouth's Motion for Stay, we need not address BellSouth's arguments regarding a bond.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Motion for Stay filed by BellSouth Telecommunications, Inc. is denied. It is further

ORDERED that this docket shall remain open pending the outcome of the Supreme Court's decision on Harris Corporations' Appeal and BellSouth's Cross Appeal.

By ORDER of the Florida Public Service Commission, this 29th day of July, 1997.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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MMB

DISSENT: Commissioner J. Terry Deason dissents from the Commission's decision to deny the Motion for Stay filed by BellSouth Telecommunications, Inc.

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 Records and Reporting, 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 Records and reporting 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.