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Public Service Commission

August 5, 2003

VIA ELECTRONIC FILING

Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW - Portals II, TW-A325
Washington, DC 20554

Re: Docket No. 03-112, ClickQuick II, LLC, San Marion at Laguana Lakes, L.L.C. a/k/a Bear Lakes Associates, Ltd., and Villa Del Sol, L.L.C. a/d/a VDS Associates, Ltd. against BellSouth Telecommunications, Inc. First Amended Petition for Declaratory Ruling that the Location of the Demarcation Point Pursuant to 47 C.F.R. §68.105(d) (2) Preempts the Location of the Demarcation Point Pursuant to §25-4.0345(1)(B)(2) of the Florida Administrative Code

Dear Ms. Dortch:

Forwarded herewith are *Ex Parte* Reply Comments of the Florida Public Service Commission in the above referenced docket.

Should you have additional questions, please contact me at (850) 413-6082.

Sincerely,

/ s /

Cynthia B. Miller, Esquire
Office of Federal & Legislative Liaison

CBM:tys

cc: Chairman Michael Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan Adelstein

Brad Ramsay, NARUC
Terri Natoli
Jeremy Miller
Qualex International
Parties on FCC Service List

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
ClickQuick II, LLC, San Marion at)
Laguana Lakes, L.L.C. a/k/a Bear Lakes)
Associates, Ltd., and Villa Del Sol,)
L.L.C. a/d/a VDS Associates, Ltd.)
against BellSouth Telecommunications, Inc.)
First Amended Petition for Declaratory)
Ruling that the Location of the Demarcation)
Point Pursuant to 47 C.F.R. §68.105(d))
(2) Preempts the Location of the)
Demarcation Point Pursuant to)
§25-4.0345(1)(B)(2) of the Florida)
Administrative Code)

WC Docket No. 03-112

**FLORIDA PUBLIC SERVICE COMMISSION
EX PARTE REPLY COMMENTS**

The Florida Public Service Commission replies to the comments filed by AT&T Corp. and Smart Buildings Policy Project (AT&T), the Real Access Alliance (RAA), ClickQuick and BellSouth Telecommunications, Inc. (BST).

ClickQuick is not a Telecommunications Company and is not Entitled to Federal Telecommunications Act Treatment as a Telecommunications Company

The FPSC believes it is important to first note that ClickQuick, the petitioner, is not a telecommunications company as defined under Florida or Federal law. ClickQuick is an Internet Service provider. This is a critical threshold matter, because competitive protections of the Federal Telecommunications Act are not triggered; thus, the FCC has no need to preempt the FPSC rule.

According to AT&T, at page two of its comments, the Federal Communications Commission's (FCC) Minimum Point of Entry (MPOE) Rule promotes facilities-based local exchange competition. This argument is, however, flawed as it applies to the petition. The petition

is about a non-telecommunications company's efforts to invoke the FCC MPOE rule to gain access to wiring that has been installed by a telecommunications company, BST. This is somewhat analogous to a company being contracted to install doorbells in an apartment complex, and the company wanting to use the telephone wire that was installed at the expense of the telecommunications company to install the doorbells. The doorbell company certainly would gain from not having the expense of installing its own wiring, but there is no federal or state requirement that BST must allow this type of company access to the telecommunications wiring.

The FPSC Rule Does Not Thwart Competition

AT&T states on page two of its comments that the FCC rule on MPOE decreases reliance on local exchange providers (LECs) and enables competitive local exchange providers (CLECs), through arrangements with building owners, to install their own facilities, to lease, or to control the intrabuilding facilities of the building owner. The FPSC agrees with AT&T to the extent that any CLEC can enter into arrangements with the building owner and install its own facilities or lease facilities from the building owner. Yet, the FPSC rule does not preclude this type of arrangement. It only requires that the LEC be responsible for any wiring up to each tenant's premises when the LEC is providing the service to the subscriber.

The FPSC rule does not apply to CLECs. CLECs gain access to the same wire through interconnection agreements with the LECs. Therefore, AT&T has failed to demonstrate that the FPSC rule impedes competition. To the contrary, AT&T has demonstrated that if the MPOE rule were used in Florida, the building owner or CLEC, could control the wiring and preclude other carriers from accessing the building, which has occurred in Florida. This scenario clearly does not

promote competition.

ClickQuick, on page five of its reply comments, states that the FPSC notably did not give express or tacit approval of BellSouth's characterization of four twisted pairs of wires as a "Single Line" facility. We should clarify that under our rule the installation of multiple pairs of wires does not make the installation "multiline." Only when a PABX or key system is installed does the FPSC consider the installation as multiline. For multiline systems, the demarcation point under the Florida rule would be in the same room and within 25 feet of the common equipment (PABX or key system).

On page four of AT&T's reply comments, AT&T makes three allegations about the Florida rule. First, AT&T states that the rule allows the incumbent LEC to use its control over the on-premises wiring to frustrate competitive access to multi-tenant environments. Clearly, the Telecommunications Act of 1996, specifically Section 251, requires that the local exchange companies (LECs and CLECs) provide access to the network elements. Under the Florida rule, the wiring up to the subscriber's premises is considered network wire; therefore, access is available to competitors under Florida's rule. We agree with BellSouth in its reply comments, on page ten, that its wire is available pursuant to state-approved rates, terms, and conditions for network terminating wire as an unbundled sub-loop element.

Second, AT&T states that Florida's rule denies building owners their right to relocate the demarcation point to the MPOE. To date, no building owner has asked to relocate a demarcation point in Florida. The Florida rule has a provision that "for good cause shown" the commission can relocate the demarcation point. Therefore, we do not agree with AT&T's implication that the

building owner could never relocate the demarcation point to the MPOE. We interpret our rule to have flexibility.

Third, AT&T states that the Florida rule prevents customers from choosing alternative providers of their services. As previously stated, Section 251 of the Act prevents this and the Florida rule does not preclude a customer from choosing a provider of choice. However, if the wiring is made the responsibility of the premises owner, customers could be, and have been, precluded from having a choice of providers when using the MPOE method of demarcation.

On page four of its comments, RAA states that the effect of the Florida Rule and BellSouth's practice, is to delay entrance by competitors and increase costs to competitors, because competitors are forced to install a parallel set of wires on the premises. In some cases, the additional cost and delay may make it impractical for a competitor to serve a property. However, RAA does not explain what the additional costs to a competitor would be if it had to place its own facilities because the LEC no longer installed facilities beyond the MPOE. RAA further does not mention the delay in installations and repair if the wiring is the responsibility of the premises owner who will need to recover his costs from either the tenant or the telecommunications company wanting to serve the tenant. Either way, it adds costs of a third party to the service that currently does not exist under the FPSC rule.

The FPSC rule does not address ownership of the wiring. It only places the responsibility of insuring that the service ordered by the subscriber from the LEC is delivered to the subscriber and that the repair of the facilities is the responsibility of the LEC. Whether the LEC chooses to install its own facilities or lease facilities from a building owner or other provider is solely up to the LEC.

The FPSC does not mandate that the LEC own the wiring.

It appears that the crux of the petition by ClickQuick is ClickQuick's desire to be able to use wiring that belongs to BellSouth by invoking the FCC rule regarding telecommunications companies. Section 251 of the Telecommunications Act of 1996 states that "...in prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers; is consistent with the requirements of this section and the purposes of this part..." The FPSC approach is consistent with Section 251 through approving interconnection agreements between CLECs and LECs that establish access and interconnection obligations of the local exchange carriers. The FPSC demarcation rule is not inconsistent with Section 251 since it provides access for CLECs to the wiring in question through the interconnection agreement. However, the Act does not require LECs or CLECs to offer access to the wiring by non-telecommunications companies such as ClickQuick.

Thus, the FPSC rule does not negate competition in the telecommunications market. There is no need for the FCC to take any preemption action.¹

¹In National Association of Regulatory Utility Commission v. FCC, 88 F. 2d. 422 (D.C. Cir. 1989), the Court found that the FCC could preempt state regulation of the installation and maintenance of simple inside wiring, but only to the extent that such regulation negated the FCC's exercise of the lawful authority over intermediate communication service. The Court concluded, "[T]he only limit the Supreme Court has recognized on a State's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." The Court concluded that the FCC could preempt state regulation of the installation and maintenance of simple inside wiring only to the extent the regulation negates the federal policy of ensuring a competitive market in such services."

Conclusion

The FPSC urges the FCC to deny ClickQuick's petition and states in reply comments that:

- BellSouth is not required under federal or state law to provide competitive protection to a non-telecommunications company.
- The FPSC rule does not preclude access to the wire by competitive telecommunications companies and does not thwart competition.

Respectfully Submitted,

/ s /

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