BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company	DOCKET NO. 920260-TL ORDER NO. PSC-97-0642-FOF-TL ISSUED: June 4, 1997

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING IN PART AND DENYING IN PART BELLSOUTH TELECOMMUNICATIONS, INC.'s MOTION FOR RECONSIDERATION; AND DENYING PALM BEACH NEWSPAPERS, INC.'S MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

BY THE COMMISSION:

This docket was initiated by Order No. 25552 to conduct a full revenue requirements analysis and to evaluate the Rate Stabilization Plan under which BellSouth Telecommunications, Inc. (BST or the Company) had been operating since 1988. By Order No. PSC-94-0172-FOF-TL, issued February 11, 1994, the Commission approved a Stipulation and Agreement by the Office of Public Counsel (OPC), BST, and the other parties, and an Implementation Agreement for Portions of the Unspecified Rate Reductions in Stipulation and Agreement (collectively, the Settlement). The terms of the Settlement require, among other things, that rate reductions be made to certain of BST's services. Some of the reductions specified particular services. Other scheduled reductions were unspecified, and interested persons were permitted to submit their own proposals for disposition of the monies.

The Settlement called for a total reduction of $84 million in 1996. First, switched access rates were to be reduced to parity with January 11, 1994 interstate levels. The remainder was to constitute the last of the unspecified rate reductions required by

the Settlement and Implementation Agreement. Both were to be effective October 1, 1996.

At the time the Settlement was approved, the estimated 1996 revenue impact of the required switched access reduction was $35 million. This would have left $48 million for the unspecified reductions. By the time BST filed its tariffs on May 31, 1996 for the 1996 reductions, its demand forecasts showed a revenue impact of $40 million for the switched access reduction to interstate parity, thus leaving $44 million in unspecified reductions. The most recent demand forecast admitted as evidence in this proceeding, shows a 1996 impact of approximately $43 million for the switched access reductions. Therefore, approximately $41 million in additional rate reductions were approved by the Commission.

The required switched access reductions went into effect on a provisional basis, on October 1, 1996. (Order No. PSC-96-1244-FOF-TL) The remaining tariffs were suspended. A hearing was scheduled for October 30 and 31, 1996 to consider the various proposals for implementing the unspecified rate reductions. Testimony and exhibits were stipulated into the record, and cross examination was waived by the parties. On February 7, 1997, Order No. PSC-97-0128-FOF-TL, Order Requiring Switched Access and Other Rate Reductions, was issued. The Order permanently approved the Carrier Common Line switched access reductions provisionally implemented on October 1, 1996.

This Order addresses separate post-hearing pleadings filed by BellSouth Telecommunications, Inc. and Palm Beach Newspapers, Inc.

BST's Motion for Reconsideration

On February 24, 1997, BellSouth Telecommunications, Inc. filed a Motion for Reconsideration /Clarification of Order No. PSC-97-0128-FOF-TL. In the Order, the Commission required BST to eliminate the Residual Interconnection Charge (RIC). Based on information provided by BST in discovery and admitted as evidence in this proceeding, the revenue impact of the elimination was determined to be $34,312,104. In addition, a $3.3 million reduction to the Common Carrier Line (CCL) charge was ordered, plus other reductions, all of which were required to total $40.7 million per the requirements of the Stipulation.

BST contends, based on an updated, post-hearing forecast, the revenue impact of eliminating the RIC is $35,027,252, a difference

of $715,148. BST asks that the required reduction to the CCL charge be diminished by $715,048 to incorporate this updated forecast.

BST also seeks Reconsideration/Clarification of the prorated portion of the $40.7 million subject to refund. BST believes that the refund amount should be reduced by the portion of the $1.1 million ECS credit that was already in effect by October 1, 1996. This would reduce the refund amount by approximately $466,000. BST did not request Oral Argument on its Motion.

Several responses in opposition to the motion were filed.

On March 4, 1997, Sprint Communications Company, Limited Partnership (Sprint) filed a response opposing the Motion for Reconsideration/Clarification. As to the updated forecast of the revenue impact of eliminating the RIC, Sprint states:

> The "updated forecast" for the RIC, relied upon by BellSouth to argue for a reduction in the amount of its access reduction as ordered by the Commission, is not part of this record, has not been reviewed by the parties, has not withstood cross examination in order to determine its accuracy, and as far as Sprint can determine from BellSouth's motion, has not been submitted to the Commission. This "updated forecast", is nothing more than a self-serving vehicle created by BellSouth in order to reduce its CCL access reduction obligation, as required under the Commission's order, by $715,000.

Sprint's response does not address BST's request to reduce the refund amount to reflect credit for the ECS routes implemented before October 1, 1996.

On March 10, 1997, AT&T Communications of the Southern States, Inc. (AT&T) filed a response in opposition to BST's Motion for Reconsideration/Clarification. As to the updated forecast of the revenue impact of eliminating the RIC, AT&T states:

> This "updated forecast" is not in the record of this proceeding and, in fact, was prepared after the Commission issued its refund order. The Commission's rules do not provide parties an opportunity to supplement the record with additional post-hearing evidence, and the Commission may not rely upon such non-record evidence for purposes of reconsideration. A newly-hatched forecast does not constitute a point of fact or law which the Commission overlooked or failed to consider when determining the refund amount.

As to BST's request to reduce the refund amount to reflect credit for ECS routes implemented before 10-01-96, AT&T simply states: " This request wholly fails to meet the requisite legal standard for reconsideration and also must be rejected."

On March 10, 1997, the Florida Competitive Carriers Association (FCCA), formerly known as the Florida Interexchange Carriers Association (FIXCA), filed its response in opposition to BST's Motion for Reconsideration/Clarification. FCCA states:

> In this instance, BellSouth seeks reconsideration not because the Commission overlooked or did not consider certain facts or evidence, but because BellSouth wants to supplement the record with additional material not in evidence. Thus, BellSouth has clearly failed to meet the legal standard for a motion for reconsideration.

As to BST's request to reduce the refund amount to reflect credit for ECS routes implemented before October 1, 1996, FCCA states: "BellSouth's request as to the ECS credit brings no error of law or fact to light but simply expresses BellSouth's preference for a certain result. As such, it must be rejected as well."

The proper standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters which have already been considered.

After consideration, we find that BST's Motion for Reconsideration of the determination of the revenue impact associated with the elimination of the RIC should be denied. The "updated forecast" is not part of the record, has not been subject to cross-examination or argument, and has not been filed with the Commission. An extra-record, post-hearing, updated forecast is by definition, not "a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order."

The issue of adjusting the refund to reflect the revenue reduction associated with ECS routes implemented before October 1, 1996 is somewhat different. This adjustment was not considered in the calculation of the refund. Thus, as it stands now, BST has both implemented the ECS rate reductions prior to October 1, 1996, and has been required to refund approximately $446,000 associated with the ECS routes, for the period from October 1, 1996 through March 1, 1997.

The Settlement approved by Order No. PSC-94-0172-FOF-TL states in pertinent part: "In the event that the scheduled implementation date is delayed, the PARTIES agree that Southern Bell shall return the pro rata portion of the rate reduction in question for the period of such delay to Southern Bell's customer's in the manner set forth in Paragraph 10 of the Stipulation." Paragraph 10 of the Stipulation and Agreement provides for pro rata refunds in a specified manner.

The application of this provision in this situation leads us to conclude that refund amount should have been reduced by the revenue reduction associated with the ECS routes which had gone into effect prior to October 1, 1996. We believe the motion identifies a point of fact which was overlooked by the Commission in rendering the order. Accordingly, we find that BST's Motion for Reconsideration to reduce the refund amount by the portion of the $1.1 million ECS credit that was already in effect by October 1, 1996, should be granted. This will reduce the refund amount by approximately $446,000.

Since Order No. PSC-97-0128-FOF-TL required the refunds to be made during the March 1997 billing cycles, the refunds were completed before the Motion for Reconsideration was considered. Therefore, some alternative means for reflecting this adjustment would be necessary. However, on April 11, 1997, BST filed its required report detailing the calculation of the refund amount, as required by Rule 25-4.114, Florida Administrative Code. This report reflects that BST, on its own, and in contravention of the Commission's Order, reduced the refund amount by the pro rata credit for the ECS routes. Thus, BST has chosen to "make itself whole" by taking the credit prior to the Commission's decision on the matter. This apparent violation of the Commission's Order requires further investigation and may require further Commission action. Our decision to grant the Motion for Reconsideration be granted is not, and should not be construed as approval of, or assent to, BST's actions in opting to act without Commission authorization. In any event, no further adjustment is necessary to recognize the revenue reduction for the ECS routes implemented prior to October 1, 1996.

PBNI's Request for Oral Argument and Motion for Reconsideration

On February 24, 1997, Palm Beach Newspapers, Inc. (PBNI) filed a Motion for Reconsideration or in the Alternative, Petition for Relief from Unjust Rates and Inadequate Service. On that same date PBNI filed a Request for Oral Argument on its Motion for Reconsideration. Rule 25-22.058, Florida Administrative Code requires a movant to show "...with particularity why Oral Argument

would aid the Commission in comprehending and evaluating the issues before it."

In its request, PBNI lists three reasons why Oral Argument is appropriate:

> First, the primary basis of the motion for reconsideration is that the Commission overlooked or failed to consider PBNI's confidential post-hearing brief ("Confidential Brief"). The Confidential Brief explains in detail why PBNI's proposal will (a) have zero revenue effect on BST, (b) lessen exorbitant rates over time, and © serve the public interest by promoting the development of N11 services and products. Because the Confidential Brief is long and complex, oral argument will aid the Commission in comprehending and evaluating the arguments therein,
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> Second, in this proceeding no live testimony was taken; rather, all prefiled testimony and exhibits were stipulated into the record. Consequently the Commission has not had the opportunity to question any party about its position on the various proposals. Oral argument would provide the Commissioners that opportunity with respect to PBNI's proposal, and thus would aid the Commission in comprehending and evaluating the issue before it.
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> Third, as a customer of N11 service, PBNI's position in this proceeding is unique. PBNI subscribes to a monopoly non-basic service which will likely never be competitive. Like IXCs who depend on end-users reaching them through feature group access, PBNI depends on end-users reaching it through abbreviated dialing access. Oral argument would thus assist the Commissioners in understanding and evaluating two key aspects of PBNI's request for relief:
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> why competition (either facilities based or through resale) will not deliver more rationale pricing to N11 customers; and
>
> why PBNI and other N11 customers are and will remain captive customers dependent on the Commission for protection from exorbitant pricing.

On March 4, 1997, BellSouth Telecommunications, Inc. filed a response to the Request for Oral Argument. BST states that "PBN has failed to set forth a single compelling reason for the

Commission to entertain oral argument..." As to the purported failure to consider PBNI's brief, BST alleges:

> it is clear that the brief contains the same arguments that PBNI has advanced in its Motion. If it so chooses, the Commission can easily re-read the brief in deciding whether to grant PBN's Motion. Oral argument is not necessary for PBN to explain what it has already explained in its brief.

As to the absence of live testimony and cross-examination, BST states:

> PBN voluntarily waived its right to present oral testimony and cross-examine witnesses, just like all other parties. Simply because PBN may now believe that waiver of a hearing was not in its best interest does not warrant use of more Commission time to convince the Commission that it should change its mind on the N11 service issue.

BST alleges that PBN's argument that competition will not deliver more rational pricing to N11 customers is not a sufficient reason to grant oral argument. BST notes that the Commission's order reached a different conclusion with respect to the possibility of competitive provisioning for N11 service.

In the instant case, we believe the issues, responses to, and legal arguments concerning Palm Beach Newspapers, Inc.'s Motion for Reconsideration are ably presented by the parties in their pleadings. The issues are clearly delineated in those pleadings, and in the record. We do not believe that oral argument would aid the Commission in comprehending and evaluating the issues before it. Therefore, we find that PBNI's Request for Oral Argument on its Motion for Reconsideration should be denied.

In its Motion for Reconsideration, PBNI states: "The Commission's Order did not discuss, note, mention, recognize, or otherwise acknowledge the arguments PBNI advanced in its confidential post-hearing brief." The motion further states "Only PBNI's Confidential Brief presents to the Commission information critical to judging PBNI's case."

The current N11 tariff calls for a monthly minimum charge of $3300 in a Tier 1 calling area; after the monthly minimum is met, additional calls would be charged at $.02 per minute with a five minute minimum. In this docket, PBNI proposed to change the

charges so that the N11 customer pays a rate of $0.01 per minute or the current monthly minimum, whichever is greater.

On March 4, 1997, BST filed a response to PBNI's Motion for Reconsideration. BST states "PBN's Motion for Reconsideration reflects that PBN simply disagrees with the result reached by the Commission. Beyond curiously attributing the unwanted result to the Commission's 'failure' to consider PBN's post-hearing brief, PBN has identified no point of fact or law that the Commission failed to address when considering PBN's position in this matter." BST states it

> knows of no requirement compelling the Commission to affirmatively state in its Orders that it has read the briefs of any party. What is clear from the record, however, is that the Commission did consider the record evidence proffered by PBN at the hearing on each issue raised by it in its Motion for Reconsideration."

On March 10, 1997, AT&T Communications of the Southern States, Inc. (AT&T) filed a response to PBNI's Motion for Reconsideration. AT&T states:

> Based upon PBNI's assertion that granting its motion will have no revenue effect on BellSouth, and therefore will not decrease the amount of the rate reductions or alter the disposition of the reductions determined in Order No. PSC-97-0128-FOF-TL, AT&T does not object to the motion.
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> No other responses to the Motion were filed.

As noted, the core issue in PBNI's Motion goes to what it perceives as the failure to consider the arguments advanced by PBNI in its confidential post-hearing brief. In its brief, PBNI focused almost solely on its cost argument, one of several arguments originally addressed in PBNI witness Freeman's testimony. The brief did a fairly extensive analysis of the revenue to cost relationship of N11 Service using data supplied by BST in this proceeding. In the brief, PBNI drew several conclusions, not all of which were supported by evidence in the record. The main conclusion drawn from that analysis was that the subscriber's average cost per message was so high as to be contrary to the public interest because it chills the development of abbreviated dialing local information services which the Commission had previously found to be in the public interest. (PBNI Brief, p. 6) Mr. Freeman stated in his direct testimony that although some market for N11 exists, the market will never reach its full

potential unless "proper pricing signals" via cost-based rates are put in place.

BST witness Varner had noted, however, that there had been 51 requests for N11 codes since the service was instituted, and that there were waiting lists for the codes in the major market areas. As noted in the order, witness Freeman presented no evidence that there is demand for the service in the smaller market areas at any price. In sum, the larger markets (Tier 1) with the highest rates have waiting lists for N11 codes, yet those rates were the subject of PBNI's analysis in its brief. That is, PBNI developed average price per minute data based on Tier 1 prices, and compared it to average cost data, showing substantial contribution levels. PBNI argued that the market would not develop fully for that reason, yet there was record evidence that there were waiting lists for N11 Service in those large markets. In its brief, PBNI did not specifically address the smaller markets (Tiers 2-4) that have no waiting lists, even with the substantially lower rates.

We believe that all the evidence put forth by PBNI in this proceeding was fully considered. We disagree that we failed to consider the arguments presented in PBNI's brief. We were simply was not persuaded by them. Our decision took into consideration more than just the revenue to cost relationships, and made decision on PBNI's proposal based on other factors as discussed in the Order. We concluded, that it was not appropriate to reduce N11 rates in this proceeding, noting that there are alternatives to N11 Service and that BST would be required to resell its N11 Service if such were requested by an ALEC.

A brief is the argument of counsel, not evidence. PBNI's argument that the importance or weight of the brief increases because there was no actual hearing is without merit. Cross-examination was waived by the consent of all the parties. If PBNI had evidence it wished to present to the Commission at hearing, it should not have agreed to waive cross examination. Several parties developed cost data in their cases, yet PBNI was the only party to request reconsideration because it did not have an opportunity to present its case at hearing. We disagree with PBNI that this is reversible error. We specifically found that "it is not appropriate to use the funds at issue in this proceeding to reduce N11 Service usage rates." Order at p. 27.

The proper standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA

1981). In a motion for reconsideration, it is not appropriate to reargue matters which have already been considered. In the instant case, PBNI has not identified any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-97-0128-FOF-TL. PBNI's motion is therefore, denied.

PBNI's Alternative Petition for Relief from Unjust Rates

PBNI filed with its Motion for Reconsideration an Alternative Petition for Relief from Unjust Rates. The Petition states: "If the Commission declines to reconsider its decision with respect to PBNI's proposal in this docket, PBNI in the alternative petitions the Commission for relief from unjust rates and inadequate service pursuant to Section 364.051, Florida Statutes." PBNI asks that the Commission open a new docket and "move into the new docket from Docket No. 920260-TL Exhibits 22 and 23" and "PBNI's Confidential Brief." PBNI seeks relief from the current rates for its N11 Service. PBNI bases its claim on Section 364.051(6)(a), Florida Statutes, which provides in part "...the local exchange telecommunications shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers."

PBNI also claims as a basis for relief, Section 364.051(6)(b), Florida Statutes, which states in pertinent part:

> (b) The commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market . . . .

PBNI submits that to state a claim for relief under Section 364.051(6), a petitioner must allege the following elements:

(a) it is being subjected to an anticompetitive act or practice; or

(b) it is being subject to unreasonable discrimination in comparison to similarly situated customers; or

© it is being subject to inadequate service; or

(d) as a provider, it is being treated unfairly in the telecommunications market.

and that granting the requested relief is in the public interest.

PBNI then describes in detail the genesis of N11 service and the factual basis for its claims.

On March 4, 1997, BellSouth Telecommunications, filed a Response to PBNI's petition. BellSouth "denies every allegation stating or implying that BellSouth's pricing and provisioning of N11 service violate any prohibition in Section 364.051(6)(a) or (b). BellSouth further denies that its N11 service is anticompetitive, discriminatory, inadequate or offered at exorbitant rates." BellSouth asks that the Complaint be dismissed, but does not say that the Commission lacks jurisdiction to consider all of PBNI's claims.

The acceptance of a petition for filing with the Commission is a ministerial act that does not require Commission approval. It will be processed like any other petition. No Commission action is necessary. Similarly, "Moving" documents into a docket, i.e. exhibits and a brief, is not an action that requires a Commission decision at this time, if at all. We assume that by this use of the term "Moving into the docket," PBNI means presenting the documents for consideration in the docket. There are procedures in place to protect the rights of all interested persons and the confidentiality of the documents available to PBNI in presenting information for consideration in a docket. No Commission action is necessary at this point to enable PBNI to present information for consideration in the docket. Therefore, we find that No Commission action is necessary at this time with respect to PBNI's Alternative petition for Relief From Unjust Rates. It will be processed like any other petition.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion For Reconsideration is granted to the extent that credit for the ECS routes implemented before October 1, 1996, shall be reflected in the calculation of the refund amount. It is further

ORDERED that BellSouth Telecommunication's Motion for Reconsideration of the revenue impact of eliminating the Residual Interconnection Charge is denied. It is further

ORDERED that Palm Beach Newspapers, Inc.'s Request for Oral Argument is denied. It is further

Ordered that Palm Beach Newspapers, Inc.'s Motion for Reconsideration is denied. It is further

ORDERED that no action is necessary at this time with respect to Palm Beach Newspapers Inc.'s Alternative Petition for Relief from Unjust Rates. It will be processed like any other petition. It is further

ORDERED that this docket shall remain open pending audit and determination of the 1996 and 1997 sharing amounts.

By ORDER of the Florida Public Service Commission, this 4th day of June, 1997.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.