

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into
pricing of unbundled network
elements (BellSouth track).

DOCKET NO. 990649A-TP
ORDER NO. PSC-02-1200-FOF-TP
ISSUED: September 4, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

ORDER ON PETITION FOR INTERIM RATES

BY THE COMMISSION:

I. Background

Pursuant to the federal Telecommunications Act of 1996 (Act), the Federal Communications Commission (FCC) implemented its pricing rules which require that state commissions establish unbundled network element (UNE) rates. On December 10, 1998, a group of carriers, collectively called the Competitive Carriers, filed their Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that this Commission set deaveraged UNE rates. The petition was addressed in Docket No. 981834-TP.

On May 26, 1999, this Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part the Competitive Carriers' petition. Specifically, we granted the request to open a generic UNE pricing docket for the three major incumbent local exchange providers, BellSouth Telecommunications, Inc. (BellSouth), Sprint-Florida, Incorporated (Sprint), and GTE Florida Incorporated (GTEFL, now Verizon). Accordingly, Docket No. 990649-TP was opened to address the deaveraged pricing of UNEs, as well as the pricing of UNE combinations and nonrecurring charges.

Subsequently, by Order No. PSC-01-2132-PCO-TP, this docket was divided into sub-dockets in an effort to alleviate confusion as to whether filings are intended for the BellSouth track of this Docket

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or the Sprint/Verizon track of this Docket. Filings directed towards the BellSouth track would be placed into 990649A-TP, and filings directed towards the Sprint/Verizon track would be placed into 990649B-TP.

On May 25, 2001, we issued our Final Order on Rates for Unbundled Network Elements Provided by BellSouth, Order No. PSC-01-1181-FOF-TP. The Order addressed the appropriate methodology, assumptions, and inputs for establishing rates for unbundled network elements for BellSouth. We ordered that the identified elements and subloop elements be unbundled for the purpose of setting prices, and that access to those subloop elements should be provided. We also determined that the inclusion of non-recurring costs in recurring rates should be considered where the resulting level of non-recurring charges would constitute a barrier to entry. In addition, we defined xDSL-capable loops, and found that a cost study addressing such loops may make distinctions based upon loop length. We then set forth the UNE rates, and held that they would become effective when existing interconnection agreements are amended to incorporate the approved rates, and those agreements become effective.

Of significance to this decision, we ordered BellSouth to file, within 120 days of the issuance of the Order, a cost study for hybrid copper/fiber xDSL-capable loops and revisions to its cost studies for network interface devices (NIDs). BellSouth was also ordered to file a "bottoms-up" loop cost study, explicitly modeling engineering, structures and cable installation. Finally, BellSouth was directed to submit a study of an SL1 loop that excluded a design layout record and a test point, but would be guaranteed not to be converted to alternate facilities. The Company has provided a cost study for a new loop type, the Unbundled Copper Loop-Nondesignated (UCL-ND) to satisfy these requirements.

Subsequent to the issuance of Order No. PSC-01-1181-FOF-TP, BellSouth determined, through proceedings in other states, that changes were needed to the inputs for the Daily Usage Files (DUF) cost studies. As a result, that issue has been incorporated into this proceeding as well.

On September 24, 2001, BellSouth filed the revisions to its cost studies in response to Order No. PSC-01-1181-FOF-TP. On October 8, 2001, BellSouth filed revisions to the cost study to reflect those changes necessary as a result of this Commission's decision on reconsideration, reflected in Order No. PSC-01-2051-FOF-TP.

On November 2, 2001, BellSouth again filed revised cost studies, to update Daily Usage File (DUF) information.

Parties filed a number of requests for extensions to file testimony and discovery responses. Additionally, on January 28, 2002, two days before the scheduled hearing, BellSouth refiled its cost study. As a result, the hearing was postponed and was held on March 11 and 12, 2002.

On June 13, 2002, we considered our staff's recommendation on this matter at a Special Agenda Conference. At that Agenda, we expressed concern that the recommended rates, even incorporating input changes suggested by our staff, still appeared to be too high to provide a meaningful incentive for local telecommunications competition in Florida, which we have been statutorily mandated by the Legislature to foster for the benefit of Florida consumers.¹ Consequently, this Commission voted to hold further consideration of this matter in abeyance for a period of 60 days from June 13, 2002, the date of our consideration of this matter. This decision was based on the belief that a negotiated resolution is in the best interest of the parties and Florida consumers, because the parties are in the best position to determine the needs of their respective businesses. Accordingly, by Order No. PSC-02-0841-PCO-TP, issued June 19, 2002, the parties were required to discuss a negotiated resolution of UNE rates in Florida during the 60-day period.

The parties were unable to negotiate a mutually agreeable resolution of this matter. On August 22, 2002, AT&T Communications of the Southern States, LLC, (AT&T) filed its Petition for Interim Rates. On August 26, 2002, our staff filed a recommendation addressing the matters at issue in BellSouth's 120-day filing. On

¹See Section 364.01, Florida Statutes.

that same day, BellSouth filed its response to AT&T's Petition. This Order addresses only AT&T's Petition for Interim Rates.

At our September 3, 2002, Agenda Conference, at which we considered AT&T's Petition, we decided not to hear oral argument from the parties, because no request for oral argument was filed in accordance with Rule 25-22.058, Florida Administrative Code.

II. Petition

As stated in the Case Background, we set permanent rates for UNEs by our Final Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, in this docket. However, in addition to ordering final rates, this Commission also requested that BellSouth make a filing in 120 days to revise certain portions of its cost studies regarding its loops, to model cable and structures engineering and installation using a "bottoms up" approach. After a hearing on BellSouth's 120 day filing, a recommendation was filed by our staff for our consideration at the June 13, 2002, Agenda Conference. At the June 13, 2002, Agenda Conference, we decided to hold the proceedings in abeyance for 60 days to give the parties the opportunity to negotiate rates. Currently, a special agenda conference is scheduled for September 6, 2002, to consider the issues associated with BellSouth's 120-day filing.

In its Petition for Interim Rates, AT&T requests that this Commission establish interim UNE rates at the level recommended by AT&T and WorldCom in the 120-day phase of this docket. Further, AT&T asks that once interim rates are established that we should:

- 1) Consider other factors affecting the current market place in Florida and/or other incentives for BellSouth to reduce wholesale rates.
- 2) Require BellSouth to file the data, assumptions, input values, and revisions to its cost study consistent with the "bottoms up" approach previously ordered by the Commission in Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, in this docket.
- 3) Consider additional evidence and/or re-examine evidence on rates for loops and the UNE Platform.

Petition at pp. 9-10.

AT&T also argues that Florida's UNE rates are too high and that the rates proposed by it and WorldCom in this phase of the proceeding should be adopted as interim rates. However, we have yet to make a final determination on whether any rates proposed in this phase of the proceeding should be adopted, including the rates requested by AT&T and WorldCom.

AT&T also quotes Chairman Jaber's statement "[a]nd I think philosophically if I ever expect to have competition in the local telecommunications market, then I've got to recognize that UNE prices cannot be higher in some areas than BellSouth's retail offerings" to support its position that UNE prices must go down and that they cannot be higher than BellSouth's retail rates. Petition p. 3; Agenda Transcript, June 13, 2002, p. 7. However, the Chairman's comment was made in the context of encouraging the parties to negotiate UNE prices. The Chairman also clearly recognized that many factors go into the development of a competitive market, and that this Commission's ultimate decision on UNE prices would need to be based on the record, if the parties were unable to reach agreement during the negotiation period -- which they did not. Nothing, however, precludes our use of the philosophy expressed at the June 13th Agenda Conference from being applied to the record in this matter at the upcoming September 6th Agenda Conference.

In its Response, BellSouth contends that AT&T's pleading is untimely and should be stricken as such. If we do not strike AT&T's pleading, BellSouth argues that this Commission should deny the Petition, because it is "premised upon the erroneous contention that there is 'virtually no' local competition in BellSouth's Florida service area." BellSouth also believes the Petition should be denied, because AT&T ignores the fact that a proceeding to establish rates has already been conducted. BellSouth also notes that no state commission has set UNE rates at the levels proposed by AT&T.

Specifically, BellSouth contends that AT&T's Petition is actually a supplemental brief. While it suggests interim rates, BellSouth emphasizes that the Petition only discusses why the rates AT&T proposed at hearing should be adopted. BellSouth argues that the Petition is untimely, and that AT&T has not shown any change in

circumstances that would serve as a basis for its Petition. BellSouth argues that the only thing that has changed is that this Commission's votes on UNE rates, BellSouth's 271 application, and the Third-Party OSS Test are approaching and AT&T is in search of a new "roadblock."

BellSouth also argues that AT&T's Petition is based on incorrect information, particularly with regard to the level of competition in BellSouth's Florida service area. Furthermore, BellSouth maintains that AT&T's profit margin in Florida is irrelevant to the establishment of UNE rates and that we are bound by the TELRIC standard, as specifically recognized by Chairman Jaber and Commissioner Deason at the June 13, 2002, Special Agenda Conference. BellSouth adds that it believes the ALECs can actually earn a profit at current UNE rate levels.

For these reasons, BellSouth asks that AT&T's Petition be denied.

III. Decision

Upon consideration of the foregoing, we find that the request for interim rates is inappropriate. As noted previously, final rates for UNEs were set by this Commission in May 2001. The appropriate method by which to seek a change in rates would be to request that we revisit those rates, as is being done to a limited extent in this phase of the proceeding. Most of the rates AT&T seeks to have replaced with its interim rates are still subject to our determination at the September 6th Agenda Conference. Thus, as to those rates, AT&T's Petition is premature.

As to those rates AT&T seeks to have reconsidered that were not identified in this phase of the proceeding, as stated above, we find that a request for interim rates is an inappropriate way to seek revisitation of those rates. If AT&T wishes to seek a change in those rates not currently subject to consideration at the September 6th Agenda Conference, it should file a petition requesting that this Commission revisit the rates for those elements and set forth specific reasons that warrant our re-

examination of rates that were established barely a year ago.² As for the rates resulting from our September 6th decision, we note that it may be appropriate to allow the rates, once set, to remain in place for some period of time in order to determine their effect on the market.

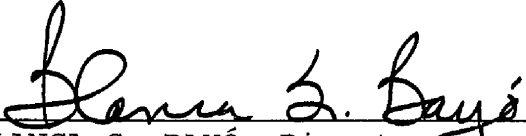
Since the Petition is essentially requesting a new hearing and reconsideration of the UNE rates, the Petition is either a thinly-veiled request for reconsideration or a motion for a new hearing. As such, the Petition is untimely and premature. As such, we hereby deny AT&T Communications of the Southern States, LLC's, Petition for Interim Rates.

It is therefore

ORDERED by the Florida Public Service Commission that AT&T Communications of the Southern States, LLC's, Petition for Interim Rates is hereby denied. It is further

ORDERED that this docket shall remain open pending further proceedings to address BellSouth Telecommunications, Inc.'s 120-day filing.

By ORDER of the Florida Public Service Commission this 4th Day of September, 2002.



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

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² See McCaw Communications of Florida, Inc., Appellant vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996).

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.