



Public Service Commission

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RECORDS AND REPORTING

DATE: MARCH 22, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (FORDHAM) *C. J. F. PIC*
DIVISION OF COMPETITIVE SERVICES (HINTON) *CH*

RE: DOCKET NO. 990108-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF THE OTHER PHONE COMPANY, INC. D/B/A ACCESS ONE COMMUNICATIONS AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING BREACH OF RESALE AGREEMENT.

AGENDA: APRIL 3, 2001 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990108RD.RCM

CASE BACKGROUND

On January 29, 1999, The Other Phone Company, Inc. d/b/a Access One Communications (Access One) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for breach of their resale agreement. This matter was set for an administrative hearing on August 11, 1999.

On August 11, 1999, Access One and BellSouth filed a Joint Motion for Continuance. In the Joint Motion, the parties indicated that negotiations were underway, and they were hopeful that the negotiations would result in settlement of all issues. On August 12, 1999, this Commission entered Order No. PSC-99-1584-PCO-TP, granting the joint Motion for Continuance. The Order did not specify any new hearing dates.

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FPSC-RECORDS/REPORTING

DOCKET NO. 990108-TP
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Since that time, there has been no activity of any type on this docket. The Docket was set for Prehearing on January 9, 2001 and Hearing on January 31, 2001. There have been no pleadings filed by Access One for the last 16 months. On November 29, 2000, BellSouth filed a Motion to Dismiss Complaint.

Staff has made several unsuccessful attempts to contact any attorney of record in this Docket. Also, staff has made several contacts with Access One and has been unable to identify anyone in that company who professes any knowledge of the pending Docket. The final person at the company with whom staff spoke indicated that they would provide a document via facsimile to the Commission which would either withdraw the complaint or agree to the motion to dismiss. That document was not forthcoming nor did the company responded further in any manner, until after a January 4, 2001, recommendation was filed for the January 16, 2001 Agenda Conference.

On Monday, January 8, 2001, staff received a telephone call from attorney Neil Baritz, who advised that he had been retained to represent Access One in this Docket, and would be requesting a deferral of BellSouth's Motion to Dismiss. At the end of that day, staff received via facsimile a copy of a letter from Mr. Baritz to Chairman Jacobs, requesting that the item be deferred from the January 16, 2001, Agenda. On March 7, 2001, staff received via facsimile a copy of a letter from Mr. Baritz to Chairman Jacobs, wherein Mr. Baritz represented that Access One consents to the dismissal of the Complaint in this Docket.

State commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997). A Petition has been filed requesting our review of alleged violations of an agreement we previously approved to determine if the parties are in compliance with that agreement. Based on Iowa Utils. Bd. and Section 252(c)(1), we have jurisdiction in this matter.

Based on BellSouth's Motion to Dismiss, the failure of Access One to pursue its Complaint with any diligence whatsoever, and the consent of the attorney for Access One, staff brings the following recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's Motion to Dismiss Complaint?

RECOMMENDATION: Yes. Access One has failed to diligently pursue its Complaint and the Complaint should be dismissed (**FORDHAM**)

STAFF ANALYSIS: BellSouth filed its Motion to Dismiss Complaint pursuant to Rule 1.42(e), Florida Rules of Civil Procedure and Rule 28-106.204, Florida Administrative Code. In support of its Motion, BellSouth alleges that it continued to have settlement discussions with Access One for a short time following the continuance of the Hearing. All discussions ended, however, in late 1999. BellSouth has had no discussions with Access One regarding this Docket in more than a year. In view of the passage of more than a year since any activity has occurred in this Docket, BellSouth urges that the Complaint be dismissed. Staff also observes that, on May 9, 2000, this Commission approved a successor agreement to the one under which this complaint arose.

During the January 8, 2001, telephone call from Access One's new counsel, Neil Baritz, he advised staff that he had been retained on January 5, 2001 to represent Access One in this Docket. He stated that Access One had a great interest in preventing the complaint from being dismissed. Since that communication, however, there has been no further contact from Mr. Baritz. There has been no responsive pleading from Access One to the Motion to Dismiss, and BellSouth reports that they, also, have heard nothing further from Access One since the January 8, 2001 letter. Finally, on March 7, 2001, counsel for Access One submitted a letter consenting to a dismissal of its Complaint.

In view of Access One's failure to pursue its Complaint with any diligence whatsoever, and Access One's apparent consent to a dismissal, staff recommends that the Commission grant BellSouth's Motion to Dismiss Access One's Complaint.

DOCKET NO. 990108-TP
DATE: MARCH 22, 2001

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, this Docket will require no further action, and may be closed. (FORDHAM)

STAFF ANALYSIS: If the Commission approves staff's recommendations in Issue 1, this Docket will require no further action, and may be closed.