State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JULY 2, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BULECZA-BANKS, CASEY)
OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN)

RE: DOCKET NO. 020507-TL - COMPLAINT OF FLORIDA COMPETITIVE CARRIERS ASSOCIATION AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING BELLSOUTH'S PRACTICE OF REFUSING TO PROVIDE FASTACCESS INTERNET SERVICE TO CUSTOMERS WHO RECEIVE VOICE SERVICE FROM A COMPETITIVE VOICE PROVIDER, AND REQUEST FOR EXPEDITED RELIEF.

AGENDA: 07/15/03 - REGULAR AGENDA - MOTION TO STRIKE - A DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020507.RCM

CASE BACKGROUND

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC).

On July 3, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint and an Opposition to Request for Expedited Relief. On July 9, 2002, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss and filed a Motion for Summary Final Order. By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for

expedited relief was denied. By Order No. PSC-02-1464-FOF-TL, issued October 23, 2002, the Commission denied BellSouth's Motion to Dismiss and FCCA's Motion for Summary Final Order without prejudice.

On April 2, 2003, FCCA and BellSouth filed a Joint Motion for Approval of Settlement Agreement resolving a much contested discovery dispute and a Joint Motion for Continuance. The Motion for Continuance was addressed by Order No. PSC-03-0476-PCO-TL, issued April 9, 2003, whereby the hearing in this matter was rescheduled to August 6, 2003, along with the rescheduling of other key activities dates. On April 29, 2003, BellSouth filed its Motion for Continuance and/or Rescheduling of the August 6, 2003, hearing date. On May 6, 2003, FCCA filed its response. By Order No. PSC-03-0636-PCO-TL, issued May 23, 2003, the hearing date was rescheduled for the fourth time to July 21 and 22, 2003.[1] By Order No. PSC-03-0611-AS-TL, issued May 19, 2003, the Commission approved the Parties' Joint Motion for Approval of Settlement Agreement resolving the parties' discovery disputes up to that point in that time. In addition, by Order No. PSC-03-0611-AS-TL, the Commission, in approving the settlement, acknowledged the substitution of AT&T Communications of the Southern States, LLC (AT&T), MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLP (collectively, WorldCom), ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), Access Intergrated Networks, Inc. (AIN) for the FCCA.

On June 16, 2003, AT&T, WorldCom, ITC^DeltaCom, and AIN filed their Joint Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner. On June 19, 2003, BellSouth filed its Response to the Motion to Strike. This recommendation addresses the Motion to Strike and Response to that Motion.

The Commission is vested with jurisdiction pursuant to Section 364.01, Florida Statutes.

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[1]Amendatory Order No. PSC-03-0636A-PCO-TL, issued May 29, 2003.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant AT&T, WorldCom, ITC^DeltaCom, AIN's Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner?

RECOMMENDATION: No, staff recommends that the Commission should not grant AT&T, WorldCom, ITC^DeltaCom, AIN's Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner. **(CHRISTENSEN)**

STAFF ANALYSIS: As noted in the Case Background, on June 16, 2003, AT&T, WorldCom, ITC^DeltaCom, AIN (Petitioners) filed their Motion to Strike Portions of Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner. On June 23, 2003, BellSouth filed its Response.

A. The Petitioners' Motion to Strike

In support of their Motion, the Petitioners assert that the primary issue in this case is one of customer choice - should a customer be forced to change DSL providers simply because the customer prefers a different voice carrier. The Petitioners state that in support of their Complaint, the direct testimony of Joseph P. Gillan was filed.[2] Petitioners contend that on December 23, 2002, BellSouth filed its rebuttal testimony and exhibits of Mr. Milner.

The Petitioners argue that portions of Mr. Milner's rebuttal testimony (page 8, line 1 through page 11, line 2 and Exhibits WKM-2 and WKM-3) are inadmissible under the Florida Rules of Evidence and the Florida Administrative Procedure Act, because they lack any evidentiary foundation. They contend that as clearly demonstrated by the discovery conducted in this case, Mr. Milner has no personal knowledge of the information which BellSouth seeks to put in the record and has mostly lifted the information proffered by an unrelated party in a unrelated proceeding in a different jurisdiction.

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[2]The testimony of Mr. Gillan was originally filed on behalf of FCCA and adopted by the Petitioners pursuant to Order No. PSC-03-0611-AS-TL.

The Petitioners state that on page 8, line 1 through page 11, line 2 of Mr. Milner's rebuttal testimony, Mr. Milner's testifies about a "business case," which he illustrates in Exhibit WKM-3. The Petitioners contend that the "business case" discussed by Mr. Milner was developed by a Mr. Heck for Cinergy Communications Corporation (Cinergy) for an arbitration proceeding in Kentucky in March - April, 2002. The Petitioners assert that Mr. Milner says the "business case" shows that it would not be cost prohibitive for any CLEC to deploy its own DSLAMs in offering DSL service. The Petitioners contend that Mr. Milner did not develop the exhibit or any of the assumptions in the exhibit (with one limited exception) nor does he even know how such assumptions were developed. They assert that Cinergy is not a party to this case nor has the preparer of the "business case" been listed by BellSouth as a witness.

The Petitioners contend Mr. Milner's testimony and exhibits fail to meet the required evidentiary standards. They state that Section 90.604, Florida Evidence Code, provides that "a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has *personal knowledge* of the matter." Motion at p. 3. The Petitioners also cite to Roseman v. Town Square Association, Inc., 810 So.2d 516, 521 (Fla. 4th DCA 2001) for the proposition that Section 90.604, Florida Evidence Code, prohibits testimony by a witness who does not have personal knowledge of a matter. The Petitioners argue that Mr. Milner lacks personal knowledge of the facts and assumptions in his testimony related to the "business case" and thus, his testimony fails the admissibility standard of Section 90.604, Florida Evidence Code.

The Petitioners argue that Mr. Milner admitted at his deposition in this case, the "business case" was not his work product. See, Deposition of Mr. Milner at pp. 71-72. They contend that at deposition, Mr. Milner conceded that he did not provide any input into any of the costs or assumptions in Cinergy's exhibit that is the basis for Exhibit WKM-3. See, Deposition of Mr. Milner at p. 75. Further, the Petitioners assert that Mr. Milner admitted that he did not know how Mr. Heck arrived at any of his assumptions. Id. They contend that information was sought about the "business case" and Mr. Milner's testimony via interrogatories. They cite to BellSouth's response by Mr. Milner to Intergatory No. 21 which states:

> The only assumption Mr. Milner developed in rebuttal testimony relative to Cinergy's "business case" was the use of different DSLAM costs than Cinergy has assumed.

Motion at p. 4. Petitioners contend that even regarding the one piece of information Mr. Milner did contribute to the "business case" - the DSLAM costs - he did not contact Cinergy or Mr. Heck regarding his changes. The Petitioners assert that even Mr. Milner in his deposition conceded that Cinergy would not agree with BellSouth and Mr. Milner's changes. See, Deposition of Mr. Milner at p. 77-78, FCCA Interrogatory No. 24.

The Petitioners assert that Mr. Milner's deposition and BellSouth's discovery responses demonstrate that Mr. Milner did not create Exhibit WKM-3, and that he has no knowledge about the assumptions and information in the exhibit and his testimony (other than DSLAM costs). Further, they contend that Mr. Milner does not have the approval of Cinergy to use the information.

The Petitioners state that the above arguments refer to the required evidentiary standards for lay witness testimony, which they argue are applicable to Mr. Milner's testimony and exhibits because BellSouth has not proffered Mr. Milner as an expert witness. They state that they object to Mr. Milner's qualification as an expert in the areas related to the "business case." The Petitioners argue that even if Mr. Milner were to be found to be an expert witness, he lacks knowledge of the data and assumptions in Exhibit WKM-3, as well as the related testimony, that is required for admissibility even under the expert witness standard.

The Petitioners state that the applicable standard is set out in Section 90.705, Florida Evidence Code. They cite to Section 90.705(2), Florida Evidence Code, which provides, in part, that:

> If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the *opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.*

(Emphasis added). They cite to Husky Industries, Inc. v. Black, 434 So.2d 988. 992-93(Fla. 4th DCA 1983), where the court explained the standard that:

> *It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.* See Martin v. Story, 97 So.2d 343 (Fla. 2d DCA 1957) (opinion of public safety department expert that towed car was a dangerous instrumentality inadmissible where basis for opinion was admittedly incomplete statistic, and expert had no knowledge of the vehicle under discussion). See also Southern Utilities Co. v. Murdock, 99 Fla. 1086, 128 So. 430 (1930); Farley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975).

The Petitioners argue that the evidence code and case law prohibit the acceptance of Mr. Milner's opinions and inferences, even if testifying as an expert witness, if he does not have a sufficient basis for his opinions and if the underlying facts and data cannot be established.

The Petitioners further claim that Mr. Milner's testimony is inadmissible pursuant to Section 120.596(2)(g), Florida Statutes, which provides that "irrelevant, immaterial, or unduly repetitions evidence shall be excluded . . . ." They assert that because Mr. Milner can provide no basis for his testimony or exhibits, they are immaterial and irrelevant. As such, the information can serve no useful purpose in the record and must be excluded pursuant to Section 120.59(2)(g), Florida Statutes.

BellSouth's Response

In its Response, BellSouth emphasizes that almost five months after this Commission issued its Prehearing Order, which included Mr. Milner's rebuttal testimony and his exhibits, the Petitioners have requested that certain portions of Mr. Milner's rebuttal testimony as well as certain exhibits be stricken from the record. BellSouth contends that the Petitioners' Motion should be summarily stricken. BellSouth asserts that Mr. Milner's rebuttal testimony and exhibits are directly responsive and relevant to matters raised by witness Gillan and should be admitted in full into the record at the hearing.

BellSouth contends that witness Gillan suggested that it would be prohibitively expensive if not impossible for the ALECs to duplicate BellSouth's DSL network. BellSouth asserts that to illustrate the absurdity of Mr. Gillan's testimony, Mr. Milner

demonstrates through publically available documents, that ALECs could successfully enter the DSL market. BellSouth also contends that Mr. Milner's rebuttal testimony is also relevant to BellSouth's defense, in that the ALECs are fully capable of utilizing self-help, instead of regulatory fiat to remedy their self-created problem of choosing not to use broadband services of their own to serve customers.

BellSouth argues that Mr. Milner's testimony is clearly relevant under Section 90.401, Florida Evidence Code, in that it may prove or disprove a material fact. BellSouth contends that the Petitioners' arguments disregard other controlling provisions of Florida law. BellSouth asserts that Section 120.569(g), Florida Statutes, which was partially quoted by the Petitioners, in full states that:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, *whether or not such evidence would be admissible in a trial in the courts of Florida.*

(emphasis in Response) Response at p. 2. BellSouth asserts that under this section, whether or not a trial court would or would not exclude Mr. Milner's testimony under standards applicable either to lay or to expert witnesses has no bearing. BellSouth contends that the Florida Administrative Procedures Act provides this Commission with discretion to admit evidence that might not otherwise be admitted in a trial court. BellSouth argues that the basis for the Petitioners' Motion is unfounded and should be disregarded. However, BellSouth also argues that to the extent the Commission is inclined to strictly review the "evidentiary foundation" underlying the testimony of the witnesses, then the Commission should strike the testimony of Mr. Gillan, who provided no personal knowledge, underlying facts, or data to support his view. BellSouth asserts that Mr. Milner's rebuttal testimony simply responds to Mr. Gillan's testimony, and in contrast to Mr. Gillan, Mr. Milner fully disclosed the basis for his conclusions.

BellSouth also cites Section 120.57(1)(c), Florida Statutes, states that:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Response at p. 2. BellSouth concedes that Mr. Milner's testimony which refers to matters of public record before other state commissions, might be construed by some as hearsay. BellSouth states that even if Mr. Milner's rebuttal testimony was deemed to constitute hearsay, it is still admissible in an administrative proceeding. BellSouth contends that because Mr. Milner's rebuttal testimony responds directly to Mr. Gillan's direct testimony, and is thus used to explain other evidence, it is entirely appropriate for this Commission to admit the rebuttal testimony, in its entirety, and weigh the evidence in its discretion. The Petitioners are free to cross-examine Mr. Milner about the basis for his opinions at hearing.

BellSouth asserts that it is also clear that this Commission has authority to admit into evidence matters of public record filed with other state commissions. BellSouth contends that the Section 120.569(i), Florida Statutes, allows this Commission to "officially recognize" material. Official recognition is akin to judicial notice and Florida law allows a court to take judicial notice of "records of any court of this state." See, Section 90.202(6), Florida Evidence Code. BellSouth asserts that logically, applying the administrative equivalent of judicial notice means that this Commission can officially recognize the records of any other state commission, including the contested portion of Mr. Milner's rebuttal testimony.

BellSouth, in addition, argues that the Petitioners motion is untimely and presents additional grounds for denial. BellSouth contends that the Petitioners' Motion should have been raised shortly after the Prehearing Order was issued and not in the month preceding the hearing.

Analysis

The Petitioners argue extensively that Mr. Milner has no "personal knowledge" of the "business case" presented in his rebuttal testimony, because he has adopted a "business case" created by an ALEC and submitted in a proceeding before another

state commission. Section 90.604, Florida Evidence Code, provides that:

> Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness's own testimony.

The Petitioners contend that through deposition and interrogatories, they have shown that Mr. Milner does not have the requisite personal knowledge to testify about this "business case." In reviewing the deposition of Mr. Milner, page 70 through page 80, it appears that Mr. Milner has knowledge of the business case in question, although he acknowledges that he did not create the underlying document. He did adopt the ALEC's scenario and modified the business case regarding the DSLAM costs. In his deposition, Mr. Milner states that he is familiar with the economic model used, because it was contained on the "one piece of paper" he used for the business case. Mr. Milner further states that he uses the model to show that an ALEC could make a healthy internal rate of return on provisioning DSL serve. He adds that it was irrelevant to his point whether he knew how the underlying assumptions was reached in the business case. Milner Deposition at pp.79-80.

However, the Petitioners' argument regarding personal knowledge relies on their assertion that Mr. Milner is not an expert because BellSouth did not proffer him as an expert. See, Milner Direct Testimony at pp. 1-2. However, in his Direct Testimony, Mr. Milner lists his extensive experience and background in telecommunications, including over 32 years of work experience and a Master of Business Administration. Staff believes that Mr. Milner is an expert in his field. Section 90.702, Florida Evidence Code, provides for testimony by experts. Under Section 90.702, Florida Evidence Code, the expert witness may testify about the scientific, technical, or other specialized knowledge in the form of an opinion if that opinion can be applied to the evidence at trial. Section 90.705, Florida Evidence Code, provides that on cross-examination, the expert will be required to specify the facts or data upon which his opinion or inferences rely. Section 90.705(2), Florida Evidence Code, further provides that:

> Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

Thus, as an expert Mr. Milner would be able to rely on information outside his personal knowledge to form an opinion if the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed. Staff believes that the Petitioners have not made a prima facie showing at this time that Mr. Milner lacks a sufficient basis for the opinions he expresses in his rebuttal testimony and exhibits at this time. See, Section 90.704, Florida Evidence Code.

Further, as noted by BellSouth in its Response, the Administrative Procedures Act (APA), has a more relaxed standard for the admissibility of evidence in administrative hearings. Section 120.569(g), Florida Statutes, provides that:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, *whether or not such evidence would be admissible in a trial in the courts of Florida*.

Staff believes that under the standard set forth in the APA, Mr. Milner's "business case" and related testimony can be admitted.

While staff believes that based on present facts the Motion to Strike should be denied, staff notes that the Petitioners still have the opportunity to conduct voir dire of the witness at the hearing. Further, the Petitioners have the ability to cross-examine the witness on the testimony and exhibits at hearing and may argue that the testimony and exhibits should be given no weight.

For the foregoing reasons, staff recommends that the Commission should not grant AT&T, WorldCom, ITC^DeltaCom, AIN's

Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending further proceedings. **(CHRISTENSEN)**

STAFF ANALYSIS: Regardless of whether the Commission approves or denies staff's recommendation on Issue 1, the merits of this case shall still need to be addressed at hearing. Thus, this docket should remain open pending further proceedings.