

Timolyn Henry

ORIGINAL

From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Tuesday, October 03, 2006 4:20 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Randa, Johna A; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Culpepper, Robert
Subject: 050119-TL and 050125-TP BellSouth's Motion for Clarification
Attachments: 050119-TL and 050125-TP Motion for Clarification.pdf

- A. Lynn Barclay
 Secretary to Robert A. Culpepper
 BellSouth Telecommunications, Inc.
 c/o Nancy Sims
 150 South Monroe, Rm. 400
 Tallahassee, FL 32301-1558
 (404) 335-0788
lynn.barclay@bellsouth.com
- B. Docket No. 050119-TP and 050125-TP Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, et al. concerning BellSouth Telecommunications, Inc.'s; Petition and Complaint of AT&T for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth
- C. BellSouth Telecommunications, Inc.
 on behalf of Robert A. Culpepper
- D. 10 pages total (includes Bayó letter, certificate of service and Motion)
- E. BellSouth's Telecommunications, Inc.'s Motion for Clarification

<<050119-TL and 050125-TP Motion for Clarification.pdf>>

Lynn Barclay
 Legal Department
 675 West Peachtree Street
 Suite 4300
 Atlanta, GA 30375
 404 335-0788

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Legal Department

Robert Culpepper

Senior Regulatory Counsel
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0841

October 3, 2006

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 050119-TL and 050125-TP

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion for Clarification, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Robert Culpepper

cc: All Parties of Record
Jerry Hendrix
E. Earl Edenfield, Jr.
James Meza III

651968

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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket Nos.: 050119-TL and 050125-TP;
Consolidated Pursuant to Order No.: PSC-05-0517-PAA-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 3rd day of October, 2006 to the following:

Felicia Banks
Laura King
Michael Barrett
Staff Counsels
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
fbanks@psc.state.fl.us
mbarrett@psc.state.fl.us
lking@psc.state.fl.us

Benjamin H. Dickens, Esq.
Blooston, Mordokofsky, Jackson
& Dickens
2120 L Street, N.W. Suite 300
Washington, DC 20037
Tel. No. (202) 828-5510
Fax. No. (202) 828-5568
bhd@bloostonlaw.com

Kenneth A. Hoffman, Esq.
Martin P. McDonnell, Esq.
Marsha E. Rule, Esq.
Rutledge, Ecenia, Purnell & Hoffman
215 South Monroe Street, Suite 420
Tallahassee, FL 32301
Tel. No. (850) 681-6788
Fax. No. (850) 681-6515
ken@reuphlaw.com
marty@reuphlaw.com
marsha@reuphlaw.com

Tracy Hatch Esq. (+)
AT&T Communications of the Southern
States, LLC
101 North Monroe Street, #700
Tallahassee, FL 32301-1546
Tel. No.: (850) 425-6309
Fax No.: (832) 213-0204
thatch@att.com

Frontier Communications
of the South, Inc.
Ms. Angie McCall
Senior Regulatory Analyst
300 Bland Street
P. O. Box 770
Bluefield, WV 24701
Tel. No. (304) 325-1688
Fax. No. (304) 325-1483
amccall@czn.com

GT Com
Mr. R. Mark Ellmer
P. O. Box 220
Port St. Joe, FL 32457-0220
Tel. No.: (850) 229-7315
Fax No.: (850) 229-5141
mellmer@fairpoint.com

ITS Telecommunications Systems, Inc.
Mr. Robert M. Post, Jr.
16001 SW Market Street
Indiantown, FL 34956-0277
Tel. No.: (772) 597-3113
Fax No.: (772) 597-2110
maryannh@itstelecom.net

NEFCOM

Ms. Deborah Nobles
505 Plaza Circle, Suite 200
Orange Park, FL 32073-9409
Tel. No.: (904) 688-0029
Fax No.: (904) 688-0025
dnobles@townes.net

Lynn B. Hall
Smart City Telecom
3100 Bonnett Creek Road
Lake Buena Vista, FL
Tel. No.: (407) 828-6730
FAX: (407) 828-6734
lbhall@smartcity.com

TDS Telecom/Quincy Telephone
Mr. Thomas M. McCabe
P. O. Box 189
Quincy, FL 32353-0189
Phone: (850) 875-5207
FAX: 875-5225
Thomas.mccabe@tdstelecom.com

Charles V. Gerkin, Jr. (+)
FRIEND, HUDAK & HARRIS, LLP
Three Ravinia Drive, Suite 1450
Atlanta, GA 30346
Tel. No. (304) 325-1688
Fax. No. (304) 325-1483
cgerkin@fh2.com
Represents MetroPCS

Vicki Gordon Kaufman
Moyle Flanigan Katz Raymond
& Sheehan, PA
118 North Gadsden Street
Tallahassee, Florida 32301
Tel. No. (850) 681-3828
Fax. No. (850) 681-8788
vkaufman@moylelaw.com
Atty. for NuVox
Atty. for CompSouth
Atty. for MetroPCS
Atty. Sprint Nextel

Susan J. Berlin
NuVox Communications, Inc.
Two North Main Street
Greenville, S.C. 29601
Tel. No. (864) 331-7323
Fax. No. (864) 672-5105
sberlin@nuvox.com

Ronald W. Gavillet
Neutral Tandem-Florida, LLC
One South Wacker, Suite 200
Chicago, IL 60606
Tel. No. (312) 384-8000
Fax. No. (312) 346-3276
rgavillet@neutraltandem.com

William R. Atkinson
Sprint Nextel
3065 Cumberland Circle, SE
Mailstop GA ATLD0602
Atlanta, GA 30339

Michele K. Thomas, Esq.
Sr. Corporate Counsel
T-Mobile
60 Wells Avenue
Newton, MA 02459
Tel. No. (617) 630-3126
Fax. No. (617) 630-3187
Michele.Thomas@T-Mobile.com

Floyd Self, Esq.
Messer, Caparello & Self
Hand: 215 S. Monroe Street, Ste. 701
Tallahassee, FL 32301
Mail: P.O. Box 1876
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
fself@lawfla.com

Charles F. Palmer
Troutman Sanders LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308-2216
Tel. No. (404) 885-3402
Fax. No. (404) 962-6647
charles.palmer@troutmansanders.com

Elaine Critides
Verizon Wireless
Legal & External Affairs Department
1300 I Street, N.W. – Suite 400 West
Washington, D.C. 20005
Tel. No. (202) 589-3756
Fax. No. (202) 589-3750
elaine.critides@verizonwireless.com

Michael A. Gross
VP – Reg. Affairs & Reg. Counsel
Florida Cable Telecomm. Assn.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676
mgross@fcta.com

Holly Henderson
Southern Communications Services, Inc.
d/b/a Southern LINC Wireless
5555 Glenridge Connector, Suite 500
Atlanta, Georgia 30342
Tel. No. (678) 443-1670
Fax. No. (678) 443-1552

Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19TH Street, N.W.
Suite 500
Washington, D.C. 20036
Tel. No. (202) 955-9600
Fax. No. (202) 955-9792
Atty. for SouthernLINC

Leigh A. Hyer
Verizon Access Transmission Svcs.
P.O. Box 110, FLTC0717
Tampa, FL 33601-0110
Tel. No. (813) 483-1256
leigh.a.hyer@verizon.com



Robert Culpepper

(+) Signed Protective Agreement

inconsistent with other portions of the *Order*, BellSouth requests that the Commission clarify its *Order* by recognizing that *T-Mobile* is not necessary to resolve the instant dispute and thus should be removed from the *Order*.

STANDARD OF REVIEW

The appropriate standard of review in cases where a party seeks clarification of a Commission Order is “whether the order require[s] further explanation or clarification to fully make clear [the Commission’s] intent.”³ It is respectfully submitted that clarification of the *Order* as stated herein is required to make clear *T-Mobile* is not necessary to resolve the instant dispute. Such clarification will eliminate an unnecessary and overly-expansive interpretation of the *T-Mobile* decision, and will rectify any apparent inconsistency between the Commission’s resolution of Issue 1 (invalidating the Tariff) with the Commission’s decision regarding Issue 11 (transit rate issue).

DISCUSSION

In its *Order*, the Commission “found the Tariff is inappropriate and invalid for two main reasons:

- Florida law provides that a tariff filing is an inappropriate mechanism for interconnection arrangements such as transit traffic; and
- Federal policy and law *seem to indicate* that the negotiation process is preferred to a unilateral tariff for transit service arrangements.”⁴

Regarding the second bullet point, the Commission stated that “the *T-Mobile* decision is significant in its overarching principal that contractual arrangements are preferred to a default mechanism. The compensation arrangements at issue in *T-Mobile* were for

³ *In re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies.* Docket No. 000121-TP, Order No. PSC-01-2449-FOF-TP, issued December 14, 2001, at 9.

⁴ *Order* at 16 (emphasis added).

transport and termination of traffic, which include transit traffic. Our goal is to stay consistent with this policy.”⁵ While BellSouth appreciates and supports the Commission’s goal to render rulings that are consistent with federal policy, BellSouth submits that *T-Mobile* is not applicable to this instant dispute and does not represent applicable federal policy on the matter.

Specifically, the first paragraph of *T-Mobile* makes clear that the issue in dispute there was an unrelated to transit service as it provides that T-Mobile USA (and other wireless carriers) jointly filed a petition seeking a declaratory ruling “that wireless termination tariffs are not the proper mechanism for establishing *reciprocal compensation arrangements* for the transport and termination of traffic.”⁶ Unlike the instant matter, all local exchange carriers have an explicit Section 251 obligation “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁷ Moreover, if a carrier cannot reach an arrangement (or agreement) regarding any Section 251 obligation with an incumbent local exchange carrier (“ILEC”), then such carrier can seek compulsory arbitration pursuant to Section 252 of the Act.

In *T-Mobile*, the FCC revised (or clarified) its rules applicable to commercial mobile radio service (“CMRS”) providers to make clear that either a CMRS provider or an ILEC may invoke Section 252 of the Act in the event such parties cannot reach agreement regarding matters such as appropriate reciprocal compensation arrangements.⁸ In so doing, the FCC also amended its CMRS rules to expressly prohibit, on a

⁵ *Id.* at 18.

⁶ *T-Mobile* at ¶ 1 (emphasis added).

⁷ 47 U.S.C. § 251(b)(5).

⁸ *T-Mobile* at ¶ 9; FCC Rule 20.11.

prospective basis, LECs from using tariffs to establish reciprocal compensation arrangements with CMRS providers.⁹

Thus, *T-Mobile* involves a tariff that was designed to establish *reciprocal compensation* arrangements between CMRS providers and LECs.¹⁰ Unlike reciprocal compensation, which is specifically addressed in Section 251(b)(5) of the Act, the Commission specifically noted in its *Order* that there is no explicit Section 251 transiting obligation.¹¹ As such, the Act's reciprocal compensation provisions (and the FCC's rules and orders that implement and interpret such provisions) have no application to BellSouth when BellSouth acts as a transit provider. Thus, on its face, *T-Mobile* is inapplicable to the instant dispute.¹²

This conclusion is supported by the fact that in its *Order*, the Commission recognized that the FCC in a Further Notice of Proposed Rulemaking in the pending Intercarrier Compensation docket ("*Intercarrier Compensation FNPRM*"), has requested comments on whether transiting is a Section 251 obligation, and if so what rules, if any, should apply to the pricing of transit service.¹³ Tellingly, in the transit service section of the *Intercarrier Compensation FNPRM*,¹⁴ the FCC does not even mention the *T-Mobile* decision. This is not by oversight. Separate and distinct from transit service issues, the

⁹ Although FCC Rule 20.11(e) refers to "traffic not subject to access charges," the *T-Mobile* decision provides that such traffic is traffic exchanged between carriers that is subject to reciprocal compensation ("In this item, "non-access traffic" refers to traffic not subject to section 251(b)(5) of the Act and ISP-bound traffic."). *Id.* at fn. 6.

¹⁰ *T-Mobile* at ¶ 1.

¹¹ *Order* at 44 ("We agree that § 251 contains no explicit obligation to provide transit service, but as the FCC has stated, the question is whether there is an implied obligation."). It remains BellSouth's position that § 251 imposes no implied obligation on BellSouth to provide transit service.

¹² Further, the FCC recognized that in certain circumstances default tariffs (like the Tariff) are in fact permissible. *T-Mobile* at ¶ 13 & fn. 55. Thus, at a minimum, even if applicable, there is a question as to whether the Tariff would be prohibited under *T-Mobile*. *See id.*

¹³ *See Order* at 43.

¹⁴ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 20 FCC 05-33 (released March 3, 2005) ("*Intercarrier Compensation FNPRM*") at ¶¶ 120-133.

FCC specifically mentions the *T-Mobile* decision in the next section of the *Intercarrier Compensation FNPRM*, a section that deals with CMRS issues.¹⁵

Clarifying the *Order* as requested by BellSouth will also reconcile the apparent inconsistency between the Commission's resolution of Issue 1 (invalidating the Tariff) with the Commission's decision regarding Issue 11 (transit rate issue). In refusing to establish a rate for BellSouth's transit service, the Commission declined to find that BellSouth has a Section 251 obligation to provide transit service.¹⁶ This finding is consistent with the Commission's transit ruling rendered in a recent Section 252 arbitration involving BellSouth, NuVox, and Xspedius.¹⁷ Accordingly, notwithstanding the fact that the Commission declined to find that transiting is a Section 251 obligation, the Commission discusses a Section 251-based decision (*T-Mobile*) to tangentially support its decision to invalidate BellSouth's transit tariff; hence, the apparent inconsistency.

In addition to this conflict, there is no need for the Commission to imply that the *T-Mobile* decision is applicable federal policy because the seminal ruling of the Commission was that it had "stand-alone authority" to invalidate the Tariff under state law.¹⁸

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that the Commission should clarify its *Order* to remove its discussion of the *T-Mobile* decision,

¹⁵ *Intercarrier Compensation FNPRM* at ¶¶ 139, 140, and fn. 397.

¹⁶ *Order* at 44.

¹⁷ Docket No. 040130-TP, Order No. PSC-05-0975-FOF-TP, issued October 11, 2005, at 52 (finding that a TELRIC-based charge for transiting traffic "is inappropriate because transit service has not been determined to be a § 251 UNE.").

¹⁸ *Order* at 18.


or alternatively, clarify that *T-Mobile* involves a Section 251 dispute (reciprocal compensation) and thus is not applicable (nor necessary) to reach the decisions rendered in the *Order*.

Respectfully submitted, this 3rd day of October 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.

James Meza *By* *RAC*

JAMES MEZA III
MANUEL GURDIAN
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558



E. EARL EDENFIELD JR.
JOHN T. TYLER
ROBERT A. CULPEPPER
Suite 4300, BellSouth Center
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0757

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

651331