

Matilda Sanders

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From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Tuesday, October 24, 2006 3:44 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Randa, Johna A; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda; Culpepper, Robert; Tyler, John; Smith, Debbie N.
Subject: 050119 and 050125-TP BellSouth's Response to Small LEC's Cross-Motion
Attachments: 050119 BellSouths Response to Cross Motion.pdf

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 OTH Kim P.

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. 12 pages total (includes Bayó letter, certificate of service and Response)

E. BellSouth's Telecommunications, Inc.'s Response to Small LEC's Cross-Motion for Clarification and Reconsideration of Order No. PSC-06-0776-FOF-TP.

<<050119 BellSouths Response to Cross Motion.pdf>>

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

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Robert Culpepper

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

ORIGINAL

October 24, 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 Response to Small LEC's Cross-Motion for Clarification and Reconsideration of Order No. PSC-06-0776-FOF-TP, 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

655037

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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 24th 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@reuplaw.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

DISCUSSION

1. The Small LECs' Cross-Motion For Clarification Should Be Denied

Although the Small LECs correctly cite the standard applicable to a Motion for Clarification,¹ they dive head-long into an analysis that fails to satisfy this standard.² Specifically, the Small LECs “request that the Commission clarify its intent by further ruling that any further arbitration proceeding involving BellSouth’s transit rate will, at minimum, consider BellSouth’s cost to provide transit service and the prospect of establishing a bill and keep mechanism for transit service.”³ Contrary to the Small LECs’ claim, this request is not one of clarification regarding the Commission’s intent; rather, through this request for “clarification” the Small LECs seek affirmative relief by asking that the Commission make additional findings regarding the scope of future state-law arbitration proceedings. In effect, they ask the Commission to expand its ruling by prematurely establishing issues in a hypothetical, future arbitration, involving BellSouth and unknown parties. Such a request does not clarify nor explain the Commission’s straightforward ruling -- that is, if transit service arrangement negotiations are unsuccessful, then any party may seek arbitration under state law.⁴

The Commission’s Order is plain, clear, and unambiguous. As such, the Small LECs’ motion for clarification should be denied as they cannot meet the standard for clarification.

2. The Small LECs' Cross-Motion For Reconsideration Should Be Denied

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in

¹ Small LECs’ Cross-Motion, at 2.

² 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.” *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.

³ Small LECs’ Cross-Motion at 8.

⁴ Order at 59.

rendering an order.⁵ In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.⁶ Moreover, a motion for reconsideration is not intended to be “a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order.”⁷ Indeed, a motion for reconsideration should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review.”⁸ Further, it is inappropriate to raise new arguments in a motion for reconsideration.⁹ Viewing the Small LECs’ claim in light of this standard, it is readily apparent that the claim does not come close to satisfying the requirements.

In their motion for reconsideration, the Small LECs claim that because “[t]he prospect of a partial rather than full refund was never placed at issue in this proceeding[,]”¹⁰ the Commission has no choice but to order a full refund of amounts paid under the transit traffic tariff.¹¹ The Small LECs’ request for a full refund is inappropriate. If the Small LECs were to receive a full refund, they would reap an improper benefit by having received BellSouth’s transit service for free. In addition to being irrational and inequitable, such a result cannot be logically squared with the Commission’s Order.

Specifically, the Commission found that “[a]ll parties agree that BellSouth should be compensated for providing a transit function.”¹² Regarding compensation, the Commission concluded that “[t]he record evidence is persuasive that the originating carrier utilizing

⁵ See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962).

⁶ See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (citing State ex. Rel. Jayatex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

⁷ Diamond Cab Co., 394 So.2d at 891.

⁸ Steward Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

⁹ In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996 (“It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier.”); In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996 (“Reconsideration is not an opportunity to raise new arguments.”).

¹⁰ Small LECs’ Cross-Motion at 8.

¹¹ Small LECs’ Cross-Motion at 12.

¹² Order at 21.

BellSouth's transit service is responsible to compensate BellSouth for that service."¹³ Additionally, the Commission noted that "the Small LECs' claim that there should be no compensation impact on them when they originate [transit] traffic is nonsensical."¹⁴ In sum, the Commission concluded that an originating carrier that uses BellSouth's transit service has an obligation to pay BellSouth for such service and the Small LECs' claims to contrary made no sense. The Small LECs' request for a full refund cannot be reconciled with the aforementioned portions of the Order and belies their claim that the concept of refunds was not addressed.

If BellSouth were not allowed to recoup the difference between the Tariff rate and a negotiated or arbitrated rate, the illogical result would be that BellSouth would have received absolutely nothing for the valuable service that it has already provided. As the Commission aptly noted, if the Small LECs were to receive a full refund then an unfair windfall could result in their favor¹⁵ as well as violating Florida law, which prohibits the provision of free service.¹⁶ The Commission used sound reasoning in reaching a fair result in addressing the refund issue.

The Small LECs' reliance on In Re: Investigation to Determine Whether BellSouth Telecommunications, Inc.'s Tariff Filing to Restructure its Late Payment Charge is in violation of Section 364.051, F.S., Order No. PSC-01-1769-FOF-TL issued August 30, 2001 (the "Late Payment Charge Order") is misplaced.

The Late Payment Charge Order involved a tariff BellSouth filed with the Commission. Under the Late Payment Tariff, BellSouth applied a Late Payment charge of \$1.50 for residential customers and \$9.00 for business customers plus an interest charge of 1.50% on unpaid balances

¹³ Order at 22.

¹⁴ Order at 22.

¹⁵ Id. at 58.

¹⁶ Section 364.08, Florida Statutes.

in excess of \$6.00. Prior to filing that tariff, BellSouth applied a Late Payment charge of 1.50% to any unpaid balance greater than \$1.00.¹⁷

The issue in the Late Payment Charge Order was whether BellSouth's restructured late payment charges were subject to the price caps contained in Florida's price regulation statute. Notwithstanding BellSouth's arguments to the contrary, the Commission held that BellSouth's restructured late payment charge tariff was a "non-basic service" subject to the price increase limitations set forth in the price regulation statute and that based on the evidence of record, BellSouth's restructured late payment fee charges exceeded the statute's price caps. As such, the Commission ordered BellSouth to discontinue assessing the restructured 1.50% interest charge on unpaid balances in excess of \$6.00 and that BellSouth refund amounts collected through the restructured interest charge of 1.50% on all unpaid balances in excess of \$6.00 with interest.¹⁸

In contrast, in this docket, the Commission held that BellSouth's transit traffic tariff is not a nonbasic service under the price regulation statute.¹⁹ As such, the Late Payment Charge Order is not controlling precedent because this docket does not involve the issue of what refunds are owed because of an impermissible rate increase made under the price regulation statute. In any event, what the Commission did not do in the Late Payment Charge Order is order BellSouth to refund all amounts it had collected as late payment charges – which would have created a windfall for those who had failed to pay timely for services received. Instead the Commission applied the same fair and simple logic that the Commission has applied in the current Docket – by ordering an off-set between the amount paid under the tariff and the amount to otherwise be paid for the service. This is the exact same result that will occur under the *Order*.

¹⁷ Late Payment Charge Order at 1.

¹⁸ Id. At 16.

¹⁹ Order at 17 (finding that "transit service is more characteristic of a local interconnection arrangement . . . not a nonbasic service as BellSouth asserts.)

Likewise, the Small LECs' claim that the Commission relied "upon equitable remedies to order a partial refund"²⁰ is inaccurate. Instead, the Commission relied on its "wide latitude" under Florida law²¹ to issue a partial refund. In ordering a partial refund, the Commission observed that "there is no explicit guidance in the law as to which refund approach is appropriate . . . we look to the principals of equity to render a sound decision."²² The Commission's review of black letter law principals of equity to reach what the Commission considered a fair refund ruling rendered under state law does not equate to the granting of equitable relief. Notably absent from the Small LECs' motion for reconsideration is any discussion of how the Commission's refund ruling runs afoul of the Commission rule and Florida statute the Commission relied upon in making its refund ruling. Stated differently, the Small LECs did not articulate, nor can they articulate, any reason why the Commission's reliance on Section 25-4.114, in fashioning the ordered refund, is somehow improper.

Notwithstanding the Small LECs' claims to the contrary, there is absolutely nothing impermissible about the Commission granting partial refunds.²³ Again, as the Commission noted, it has "wide latitude under Rule 25-4.114, Florida Administrative Code to order refunds."²⁴ The Small LECs do not challenge such latitude. Moreover, the Commission has issued partial refunds in the past²⁵ and has considered partial refunds in prior cases involving

²⁰ Small LECs Cross-Motion at 11.

²¹ Order at 57.

²² Order at 58.

²³ See, e.g., In re: Disposition of CIAC gross-up funds collected by North Fort Myers Utility, Inc, in Lee County, Docket No. 971179-SU; Order No. PSC-99-1068-PAA-SU at 38 (rejecting utility's offer to forego rate indexing increases for 1998-2000, and directing utility to refund that *portion* of 1995-1997 price indexes related to reclassification of expenses).

²⁴ Order at 57.

²⁵ *Id.*

BellSouth.²⁶ As such, the Commission should disregard and dismiss the Small LECs' contention that the Commission does not have the authority to grant partial refunds.

Finally, the Small LECs' final fleeting statement about "retroactive ratemaking"²⁷ is as equally erroneous as every other claim in their Cross-Motion. As the Commission is well-aware, the factual circumstances involved in this docket, regarding issuance of a refund, do not implicate the concept of retroactive ratemaking. That is so because this docket involves a refund in the context of BellSouth's recovery of cost expended, and it is well-settled that "recovery of costs expended is not retroactive ratemaking any more so than an order directing a refund would be."²⁸

²⁶ In addition to the Late Payment Charge Case, see *In Re: Complaint of Alexander Tomas against BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company regarding charges for rotary service*, Docket No. 95-0235-TL, Order No. PSC-9600866-FOF-TL (July 2, 1996).

²⁷ Cross-Motion at 12.

²⁸ *GTE Florida Inc. v. Clark*, 668 So.2d 971, 973 (Fla. 1996). See also, *Citizens of the State of Florida v. Florida Public Service Commission*, 415 So.2d 1268 (1982) (Commission's full consideration of retroactive application of new depreciation for telephone company did not constitute retroactive rate making; new depreciation allowance did have effect on prior Commission order, but this was a factor that all parties knew or should have known would affect 1980 refund).

CONCLUSION

For all of the foregoing reasons, BellSouth respectfully requests that the Commission deny the relief sought by the Small LECs in their Cross-Motion For Clarification And Reconsideration.

Respectfully submitted, this 24th day of October 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.

James Meza *By RAE*

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

[Handwritten Signature]

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.