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From: Woods, Vickie [Vickie.Woods2@bellsouth.com]
Sent: Thursday, November 30, 2006 4:44 PM
To: Filings@psc.state.fl.us
Subject: 060598-TL BellSouth Telecommunications, Inc.'s Memorandum of Law
Importance: High
Attachments: 060598-T.pdf; Legal memoranda5.doc

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A. Docket No. 060598-TL: In Re: Petition to recover 2005 tropical system related costs and expenses by BellSouth Telecommunications, Inc.

B. BellSouth Telecommunications, Inc.
on behalf of Manuel A. Gurdian

D. 9 pages total .pdf (including letter, pleading and certificate of service)
7 pages total word document

E. BellSouth Telecommunications, Inc.'s Memorandum of Law

.pdf version attached

<<060598-T.pdf>>
word version

<<Legal memoranda5.doc>>

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November 30, 2006

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

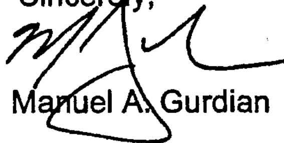
Re: Docket No. 060598-TL: Petition by BellSouth Telecommunications, Inc., pursuant to Florida Statutes §364.051(4), to Recover 2005 Tropical System Related Costs and Expenses

Dear Ms. Bayó:

Pursuant to Order No. PSC-06-0941-PCO-TL, enclosed is BellSouth Telecommunications, Inc.'s Memorandum of Law, which we ask that you file in the captioned docket.

Copies of this letter will be served to the parties shown on the attached Certificate of Service.

Sincerely,



Manuel A. Gurdian

cc: Jerry D. Hendrix
E. Earl Edenfield, Jr.
James Meza III

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CERTIFICATE OF SERVICE
Docket No. 060598-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 30th day of November, 2006 to the following:

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Manuel A. Gurdian

(+) Signed Protective Agreement

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by BellSouth Telecommunications, Inc., pursuant to Florida Statutes § 364.051(4) to Recover 2005 Tropical System Related Costs and Expenses	))))	Docket No. 060598-TL November 30, 2006

BELLSOUTH'S MEMORANDUM OF LAW

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Order No. PSC-06-0941-PCO-TL (Issued November 8, 2006), hereby files its Memorandum of Law addressing whether competitive local exchange carriers ("CLECs") that purchase wholesale Unbundled Network Element ("UNE") loops from BellSouth should be assessed a line-item charge pursuant to Section 364.051(4)(b)(6), Florida Statutes.

I. Introduction

In 2005, after an extraordinary 2004 hurricane season, the Florida Legislature amended Section 364.051, Florida Statutes to allow price-regulated local exchange companies ("LECs"), like BellSouth, to recover "intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities damaged by" named tropical systems. The Legislature determined that the proper vehicle to recover any storm recovery expenses was through a line-item charge on BellSouth's retail basic and nonbasic customers and, to the extent the Commission determined appropriate, BellSouth's wholesale loop UNE customers. Specifically, Section 364.051(4)(b)(6), Florida Statutes provides as follows:

> The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local exchange telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the commission shall verify that the collected amount does not exceed the amount authorized by

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the order. If collections exceed the ordered amount, the commission shall order the company to refund the excess.

Consistent and as expressly authorized with the statute, BellSouth submits that wholesale loop UNE customers should be included in the assessment of the line-item charge that is the subject of BellSouth's Petition pursuant to Section 364.051(4)(b)(6).

II. Section 364.051(4) Does Not Re-Price UNE Rates

The primary argument of the Competitive Carriers of the South, Inc. ("CompSouth") is that the Florida Public Service Commission ("Commission") should not apply the line-item charge authorized under Section 364.051(4) to CLEC wholesale UNE loop customers, because such a charge conflicts with federal law. Stated another way, CompSouth contends that that the Commission is prohibited by federal law from complying with Florida law and determining that the line-item charge should apply to CLEC UNE loop customers. The gist of CompSouth's argument is that, through the line item charge, BellSouth is seeking to re-price UNEs at above TELRIC rates, which violates the Telecommunications Act of 1996 Act ("the Act") and Federal Communications Commission ("FCC") regulations. *See* Statement of Basic Position in Joint Prehearing Statement of CompSouth and Nuvox and Testimony of Don J. Wood, p. 13-16. As established below, the fundamental flaw in this argument is that, as a matter of fact, the line-item charge does not re-price or alter the UNE rates established by this Commission for UNE loops.[1] Instead, it is a separate line-item charge of limited duration established under state law for the recovery of intrastate costs and expenses associated with repairing BellSouth's network following the 2005 Storms.

[1] Because the line-item charge does not modify or raise UNE rates, there is no conflict between Section 364.051(4) and federal law as suggested by CompSouth. For this reason, BellSouth will not burden this Commission with a detailed discussion and legal analysis of federal preemption law that is clearly inapplicable to the case at hand.

The Act imposes a series of duties upon ILECs that are designed to foster local competition in the telecommunications market. *See* 47 U.S.C. § 251(c)(2)-(6). Among these duties is the obligation to lease to CLECs certain parts of the ILEC's network, such as "local loops" (the wires that connect end users to the network). *See* 47 U.S.C. § 251(c)(3). Before a facility is required to be made available under this provision, the FCC must determine that competitors are "impaired" without access to it. *See* 47 U.S.C. § 251(d)(2). A facility that the FCC has determined must be made available under this provision is known as an "unbundled network element," or "UNE." Rates for are established via a pricing methodology known as "Total Element Long Run Incremental Cost" or "TELRIC." *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, at 15844, ¶ 672 (1996) ("Local Competition Order") (subsequent history omitted). TELRIC allows CLECs access to UNEs at low rates that stop just "short of confiscati[on]." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

The storm recovery line-item charge available under Florida law has nothing to do with BellSouth's provisioning of UNEs pursuant to the Act. Rather, the line-item charge is being assessed pursuant to Florida law for the sole purpose of recovering the intrastate expenses BellSouth incurred in repairing its network following the 2005 Storms.

In addition, any suggestion that the proposed line-item charge is an increase in the rate for the specific UNE is factually incorrect. Indeed, no UNE rates will increase or be modified as a result of this line-item charge; the CLECs will pay the same UNE rate for wholesale loops that they paid prior to the implementation of the line-item charge; and UNE rates set forth in the CLECs' interconnection agreements will not be altered or

modified through this line-item charge. Accordingly, the underlying premise of CompSouth's argument is not true and is fatal to their argument.

In fact, if the Commission adopted CompSouth's argument, all of the other line-item charges or fees authorized under Florida law that are imposed on CLECs would be invalid as well. For instance, under CompSouth's theory, Regulatory Assessment Fees imposed by the Commission or the payment of 911 surcharges to Florida counties would be preempted by federal law because they indirectly increase the costs of providing service in Florida. Clearly, this is not the case as the Legislature has deemed it appropriate that CLECs are required to pay certain fees under Florida law and the mere existence of these fees does not violate or conflict with federal law. The line-item storm recovery charge at issue here is no different.

III. The Commission's Adoption of CompSouth's Position Would Render Florida Statutes § 364.051(4)(b)(6) Meaningless

Any determination that the storm recovery line-item charge conflicts with federal law and thus cannot apply to CLECs renders Section 364.051(4)(b)(6), Florida Statutes meaningless. This is so because it results in a finding that, in no event, could the Commission find that it would be appropriate to apply the line-item charge on BellSouth's wholesale loop UNE customers, notwithstanding Section 364.051(4)'s clear language to the contrary.

Under Florida law, clear and unambiguous statutory language must be given its plain and obvious meaning. *Holly v. Auld*, 450 So.2d 217 (Fla. 1984); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982). *See also, Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976) ("the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.").

When the statutory language is clear, "courts have no occasion to resort to rules of construction—they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker*, 668 So.2d 989, 990-91 (Fla. 1996). Moreover, the Florida Supreme Court has held that "a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *State v.* Goode, 830 So.2d 817, 824 (Fla. 2002). In addition, the Legislature is presumed to have known of the existence of Section 252 of the Act, because it is a well settled rule of statutory construction that "the Legislature is presumed to know the existing law when a statute is enacted." *See Wood v. Fraser*, 677 So.2d 15 (Fla. 2d DCA 1996) citing *Collins v. Inv. Co. v. Metro Dade County*, 164 So.2d 806, 809 (Fla. 1964); *see also Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, 22 (Fla. 2004) ("[C]ourts must presume that the Legislature passes statutes with the knowledge of prior existing statutes.").

Thus, based upon the above rules of statutory construction, the Legislature's clear intent was for the Commission to have the discretion to determine that BellSouth's wholesale UNE loop customers are within the universe of customers that would be subject to this line-item charge. Indeed, to adopt CompSouth's arguments transforms the Commission's clear discretion to really no discretion at all as it results in a finding that the line-item charge would not apply to CLECs in any scenario. Such a reading renders Section 364.051(4) meaningless and contravenes the clear intent of the Legislature.

IV. Public Policy Requires that the Line-Item Charge also be Imposed on Wholesale Unbundled Loop Customers

BellSouth believes that it is not appropriate policy for one group of customers to be assessed the line-item storm recovery charge while another group of customers

identified in the statute are exempt. In fact, failing to assess the line-item charge on wholesale unbundled loop customers could, in future proceedings where BellSouth was not entitled to collect the maximum amount allowed, result in BellSouth's retail customers making up the shortfall in all instances, which is not what the Legislature contemplated.

For example, if the Commission determined that the amount of the storm related expenses was $25 million and could only be recovered from BellSouth's 5 million retail access line customers, then a per line-item charge of $.42 per access line per month would be assessed. However, if the line-item charge is also assessed to 500,000 unbundled loops, then the line-item charge to be assessed to both retail lines and wholesale loops would be reduced to $.39 per access line per month. In the above example, not assessing the line-item charge to unbundled loop customers results in only BellSouth's retail end users being responsible for charges that both BellSouth end users and CLEC end users received benefit from. Accordingly, the line item charge should be assessed on BellSouth's wholesale UNE loop customers as well as its retail customers.

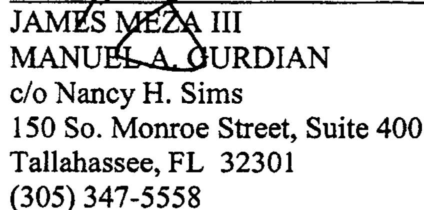
V. **Summary**

In summary, BellSouth is not seeking to re-price UNE loops or to change the UNE loop rates established by this Commission. The line-item charge is a separate, temporary charge that will only be assessed for a 12-month period. Further, the line-item charge is a mechanism under Florida law for BellSouth to recover a portion of its incremental intrastate costs and expenses incurred as a result of the 2005 tropical storm season. The line-item charge has nothing to do with BellSouth's obligations pursuant to Section 252 of the Act or the FCC's UNE pricing rules. Moreover, the line-item charge

has nothing to do with BellSouth's provisioning of an unbundled network element pursuant to federal law. Rather, the storm recovery line-item surcharge is being assessed pursuant to Florida law and any argument to the contrary is insufficient to keep the Commission from approving the charge. Accordingly, based upon the foregoing, BellSouth requests that the Commission make a determination that the proposed line item charge on CLECs that purchase UNE loops from BellSouth is appropriate pursuant to Section 364.051(4)(b)(6), Florida Statutes.

Respectfully submitted this 30th day of November, 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.



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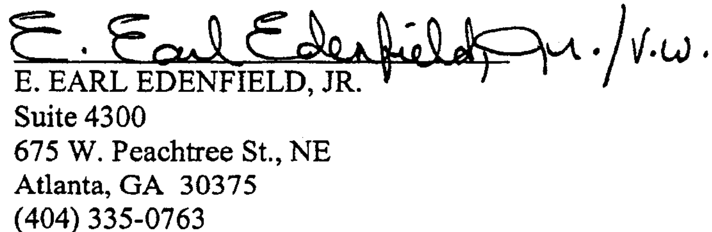

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