

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers for Commission action to support local competition in BellSouth Telecommunications, Inc.'s service territory.

DOCKET NO. 981834-TP
ORDER NO. PSC-99-0769-FOF-TP
ISSUED: April 21, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER DENYING MOTION TO DISMISS
AND DENYING REQUEST TO INITIATE RULEMAKING

BY THE COMMISSION:

I. BACKGROUND

On December 10, 1998, the Florida Competitive Carriers Association (FCCA), the Telecommunications Resellers, Inc. (TRA), AT&T Communications of the Southern States, Inc. (AT&T), MCImetro Access Transmission Services, LLC (MCImetro), Worldcom Technologies, Inc. (Worldcom), the Competitive Telecommunications Association (Comptel), MGC Communications, Inc. (MGC), and Intermedia Communications Inc. (Intermedia) (collectively, "Competitive Carriers") filed their Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. In the Petition, the Competitive Carriers requested the following relief from this Commission:

- (a) Establishment of a generic BellSouth Unbundled Network Element (UNE) pricing docket to address issues affecting local competition;
- (b) Establishment of a Competitive Forum to address BellSouth operations issues;

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- (c) Establishment of third-party testing of BellSouth's Operation Support System (OSS);
- (d) Initiation of a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers (LECs); and
- (e) Provision of such other relief that the Commission deems just and proper.

On December 30, 1998, BellSouth Telecommunications, Inc. (BellSouth) filed a Motion to Dismiss the Petition of the Competitive Carriers for Commission Action to Support Local Competition in BellSouth Service Territory. BellSouth requested that we dismiss the Competitive Carriers Petition with prejudice. On January 11, 1999, the Competitive Carriers filed their Response in Opposition to BellSouth's Motion to Dismiss. The Competitive Carriers request that we deny BellSouth's Motion to Dismiss.

In this Order, we address BellSouth's Motion to Dismiss and the Competitive Carriers' request to initiate a rulemaking proceeding to develop expedited dispute resolution procedure for interconnection-related complaints.

II. BELLSOUTH'S MOTION TO DISMISS THE COMPETITIVE CARRIERS' PETITION

A. STANDARD OF REVIEW FOR MOTION TO DISMISS

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action or claim. See Augustine v. Southern Bell & Telegraph Co., 91 So. 2d 320 (Fla. 1956). In other words, the issue is whether the petition states a claim upon which we can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (1st DCA 1958). We must take all material factual allegations of the petition as true. See Varnes v. Dawkins, 625 So. 2d 349, 350 (1st DCA 1993). The moving party must specify the grounds for the motion to dismiss. We must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

B. BELLSOUTH'S MOTION TO DISMISS

BellSouth requests that we deny the FCCA's Petition in its entirety. BellSouth believes that the Petition violates the spirit and the letter of the Telecommunications Act of 1996 (the Act). BellSouth contends that we have already addressed and resolved the issues presented in the Petition through our efforts to implement the Act using the procedures prescribed by the Act. Those efforts include the approval of arbitrated and negotiated agreements under Sections 251 and 252 of the Act and review of BellSouth's request to provide interLATA service under Section 271 of the Act. BellSouth argues that there is no justification for undoing these prior Commission actions, and that we have no legal authority to implement procedures other than those provided by the Act.

Furthermore, BellSouth disagrees with the Competitive Carriers that local competition is impossible with the current regulatory tools that are available. BellSouth does not believe that we should effectively overturn our previous arbitration decisions through a generic UNE pricing proceeding. Similarly, BellSouth contends that the requests for a Competitive Forum and third party OSS testing are contrary to the procedures prescribed by the Act. More importantly, BellSouth views the Petition as a request for a "collaborative approach" to the Section 271 application process. BellSouth argues that such an approach would result in an open-ended process designed merely to delay the Section 271 application process. In addition, BellSouth does not believe that an expedited dispute resolution process is necessary. BellSouth notes that carriers can already request that we address complaints in an expedited manner. Moreover, as a result of the use of an expedited dispute resolution process for telecommunications companies, BellSouth contends that our discretion, time, and resources in handling these disputes, as well as other matters that come before us, would be greatly reduced. These disputes would effectively be given priority over all other matters properly before us.

C. COMPETITIVE CARRIERS' RESPONSE

The Competitive Carriers request that we deny BellSouth's Motion to Dismiss for several reasons. First, the Competitive Carriers believe that they should not be forced to wait on BellSouth's 271 filing before we provide the rules for local competition. The Competitive Carriers contend that BellSouth's suggested approach would allow BellSouth to dictate the pace of

local competition. Moreover, the Competitive Carriers note that we have directed the parties to attempt to resolve specific disputes outside the context of a Section 271 proceeding. See Order No. PSC-97-1459-FOF-TL at 12.

Second, the Competitive Carriers contend that we do have the legal authority to grant the relief requested. Under the Act, we have authority under Section 251(d)(3) and Sections 261(b) and (c). Under state law, we have authority under Section 120.54(7) and 364.01(4)(d) and (g), Florida Statutes. As to the rulemaking request for rules on expedited dispute resolution, the request is authorized under Section 120.54(7), Florida Statutes, and Rule 28-103.006, Florida Administrative Code. The Competitive Carriers strongly disagree with BellSouth's contention that the requests for relief violate the letter and spirit of the Act. They note that BellSouth fails to cite any specific provision or purpose that their requests violate.

Third and most importantly, the Competitive Carriers contend that BellSouth's arguments are factual in nature. A Motion to Dismiss should only be granted as a matter of law, assuming all facts alleged to be true. (See Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla. 1956)). The Competitive Carriers argue that BellSouth's arguments regarding the need (or lack thereof) for a UNE pricing docket are largely factual in nature and do not persuasively dispute our legal authority to conduct such a proceeding. The Competitive Carriers make a similar argument regarding their requests for the establishment of a Competitive Forum, third party OSS testing, and an expedited dispute resolution process. The Competitive Carriers contend that these proceedings and processes are necessary to jump start competition in the local market in BellSouth's territory.

D. CONCLUSION

Taking all of the facts alleged in the Competitive Carriers' Petition to be true, we hereby deny BellSouth's Motion to Dismiss the Competitive Carriers' Petition. The Petition alleges sufficient facts for us to grant the Competitive Carriers the specific relief requested. Furthermore, we agree with the Competitive Carriers that we have the necessary legal authority under federal and state law to grant the relief requested. Specifically, the Commission is not restricted by federal law (the Act and related FCC orders) from initiating the processes requested and is given express authority under state law to implement the Act

through appropriate procedures under Section 120.80(13)(d), Florida Statutes. Section 120.80(13)(d), Florida Statutes, states in pertinent part:

- (d) Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with the Act.

Put simply, processes designed to further open the local market to competition are entirely consistent with the purposes and procedures of the Act. If the Commission finds that the requested relief (proceedings) is designed to achieve that goal and do not undermine the procedures prescribed by the Act, then the relief is well within the legal authority of the Commission.

BellSouth's arguments rely primarily on questions of fact and policy and do not represent sufficient grounds for the granting of a Motion to Dismiss. In fact, the vast majority of BellSouth's Motion to Dismiss attempts to rebut factual allegations from the Competitive Carriers' Petition, more akin to a response than a motion to dismiss. BellSouth's factual and policy arguments will be discussed to some degree in the next section of this Order where we address one of the Competitive Carriers' specific requests for relief.

We note that the Competitive Carriers do not request specific, substantive relief, e.g., certain rates or terms for collocation. Instead, they request the initiation of proceedings or processes that may or may not result in specific, substantive relief favorable to the Competitive Carriers. BellSouth will have the opportunity to make its factual and policy arguments in the appropriate proceedings should we grant the relief (the establishment of proceedings or processes) requested.

III. COMPETITIVE CARRIERS' REQUEST TO INITIATE RULEMAKING

The Petitioners have requested five items of relief as discussed in the Background section of this order. In this Order, we will only address the request to initiate a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers (LECs) for

interconnection agreement disputes. We will address the remainder of the Competitive Carriers' Petition in a subsequent order.

A. COMPETITIVE CARRIERS' REQUEST

The Competitive Carriers argue that an expedited dispute resolution process is necessary for disputes related to interconnection agreements for several reasons. First, the Competitive Carriers contend that BellSouth has little incentive to open its markets to its competitors. Second, the Commission's current dispute resolution processes take months to complete. The Competitive Carriers believe that undue delay in addressing disputes regarding interconnection agreements is inconsistent with the pro-competitive goals of that Act.

Accordingly, the Competitive Carriers suggest we take the following actions. We should initiate a formal rulemaking proceeding pursuant to Sections 120.54(7) and 120.80(13)(d), Florida Statutes, and Rule 28-103.006, Florida Administrative Code, for purposes of promulgating rules and regulations relating to post-interconnection dispute resolution. The procedure should begin with an informal settlement mediation with a member of our staff and move to a formal dispute resolution proceeding should no resolution be achieved. The formal proceeding would require a hearing within sixty days, post-hearing submissions (briefs) by the parties within five days of availability of the hearing transcript, and a staff recommendation within 30 days of the filing of the briefs.

Also, a complainant may request an expedited proceeding in which a decision must be rendered within thirty days. This decision would be interim in nature and effective until the formal dispute resolution procedure is completed. Attached to this Order is a draft of the proposed rules submitted by the Competitive Carriers on February 2, 1999. (See Attachment A.)

B. BELLSOUTH'S RESPONSE

In its Motion to Dismiss, BellSouth argues that a rulemaking to develop an expedited dispute resolution procedure is unnecessary under our present rules. Any party can request that we handle a complaint petition in an expedited manner. Furthermore, the requirement of an expedited process would effectively deprive us of our discretion in exercising our jurisdiction on matters that come before us in the time and manner that we see fit. In addition,

ORDER NO. PSC-99-0769-FOF-TP
DOCKET NO. 981834-TP
PAGE 7

ALECs would become a special class entitled to unique expedited treatment that other entities that come before us, such as water or wastewater customers, would not have.

C. CONCLUSION

Upon consideration, we hereby deny the Competitive Carriers' request to initiate rulemaking on an expedited dispute resolution process for interconnection agreement complaints. We agree with BellSouth that parties already have the opportunity to file petitions with requests for expedited treatment. Also, we agree that the expedited processes requested would deprive us of discretion to exercise our jurisdiction as we see fit and would entitle ALECS to special treatment that other entities who come before us do not receive.

Based on the foregoing, it is

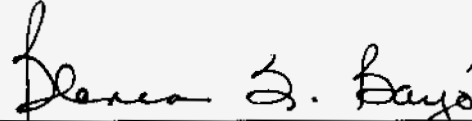
ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion to Dismiss the Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory is denied. It is further

ORDERED that the Competitive Carriers' request to initiate a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers is denied. It is further

ORDERED that this docket shall remain open to address the remainder of the Competitive Carriers' Petition.

ORDER NO. PSC-99-0769-FOF-TP
DOCKET NO. 981834-TP
PAGE 8

By ORDER of the Florida Public Service Commission this 21st
day of April, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
WPC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ORDER NO. PSC-99-0769-FOF-TP
DOCKET NO. 981834-TP
PAGE 9

ATTACHMENT A

MCWHIRTER REEVES
ATTORNEYS AT LAW

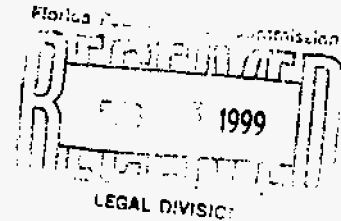
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February 2, 1999

Martha Brown
William Cox
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



RE: Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory - Docket No. 981834-TP

Dear Martha and Will:

The Petition for Commission Action to Support Local Competition in BellSouth's Service Territory was filed in the above docket on December 10, 1998. In the petition, FCCA and the other Petitioners asked the Commission, *inter alia*, to adopt rules providing for the expeditious processing of complaints arising from approved interconnection agreements. Petitioners since have drafted rule language that illustrates the provisions described in the Petition. I am enclosing the draft for the Staff's information.

Yours truly,

Joe McGlothlin
Joseph A. McGlothlin

JAM/jg

Enclosure

cc: Parties of Record

WOOD TOWN
N. 11700 SENECA
68. NOV 8 8 024
G. J. J. J. J.

**DRAFT OF
PROPOSED RULES FOR
EXPEDITED HANDLING OF DISPUTES
ARISING UNDER COMMISSION-APPROVED INTERCONNECTION AGREEMENTS**

25-22.0325 Interconnection Agreement Disputes.

(1) This rule establishes procedures for Commission resolution of disputed issues arising under or pertaining to interconnection agreements approved by the Commission pursuant to its authority under the federal Telecommunications Act of 1996 and supplements the rules in Chapters 28-106 and 25-22, F.A.C. The disputed issues may include both express and implied terms of interconnection agreements and complaints brought under the federal Telecommunications Act of 1996. The following dispute resolution procedures are applicable to any proceeding in which the complaining party affirmatively elects to proceed under these rules rather than the procedural rules which would otherwise be applicable. The election must appear within the complaint. This rule is intended to resolve disputes concerning:

- (a) proper interpretation of terms and conditions in interconnection agreements;
- (b) implementation of activities explicitly provided for, or implicitly contemplated in, interconnection agreements; and
- (c) enforcement of terms and conditions in such interconnection agreements.

(2) Informal Settlement Conferences.

(a) For purposes of this rule, an informal settlement conference means one or more optional, informal meetings between designated Commission staff members and parties to an interconnection agreement. The purpose of the informal settlement conference is to provide a forum in which disputes may be resolved outside of a more formal hearing procedure.

(b) Any party to an interconnection agreement may request an informal settlement conference by filing a written request with the Commission and, on the same day, delivering a copy of the request either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises, to the General Counsel of the Commission, and to the Director of Communications. The written request should include:

- (1) the name, address, telephone number and facsimile number of each party to the interconnection agreement and the requesting party's designated representative;
- (2) a description of the parties' efforts to resolve their differences by negotiation;
- (3) a list of the discrete issues in dispute, with a cross-reference to the area or areas of the agreement applicable or pertaining to the issues in dispute; and

ATTACHMENT A

(4) the requesting party's proposed solution to the dispute.

(c) Within three business days after the request is filed, the General Counsel and Director of Communications shall each designate a staff member to conduct the informal settlement conference. The designated staff members shall notify the parties of the time, date, and location of the settlement conference, which shall be held no later than ten business days from the date the request was filed. The Commission staff may require the respondent to file a response to the request. The parties should provide the appropriate personnel with authority to discuss and to resolve the disputes at the settlement conference.

(d) The settlement conference shall be conducted as an informal meeting and will not be transcribed.

(e) The settlement conference may result in an agreement on the resolution of the dispute described in the request. If an agreement is reached, the agreement will be binding on the parties. In the event that the parties do not reach an agreement as a result of the settlement conference, either party may utilize other procedures for dispute resolution provided in this Rule.

(3) **Formal Dispute Resolution Proceeding.**

(a) A formal proceeding for dispute resolution will commence when a party (complainant) files a complaint with the Commission and, on the same day, delivers a copy of the complaint either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises. All subsequent pleadings shall likewise be served by hand delivery or facsimile on the same day they are filed with the Commission.

(b) The complaint shall include:

(1) the name, address, telephone number and facsimile number of each party to the interconnection agreement and the complainant's designated representative;

(2) a description of the parties' efforts to resolve their differences by negotiation;

(3) a detailed list of the discrete issues in dispute, with a cross-reference to the area or areas of the agreement applicable or pertaining to the issues in dispute;

(4) an identification of pertinent background facts, including any facts believed to be undisputed;

(5) an identification of the relevant law or rules applicable to each disputed issue; and

(6) the complainant's proposed solution to the dispute.

ATTACHMENT A

(c) To the extent applicable, the complainant may also include in the complaint a request for an expedited ruling under section (4) or a request for an interim ruling under section (5).

(d) The respondent shall file a response to the complaint within ten business days after the filing of the complaint. The response shall specifically affirm or deny each allegation in the complaint. The response shall include the respondent's position on each issue in dispute, a cross-reference to the area or areas of the contract applicable or pertaining to the issue in dispute, and the respondent's proposed solution on each issue in dispute. In addition, the response also shall:

- (1) stipulate to any undisputed facts; and
- (2) identify relevant law or rules applicable to each disputed issue.

(e) The complainant may file a reply within five business days after the filing of the response to the complaint. The reply shall be limited solely to new issues raised in the response to the complaint.

(f) The hearing on the complaint shall commence no later than sixty days after filing of the complaint and transcripts shall be provided on a daily basis.

(g) The parties' post-hearing submissions shall be filed within five days after receipt of the transcript of the final hearing.

(h) The written recommendation of the Commission staff shall be filed in time for consideration no later than the first agenda conference scheduled thirty days or more after receipt of the parties' post-hearing submissions.

(4) Request for Expedited Ruling.

(a) This section establishes procedures pursuant to which a party who files a complaint to initiate a dispute resolution under this rule may request an expedited ruling when the dispute directly affects the ability of a party to provide uninterrupted service to its customers or, precludes the provisioning of any service, functionality, or network element. The presiding officer has the discretion to determine whether the resolution of the complaint may be expedited based on the complexity of the issues or other factors deemed relevant.

(b) A request for expedited ruling shall be filed at the same time and in the same document as the complaint filed pursuant to section (3). The complaint shall be entitled "Complaint and Request for Expedited Ruling." In addition to the requirements listed in section (3), the complaint shall also state the specific circumstances that make the dispute eligible for an expedited ruling and shall be accompanied by prefiled direct testimony in support of the complaint.

ATTACHMENT A

(c) The respondent shall file a response to the complaint within five business days after the filing of the complaint and shall file its prefiled rebuttal testimony within ten business days after the filing of the complaint. In addition to the requirements listed in section (3), the respondent shall state its position on the request for an expedited ruling.

(d) After reviewing the complaint and the response, the presiding officer will determine whether the complaint warrants an expedited ruling. If so, the hearing shall be scheduled to commence no later than thirty days after the filing of the complaint, and the notice of hearing shall preserve the option for a ruling from the bench at the conclusion of the hearing. If the presiding officer determines that the complaint is not eligible for an expedited ruling, the presiding officer shall so notify the parties within five days of the filing of the response.

(e) In the absence of a ruling from the bench at the conclusion of the hearing, the parties' post-hearing submissions shall be filed within three days after receipt of the transcript of the final hearing.

(f) In the absence of a ruling from the bench at the conclusion of the hearing, the written recommendation of the Commission staff shall be filed in time for consideration no later than the first agenda conference scheduled twenty days or more after receipt of the parties' post-hearing submissions.

(5) Request for Interim Ruling Pending Dispute Resolution.

(a) This section establishes procedures pursuant to which a party who files a complaint to initiate a dispute resolution under either section (3) or section (4) may also request an interim ruling on whether the party is entitled to relief pending the resolution of the merits of the dispute. This section is intended to provide an interim remedy when the dispute compromises the ability of a party to provide uninterrupted services or precludes the provisioning of scheduled service.

(b) Any request for an interim ruling shall be filed at the same time and in the same document as the complaint filed pursuant to section (3). The heading of the complaint shall include the phrase "Request for Interim Ruling." The complaint shall set forth the specific grounds supporting the request for interim relief pending the resolution of the dispute, as well as a statement of the potential harm that may result if interim relief is not provided. A complaint that includes a request for interim ruling shall be verified by affidavit. Such complaint must list the contact person, address, telephone number, and facsimile number for both the complainant and respondent.

(c) Within ten business days of the filing of a complaint and request for interim ruling, the presiding officer shall conduct a hearing to determine whether interim relief should be granted during the pendency of the dispute resolution process. The presiding officer will notify the parties of the date and time of the hearing by facsimile within five business days of the filing of a complaint and request for interim ruling. The parties should be prepared to present their

ATTACHMENT A

positions and evidence on factors including but not limited to: the type of service requested; the economic and technical feasibilities of providing that service; and the potential harm in providing the service. The presiding officer will issue an interim ruling on the request based on the evidence provided at the hearing.

(d) The presiding officer shall issue a written ruling on the request within twenty-four hours of the close of the hearing and will notify the parties by facsimile of the ruling. The interim ruling will be effective throughout the dispute resolution proceeding until a final decision is issued pursuant to this rule.