

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telephone
Company of Central Florida, Inc.
for resolution of items under
dispute in resale agreement with
BellSouth Telecommunications,
Inc.

DOCKET NO. 981052-TP
ORDER NO. PSC-99-1013-FOF-TP
ISSUED: May 20, 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.

APPEARANCES:

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Davidson, Decker, Kaufman, Arnold & Steen, P.A., 117
South Gadsden Street, Tallahassee, Florida 32301.
On behalf of Telephone Company of Central Florida, Inc.

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Monroe Street #400, Tallahassee, Florida 32301.
On behalf of BellSouth Telecommunications, Inc.

JUNE C. MCKINNEY, Florida Public Service Commission, 2540
Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
On behalf of the Commission Staff.

ORDER ON COMPLIANCE AND ARBITRATION
OF RESALE AGREEMENT

BACKGROUND

On August 20, 1998, Telephone Company of Central Florida, Inc.
(TCCF), filed a petition for resolution of items under dispute in
its resale agreement with BellSouth Telecommunications, Inc.

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(BellSouth or BST). The issues raised in the petition were separated into an issue for enforcement of its current interconnection agreement, and two issues for arbitration of the renewal of the resale agreement. An evidentiary hearing, pursuant to Section 120.57, Florida Statutes, was held on January 22, 1999, and February 9, 1999.

I. COMPLIANCE WITH THE AGREEMENT

The issue before us is whether Telephone Company of Central Florida, Inc. (TCCF) could or can resell ESSX® service after May 30, 1996. As part of the parties' interconnection agreement, BellSouth Telecommunications, Inc. (BellSouth or BST) agreed to provision ESSX® service to TCCF. However, after May 30, 1996, BellSouth discontinued the sale of ESSX® service and replaced that service with MultiServ. ESSX® service was grandfathered for customers ordering service by May 30, 1996. Pursuant to the parties' agreement, TCCF placed an order for ESSX® service on May 29, 1996.

According to TCCF witness Ripper, the grandfathering of ESSX® service should not have affected TCCF's ability to resell ESSX®. Witness Ripper testified to his belief that if ESSX® was ordered before May 30, 1996, it could be provisioned at anytime thereafter. BST witness Hendrix opined that BST should have notified TCCF that ESSX® was not available for resale; however, he also acknowledged that instead of so notifying TCCF, BST attempted to provision ESSX® for TCCF. BST witness Cathey testified that even as late as November of 1998, TCCF had not been informed that ESSX® could not be resold. BST witness Hendrix testified that ESSX® should have been available for resale only for the duration of TCCF's contract.

It is undisputed that all of the ESSX® lines ordered by TCCF have not been provisioned. It is also undisputed that BellSouth had problems in provisioning ESSX® service during the contract period. The parties entered into a settlement agreement on the provisioning problem in March of 1997, and further adjustments were made later in 1997. According to TCCF witness Koller, TCCF lost customers to BST during this time. Witness Koller also opined that BST's delays in provisioning were intentional.

Conclusion

Based on the foregoing, we conclude that BST has not completed the provisioning of ESSX[®] service ordered under this contract prior to the grandfathering of ESSX[®] on May 30, 1996. We believe that, whether as a standard or nonstandard ESSX[®] arrangement, BST is obligated to perform under its agreement with TCCF. Accordingly, we hereby order BST to fulfill all remaining requests for installation of ESSX[®] service placed on May 29, 1996, by TCCF. ESSX[®] service shall be available to TCCF for resale until all lines ordered by TCCF on May 29, 1996, are sold. After BST completes the provisioning of previously-ordered ESSX[®] lines, the lines shall be available to TCCF for the full 73-month period pursuant to BST's tariff.

II. ARBITRATION

A. OSS Costs

In its new resale agreement with TCCF, BellSouth proposes to establish and incorporate charges to recover costs BST has incurred associated with the development and implementation of nondiscriminatory electronic interfaces to afford Alternative Local Exchange Carriers (ALECs) access to certain BST operational support systems (OSS). These interfaces allow ALECs to access BellSouth's OSS for pre-ordering, ordering, provisioning, maintenance and repair, and billing. Since BellSouth was required by the Act to develop and implement these interfaces, BellSouth asserts it should be allowed to recover the development, implementation and maintenance costs of these interfaces, as well as any ongoing order processing costs that it incurs.

BellSouth proposes to levy two types of charges per local service request (LSR). For orders submitted electronically, BST would charge TCCF \$6.78 per LSR; for orders submitted manually, BST would charge TCCF \$20.08 per LSR. According to BellSouth witness Caldwell the proposed \$6.78 charge per LSR submitted electronically is designed to recover two cost components. The first component, \$2.46, relates to the development and implementation of the electronic interfaces. The second component, \$4.32, represents BST's ongoing order processing charges for an ALEC LSR.

Both recurring and nonrecurring costs would be recovered in BellSouth's proposed charges. Recurring costs include such items

as the capital costs (return, depreciation, and taxes) associated with investment in, for example, computer equipment, as well as operating expenses such as those related to ongoing application software maintenance and ongoing labor costs to support access to legacy systems via the electronic interfaces. Further, Local Carrier Service Center (LCSC) labor associated with orders submitted electronically but that "fallout" is recovered in the \$4.32 component, while the \$20.08 manual ordering charge represents BST's cost of LCSC labor for manual order processing. Nonrecurring costs are reflected in BellSouth's proposed \$2.46 component, and include software expenses and one-time labor costs of systems planning and design, programming, testing, and implementation of the electronic interfaces.

In arriving at its proposed rates per local service request, BST identified all costs associated with the development of the interfaces to access its operational support systems, and then essentially derived its rates by dividing by its projected total region LSRs for the period 1999-2001.

TCCF witness Welch stated that it first became aware of BellSouth's intent to assess OSS charges from a review of the February 1998 draft resale agreement. BST informed TCCF that these charges were associated with the development and implementation of the operational support system interfaces, interfaces that BellSouth had developed on behalf of the ALECs. TCCF also became aware that BST would assess charges for manual processing of orders. According to witness Welch, TCCF believes that OSS development costs should be solely the responsibility of BellSouth.

Witness Welch offers several arguments as to why it is inappropriate for BellSouth to levy charges to recover OSS development from TCCF and other ALECs. First, she cites to Section 251(b)(1) of the Telecommunications Act of 1996 (the Act), which requires each Local Exchange Carrier (LEC) "... not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services," as well as Section 251(c)(1)(2)(D), which requires LECs to negotiate in good faith and provide interconnection under rates, terms and conditions that are just, reasonable and nondiscriminatory. Witness Welch argues that BellSouth would be in violation of the Act if it imposes OSS charges on ALECs.

Second, TCCF witness Welch notes that in Order No. PSC-97-1459-FOF-TL, issued November 19, 1997, the FPSC's order denying

BellSouth's § 271 application, this Commission quoted the FCC as requiring comparable access to OSS:

In order to meet the nondiscriminatory standard of OSS, an incumbent LEC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers or other carriers.

Witness Welch contends that BST has not provided TCCF such equivalent access to OSS, and BellSouth's proposal to charge OSS fees, in the absence of adequate OSS systems, is "nothing short of outrageous." Moreover, she states that rather than provide resellers access to its existing legacy systems, BellSouth has chosen instead to provide ALECs access to its OSS only on a piecemeal basis during the past few years.

Witness Welch also asserts that mechanized order flowthrough (where an operator inputs data into an ordering screen and subsequent ordering processes are completed without further human intervention) is available only to a limited degree from the OSS interfaces that BellSouth has offered to ALECs during the past two years. Because of the absence of this ability, the witness stated that TCCF's provisioning and servicing costs have been excessive during its two and one-half years of doing business with BST.

Witness Welch takes exception to BellSouth's proposed charge for manual order processing. She contends that to date, BellSouth has no automated system that would allow an ALEC to process adds, moves or changes. In the absence of reliable OSS, she inquires: "Why should the reseller be charged . . . for the manual submission of an order when no alternative means of submitting the order exists? In fact, why should the reseller be charged a fee at all if appropriate and functional OSS does not exist?" The witness repeats this general theme in her rebuttal testimony when describing the efforts of a TCCF employee who spent 14 hours trying to perform certain functions with Trouble Analysis Facilitation Interface (TAFI) and Local Exchange Navigational System (LENS), without success. TCCF witness Welch concludes that BellSouth should not be allowed to include charges for OSS cost recovery in the parties' new resale agreement. Instead, she recommends that each party should absorb its own costs incurred associated with OSS

systems. She cites this Commission's Order No. PSC-96-1579-FOF-TP, issued December 31, 1996, page 87, where we concluded:

Based on the evidence, we find that these operations support systems are necessary for competition in the local market to be successful. We believe that both the new entrants and the incumbent LECs will benefit from having efficient operational support systems. Thus, all parties shall be responsible for the costs to develop and implement such systems.... However, where a carrier negotiates for the development of a system or process that is exclusively for that carrier, we do not believe all carriers should be responsible for the recovery of those costs.

Based on the foregoing, each party shall bear its own cost of developing and implementing electronic interface systems, because those systems will benefit all carriers. . . .

In his rebuttal testimony, BellSouth witness Pate asserted there were several factual errors and misunderstandings contained in witness Welch's direct testimony, especially with respect to what the specific systems are intended to do.

With regards to the OSS cost support sponsored by BellSouth witness Caldwell, TCCF witness Welch asserted that the material provided to them consisted only of high level spreadsheets; moreover, while BST's filing in Docket No. 960757-TP consisted of an electronic model with complete supporting data, similar information was not provided to TCCF in this proceeding. However, witness Welch admitted that TCCF likely did not have the resources or staff to conduct a thorough critique of BellSouth's cost study. However, the witness stated that placing the burden of such an exhaustive analysis on small firms such as TCCF would undermine the procompetitive intent of the Act. Instead, she recommended that if BellSouth's OSS cost study were to be the basis for establishing charges, the Commission should initiate a generic proceeding to conduct a thorough examination of all aspects of the study.

To date, we have not made a determination as to what costs, if any, BST incurs to provide OSS functions. As noted by TCCF, the

Commission did determine in 1996 that new entrants and incumbents will each incur costs to develop OSS, and concluded at that time that each party should bear its own costs of developing and implementing electronic interface systems. However, in Order No. PSC-98-0604-FOF-TP, issued April 29, 1998, in Dockets Nos. 960757-TP, 960833-TP, and 960846-TP, at page 165, we recognized that "OSS costs, manual and electronic, may be recoverable costs incurred by BellSouth." While we declined in those proceedings to establish any charges to recover OSS costs, we did encourage the parties to negotiate rates for OSS functions, and concluded that "[i]f, however, the companies are unable to reach agreement through such negotiations, they may of course seek our guidance." (Ibid.)

BellSouth witness Caldwell sponsored the cost study, which is her Exhibit #17 and consists of 13 pages. Since this exhibit amounted to a high level summary of the results, extensive discovery concerning the development of this exhibit, covering virtually every page and distinct type of calculation in the exhibit was conducted by our staff. Unfortunately, while we do not believe the company intended to be unresponsive, BST's responses (Exhibit 9) are insufficient to evaluate the propriety of the expenses reflected in the analysis.

Also, BellSouth proposes to recover its OSS costs on a per local service request (LSR) basis. To simplify somewhat, BST essentially determined its OSS costs to be recovered, and divided this amount by three years' forecasted LSRs for the entire BellSouth nine-state region. If BST underestimates the number of LSRs for the 1999-2001 period, the per LSR cost would be overstated. Thus, an issue arises as to whether there would be a prospective true-up. According to BellSouth witness Arrington, no contract language exists to allow for this contingency. Another question concerns why the proposed charge is on a per LSR basis, as opposed to some other means. A review of witness Caldwell's Exhibit #17 indicates that a sizeable portion of the costs involved are either nonrecurring, or volume insensitive. As such, perhaps an alternative rate structure, such as a uniform mark-up over all wholesale offerings, may be more appropriate. Also, it was unclear from the record why a three-year recovery period would be most reasonable.

In addition, BST's interfaces are still in the developmental stage and an independent determination has not been made that these systems provide pre-ordering or ordering functions to ALECs in the same time and manner as BST's internal interfaces. Moreover,

BellSouth's proposed charge for electronic processing lumps together the electronic interface development costs of eight distinct electronic interfaces. The record in this proceeding clearly indicates that TCCF does not use all of these systems. It does not seem appropriate that TCCF or any ALEC should pay for systems they do not use. Although BellSouth witness Caldwell asserted that the cost was lower due to all systems being developed at the same time, we could locate no record evidence to substantiate this claim.

Conclusion

Based on the foregoing, we conclude that OSS cost recovery more properly should be addressed with in a generic proceeding, not in this arbitration proceeding. If we were to establish OSS charges in this docket, such an action would be precedential and the basis for BellSouth's including the same charges in all future negotiated agreements. Accordingly, we believe that an issue with such broad applicability is best handled in a generic docket, not obliquely in an arbitration proceeding. Therefore, we decline to approve or set charges to recover BST's OSS costs at this time.

B. Resale of ESSX® in New Agreement

TCCF requested arbitration of the ESSX® terms in its new resale agreement with BST. TCCF seeks, as a remedy for past non-performance, to include in the new agreement the resale of ESSX® to new (retail) end-user customers, in addition to grandfathered ESSX® end-user customers. It is BST's position that ESSX® is simply not available for resale. BST witness Arrington testified that to make ESSX® available to new customers under the new agreement will make ESSX® available to all ALECs, even though ESSX® is now a grandfathered service.

At the crux of this issue is the question "Who constitutes a 'new customer' for purposes of resale of the grandfathered ESSX® service in the new resale agreement?" FCC Order 96-325, and Order No. PSC-96-1579-FOF-TP, support the opinion that while it is possible to construe a reseller such as TCCF to be a (wholesale) new customer to BST, we find that a "new customer," as used in this proceeding, is a (retail) end-user customer of either BST or TCCF after May 30, 1996. Thus, eligibility for the grandfathered ESSX® service hinges on whether the end-user did or did not have ESSX® on May 30, 1996. We conclude that any end-user customer that had

ESSX[®] by May 30, 1996, is grandfathered and eligible to continue to receive ESSX[®].

Both BST and TCCF agree that MultiServ is a bundled substitute service for the grandfathered ESSX[®] service and provides more value for the end-user customers. Both parties also agree that MultiServ is priced higher than the grandfathered ESSX[®] service. TCCF witness Ripper testified that BST should be required to provide TCCF with MultiServ at the same price as ESSX[®]. BST witness Arrington disagreed. However, BST witness Wilburn testified that the parties could work out a special pricing arrangement.

We are concerned that denying TCCF the ability to resell ESSX[®], without any recourse but MultiServ, has the potential to drive TCCF out of the business since TCCF's "flagship" product is ESSX[®]-based.

The record shows that TCCF has expressed interest in and BST has indicated a willingness to consider a special contract through which TCCF will resell 'centrex'-like services to new end-user customers in place of the grandfathered ESSX[®]. Also, both BST and TCCF will market MultiServ service to new end-user customers. However, we believe that BST has a competitive advantage by being able to offer any of its prospective new end-user customers a special Contract Service Arrangement (CSA). While TCCF could resell this CSA after the fact, TCCF does not possess such ability at the outset. We believe that TCCF's lack of such capability to offer a CSA to a new end-user customer which may require a CSA in order to become a TCCF customer disadvantages TCCF. Therefore, we conclude that a special contract arrangement that will allow TCCF to resell MultiServ in place of ESSX[®] is critical in resolving this issue fairly. We note that TCCF is probably one of the few ALECs reselling grandfathered ESSX[®] from BST and planning to continue to resell this service in its new resale agreement. Accordingly, we find it appropriate to strongly encourage the parties to negotiate a term and volume contract for MultiServ, with discounts at the same price points or as close as possible to the price points of ESSX[®], in the new resale agreement.

Conclusion

Based on the foregoing, we find that grandfathered ESSX[®] service should not be included in the new resale agreement for end-user customers which did not already have ESSX[®] as of May 30, 1996. However, end-user customers which already had ESSX[®] by May 30,

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1996, can continue to use the grandfathered ESSX® service available in the resale agreement. We also find that TCCF will be disadvantaged if it has to resell MultiServ, a substitute for the grandfathered ESSX®, to its class of end-user customers for more than the price of ESSX®. Further, the parties are strongly encouraged to negotiate a "term and volume contract" to allow TCCF to resell MultiServ at or as close to the price points of ESSX®, and report back to the Commission or file an agreement within 90 days from the issuance of this order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. shall fulfill all requests for installation of ESSX® service placed after March 14, 1997, which are associated with the original May 29, 1996, order placed by Telephone Company of Central Florida, Inc., and that the service be provided for the full 73 months from the day the service is implemented. It is further

ORDERED that grandfathered ESSX® service shall be made available for resale in the new resale agreement only to grandfathered ESSX® end-user customers. It is further

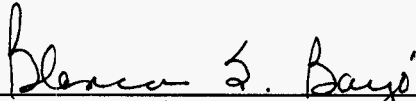
ORDERED that the parties are encouraged to negotiate a "term and volume contract" to allow Telephone Company of Central Florida, Inc., to resell MultiServ at or as close to the price points of ESSX® and report back to the Commission in 90 days from the issuance of this Order. This arrangement should be available for resale by other ALECs. It is further

ORDERED that OSS costs shall not be included in the new resale agreement between BellSouth Telecommunications, Inc. and Telephone Company of Central Florida, Inc. It is further

ORDERED that this docket shall remain open.

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By ORDER of the Florida Public Service Commission this 20th
day of May, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CBW/CB

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.