

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BlueStar Networks, Inc. for arbitration of certain unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

DOCKET NO. 991838-TP  
ORDER NO. PSC-00-0185-PCO-TP  
ISSUED: January 25, 2000

ORDER GRANTING BELLSOUTH'S  
MOTION TO REMOVE ISSUES FROM ARBITRATION

On December 7, 1999, BlueStar Networks, Inc. (BlueStar) filed a Petition for arbitration of certain unresolved issues in its interconnection negotiations with BellSouth Telecommunications, Inc. (BellSouth). On January 3, 2000, BellSouth filed its Response. This matter is currently scheduled for hearing on March 2-3, 2000.

On January 18, 2000, BellSouth filed a Motion to Remove Issues from Arbitration, and requested an expedited ruling. On January 19, 2000, BlueStar filed its Response. In its Motion, BellSouth explains that BlueStar has asked the Commission to impose liquidated damages that would apply if BellSouth were to fail to comply with certain performance standards. Although BellSouth presented its own version of Issue 14 at the January 10, 2000 issue identification meeting, it now objects to the inclusion of either version of the following issue in this proceeding:

BlueStar's version:

Should the interconnection agreement include the liquidated damages provisions filed by BellSouth in Tennessee in Docket Nos. 99430 and 99377 as Exhibit No. AJV-1 which relate to BellSouth's Service Quality Measurements (SQMs)?

BellSouth's version:

What, if any, provisions should the agreement include for liquidated damages?

First, BellSouth argues that BlueStar's proposed version is not appropriate for arbitration because it was not included in the Petition. BellSouth explains that BlueStar did include an issue

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regarding inclusion of a liquidated damages provision originally set forth in an agreement approved by the Texas Public Utilities Commission. During the issue identification meeting, however, BlueStar presented the revised issue as set forth above.

Notwithstanding, BellSouth argues that this Commission has repeatedly ruled that liquidated damages is not an appropriate issue to be arbitrated in a proceeding under Section 252 of the Telecommunications Act because the Commission lacks the statutory authority to award such damages. BellSouth cites to a string of Commission orders to support its argument that "the Commission has established a clear chain of precedent that damage and penalty issues are not appropriate for arbitration."<sup>1</sup> Accordingly, BellSouth requests that neither version of the issue be included for arbitration in this proceeding.

On January 19, 2000, BlueStar filed its Response to BellSouth's Motion, wherein it states:

Issue No. 14 in BlueStar's Petition relates to BellSouth's refusal to include in the agreement consequences for its failure to perform under the agreement. Originally, BlueStar had asked BellSouth to include the liquidated damages provision recently approved and adopted by the Public Utility Commission of Texas. Subsequently, BlueStar learned that BellSouth has voluntarily offered such a provision in a Tennessee arbitration. It is that provision which BlueStar seeks to include in its agreement.

BlueStar further states that with regard to the orders cited by BellSouth, it acknowledges that this Commission cannot award damages. BlueStar insists, however, that it is not asking us to award damages, but only to arbitrate terms and conditions to be

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<sup>1</sup> See Order No. PSC-96-1579-FOF-TP, issued December 31, 1996 in consolidated Dockets Nos. 960833-TP, 960846-TP, and 960916-TP; Order No. PSC-99-1309-PHO-TP, issued July 8, 1999 in Docket No. 990149-TP; Order No. PSC-99-1926-PHO-TP, issued September 28, 1999 in Docket No. 990691-TP; and Order No. PSC-99-2117-PHO-TP, issued October 25, 1999 in Docket No. 990750-TP.

included in the parties' interconnection agreement that will deter BellSouth from nonperformance.

BlueStar argues that there is a distinction between adjudicating damages and our authority to prevent anti-competitive behavior. BlueStar argues that in this proceeding, the Commission is implementing the Telecommunications Act of 1996 (Act), the objective of which is to facilitate competition in the local exchange market. It states that new entrants who avail themselves of an incumbent local exchange carrier's (ILEC) facilities are dependent upon the quality of the response they receive from the ILEC. BlueStar argues, however, that an ILEC has every incentive to frustrate the intent of the Act by favoring its own operations over that of a new entrant. Therefore, it states, "[s]tandard consequences are needed to counter that incentive and to facilitate the competition that is the objective of the Act."

BlueStar asserts that the damage provision it seeks to include in its interconnection agreement has been proffered by BellSouth in the state of Tennessee and at the Federal Communications Commission. Thus, it argues, "BellSouth itself recognizes the necessity of including provisions which will help ensure performance in interconnection agreements."

As pointed out by BellSouth, the issue regarding the award of liquidated damages has been raised and rejected in numerous other dockets which have been arbitrated by this Commission. I am not persuaded by BlueStar's attempt to distinguish this case from those prior rulings. In Order No. PSC-96-1579-FOF-TP, issued on December 31, 1996 in consolidated Dockets Nos. 960833-TP, 960846-TP, and 960916-TP, we stated:

We should limit our consideration in this arbitration proceeding to the items enumerated to be arbitrated in Sections 251 and 252 of the Act, and matters necessary to implement those items. A liquidated damages provision does not meet that standard. The Act does not require parties to include in their agreements any particular method to resolve disputes. Further, it is not appropriate for us to arbitrate a liquidated damages provision under state law. If we did, we would be, in effect, awarding damages to one party for a breach of contract. We lack the authority to award

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money damages . . . If we cannot award money damages directly, we cannot do so indirectly by imposing a liquidated damages arrangement on the parties.

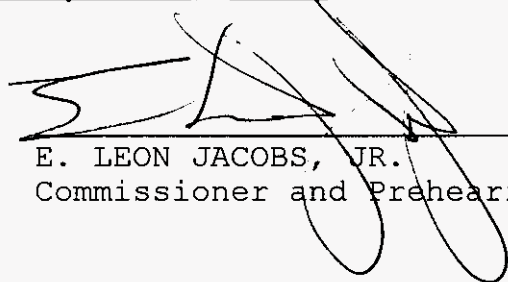
(citing Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, 291 So.2d 199, 202 (Fla. 1974)).

Accordingly, I find that the liquidated damages issue requested by BlueStar, as framed by both BlueStar and BellSouth in Issue 14, is inappropriate for arbitration by this Commission. Thus, BellSouth's motion is granted, and neither version of Issue 14 shall be included in this proceeding.

Based upon the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Remove Issues from Arbitration is hereby granted as set forth in the body of this Order.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 25th day of January, 2000.



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E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

( S E A L )

DMC

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

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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.