BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements.	DOCKET NO. 990649A-TP ORDER NO. PSC-02-0940-PCO-TP ISSUED: July 12, 2002

ORDER DENYING INTERVENTION

On May 25, 2001, we issued our Final Order on Rates for Unbundled Network Elements Provided by BellSouth (Phases I and II), Order No. PSC-01-1181-FOF-TP. Within the Order, we addressed the appropriate methodology, assumptions, and inputs for establishing rates for unbundled network elements for BellSouth Telecommunications, Inc. (BellSouth). We ordered that the identified elements and subloop elements be unbundled for the purpose of setting prices, and that access to those subloop elements shall be provided. We also determined that the inclusion of non-recurring costs in recurring rates should be considered where the resulting level of non-recurring charges would constitute a barrier to entry. In addition, we defined xDSL-capable loops, and found that a cost study addressing such loops may make distinctions based upon loop length. We then set forth the UNE rates, and held that they would become effective when existing interconnection agreements are amended to incorporate the approved rates, and those agreements become effective.

Furthermore, we ordered BellSouth to refile, within 120 days of the issuance of the Order, revisions to its cost study addressing hybrid copper/fiber xDSL-capable loops, network interface devices (NIDs), and cable and structure engineering and installation. The parties to the proceeding were also ordered to refile within 120 days of the issuance of the Order, proposals addressing network reliability and security concerns as they pertain to access to subloop elements. Later, BellSouth determined, through proceedings in other states, that changes were needed to the inputs for Daily Usage Files (DUF) and Unbundled Copper Loop/Non-Designed (UCL-ND) rates. As a result, that issue has been incorporated into this proceeding as well. This proceeding has come to be referred to as "BellSouth's 120-day filing."

On March 11 and 12, 2002, we conducted an administrative hearing in this Docket, Docket No. 990649A-TP, to receive evidence regarding the issues addressed as part of BellSouth's 120-day filing. Thereafter, upon being presented with our staff's initial recommendation resulting from the hearing, we decided to hold further consideration of this matter in abeyance for a period of 60 days from June 13, 2002, the date of our consideration of this matter. During this 60-day period, the parties are required to discuss a negotiated resolution of UNE rates in Florida.

On June 28, 2002, MPower Communications Corp. (MPower) filed a Petition to Intervene in this proceeding. Therein, MPower asks that it be allowed to intervene in this proceeding because it is a Florida-certificated alternative local exchange provider, as well as an interexchange carrier. MPower asks that it be allowed to intervene at this point to protect its interests, because it believes that the case has entered into a distinctly new phase in view of the Commission's directive to the parties to further attempt a negotiated resolution of UNE rates in Florida. MPower asserts that in the past the Commission has allowed intervention after a hearing if the status of the case has changed in such a way that parties should be allowed to intervene to address previously unforeseen developments.[1] MPower contends that the circumstances of this case have changed, and therefore, it should be allowed to intervene.

No responses to MPower's petition to intervene were filed.

Rule 25-22.039, Florida Administrative Code, states, in pertinent part:

> . . . Petition for leave to intervene must be filed at least five (5) days before the final hearing, must conform with the Uniform Rule 28-106.201(2) and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding

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[1]*Citing* Southern States Utilities, Inc. v. Florida Public Service Commission, 704 So. 2d 555 (Fla. 1st DCA 1997); and Commission Order No. 25805, issued in Docket No. 910756-EI.

> as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. . . .

Mpower has not met the requirements of Rule 25-22.039, Florida Administrative Code, in that the company has requested intervention well after the hearing conducted in this proceeding.

Furthermore, neither the circumstances nor the matters at issue in this case have changed as a result of our decision to require the parties to further engage in negotiations. The matters at issue have remained the same since the inception of this case, those matters being the establishment of appropriate rates for unbundled network elements for BellSouth. In this Docket, we have already conducted two hearings in which MPower did not participate. While we have directed the parties to further negotiate, the opportunity to negotiate has been available to the parties throughout this process. Thus, our 60-day abatement of our proceedings pending further negotiation does not present an unforeseen change in the case or the issues being addressed such that MPower's substantial interests will now be impacted.[2]

The company has not identified any basis to deviate from the requirements of Rule 25-22.039, Florida Administrative Code. Therefore, upon consideration, I hereby deny the Petition to Intervene.

It is therefore

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[2] It is noteworthy that the cases cited by Mpower are both fully distinguishable from this situation. In the Southern States Utilities case, the court found that intervention should have been allowed, because of a Supreme Court decision issued after hearing, and because the issue of a potential surcharge did not arise until after the case had been remanded to the Commission for further consideration. As for the situation addressed in Docket No. 910759-EI, the intervenor filed its petition on the day of the hearing, not after, and even then was only allowed to file a post-hearing brief.

ORDERED by Chairman Lila A. Jaber, as Prehearing Officer, that MPower Communications Corp.'s Petition to Intervene is hereby denied.

By ORDER of Chairman Lila A. Jaber, as Prehearing Officer, this 12th Day of July, 2002.

LILA A. JABER
Chairman and Prehearing Officer

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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 the Commission Clerk and Administrative Services, 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.