

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.

DOCKET NO. 030851-TP

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport.

DOCKET NO. 030852-TP
ORDER NO. PSC-04-0155-PCO-TP
ISSUED: February 16, 2004

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL AND PROTECTIVE ORDER
GOVERNING HANDLING OF INFORMATION

I. Case Background

In response to the Federal Communications Commission's (FCC) August 21, 2003, Triennial Review Order (TRO), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements.

All parties filed direct testimony on December 4, 2003. On January 13, 2004, Sprint Communications Company Limited Partnership, and Sprint-Florida, Incorporated (collectively Sprint) filed a Motion to Compel BellSouth Telecommunications, Inc., (BellSouth) to turn over the "source code" to BellSouth's economic model filed in this proceeding, the BellSouth Analysis of Competitive Entry or "BACE" model. Sprint claims that this code is necessary to audit and verify BellSouth's economic model.¹

On January 20, 2004, BellSouth filed its response, arguing therein that it had produced a "pdf" version of the model that would allow Sprint to follow the logic in the model, thereby making production of the source code to the BACE model unnecessary. In addition, BellSouth argues that the source code is intellectual property and that providing the code would allow Sprint to alter or reengineer the BACE model. Citing prior Commission decisions, BellSouth contends that this should not be allowed.²

¹ BellSouth has offered the BACE model as evidence of the potential deployment by CLECs in relevant markets as contemplated by the TRO.

² Order No. PSC-01-1181-FOF-TP, issued on May 25, 2001, in Docket No. 990649A-TP.

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The parties involved were afforded the opportunity to voice their arguments during the February 9, 2004, Prehearing Conference.

II. Background of the BACE Model

The BACE model is designed to demonstrate that CLECs are not impaired in their ability to provide service to mass market customers without access to unbundled local switching in certain geographic markets. The source code to the BACE model is “written to make an application execute the tasks that it performs. It is the ‘guts’ of any computer application, and it has tremendous value to its owner and/or developer.” (BellSouth, ¶5)

III. Decision

I fully acknowledge the policies relating to mandated disclosure of BellSouth’s source code – its intellectual property. Such information should only be compelled in the most exceptional of circumstances. Although this case does not present such an exceptional circumstance, Sprint and Commission staff must be afforded an opportunity to audit the BACE model.

In this instance, Sprint and Commission staff state that they have been unable to effectively audit or otherwise verify the integrity of the BACE model. I, therefore, order BellSouth to:

1. Make the most recent version of the BACE model available to Sprint and our staff by close of the business day on February 18, 2004, at BellSouth’s office in Tallahassee, Florida; and
2. Make a BellSouth representative who is familiar with the functions and capabilities of the most current version of the model available while Sprint and Commission staff use the model.

This is the only viable alternative to requiring BellSouth to turn over the BACE model source code. In making this ruling, I emphasize that this is a unique circumstance made necessary by the fact that the BACE model is integral to BellSouth’s case and that Sprint and our staff have expressed difficulty in auditing and verifying BellSouth’s economic model without taking such measures.

Pursuant to Section 364.183, Florida Statutes, proprietary confidential business information obtained by the Commission or on its behalf shall be protected. The source code to the BACE model clearly meets the definition of proprietary confidential business information found in Section 364.183(3), Florida Statutes. As such, the following conditions shall apply to the handling and dissemination of this information:

1. The use of the compelled proprietary information shall be limited to these dockets, and dissemination shall be limited to counsel of record, consultants working directly for counsel, persons identified to testify at the technical hearing, those persons otherwise authorized to review confidential information pursuant to protective agreements between the parties, and Commission staff;
2. This source code shall only be used for purposes of verifying and auditing the model. Use of the code for any other purpose shall be prohibited and shall be considered a sanctionable offense;
3. The provisions of this Order will continue to govern the information at issue until a final decision is rendered on the specific item of information filed. While this Order includes a preliminary finding that the information is, in fact, confidential, BellSouth shall still be required to follow the procedures in Rule 25-22.006, Florida Administrative Code, for seeking confidential classification of the information when filed; and
4. This Order will supplement the procedure for use of confidential information set forth in the Order Establishing Procedure issued in these Dockets.

The outlined procedures comply with Rule 25-22.006(6), Florida Administrative Code, regarding protection of proprietary information in Commission proceedings. I emphasize that this Order does not preclude Commission staff from reviewing the information protected by this Order.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that Sprint Communications Company Limited Partnership, and Sprint-Florida, Incorporated's Motion to Compel is hereby granted in part and denied in part. It is further

ORDERED that BellSouth shall comply with the provisions of this Order by the close of business on Wednesday, February 18, 2004.

ORDER NO. PSC-04-0155-PCO-TP
DOCKET NOS. 030851-TP, 030852-TP
PAGE 4

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 16th
day of February, 2004.



CHARLES M. DAVIDSON
Commissioner 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; 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 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.