

BEFORE THE PUBLIC SERVICE COMMISSION

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-04-0164-PCO-TP
ISSUED: February 17, 2004

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER

I. Case Background

In response to the Federal Communications Commission's (FCC's) 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.

On January 21, 2004, DIECA Communications Inc., d/b/a Covad Communications Company (Covad) filed a Motion for Summary Final Order as to Issue Nos. 7-12 and 14-18, or in the alternative, find the evidence offered to be insufficient, or expand the procedural schedule to accommodate CLEC rebuttal. On January 27, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Response in Opposition to Covad's Motion. On January 28, 2004, Verizon Florida, Inc. (Verizon) filed its Response to Covad's Motion.

II. Covad's Motion for Summary Final Order

Covad asserts in its motion that BellSouth's and Verizon's evidence and testimony do not present any relevant evidence regarding dedicated transport triggers and fail as a matter of law to comport with the test ordered by the FCC. Covad moves that this Commission enter a summary final order answering Issue Nos. 7-12 and 14-18 in the negative.

Covad contends that BellSouth's and Verizon's evidence and testimony present routes that assume the existence of dedicated transport, rather than presenting specifically identifiable dedicated transport facilities and routes. Covad argues that this presentation of evidence is contrary to the trigger tests mandated by the FCC and is an attempt to shift the burden of proof to CLECs.

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III. BellSouth's Response in Opposition to Covad's Motion

In its response, BellSouth counters that this Commission should deny Covad's motion in its entirety. BellSouth contends that arguments as to the weight of the evidence are appropriately raised in post-hearing briefs. Further, BellSouth asserts Covad's motion demonstrates an evidentiary disagreement, which by its very nature constitutes material issues of fact in dispute. Thus, summary disposition is improper according to BellSouth.

IV. Verizon's Response in Opposition to Covad's Motion

In its response, Verizon sets forth similar arguments and asserts that Covad's motion wholly fails to demonstrate that there exists no genuine issue of material fact regarding the dedicated transport triggers.

V. Analysis

Rule 28-106.204(4), Florida Administrative Code, provides that any party may move for summary final order whenever there is no genuine issue as to any material fact. Section 120.57(1)(h), Florida Statutes, provides that in any proceeding in which an agency has final order authority, all inferences are drawn in favor of the non-moving party/parties, and the moving party must demonstrate that there are no material facts in dispute. (See also, Order No. PSC-03-1469-FOF-TL)

VI. Decision

Upon consideration of the above arguments, I find that a decision regarding the sufficiency of the pre-filed testimony filed by BellSouth and Verizon would be premature at this time. Similarly, an order that BellSouth and Verizon file "competent, relevant evidence" would be improper in that such order would assume that the testimony filed thus far is not sufficient. Further, I find that Covad's motion fails to meet the standard for Summary Final Order as stated above.

Covad's motion addresses the sufficiency of BellSouth's and Verizon's testimony, but it fails to show there is no genuine issue of material fact for the Commission to address. All parties have made it clear in their filings that there are significant differences in opinion as to what type of evidence constitutes satisfaction of the FCC's "triggers." Such disputed questions will be addressed by this Commission in the course of the hearing. Covad's arguments do not constitute a proper rationale for summary disposition at this point in the proceeding.

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Accordingly, I find that Covad's Motion for Summary Final Order and Covad's Motion for Oral Argument are denied.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that DIECA Communications Inc., d/b/a Covad Communications Company's Motion for Summary Final Order is denied. It is further

ORDERED that DIECA Communications Inc., d/b/a Covad Communications Company's Motion for Oral Argument is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 17th day of February, 2004.


CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(S E A L)

JPR

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.

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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.