

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

DECEMBER 26, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (GREER) *SAS for SLG + WDH*
DIVISION OF LEGAL SERVICES (PELLEGRINI) *MCB*

RE: DOCKET NO. 961346-TP - PETITION FOR ARBITRATION OF
DISPUTE WITH BELLSOUTH TELECOMMUNICATIONS, INC.,
REGARDING CALL FORWARDING, BY TELENET OF SOUTH FLORIDA,
INC.

AGENDA: JANUARY 7, 1997 - REGULAR AGENDA - DECISION PRIOR TO
HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: ARBITRATION DECISION APRIL 1, 1997

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961346TP.RCM

CASE BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth has declined to continue selling call forwarding to Telenet, alleging that Telenet uses the service in violation of section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff. Telenet alleges that the tariff provision is an anticompetitive restriction and that it has not been able to reach a resale agreement with BellSouth. Although Section 364.161(1), Florida Statutes, requires that the Commission arbitrate the dispute within 120 days, the parties have stated that they do not object in this case to the Commission's rendering its decision by April 1, 1997.

BellSouth at first advised Telenet that it would terminate all call forwarding services to Telenet on November 21, 1996. Later, this date was extended to December 5, 1996, in order to provide the parties with time to work out conditions by which the status quo could be preserved until the Commission's decision.

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At the same time it filed its petition for arbitration with this Commission, Telenet filed a petition for a temporary injunction in the Seventeenth Judicial Circuit, Broward County. However, Telenet later requested that its petition for temporary injunction be stayed, in light of an agreement it reached with BellSouth by which Telenet would be permitted to continue to provide call forwarding services to existing, but not new, customers for the duration of this proceeding.

On December 5, 1996, BellSouth filed its answer and response to Telenet's petition and a motion to dismiss. Telenet filed its opposition to BellSouth's motion to dismiss on December 17, 1996. This recommendation addresses BellSouth's motion to dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's motion to dismiss Telenet's petition for arbitration?

RECOMMENDATION: No.

STAFF ANALYSIS: In its motion to dismiss, BellSouth asserts that Telenet's petition does not set forth a proper basis for arbitration under Section 364.161, Florida Statutes. BellSouth alleges that there is no dispute concerning "the terms, conditions, and prices of any feasible unbundling request," required by the statute as a condition precedent to a petition for arbitration. Rather, BellSouth alleges, Telenet merely wishes to purchase tariffed call forwarding services and to resell those services in a manner that contravenes a tariff restriction.

BellSouth's General Subscriber Service Tariff A13.9.1.A.1 defines call forwarding as "an arrangement for transferring incoming calls to another local service telephone number by dialing a code and the number of the service to which calls are to be transferred." The tariff provides that:

Call Forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment in whole or in part of message toll

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charges that would be regularly applicable between the station originating the call and the station to which the call is transferred.

BellSouth has concluded that Telenet's use of call forwarding contravenes this provision, and, as a result, declines to continue selling the service to Telenet.

BellSouth believes that an arbitration is not appropriate in this case, but that if Telenet wishes to challenge BellSouth's application of this tariff provision, it should proceed pursuant to Rule 25-22.032, Florida Administrative Code, (complaint process) or Rule 25-22.036, Florida Administrative Code (formal administrative hearing). BellSouth recognizes Telenet's right to challenge the tariff provision as applied and states that it would have no objection to the Commission's treating Telenet's petition as though it were a properly-filed complaint.

Telenet asserts that its petition sets forth a proper case for arbitration under Section 364.161(1), Florida Statutes. Telenet points out that in Section 3(29) of the Telecommunications Act of 1996, 47 U.S.C. §151 et seq., "network element" is defined as "a facility or equipment used in the provision of telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment." Telenet notes that, in its First Report and Order, FCC 96-325, issued August 8, 1996, the FCC, at paragraph 262, interprets the definition of "network element" to include "facilities or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Thus, Telenet argues, software and elements sold directly to end users as retail services, such as call forwarding, are "network elements."

Telenet further argues that the provision in Section 364.161, Florida Statutes, requiring local exchange telecommunications companies to unbundle all of their network features, functions and capabilities, including access to signaling databases, systems and routing processes, contemplates multi-path call forwarding. Moreover, Telenet states that Section 364.161(2), Florida Statutes, provides that "no local telecommunications company may impose any restrictions on the resale of its services or facilities except those which the Commission may determine are

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reasonable." Telenet concludes, therefore, that BellSouth's denial of a tariffed service, i.e., an unbundled network element, based on the application of a tariff restriction, is a proper matter to be arbitrated under Section 364.161(1) Florida Statutes.

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which the Commission may grant the relief requested. All allegations in the petition should be taken as though true, and considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963). Applying this standard, staff believes that Telenet's petition is a proper request for arbitration under Section 364.161(1), Florida Statutes.

Section 364.161(1), Florida Statutes, provides that:

Upon request, each local exchange telecommunications company shall unbundle all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes, and offer them to any other telecommunications provider requesting such features. The parties shall negotiate the terms, conditions, and prices of any feasible unbundling request. If the parties cannot reach a satisfactory resolution within 60 days, either party may petition the commission to arbitrate the dispute and the commission shall make a determination within 120 days.

In its petition, Telenet alleges that BellSouth first offered to sell Telenet call forwarding lines in November 1995, and that Telenet began negotiations with BellSouth in June 1996. Telenet alleges that negotiations continued through the months of July and August. On September 19, 1996, BellSouth advised Telenet that it would not authorize any new service until Telenet initiated a request for a resale agreement, and on October 15, 1996, BellSouth notified Telenet that it would remove call forwarding features from Telenet's lines on November 21, 1996, absent proof that Telenet was not using the service in violation of Section A13.9.1.A.1.

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It appears in Telenet's petition for arbitration that Telenet requested that BellSouth unbundle multi-path call forwarding and that Telenet and BellSouth engaged in negotiations for at least 60 days. Further, it appears that Telenet had sufficient reason to conclude that continued negotiations would not be successful. Staff concurs with Telenet that call forwarding is a network element that BellSouth is obligated to unbundle pursuant to Section 364.161(1), Florida Statutes. Moreover, whether the application of Section A13.9.1.A.1 to Telenet's use of call forwarding is a reasonable restriction under Section 364.161(2), Florida Statutes, is appropriate for the Commission to determine. Therefore, staff believes Telenet has stated a proper claim for arbitration under the provisions of Section 364.161, Florida Statutes.

Telenet is a start-up alternative local exchange carrier, certificated by Order No. PSC-96-0538-FOF-TX, issued on April 17, 1996. It elected to request arbitration in order to obtain a resolution of its dispute with BellSouth in the shortest possible period of time. Staff concurs with BellSouth's observation that Telenet could proceed in other ways to obtain the Commission's ruling on the applicability of the tariff provision in question. However, staff understands that Telenet declined to proceed under Rule 25-22.032, Florida Administrative Code, which controls the Commission's complaint process, because it believes that there is little likelihood of an informal resolution at this stage, and, moreover, because it fears that the Commission would rule less timely on a complaint and that the Commission's ruling would be protested. Staff also understands that, likewise, Telenet declined to proceed under Rule 25-22.036, Florida Administrative Code, which controls the initiation of formal administrative proceedings before the Commission, because it recognizes that, while the proceeding would not be unlike an arbitration, it would not be constrained by a statutory period in Telenet's favor.

Based on the foregoing, staff believes that Telenet's petition for arbitration is appropriate. The petition states a cause of action for which relief may be sought from the Commission. Thus, staff recommends that the Commission deny BellSouth's motion to dismiss Telenet's petition for arbitration.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No.

STAFF ANALYSIS: If the Commission adopts staff's recommendation in Issue 1, this docket should remain open in order to resolve the dispute between the parties.