

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for arbitration ) DOCKET NO. 961346-TP  
of dispute with BellSouth ) ORDER NO. PSC-97-0462-FOF-TP  
Telecommunications, Inc. ) ISSUED: April 23, 1997  
regarding call forwarding, by )  
Telenet of South Florida, Inc. )  
\_\_\_\_\_)

The following Commissioners participated in the disposition of this matter:

JOE GARCIA  
DIANE K. KIESLING

APPEARANCES:

Douglas G. Bonner, Esquire, and Colin M. Alberts, Esquire, Swidler & Berlin, Chartered, 3000 K. Street N.W., Suite 300, Washington, D.C. 20007-5116  
On behalf of Telenet of South Florida, Inc.

J. Phillip Carver, Esquire, and Nancy B. White, Esquire, c/o Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556  
On behalf of BellSouth Telecommunications, Inc.

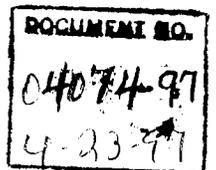
Charles J. Pellegrini, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Commission Staff.

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

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 (GSST). Telenet alleges that the tariff provision is an anticompetitive restriction and that it has not been able to reach a resale agreement with BellSouth.



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 our decision.

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. In Order No. PSC-97-0072-FOF-TP, issued January 23, 1997, we denied BellSouth's motion to dismiss. An evidentiary hearing was held on February 12, 1997.

At the issue identification meeting held in this proceeding on January 2, 1997, Telenet declined to add an issue regarding the unbundling and pricing of call forwarding services. Thereafter, the Prehearing Officer granted from the bench BellSouth's motion to strike portions of Telenet's testimony regarding the unbundling and pricing of its call forwarding services. BellSouth is required by Section 364.161 (1), Florida Statutes, and Section 251(c)(4) of the Telecommunications Act of 1996 (Act) to offer for resale, upon request, any features, functions or capabilities to the extent technically and economically feasible. The terms, conditions and price for a resold service are not, however, issues for us to arbitrate in this proceeding.

The issue before us is whether BellSouth may continue to sell its call forwarding services subject to the existing tariff restrictions. After reviewing the evidence of record, the arguments of the parties, and the recommendations of our staff, we set forth our decision below.

#### RESALE OF CALL FORWARDING

As previously stated, Telenet filed a petition for arbitration regarding the reasonableness of BellSouth's tariff restriction on the resale of its call forwarding services. The record shows that Telenet is currently reselling BellSouth's call forwarding services in a way that avoids the payment of toll or access charges, which violates BellSouth's tariff.

We first consider the business relationship between Telenet and BellSouth, and then the service that Telenet intends to provide based on BellSouth's call forwarding service. Next, we consider the tariff restriction that is in contention, followed by the parties' arguments concerning whether or not the tariff restriction is reasonable and nondiscriminatory. Finally, we consider BellSouth's contention that access charges are applicable, and

Telenet's contention that it is delivering calls within its local calling area.

#### Business Relationship

Telenet witness Kupinsky states that Telenet was certified by this Commission as an alternative local exchange company (ALEC) in April of 1996. He states that Telenet has offered local exchange services in the tri-county area of Dade, Broward and Palm Beach counties in competition with BellSouth since May 1996. He states further that Telenet began purchasing call forwarding features, as well as standard business lines with other features, in November of 1995. Witness Kupinsky states that the lines at first were purchased in names other than Telenet, since Telenet was not yet formed as a corporation. He states, moreover, that Telenet did not indicate to BellSouth customer representatives that Telenet's customers would be using the business lines or call forwarding services to avoid BellSouth's toll charges. BellSouth witness Scheye asserts there was no way for BellSouth's customer representatives to discern how Telenet intended to use the service, whether for resale or not.

According to witness Scheye, Telenet is reselling call forwarding features associated with custom calling service, such as call forwarding variable, call forwarding variable multipath and remote access call forwarding variable. Witness Scheye believes this is a misuse of BellSouth's call forwarding services and violates the nature and purpose of the services. Witness Scheye states that Telenet has not attempted to negotiate a resale agreement pursuant to the applicable law; therefore, he claims, Telenet is not authorized to resell any of BellSouth's retail services. He later asserts that the resale of call forwarding services is not at issue, but only Telenet's use of these services as a means to bypass long distance charges.

#### Telenet Service

According to Telenet witness Kupinsky, Telenet currently has approximately 239 customers, with about 100 prospective customers. He explains that, in the provision of Telenet's service, customers dial a local phone number that gives them access to Telenet's computer voice mail network. The customers then enter an access code and the telephone number they wish to reach. He states that Telenet's voice mail network enables Telenet's customers to place what are generally considered toll calls for a flat fee of 10 cents per call within the existing service area. He states further that this is accomplished by using forwarding lines to create direct connections between each Telenet Interactive Voice Response (IVR)

switching system, each of which routes calls between each other. He states that what would normally be a long distance or an extended calling service (ECS) call is broken into a series of local calls.

As witness Kupinsky further explains, a Telenet customer in the Miami area calling a number in Pompano would dial a local number in Miami to reach Telenet's IVR. Once in Telenet's computer system, the customer would enter an access code and the number the customer wishes to call. The IVR located in Miami would place the customer on hold and look in the routing table for the correct forwarding number required for the call to reach the IVR in Pompano. As a result, the Miami IVR would call a local number in North Dade, which would call another local number in Hollywood. The Hollywood number would call a local number in Fort Lauderdale, which would call a local number in the Pompano IVR. At this point, the two IVRs would connect and the call would be placed. Witness Kupinsky states that this process takes about 10 to 15 seconds.

Upon consideration, we find that, while a Telenet customer would pay 10 cents for the call described above, or any call within the tri-county area in which Telenet operates, a customer making the same call on BellSouth's network would pay the applicable ECS or toll rate. We also find that Telenet does not pay any access charges to BellSouth. In addition, we find that if these calls were made through AT&T, for example, the calls would be toll, and AT&T would pay access charges to BellSouth.

#### Tariff Interpretation

In Section A13.9.1.A.1 of BellSouth's GSST, "call forwarding variable" is described as follows:

This provides 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.

Witness Kupinsky states that call forwarding is a key element in the Telenet network, and that Telenet would not be able to compete without the use of call forwarding services. Witness Kupinsky contends that Telenet requires "remote access to call forwarding," which offers the multi path feature. He explains that remote access allows subscribers to activate or deactivate the feature from a remote location. He explains further that "call forwarding multipath" provides the capability to specify the number of calling paths that can be forwarded simultaneously.

BellSouth witness Scheye states that Telenet's use of "call forwarding multipath" violates GSST section A13.9.1.A.1. That part of the tariff provides:

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

Witness Kupinsky asserts that the restriction in BellSouth's tariff on call forwarding services is anticompetitive and discriminatory towards ALECs and resellers. He contends that the restriction is an artificial barrier to entry and is detrimental to the consumers of South Florida since BellSouth continues to charge monopolistic rates. He points out that even if Telenet were to purchase intraLATA toll service from BellSouth at a 20% wholesale discount, it would cost Telenet 16 cents per minute, which is substantially higher than the current flat rate of 10 cents per call Telenet charges its customers. Thus, he contends that BellSouth's intraLATA network is an essential bottleneck facility for any provider of competitive local exchange service. Furthermore, he contends that call forwarding, without end-user restrictions, must be provided to introduce competition in the intraLATA market dominated by BellSouth.

The record shows that Telenet's intent is to offer prices to consumers that are less than those offered by its competitors. Moreover, the record shows that the rate available to Telenet through BellSouth's wholesale discount is 16 cents per minute, less than BellSouth's current intraLATA toll rate of 21 cents per minute. In addition, as discussed below, there are other alternatives available to Telenet to provide intraLATA toll services to consumers.

Witness Scheye states that BellSouth's limitation on the use of call forwarding is not a resale restriction. Rather, the limitation defines the nature of the service. He believes that the definition and the tariff limitation specify the proper usage of the service in all instances, whether sold as a retail service or as a resold service. He contends that the tariff is clear that the appropriate rates should be applied for the purpose of call forwarding when calls are transferred outside the local calling area. Furthermore, he states that the tariff specifically prohibits any systematic use of the service to avoid the payment of toll charges. He states that Telenet's use is more than a

violation of a particular tariff term and condition; it is essentially an attempt to displace one service through the misuse of another service.

In its brief, Telenet argues that BellSouth's contention that the provision is not a restriction but definitional is disingenuous, and is an attempt by BellSouth to obscure clear-cut state and federal directives. BellSouth witness Scheye claims that even if we were to define the toll service prohibition as a resale restriction, we could still determine that it is reasonable and nondiscriminatory.

Section 364.161 (2), Florida Statutes, in pertinent part, states:

Other than ensuring that the resale is of the same class of service, no local exchange telecommunications company may impose any restrictions on the resale of its services or facilities except those the commission may determine are reasonable. (emphasis supplied)

In addition, Section 251(c) (4) (B) of the Act states that it is the duty of the incumbent LEC:

not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers. (emphasis supplied)

The FCC, in FCC 96-325, First Report and Order, CC Docket No. 96-98, at ¶939, concluded that, since restrictions and conditions may have anticompetitive results, all resale restrictions are presumptively unreasonable. We have, however, authority to approve reasonable and nondiscriminatory restrictions on resale under Florida law and the Act.

#### Reasonableness and Discrimination

BellSouth witness Scheye states that the toll bypass prohibition is clearly reasonable and nondiscriminatory for several reasons. He asserts that the tariff limitation promotes more efficient use of the network. He contends that call forwarding was not designed as a toll service, and using call forwarding to transfer calls from one central office to another to complete a toll call will generate additional traffic over facilities that were not engineered for such an unintended use. We note that witness Scheye admits that BellSouth has no studies or surveys that demonstrate that Telenet's resale of call forwarding to bypass intraLATA toll will adversely affect BellSouth's network. In addition, witness Scheye states that Telenet's demand for BellSouth's call forwarding service is not technically infeasible, and it will not exceed BellSouth's network capability.

Upon consideration, we find that if Telenet's volume grew or if other carriers used this same arrangement, this could ultimately lead to an inefficient use of BellSouth's network. We find further that there is insufficient evidence to determine if BellSouth's network would be adversely affected by Telenet's use of call forwarding to bypass toll.

BellSouth witness Scheye asserts that the price of call forwarding services is affected by the terms and conditions found in the tariff, just as the terms and conditions affect the price of other tariffed services. He claims that the elimination of the call forwarding restriction would erase distinctions between toll and local service and create tariff arbitrage. Witness Scheye contends that if the unrestricted use of call forwarding were permitted, particularly as a means of bypassing toll charges, BellSouth would need to modify the price significantly to recognize that it had become a toll and access substitute, or even reconsider whether or not to continue to offer the service.

Witness Scheye states that local calling areas have been established through tariffs and Commission proceedings to delineate local calling areas and to meet community of interest needs. He contends that the definitions of services in BellSouth's tariffs have been established to identify these calling areas, and to distinguish between local, toll and access services. Thus, he states that BellSouth's prices have been established to recognize these distinctions and reflect Commission policies for these services.

In its brief, Telenet argues that it has long been recognized by the FCC that arbitrage practices promote lower consumer rates and improved services. Witness Kupinsky states that arbitrage is

a method of introducing much-needed competition in a market that has belonged exclusively to BellSouth.

We note that we have devoted much attention to the local calling areas of consumers in Florida. This is illustrated by the extensive Commission proceedings resulting in the implementation of extended area service (EAS) and ECS throughout Florida. In addition, Part IV of Chapter 25-4, Florida Administrative Code, Commission rules regarding the classification of telephone exchanges and EAS provide specific requirements that must be met in order for a toll route to be converted to an EAS or ECS route. Moreover, in Order No. PSC-93-0108-FOF-TL, issued January 21, 1993, in Docket No. 920188-TL, we stated that EAS was created to provide specific areas that had an established community of interest with another area some form of toll relief. Therefore, we agree with BellSouth that this Commission has set certain policies regarding the price distinction between local and toll services.

BellSouth witness Scheye also states that we approved the terms and conditions currently contained in the call forwarding tariff. He asserts that such terms and conditions would not have been approved if we found them to be unreasonable or discriminatory. Witness Scheye at first contends that the terms and conditions that determine the application of the tariff should be presumed reasonable for purposes of resale and should be applied to all end user customers of the tariffed service unless we determine that a particular term or condition is unreasonable or discriminatory. He later concedes that the burden lies with BellSouth to demonstrate that its tariff restriction is reasonable and non-discriminatory.

In its brief, Telenet argues that we have never previously addressed whether BellSouth's tariff restriction is an unreasonable or discriminatory restriction, since BellSouth's tariff was filed prior to the passage of Section 364.161(2), Florida Statutes, and the Act. Telenet also argues in its brief that BellSouth's argument that call forwarding may need to be repriced to account for the loss of intraLATA toll is not at issue in this docket. Telenet contends that if BellSouth wishes to reprice its service it can accomplish that in another proceeding.

We agree with Telenet on both of these points. There have been many changes in the telecommunications industry since BellSouth's tariff was approved. When we approved BellSouth's tariff regarding call forwarding services, the approval was based on its appropriateness at that time. It is proper for us to examine whether the tariff is reasonable in today's circumstances. If BellSouth believes that its call forwarding services are being

used for purposes other than it initially intended, then BellSouth may wish to re-evaluate its tariff.

Finally, witness Scheye states that the service limitation is not discriminatory to resellers or to a reseller's end users, because BellSouth's own end users cannot use call forwarding to bypass toll charges. Witness Scheye contends that this limitation is applied to anyone who uses the service. He asserts that the limitation is nondiscriminatory as to both BellSouth's customers and to a reseller's customers. In fact, Witness Scheye contends that to apply the restriction to BellSouth's customers, but not to other end user customers, would be discriminatory. Upon consideration, we find that the restriction on BellSouth's call forwarding service is equally applicable to all end user customers and resellers. Thus, we find that the restriction is not discriminatory. We further find that the service limitations on BellSouth's call forwarding services shall be uniform across all carriers.

Access Charges

Witness Scheye states that the unrestricted resale of call forwarding by Telenet results in the delivery of traffic for which terminating access service charges would otherwise apply. Section 364.16(3)(a), Florida Statutes, states that:

No local exchange telecommunications company or alternative local exchange company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

As witness Kupinsky concedes, Telenet does not pay any access charges to BellSouth. He also concedes that if these calls were made through an interexchange carrier (IXC) such as AT&T, however, the calls would be toll, and AT&T would pay access charges to BellSouth. Witness Scheye asserts that the statute, in his opinion, does not permit an interconnection or resale arrangement to be used as a conduit for the bypass of access charges.

Based on the nature of the service that Telenet provides, witness Scheye states that BellSouth has an interconnection arrangement with Telenet, as contemplated by Chapter 364, Florida Statutes. Although there is no signed "interconnection agreement" between the two companies as envisioned by Section 364.161 or

364.162, Florida Statutes, witness Kupinsky agrees that the two companies are physically connected through BellSouth's business lines and call forwarding service and Telenet's IVR switching system. Witness Kupinsky asserts that Telenet is not receiving traffic from IXCs for which terminating access charges would apply; Telenet is merely enhancing the local exchange carrier (LEC) services already provided by BellSouth. Furthermore, since no IXC is involved, he asserts that bypass of terminating access charges is not at issue.

Witness Kupinsky states that Telenet is not violating section 364.16(3)(a), Florida Statutes, and does not owe BellSouth access charges because the calls Telenet handles never leave the BellSouth network. Although Telenet owns its IVRs, he states that the calls remain on the BellSouth line even when they are in the IVRs. We are not persuaded that the calls never leave the BellSouth network. The IVRs are the only network components that Telenet owns. We find that the IVRs are a crucial component in the provision of Telenet's service. We find further that there is a break in BellSouth's service when the call goes from BellSouth's lines into Telenet's IVR and then back out into BellSouth's network. Upon consideration, we conclude that terminating access charges are applicable.

#### Local Calling Area

Telenet witness Kupinsky contends that Telenet's local calling area consists of the tri-county region of Dade, Broward and Palm Beach counties. He asserts that when a Telenet customer is using its system, the call is a local call because the customer is calling within Telenet's local calling area. However, he concedes, as noted above, that if that same customer were to use BellSouth's network, or make that same call through AT&T or MCI, it would be either an ECS or a toll call.

Witness Scheye states that intraLATA toll is designed to provide a non-local call between two points within a Florida LATA. He states that BellSouth will either receive toll or access for the intraLATA call. Further, he states that Telenet's use of its call forwarding services circumvents the appropriate tariffs and charges established for long distance calls. He asserts that while Telenet claims it provides local exchange service to end users, it does not provide any of the essential elements that make up basic local exchange service. He notes that Section 364.337 (2), Florida Statutes, in his opinion, requires that basic local telecommunications service provided by an ALEC include access to operator services, 911 services, and relay services for the hearing

impaired. He states that BellSouth is the company that provides these elements to Telenet's customers.

Although Telenet states in its price list that it does not provide basic local exchange service, witness Kupinsky asserts that Telenet provides local exchange service in competition with BellSouth. He further asserts that Telenet does not provide basic local service since it does not provide dial tone; instead, it provides intraLATA call switching for customers.

Witness Scheye states that since customers dial an access code to use Telenet's service, similar to dialing around for an IXC, it is actually providing service as an IXC, not as an ALEC. Witness Kupinsky agrees that Telenet is an intraLATA toll provider since it provides calls within the LATA. He contends, however, that Telenet does not function as an IXC since it has designated the entire three county area in which it operates as its local calling area. He contends further that since an ALEC has full statewide authority, the LEC's local calling area is not necessarily the same as the ALEC's. Furthermore, in its brief, Telenet argues that in Order No. PSC-96-1231-FOF-TP, issued October 1, 1996, we stated that the ALEC's local calling area may or may not be the same as the LEC's local calling area.

We agree that an ALEC has full statewide authority when it receives certification from this Commission, and that it has the authority to designate its local calling area in whatever way it chooses. Section 364.16 (3)(a), Florida Statutes, nonetheless, does not allow an ALEC to knowingly deliver traffic where terminating access charges would otherwise apply. Therefore, while an ALEC may have a different local calling area than an incumbent LEC, it is required by statute to pay the applicable access charges.

#### Options

BellSouth witness Scheye also contends that the toll bypass restriction in its tariff is not discriminatory or anticompetitive because there are several options available to resellers to use for developing competitive services. He explains that these alternatives include the reselling of BellSouth's ECS service, the reselling of BellSouth's wide area telecommunications service (WATS), the purchase of intraLATA toll service from BellSouth at the wholesale discount, the reselling of service from interexchange carriers, and the opportunity for Telenet to build its own infrastructure.

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While Telenet witness Kupinsky states that Telenet did not consider every available alternative, he states that Telenet did consider alternatives such as the purchase of BellSouth's intraLATA toll service at the wholesale discount, and the building of its own infrastructure. He states that these alternatives are not a part of Telenet's business plan. In addition, he contends that these alternatives would not provide real savings to the customer because the customer prices would basically be the same as offered by BellSouth. Nonetheless, as we earlier noted, if Telenet were to purchase intraLATA toll service from BellSouth at a 20% discounted wholesale rate, it would cost Telenet 16 cents per minute. As we also have noted earlier, while Telenet asserts that this discounted rate is substantially higher than the flat rate of 10 cents per call it charges its customers, it is still less than BellSouth's current intraLATA toll rate of 21 cents per minute.

Conclusion

Upon consideration of the evidence in the record and in conformance with Chapter 364, Florida Statutes, and the Act, we find it appropriate for BellSouth to continue to sell its call forwarding services to Telenet subject to the restrictions of GSST section A13.9.1.A.1. We point out that we have always encouraged negotiations to promote competition. We encourage BellSouth and Telenet to continue their negotiations to arrive at an appropriate arrangement whereby Telenet may continue providing service to end users.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that BellSouth Telecommunications, Inc., may continue to sell its call forwarding services to Telenet of South Florida, Inc., subject to the restrictions of General Subscriber Service Tariff section A13.9.1.A.1. It is further

ORDERED that this docket shall be closed.

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By ORDER of the Florida Public Service Commission, this 23rd  
day of April, 1997.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay Flynn  
Chief, Bureau of Records

( S E A L )

CJP

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).

M E M O R A N D U M

APRIL 22, 1997

**RECEIVED**  
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FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *MB*

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

0462-FOF

Attached is a FINAL ORDER ON ARBITRATION to be issued in the  
above-referenced docket. (Number of pages in Order - 13)

*see 1*

CJP/clp  
Attachment  
cc: Division of Communications  
I: 961346fo.cjp

*3/2*