State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 23, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (L. FORDHAM) LF BLC
DIVISION OF COMPETITIVE SERVICES (BARRETT, MaB FULWOOD, HINTON) CH
DIVISION OF REGULATORY OVERSIGHT (VINSON, BROUSSARD) CV EBB AH

RE: DOCKET NO. 000731-TP - PETITION BY AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC. D/B/A AT&T FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252.

AGENDA: 09/4/01 - REGULAR AGENDA - MOTIONS FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000731.RCM

CASE BACKGROUND

On June 16, 2000, AT&T Communications of the Southern States, Inc. and TCG South Florida (collectively "AT&T") filed a Petition for Arbitration pursuant to 47 U.S.C. Section 252(b) of the Telecommunications Act of 1996, seeking arbitration of certain unresolved issues in the interconnection negotiations between AT&T and BellSouth Telecommunications Incorporated (BellSouth). The petition enumerated 34 issues. On July 11, 2000, BellSouth filed its response. A number of the issues originally contained in the Petition were withdrawn, settled, or, by agreement of the parties, deferred to appropriate generic proceedings. On February 14-15, 2001, an administrative hearing was held on the remaining issues,

and on June 28, 2001, Final Order No. PSC-01-1402-FOF-TP was issued.

On July 13, 2001, both AT&T and BellSouth timely filed separate motions for reconsideration of the Final Order. On July 25, 2001, BellSouth filed its Memorandum in Opposition to AT&T's Motion for Reconsideration and Cross-Motion for Clarification. On July 30, 2001, BellSouth filed a Motion for Extension of Time for the filing of the executed agreement. This recommendation addresses those Motions. We have authority to address this matter pursuant to Chapter 364, Florida Statutes, 47 C.F.R. §§ 52.3 and 52.19, and FCC Order No. FCC 99-249.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motions for Reconsideration filed by BellSouth and AT&T be granted?

RECOMMENDATION: No. The Motions for Reconsideration filed by BellSouth and AT&T should not be granted. However, the Order should be corrected as reflected in this recommendation to correct a scrivener's error identified by both parties. **(FORDHAM)**

STAFF ANALYSIS: Rule 25-22.060(1)(a), Florida Administrative Code, governs Motions for Reconsideration and states, in pertinent part: "Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." The standard of review for a Motion for Reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., at 317.

Furthermore, staff notes that clarification has been requested within the pleadings. Neither the Uniform Rules of Procedure nor the Commission's Rules specifically make provision for a motion for clarification. However, the Commission has typically applied the Diamond Cab standard in evaluating a pleading titled a motion for clarification when the motion actually sought reconsideration of some part of the substance of a Commission order. In cases where the motion sought only explanation or clarification of a Commission order, the Commission has typically considered whether its order requires further explanation or clarification to fully make clear the Commission's intent. See, e.g., Order No. PSC-95-0576-FOF-SU, issued May 9, 1995.

AT&T Motion for Reconsideration

The AT&T Motion contains six points for which this Commission is requested to reconsider its findings:

1. The Commission's decision to adopt BellSouth's definition for "currently combines."

Though conceding that the Eighth Circuit Court did not specifically define "currently combines", AT&T argues that any definition should require that BellSouth provide combinations which may be typically combined, even if BellSouth does not currently combine them. AT&T cites a Georgia Public Service Commission finding in support of its claim.[1]

BellSouth responds that the Commission correctly found that "currently combines" refers only to those combinations of UNEs that are "in fact, already combined and physically connected in BellSouth's network at the time a requesting carrier places an order." BellSouth further observes that AT&T re-asserts the same argument that it made at the hearing and in its brief; thus, reconsideration should be denied.

On this point, staff believes AT&T clearly does not meet the criteria for reconsideration. AT&T has failed to identify a point

[1] Order, *UNE Combinations, In re: Generic Proceeding to Establish Long-Term Pricing Policies forv Unbundled Network Elements, Docket No. 10692-U,* Georgia Public Service Commission, February 1, 2000, p. 11.

of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. AT&T merely reargues that which is found within the record, (Order at 11-16) and points out that the state of Georgia adopted a definition different than that of this Commission. While the Georgia Commission may have reached a different conclusion, its decision does not identify a mistake of fact or law in this Commission's Order. Accordingly, staff recommends that reconsideration of this point be denied.

2. The Commission's decision that BellSouth's "glue charge" may be charged at market based rates.

AT&T argues that the "glue charge" is BellSouth's attempt to obtain an additional profit over and above the reasonable profit it recovers in the cost based rates for network element combinations. Accordingly, there should be no additional charges added for the provision of such combinations.

BellSouth responds that AT&T makes no new argument and, in fact, is just repeating the argument from its brief, using identical language. Accordingly, BellSouth urges that reconsideration be denied.

Staff believes that AT&T offers no new authority or new argument on this point but, rather, only reargues that which was argued at the hearing and in its brief. (Order at 25, 26) As such, AT&T has not identified a mistake of fact or law on this point. Accordingly, staff recommends that reconsideration of this point be denied.

3. Tandem Switching element.

AT&T urges that the FCC has made clear that the geographic area test is the only criteria which must be met to entitle them to compensation at the tandem switching rate. AT&T also points to what it considers to be an inconsistency in the Order when one paragraph defers the "policy decision" to the generic docket, but in another paragraph, applies an "actually serves" geographic test in the proceeding. (Order at 79, 80) Accordingly, AT&T asks that this Commission reconsider and find that AT&T meets the geographic test, or, in the alternative, defer a finding on this issue until the Commission adopts the appropriate test in its generic proceeding in Docket No. 000075-TP.

BellSouth responds that the Commission ruling is totally consistent with the record from the hearing. Since AT&T raised no new issues and did not identify any point of fact or law not considered by the Commission in reaching its finding, BellSouth urges denying reconsideration.

Staff does not believe there is any inconsistency on this issue in the Order. The Commission did not find that AT&T does not meet the criteria, only that the evidence in the record is not sufficient to make a finding that it does. This Commission noted, however, that it appears the geographic area test alone may be sufficient. Therefore, the FCC's clarification added no additional facts not previously identified by this Commission. (Order at 76) Also, it is not necessary to defer a ruling on the issue as the parties may avail themselves of any decision from the generic proceeding in Docket No. 000075-TP.

Again, staff believes that the motion fails to identify a point of fact or law which was overlooked or not considered in rendering the Commission's Order. Moreover, the comments generally constitute reargument of matters previously considered and disposed of by this Commission. Therefore, staff recommends that this portion of the motion be denied.

4. OSS Issues

a. Electronic Ordering

b. Electronic Processing after Electronic Ordering.

In both of these issues, AT&T argues that BellSouth is not providing nondiscriminatory access to its OSS unless AT&T can order electronically everything that BellSouth itself orders electronically. AT&T believes that the direction in the Order regarding addressing this issue through the review of the Change Control Process (CCP) in the third party OSS testing will not be productive. (See Order at 139) Accordingly, it is requesting that the Commission reconsider and require BellSouth to modify its systems so that AT&T's orders electronically flow through the systems, just as BellSouth's orders flow through.

BellSouth responds that AT&T made the same argument at the hearing and in its brief, which the Commission considered and rejected. BellSouth agrees that the issues should be addressed

through the CCP. Additionally, BellSouth notes that AT&T raised no point of law or fact that the Commission failed to consider. Accordingly, BellSouth urges that reconsideration be denied.

Staff agrees with BellSouth that AT&T offers no new authority or new argument on this point but, rather, only reargues that which was argued at the hearing. (Order at 144, 145) Accordingly, staff recommends that reconsideration of this point be denied.

5. MTU/MDU Access Terminals

AT&T's Motion for Reconsideration asks for "Clarification" that BellSouth is required to connect all pairs in a high-rise multi-tenant unit to the access panel at the time it is installed. To do otherwise, according to AT&T, would further delay AT&T's ability to serve customers in a timely manner.

BellSouth responds that clarification is not necessary because AT&T currently has the ability to remedy any potential delay in provisioning additional pairs to the access terminal by simply requesting that BellSouth provision all available pairs. Additionally, BellSouth claims that clarification is inappropriate because AT&T is raising a new argument based on facts not currently in the record.

Though the AT&T Motion asks for "Clarification" that BellSouth is required to connect all pairs in a high-rise multi-tenant unit to the access panel at the time it is installed, that was not the intent of the Commission, as clearly stated in its decision starting on page 55 of the Order. There, the Commission stated that, "If AT&T elects to approach provisioning under a 'pay-as-you-go' format, that is a business decision that it has made; BellSouth did not require provisioning in that manner." Additionally, the Motion does not identify a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. AT&T offers no new authority or new argument on this point but, rather, only reargues that which was argued at the hearing. Staff, again, notes that AT&T has the option of ordering any number of pairs provisioned with a single visit by a BellSouth technician. Alternatively, AT&T may choose a "pay-as-you-go" plan. That is a business decision to be made by AT&T. Accordingly, staff recommends that reconsideration on this point be denied.

6. Unbundled Local Switching

Both AT&T and BellSouth ask for clarification, rather than reconsideration, on this issue.

Though AT&T's Motion does not ask for clarification in the title, this section of the Motion simply requests clarification of what AT&T perceives as an inconsistency in Order No. PSC-01-1402-FOF-TP. Upon reexamination of the quoted section in the AT&T Motion, staff observes that words were inadvertently omitted from the Order, either through scrivener's or electronic error, which may have contributed to this confusion. The quoted portions of the Order referenced in the first paragraph of Section VI of the AT&T Motion is as follows: "While FCC Rule 51.319(c)(2) is silent on answering this specific concern in a direct fashion, we believe that the FCC's intent was to have the rule apply on the "per-location-within the MSA" basis that AT&T supported." (Order at 63) It should actually have read "While FCC Rule 51.319(c)(2) is silent on answering this specific concern in a direct fashion, we believe, as BellSouth does, that the FCC's intent was to have the rule apply throughout the MSA, and not on the "per-location-within the MSA" basis that AT&T supported." Therefore, Order No. PSC-01-1402-FOF-TP should be corrected to reflect the above quote. With that clarification, this issue should be otherwise clear.

BellSouth Motion for Reconsideration

BellSouth seeks reconsideration of the portion of the Final Order which requires it to provision access terminals to AT&T within five calendar days. The reason, according to BellSouth, is that there is no record evidence to support the Commission's mandated time frame. AT&T did not respond to BellSouth's Motion.

Staff concurs that there is no record evidence supporting a fixed time frame for such provisioning. However, staff also points out that the referenced five days is not a rigid mandate, but, rather, a reasonable guideline for a "typical" installation. The operative sentence on page 56 of the Order reads ". . . typically, BellSouth should be required to provision the 'access' terminal to AT&T within five calendar days, or in a mutually agreed upon alternative timeframe." Staff, particularly, notes the the word "typically" and the concluding phrase of the referenced sentence, ". . . or in a mutually agreed upon alternative time frame." Additionally, as stated in the Order, "In the event undue

provisioning delays are experienced, AT&T may petition us for a review of the problem."

Additionally, the Motion does not identify a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. BellSouth offers no new authority or new argument on this point but, rather, only reargues that which was argued at the hearing. Accordingly, staff recommends that reconsideration of this point be denied.

BellSouth Memorandum in Opposition to AT&T's Motion for Reconsideration and Cross-Motion for Clarification

Staff believes that BellSouth's Cross-Motion for Clarification is rendered moot by the clarification which was made earlier pursuant to the AT&T Motion for Reconsideration regarding the issue of Unbundled Local Switching. Accordingly, this pleading requires no additional consideration.

ISSUE 2: Should BellSouth's Motion for Extension of Time for Filing Executed Interconnection Agreement be granted?

RECOMMENDATION: Yes. BellSouth's Motion for Extension of Time for Filing Executed Interconnection Agreement should be granted. **(FORDHAM)**

STAFF ANALYSIS: On July 30, 2001, BellSouth filed its Motion for Extension of Time. The BellSouth Motion stated that it understood counsel for AT&T agreed with the Motion, but BellSouth was unable to get with them in time to make it a joint motion. As reason for the request, BellSouth cited the Motions for Reconsideration which are the earlier subject of this recommendation. Until the question of reconsideration is determined, the final agreement can not be drafted.

Staff concurs with the reason given by BellSouth and recommends that the Motion for Extension of Time be granted. The agreement should be filed within 30 days of the date of the issuance of the order on this recommendation.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No. This Docket should remain open, pending the filing and approval of the final agreement by this Commission. **(FORDHAM)**

STAFF ANALYSIS: This Docket should remain open, pending the filing and approval of the final agreement by this Commission.