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Public Service Commission

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

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN, BANKS)
DIVISION OF COMPETITIVE SERVICES (FULWOOD, BARRETT, KING)

RE: DOCKET NO. 000828-TP - PETITION OF SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP FOR ARBITRATION OF CERTAIN UNRESOLVED TERMS AND CONDITIONS OF A PROPOSED RENEWAL OF CURRENT INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

DOCKET NO. 000761-TP - PETITION BY SPRINT SPECTRUM L.P., D/B/A SPRINT PCS FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252 OF THE TELECOMMUNICATIONS ACT.

AGENDA: 09/18/01 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000828.RCM

CASE BACKGROUND

In Docket No. 000828-TP, on July 10, 2000, Sprint Communications Company Limited Partnership (Sprint) 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 Sprint and BellSouth Telecommunications Incorporated (BellSouth). The petition enumerated 95 issues, but indicated that 68 of these

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issues remained under continued negotiations. On August 4, 2000, BellSouth timely filed its Response to the petition.

At the issue identification meeting, 36 issues were identified by the parties to be arbitrated. Prior to the administrative hearing, the parties resolved or agreed to stipulate to a significant number of those issues. The administrative hearing was held on January 10, 2001.

On February 21, 2001 and March 13, 2001, BellSouth filed a Motion to Supplement Post-Hearing Brief and a Second Motion for Leave to Supplement Post-Hearing Brief. The motions address BellSouth's arguments on Issue Nos. 22 and 9, respectively. Due to a misunderstanding between the parties, BellSouth believed that these issues had been settled and, therefore, did not address them in its post-hearing brief.

By Order No. PSC-01-1095-FOF-TP, issued May 8, 2001, the Commission rendered its final decision in the arbitration. The final order addressed the remaining issues to be arbitrated (3, 4, 6, 7, 8, 9, 22, 28A, 28B, 29, and 32) the above-referenced post-hearing motions, and jurisdiction.

On May 23, 2001, Sprint filed its Motion for Reconsideration or Clarification of Order No. PSC-01-1095-FOF-TP. On June 5, 2001, the parties filed a Joint Motion for Extension of Time to execute and file an interconnection agreement. On July 9, 2001, the parties filed their proposed Agreement. Simultaneously with the proposed Agreement, the parties each filed letters which indicated that the Agreement contained disputed language. The Agreement included "best and final" versions of the language from each respective party.

On August 9, 2001, BellSouth filed its Motion for Resolution of Disputed Language. On August 17, 2001, Sprint filed its Response to BellSouth's Motion for Resolution of Disputed Language (Response) and its Notice of Withdrawal of Motion for Reconsideration. Since Sprint has withdrawn its Motion for Reconsideration, this recommendation addresses BellSouth's Motion for Resolution of Disputed Language (Motion) and Sprint's Response. This recommendation also addresses the parties' Joint Motion for Extension of Time.

A separate docket, Docket No. 000761-TP, was opened to address Sprint Spectrum L.P. d/b/a Sprint PCS' (Sprint PCS) petition for arbitration with BellSouth Telecommunications, Inc. (BellSouth) filed on June 23, 2000. This matter was set for administrative hearing; however, prior to the hearing, on January 9, 2001, the parties settled the issues in this docket and the hearing was canceled. It is staff's understanding that the parties in this docket will be adopting the final agreement approved in Docket No. 000828-TP; therefore, this recommendation includes both Dockets.

JURISDICTION

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act concerns interconnection with the incumbent local exchange carrier, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements reached through compulsory arbitration. Specifically, Section 252(b)(1) states:

> (1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section. In this case, however, the parties have waived the 9-month requirement set forth in the Act. Pursuant to Section 252(e)(5) of the Act, if the Commission refuses to act, then the FCC shall issue an order preempting the Commission's jurisdiction in the matter, and shall assume jurisdiction of the proceeding. Furthermore, Section 252(e) requires that arbitrated agreements be submitted for approval by the State commission in accordance with the requirements of that subsection and applicable state law.

DISCUSSION OF ISSUES

ISSUE 1: Should BellSouth and Sprint's Joint Motion for Extension of Time be granted?

RECOMMENDATION: Yes, BellSouth and Sprint's Joint Motion for Extension of Time should be granted. **(CHRISTENSEN)**

STAFF ANALYSIS: As stated in the Case Background, on June 5, 2001, BellSouth and Sprint filed a Joint Motion for Extension of Time to execute and file an interconnection agreement. In support of the Motion the parties stated that they needed additional time to negotiate the final agreement. The parties asserted that since both parties were requesting the extension of time, neither party would be prejudiced by granting the extension of time. The parties requested thirty (30) days or until July 7, 2001, to file the interconnection agreement. Staff notes that July 7, 2001, was on a Saturday; thus, the agreement would be due to be filed on July 9, 2001.

On July 9, 2001, the parties filed an interconnection agreement. In letters submitted with the Agreement, the parties indicated that there was still disputed language in the Agreement. BellSouth and Sprint filed their respective Motion and Response to resolve the disputed contract language after the Joint Motion for Extension of Time.

Since the parties are in agreement regarding the extension of time and no party is prejudiced by granting the Motion, staff believes that it is appropriate to grant the parties' Joint Motion for Extension of Time. Therefore, staff recommends that the Joint Motion for Extension of Time be granted.

ISSUE 2: In accordance with Order No. PSC-01-1095-FOF-TL, should the Commission approve Sprint's or BellSouth's proposed agreement language regarding stand-alone custom calling features, Issue 3?

RECOMMENDATION: The Commission should adopt the language proposed by Sprint. (**BARRETT, CHRISTENSEN**)

STAFF ANALYSIS: Order No. PSC-01-1095-FOF-TL, issued on May 8, 2001, set forth the Commission's decision on the various issues that had been arbitrated in this docket. By a subsequent filing dated July 9, 2001, a new Interconnection, Unbundling, Resale, and Collocation Agreement (Agreement) was filed, which contained language about which the parties could not agree. Attachment 1, Section 3.1.2 of the Agreement contains the proposed interconnection agreement language regarding the resale of stand-alone custom calling features. Staff notes that the issue of the custom calling features is addressed in Section IV of the Final Order. This recommendation considers which party's language properly implements the Commission's decision set forth in Order No. PSC-01-1095-FOF-TL.

Arguments

On August 9, 2001, BellSouth filed its Motion for Resolution of Disputed Language (Motion). BellSouth's Motion included an Attachment containing a letter to the Commission from each respective party (BellSouth and Sprint letters). The letters accompanied the July 9, 2001, filing of their proposed Agreement. The Agreement included "best and final" versions of the language from the respective parties. By its Motion, BellSouth is asking the Commission to determine which party's language properly implements the Commission's decision in Order No. PSC-01-1095-FOF-TL. (Motion at p.1)

BellSouth believes it should be entitled to recover its costs associated with implementing the resale of stand-alone custom calling features. (BellSouth letter at p.1) In support, BellSouth states:

> While the details of implementation have not been investigated, the resale of stand-alone customer calling services is expected to require modifications to BellSouth's inventory and billing mechanisms, at a minimum. The inventory aspect would support multiple

> "provisioners" of a resold line and its customer calling features. For example, an end user could select ABC ALEC as his provider of local service and ABC ALEC could provide that service through [the] resale of a BellSouth service. That end user could then request that BellSouth provide his call waiting feature while requesting that Sprint provide his call forwarding feature. In this example there would be three LECs providing service on a line that today only has one. Such multiple "provisioners" would have implications for ordering as well as repair. The billing aspect would support the ability to render billing to each "provisioner" for its respective piece part of the line and its features. (BellSouth letter at pp. 1-2)

BellSouth states that witness Ruscilli discussed the cost of implementation for stand-alone custom calling features in his rebuttal testimony, stating that he " . . . requested that the Commission determine that if BellSouth makes stand-alone Custom Calling Services available to Sprint, then Sprint is required to pay for the implementation." (BellSouth letter at p.2) BellSouth believes the Commission acknowledged this testimony and, therefore, it is entitled to recover the costs of the services it provides. (BellSouth letter at p.2)

On August 15, 2001, Sprint filed its Response to BellSouth's Motion for Resolution of Disputed Language and Notice of Withdrawal of Motion for Reconsideration (Response). Sprint's Response references the previously filed letter dated July 9, 2001 (Sprint letter), though it was not attached. By the pleadings in its Response and letter, Sprint objects to the inclusion of BellSouth's proposed language regarding the implementation costs associated with BellSouth's obligation to provide stand-alone custom calling features. (Response at pp.1-2; Sprint letter at. p.1) Sprint asks the Commission to reject the language proposed by BellSouth and approve their proposed Agreement without the disputed language. (Response at p. 2) Sprint's "best and final" language proposal does not contain the BellSouth-proposed language. (Response at pp. 1-2; Sprint letter at p. 1)

Sprint believes that the Commission has ruled that BellSouth must provide custom calling features on a stand-alone basis at the wholesale discount, pursuant to its §251 obligations under the Act. (Sprint letter at p.1) "BellSouth should not be allowed to

undermine this fundamental principle by attempting to recover 'implementation costs' associated with BellSouth's fulfillment of its statutory obligation," states Sprint. (Sprint letter at p.1) Sprint asserts that a precedent from the Commission's decision in Docket No. 991220-TP, the BellSouth/Global NAPS arbitration case, is applicable here. (Sprint Motion at p. 1, letter at p.1) Sprint offers:

> . . . Sprint believes that the Commission's decision in the Global NAPS arbitration proceedings (Docket No. 991220-TP) is applicable to the language proposed by BellSouth. In that decision the Commission ruled that it would not incorporate contract language in connection with issues that were not specifically raised in either the petitioning party's arbitration Petition or the responding party's Response. In the event the Commission decides to consider BellSouth's proposed language regarding implementation costs . . . Sprint urges the Commission to reject BellSouth's proposed language. (Response at pp.1-2)

Analysis

As noted in Order No. PSC-01-1095-FOF-TL, issued May 8, 2001, the issue of resale of stand-alone Custom Calling features had never been ruled on by the Commission prior to this docketed proceeding. (Order at p. 10)

In its original Petition for Arbitration filed on July 10, 2000, Sprint identified the Statement of the Issue as: "Should BellSouth make its Custom Calling features available for resale on a stand-alone basis?" In its Response to Sprint's Petition for Arbitration dated August 4, 2000, BellSouth stated the issue in an identical manner, and enclosed its preliminary position on the matter, together with its draft interconnection Agreement with disputed language underscored. The disputed language was framed in a manner responsive to the issue as stated, and made no mention of cost, only addressing the core dispute -- whether or not to make its Custom Calling features available for resale on a stand-alone basis. Staff would note that the phrase "implementation costs" is conspicuously absent from Sprint's July 10, 2000, Petition for Arbitration, as well as BellSouth's Response to Sprint's Petition for Arbitration dated August 4, 2000.

In Order No. PSC-00-1823-PCO-TP, issued on October 5, 2000 (Order Establishing Procedure), a list of tentative issues was appended to the Order which included a specific, detailed statement of the issues presented for arbitration. Staff notes that prior to the issuance of this Order, the parties and staff participated in an issue identification meeting that provided the parties the opportunity to restate or clarify the wording for any (or all) issues. No change was proposed, and the wording of the issue in Order No. PSC-00-1823-PCO-TP remained as originally proposed by Sprint: "Should BellSouth make its Custom Calling features available for resale on a stand-alone basis?" Therefore, throughout the conduct of this proceeding, this arbitration issue was structured to consider if BellSouth was required to provide via Resale, its stand-alone Custom Calling features.

In its decision in Order No. PSC-01-1095-FOF-TL, the Commission relied upon its interpretations of §251(c)(4)(A) of the Act and portions of ¶939 of the Local Competition Order, FCC 96-325. (Order No. PSC-01-1095-FOF-TL at pp. 10-11) Additionally, in the Order, the Commission referenced 47 C.F.R. §51.605 and §51.613 in rendering its decision. (Order No. PSC-01-1095-FOF-TL at p. 11) Staff believes the Commission's decision was based upon an evaluation of the "obligation" of this proposal, and the technical feasibility aspects of the issue. "Implementation costs" were not specifically identified as an element of the issue and were not addressed, since the topic was not broached in Sprint's original Petition nor in BellSouth's Response to Sprint's Petition. Regarding this arbitrated issue, the Commission found:

> Therefore, BellSouth shall be required to make its Custom Calling features available for resale to Sprint on a stand-alone basis. If BellSouth determines that it is not technically feasible to make its Custom Calling features available for resale on a stand-alone basis, BellSouth may seek a waiver of this requirement. (Order No. PSC-01-1095-FOF-TL at p. 13)

In its July 9, 2001 letter, Sprint mentions the prior Commission decision in Docket No. 991220-TP, the Global NAPS/BellSouth arbitration. In an order addressing a Motion for Reconsideration in that docket, Order No. PSC-01-0762-FOF-TP, issued March 26, 2001, the Commission found in part:

> As for GNAPs's [Global NAPS] argument that we should clarify our decision with regard to Hearing Issue No. 13, we agree with BellSouth that this is an effort to raise an issue that should have been identified prior to hearing. No evidence was offered at hearing as to changes to the proposed agreement language that GNAPs believed might be necessary . . . Thus, GNAPs has not identified any mistake of fact or law made by us in rendering our decision, because we only addressed the issue we were asked to address based on the evidence presented to us in the proceeding. (Order No. PSC-01-0762-FOF-TP at p. 16)

Staff acknowledges, however, that BellSouth witness Ruscilli prefiled a small amount of testimony about "implementation costs" in this proceeding. (TR 478-479) Witness Ruscilli testified that "If BellSouth determines that Sprint's request is feasible, Sprint must be willing to pay for the implementation." (Order No. PSC-01-1095-FOF-TL at p.8)

Like the situation addressed in Order No. PSC-01-0762-FOF-TP, from that case points out, "[n]o evidence was offered at hearing as to changes to the proposed agreement language . . ."; as such, staff believes that a similar situation exists in this matter. (Order No. PSC-01-0762-FOF-TP at p. 16) Staff believes that the overwhelming majority of the record evidence on this issue addressed only the "obligation" of this proposal, not the "implementation costs." The topic of "implementation costs" was minimally addressed in prefiled testimony and at hearing, and was absent from Sprint's original Petition or in BellSouth's Response to Sprint's Petition. BellSouth's proposed language is addresses an aspect of this issue about which the Commission did not render a decision; thus it should be rejected. Finally, staff believes that §252(b)(4)(A) of the Act limits the consideration of arbitration matters to ". . . the issues set forth in the petition and in the response . . ." and implementation costs were neither identified by Petitioner nor Respondent. Therefore, staff recommends that the Commission should reject the language proposed by BellSouth that addresses "implementation costs," and adopt the language proposed by Sprint.

Conclusion

Staff recommends that the Commission should adopt the language proposed by Sprint.

ISSUE 3: Should Docket Nos. 000828-TP and 000761-TP be closed?

RECOMMENDATION: No. If the Commission approve staff's recommendations in Issue 2, these dockets should remain open in order that the parties may file their final interconnection agreement. Staff recommends that the parties be required to file the final interconnection agreement within 30 days from the issuance date of the Order resolving the disputed contract language. (**CHRISTENSEN**)

STAFF ANALYSIS: Should the Commission approve staff's recommendations in Issue 2, these dockets should remain open in order that the parties may file a final interconnection agreement. Staff notes that even though the parties have filed their proposed interconnection agreement, the parties may need additional time to modify the language in their interconnection agreement. Staff recommends that the parties be required to file the final interconnection agreement within 30 days from the issuance date of the Order resolving the disputed contract language.