



Public Service Commission

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DATE: NOVEMBER 19, 2001

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE) *HF*
 DIVISION OF COMPETITIVE SERVICES (SIMMONS) *SAS*
 DIVISION OF REGULATORY OVERSIGHT (HARVEY, VINSON, HALLENSTEIN, KELLY) *AV* *Can*

RE: DOCKET NO. 000121-TP - INVESTIGATION INTO THE ESTABLISHMENT OF OPERATIONS SUPPORT SYSTEMS PERMANENT PERFORMANCE MEASURES FOR INCUMBENT LOCAL EXCHANGE TELECOMMUNICATIONS COMPANIES.

AGENDA: 12/4/2001 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - PARTICIPATION ON ISSUES 1 AND 2 IS LIMITED TO COMMISSIONERS AND STAFF. PARTICIPATION ON ISSUE 4 IS DEPENDENT ON VOTE ON ISSUE 3. PARTICIPATION ON ISSUE 5 IS AT THE DISCRETION OF THE COMMISSIONERS.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000121.RCM

CASE BACKGROUND

The Commission opened this docket to develop permanent performance metrics for the ongoing evaluation of operations support systems (OSS) provided for alternative local exchange carriers' (ALECs) use by incumbent local exchange carriers (ILECs). Associated with the performance metrics is a monitoring and enforcement program that is to ensure that ALECs receive nondiscriminatory access to the ILEC's OSS. Performance monitoring is necessary to ensure that ILECs are meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner. Additionally, it establishes a standard

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against which ALECs and the Commission can measure performance over time to detect and correct any degradation of service provided to ALECs.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01 (3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that the Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, (Final Order) the Commission established permanent performance measures and benchmarks as well as a voluntary self-executing enforcement mechanism. The Final Order directed Commission staff to conduct a status conference 30 days after the Final Order in this docket to discuss BellSouth's proposed Performance Assessment Plan. Staff held two informal meetings on October 15, 2001, and November 9, 2001, to discuss BellSouth's Proposed Performance Assessment Plan.

On September 25, 2001, BellSouth filed a Motion for Reconsideration and Clarification. On October 8, 2001, AT&T, WorldCom, and Z-Tel filed a Joint Response in Opposition to BellSouth's Motion for Reconsideration.

On October 29, 2001, Z-Tel Communications, Inc., AT&T Communications of the Southern States, Inc., MCI WorldCom Communications, Inc., and DIECA Communications Company d/b/a Covad Communications Company, hereinafter referred to as the Joint ALECs, filed a Joint Motion for Clarification or, in the Alternative, Suggestion for Reconsideration on the Commission's Own Motion. On that same date, the Joint ALECs also filed a Request for Oral Argument.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion for Reconsideration filed by BellSouth be granted?

RECOMMENDATION: No, BellSouth has failed to identify any point of fact or law that the Commission overlooked or which the Commission failed to consider in rendering the Final Order. (FUDGE, HARVEY, VINSON, HALLENSTEIN)

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.

I. Benchmarks to be Applied to Measurements

BellSouth's Argument

The main thrust of BellSouth's argument is that there is no evidence to support benchmarks higher than those it proposed, nor is there any evidence that the higher benchmark can be met.

BellSouth argues that the Order recites no evidence upon which to base a conclusion that a particular benchmark level is appropriate for a given measurement. BellSouth goes on to cite several examples in which the benchmark levels varied widely. BellSouth maintains that there is no explanation as to why "[i]n some instances, BellSouth's proposals were accepted, in other

instances the ALEC's proposals were accepted, and in some instances, the decision is to select a benchmark level somewhere in between."

In addition, BellSouth argues that there is no evidence to support the Commission's reliance on the ALECs' unsupported opinions to set benchmarks at the levels advocated by the ALECs, nor is there any support for rejecting any of the benchmarks proposed by BellSouth.

ALECs

The ALECs contend that BellSouth fails to meet the standard for a Motion for Reconsideration. The ALECs cite to page 145 of the Final Order where the Commission provided the general rationale for benchmarks by stating:

. . . we agree with the ALEC Coalition that benchmarks set below 90 or 95 percent do not generally allow the ALECs a meaningful opportunity to compete. We are increasing many of the benchmarks that are set below this level for both reporting and compliance purposes.

In addition, the ALECs argue that the Commission carefully considered the concerns raised by the parties on a benchmark-by-benchmark basis. The ALECs state that while they would have preferred that the Commission adopt all of their proposed benchmarks, they will wait until the six month review before they request any change to the benchmarks. This will give the Commission several months of experience with the implemented benchmarks.

The ALECs also argue that BellSouth's reliance on the interim measures and benchmarks is misplaced, because the measures and benchmarks were adopted for the sake of time without the benefit of an evidentiary proceeding, and at the request of BellSouth.

Staff Analysis

"It is the Commission's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems appropriate." United Telephone Co. v. Mayo, 345 So. 2d 648, 654 (Fla. 1977); see also Gulf Power Co. v. FPSC, 453 So. 2d 799 (Fla. 1984) (reducing the Company's proposed 60-day

nameplate value by one-half of the difference between it and the staff's proposed 90-day projected burn value, because the Company failed to prove that its 60-day nameplate inventory policy was a reasonable and prudent policy.); Citizens of the State of Florida v. FPSC, 488 So. 2d 112, 114 (Fla. 1st DCA 1986) (holding that question of whether a used and useful calculation should rely strictly on engineering concerns or should embody other factors is one infused with policy considerations for which the PSC has special responsibility).

While the parties presented evidence on what the benchmarks should be, neither the ALECs nor BellSouth, presented evidence as to why a particular benchmark should be at a certain level. BellSouth witness Coon acknowledged that he "could not provide any factual basis for establishment of the BellSouth-proposed benchmarks." However, the Final Order clearly indicated that "for those functions that have no retail analog, BellSouth shall provide access that would offer an efficient carrier a meaningful opportunity to compete." (p. 148). Consequently, staff believes that the Commission correctly weighed the conflicting testimony and arrived at benchmarks that would offer an efficient carrier a meaningful opportunity to compete.

While BellSouth argues that there is no evidence that it can meet these high benchmarks, staff notes that there is no evidence to suggest that BellSouth cannot meet the established benchmarks. Moreover, the Commission's decision on the appropriate benchmark was not based solely on logistical concerns, but also considered policy considerations regarding what the benchmark should be so that an efficient carrier has a meaningful opportunity to compete.

As the Commission stated in the Final Order,

. . . benchmarks set below 90 or 95 percent do not generally allow the ALECs a meaningful opportunity to compete. We are increasing many of the benchmarks that are set below this level for both reporting and compliance purposes.

Based on the foregoing, staff believes that BellSouth has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

Other Issues

BellSouth also requested reconsideration of the following measures:

P-3: Percent Missed Installation Appointments

This measure monitors BellSouth's reliability in meeting committed due dates to assure that the CLEC can reliably quote expected due dates to their retail customers as compared to BellSouth.

In the Final Order, the Commission required that BellSouth change the business rule to include subsequent missed appointments in the calculation of this measure. Prior to this change, subsequent appointments rescheduled and missed were not included in the calculation of this measure.

In its Motion, BellSouth argues that subsequent missed appointments would be captured in the "Order Completion Interval" and "Total Service Order Cycle Time" Service Quality Measurements. However, BellSouth states that if subsequent missed appointments are to be included in the calculation of this measure, the business rule ordered by the Commission is unclear as to whether subsequent appointments "made" should be included in the calculation as well. BellSouth further asserts that the business rule ordered by the Commission is also unclear as to whether a subsequent appointment that is missed due to reasons outside of BellSouth's control (such as the customer not providing access) should be counted as a BellSouth miss.

The ALECs argue that subsequent appointments should be counted in the "Percent Missed Installation Appointments" metric. The ALECs contend that subsequent missed appointments reinforce the impression that the ALEC does not have a good business operation and cannot be trusted with the customer's account. The ALECs further contend that BellSouth is wrong in claiming that the "Average Order Completion Interval" and "Total Service Order Cycle Time" capture subsequent misses. The ALECs argue that both of these measures exclude large quantities of orders that seek longer than the standard interval, "L" coded orders (i.e., where the customer has requested a later than offered interval).

Staff concurs with the ALECs' argument and believes subsequent missed appointments should be included in the calculation of the "Percent Missed Installation Appointment" metric. Staff contends that the "Average Order Completion Interval" and "Total Service Order Cycle Time" metrics do not adequately recognize the serious problem ALECs and customers encounter regarding missed and subsequent missed installation appointments.

These two metrics specifically monitor two distinct intervals of elapsed time in the ordering process, i.e., how long it takes BellSouth to provide service to an ALEC or to its own customer. The "Percent Missed Installation Appointment" metric monitors reliability, or the percentage of BellSouth commitments met with respect to committed due dates. Additionally, as stated in the ALECs Opposition to BellSouth's Motion, "L" coded orders (i.e., where the customer has requested a later than offered interval) are excluded in the "Average Order Completion Interval" and "Total Service Order Cycle Time" metrics. Hence, missed installation appointments that result from "L" coded orders would not be captured in the intervals for these metrics. Staff believes that BellSouth has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

Additionally, as a point of clarification to BellSouth's Motion, staff contends that subsequent appointments "made" should be included in the calculation of this metric, and subsequent appointments missed for reasons outside of BellSouth's control (end user misses) should be excluded in the calculation of this metric.

C-2: Collocation Average Arrangement Time

This measure is defined as the average time from receipt of a complete and accurate Bona Fide firm order to the date BellSouth completes the collocation arrangement and notifies the CLEC.

In the Final Order, the Commission required BellSouth to change the business rule for this measure by requiring BellSouth not to consider a collocation arrangement complete until the ALEC accepts the collocation and associated cable assignment information as provided. Prior to this change, a collocation arrangement was considered complete on the date BellSouth completes the arrangement and notifies the CLEC.

In its Motion, BellSouth believes that it is inappropriate to be held responsible for meeting any measurement in which a portion of the process being measured is outside of its control. BellSouth further argues that an ALEC could elect to simply delay acceptance of the collocation, forcing BellSouth to miss the required benchmark.

In its Response, the ALECs acknowledge BellSouth's concern and present as a solution the change to the business rule that was required by the Final Order. That change considers the collocation arrangement time complete when the collocation cage is suitable for use by the ALEC, and the cable assignment necessary to use the facility has been provided to the ALEC.

Staff agrees that the change to the business rule requiring BellSouth not to consider a collocation arrangement complete until the ALEC accepts the collocation could create a situation where the ALECs are delaying acceptance without good reason. However, staff believes that any disagreement as to whether a collocation arrangement is "suitable for occupancy" should be resolved between the parties. If BellSouth believes that an ALEC has unjustifiably delayed or rejected acceptance of a collocation arrangement, BellSouth may dispute that action through the dispute resolution process outlined in the Final Order. Moreover, BellSouth is not liable for Tier 1 and Tier 2 penalties to the extent that the noncompliance was the result of an act or omission by the ALEC that was in bad faith. Consequently, staff believes that BellSouth has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

O-9: Firm Order Confirmation Timeliness

This measure is defined as the average response time from receipt of a valid local service request to distribution of a Firm Order Confirmation (FOC).

In the Final Order, the Commission required BellSouth to change the business rule for this measure by requiring electronic facilities checks to be conducted to ensure due dates delivered in FOCs can be relied on. Prior to this change, the interval for the return of a FOC was considered to be complete without having to confirm the availability of facilities.

In its Motion, BellSouth argues that a facilities check is not performed in the ordering process for its retail operations. BellSouth contends that this change would require BellSouth to provide service to the ALEC that is superior to what it provides itself.

In response, the ALECs argue that BellSouth should confirm facilities availability for all orders before issuing a confirmation. The ALECs contend that confirmations are useless and customer confidence will be lost if given due dates cannot be depended upon.

While staff recognizes BellSouth's argument that it does not perform a facilities check for its retail operations, that argument was not presented at the hearing and therefore, cannot be considered in a Motion for Reconsideration. As noted by the ALECs, if BellSouth believes it needs more time to perform facilities checks, the issue should be raised in the permanent metrics six month review process.

Staff believes that BellSouth has failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order.

ISSUE 2: Should BellSouth's Motion for Clarification be granted?

RECOMMENDATION: Yes, the Final Order should be clarified to explain what can be reconsidered. (FUDGE, KELLY)

STAFF ANALYSIS: Staff notes that 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. 146 So. 2d 889. 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.

I. Clarification of Procedure for Plan Approval

BellSouth assumes that staff's delegated authority will be only to approve the proposal BellSouth makes as consistent with the Order, or to reject it as inconsistent. BellSouth seeks clarification that staff will not be able to "order" specific changes.

BellSouth is also concerned with the Commission's deferral of its legal authority to impose an enforcement mechanism upon BellSouth. BellSouth's concern is that while it may ultimately consent to the enforcement plan, it will be unable to make that decision until the Plan has been approved. By the time BellSouth has adequate information to know whether it can consent, the time for appealing the Final Order will have passed.

BellSouth argues that while it could appeal the Final Order, there is no point in taking this action merely to preserve its rights, when it may be able to consent once the enforcement plan is final. Therefore, BellSouth requests that the Commission clarify whether a Supplementary Order will be entered that will reflect whether BellSouth's proposed plan is acceptable and can be appealed by any affected party.

Staff believes that this was made clear at the Agenda Conference when the Commission recognized that staff cannot order

a particular change; staff was directed to take an active role in the discussion and take a position. However, if the issue is controversial, then staff will bring the issue before the Commission.

Nevertheless, staff believes the Final Order should be clarified to explain the process for approval of the plan. To that end, staff proposes that the Final Order be clarified to reflect that another Order will be issued approving the Plan that complies with the Final Order and encompassing any changes resulting from this recommendation. The Order on the Plan will provide parties with an opportunity to seek reconsideration or appellate review as necessary.

Clarification Regarding the Number of Measures

In its Motion, BellSouth requested clarification on the number of submetrics. BellSouth stated that it could only identify approximately 250 submetrics compared to the Commission's estimated 850 submetrics. However, in an October 10, 2001, memo, BellSouth revealed that it had identified approximately 800 submetrics in Tier 1 and approximately 850 in Tier 2. At the October 15, 2001, informal meeting, staff confirmed that BellSouth had calculated approximately the same number of submetrics referenced in the Final Order. Accordingly, staff believes no clarification is necessary.

ISSUE 3: Should the Joint ALECs' Request for Oral Argument be granted?

RECOMMENDATION: No, the Request for Oral Argument should be denied. (FUDGE)

STAFF ANALYSIS: The Joint ALECs filed their request for oral argument pursuant to Rule 25-22.058, Florida Administrative Code. The Joint ALECs state that oral argument would aid the Commission in understanding and analyzing the parties' respective positions. The Joint ALECs argue that a "severity feature" is a major policy consideration, which a Commissioner acknowledged, should be before the Commission.

BellSouth argues that pursuant to Rule 25-22.060(f), Florida Administrative Code, oral argument is granted or denied, solely at the discretion of the Commission. BellSouth states that the ALEC Motion is untimely and frivolous. BellSouth argues that "[t]here is no point in wasting the Commission's time by allowing the ALECs to augment this regrettable written submission with an oral presentation."

Staff believes that the decision to either grant or deny oral argument pursuant to Rule 25-22.058, or Rule 25-22.060(f), Florida Administrative Code, is solely within the discretion of the Commission. Moreover, staff believes that oral argument will not aid the Commission in comprehending and evaluating the issue before it, because this issue was fully litigated at the hearing. Consequently, staff recommends that the Joint ALECs' Request for Oral Argument should be denied.

ISSUE 4: Should the Joint ALECs' Motion for Clarification or, in the Alternative, Suggestion for Reconsideration on the Commission's Own Motion, be granted?

RECOMMENDATION: No, the Motion for Clarification should be denied, and the Commission should not reconsider on its own motion. (FUDGE, SIMMONS)

STAFF ANALYSIS:

Joint ALEC Motion for Clarification

The Joint ALECs seek clarification that the Commission intended to adopt a measure-based plan that included a severity feature. In support, the Joint ALECs note every performance plan sponsored in this docket featured a penalty mechanism which increased the amount of the penalty as the severity of the violation increased. The Joint ALECs also recognize that the Final Order identified the shortcomings of the severity component of both plans, but note that the Commission also recognized that certain provisions of the Final Order would require interpretation.

The Joint ALECs state that at the October 15, 2001, informal meeting, they discovered that staff and BellSouth were interpreting the plan far differently than the Joint ALECs. The Joint ALECs interpreted the Final Order "to require BellSouth to submit a measure-based plan that would include a penalty mechanism that would draw from the features of the BellSouth plan but would incorporate a measure based 'severity' feature, since all proposed plans had such a feature."

After review of the Final Order and the discussion at the Agenda Conference, the Joint ALECs believe that there was a lack of clarity in staff's recommendation to the Commission. The Joint ALECs base this belief on the following:

1. Neither the staff recommendation, nor the Final Order state that BellSouth is to exclude "severity" as a component of the penalty calculation.
2. Without a severity component and given the average \$2500 penalty prescribed in the Final Order, "BellSouth could pay a low 'flat' amount and discriminate as severely as it pleases."

3. There is no evidence to support a plan that computes penalty levels without considering the severity of the poor performance.
4. The "single penalty amount" concept negates the need for the annual cap equal to 39% of BellSouth's operating revenues that the Commission adopted in the Final Order.

"For these reasons, Joint ALECs believe it was not the Commission's intent to sever the relationship between the severity of a violation and the amount of the corresponding penalty when it voted to require BellSouth to prepare a measure-based plan." (Motion at p. 6).

BellSouth Response

BellSouth argues that the Joint ALECs' Motion for Clarification is nothing more than an untimely filed Motion for Reconsideration, and therefore should be denied. According to BellSouth, the Final Order clearly indicates that differences in penalties shall be based only on type and duration by concluding that:

Remedies shall be measure based, rather than transaction-based, and shall vary by type of measure and duration for Tier 1, and type of measure for Tier 2.

Order p. 164 (emphasis added).

Moreover, the Final Order expressly rejected a severity component by stating that:

By using the same method to detect discrimination and measure its severity, witness Taylor believes that the ALEC Coalition's plan confuses the degree of certainty with the degree of severity . . . We agree with BellSouth's witness Taylor assessment that the statistical decision rule is not helpful in assessing severity.

Order p. 162.

Staff Analysis

As stated above, the Diamond Cab standard is applied if the Motion actually seeks reconsideration of some part of the substance of the Commission order. 146 So. 2d 889. In this instance, staff believes that the Joint ALECs are simply requesting whether the Commission intended to exclude a severity feature. Consequently, the Commission must determine whether the Final 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.

However, staff believes that the same time frame for requesting reconsideration should apply to motions for clarification to ensure the finality of Commission orders. Consequently, staff believes that the Joint ALECs' request could be considered an untimely motion for clarification. Nevertheless, staff will evaluate the request on a substantive basis.

As BellSouth correctly points out, the Commission stated specifically how the remedy payments were to be developed. In stating that "[r]emedies shall be measure-based, rather than transaction-based, and shall vary by type of measure and duration for Tier 1, and type of measure for Tier 2," the Commission prescribed the variables. By stating the variables in the affirmative, there was no need to specify any exclusions. Moreover, the Commission found that both BellSouth's and the Joint ALECs' remedy plans did a "poor job of estimating the extent of any discrimination" and had "fundamental flaws." (Order, p. 162) By concluding that both severity features were flawed and stating affirmatively how remedy payments were to be developed, staff believes the plain language of the order speaks for itself and does not need clarification.

Joint ALEC Request to Reconsider on Own Motion

The Joint ALECs state that they learned of the difference in interpretation after the time for filing a motion for reconsideration had passed. They argue, however, that because BellSouth's Motion for Reconsideration is pending, the Final Order has not become final, and the Commission is free to reconsider on its own Motion.

The Joint ALECs contend that the record supports inclusion of a severity component and to conclude otherwise will "doom the Commission's effort to implement an effective performance plan." They state that the Commission's rationale for excluding a severity component is based on a misapprehension of evidence. They believe that the Commission incorrectly relied on the statement of BellSouth witness Taylor that the ALEC penalty mechanism confuses statistical certainty with severity.

Citing Dr. Ford's deposition, the Joint ALECs state that Dr. Ford conclusively demonstrated that the ALEC's methodology does not use the same statistical tool for both purposes. The measure of severity contained in the ALEC plan is simply "the difference in service levels divided by one-half delta, multiplied by the standard deviation of BellSouth's service. This calculation is not a statistical decision rule, as sample size is irrelevant to its value." (Emphasis in original).

Alternatively, the Joint ALECs argue that wholesale inclusion of the ALEC methodology is not necessary to incorporate the concept of severity. The Joint ALECs point out that, in deposition, "even BellSouth's witness described an adjustment that would meet his objections and would retain the 'severity component.'" That adjustment would tune the quadratic equation of the ALEC's penalty plan to "float upward" to reflect the relative severity of the violation. Dr. Taylor acknowledged that "as adjusted, the ALEC's proposed mechanism would avoid his earlier objection, which was that the ALECs' plan (in his view) used the same statistical decision rule to detect disparity and severity."

Any number of indicia of severity could be used in a measure or transaction-based performance plan; "all that is required of a valid index is that it (always) grow larger as the disparity in service quality levels between the ALEC and BellSouth grows larger." The Joint ALECs contend that "[t]here is no valid evidentiary basis on which to omit this 'severity component' of the measures-based plan that the Commission ordered BellSouth to implement."

BellSouth Response

BellSouth argues that the Motion is untimely, fails to meet the standard for a proper motion for reconsideration, and is nothing more than an attempt to reargue the case.

BellSouth contends that the Joint ALECs do not raise any point of law or fact that the Commission overlooked. BellSouth states that the Commission did consider severity when it adopted BellSouth's plan. The plan sets differing penalties for different types of violations, based upon an assessment of their impact. The plan "does take into account the 'severity' of a violation, by assessing the relative impact of a violation of each different type of measurement." In contrast, BellSouth states that the Joint ALECs' plan relies on a mathematical formula to calculate the severity of a failure and the associated penalty, without regard for the relative importance of the measure.

Further, BellSouth argues that it was appropriate for the Commission to reject a severity component when it found the mathematical approaches presented by the parties to be flawed. BellSouth states that the real problem the ALECs have with the Commission's order is that "it does not provide them with the massive monetary windfall they seek." BellSouth believes that the Commission has ordered a plan that is "likely to result in reasonable penalties that will be adequate to prevent post-271 backsliding, without either unduly punishing BellSouth or rewarding the ALECs with a windfall of unjustified penalty payments."

Staff Analysis

As stated above, the purpose of a Motion for Reconsideration is to show that a point of fact or law was overlooked or the Commission failed to consider. While staff believes that the Joint ALECs' request should be considered an untimely motion for reconsideration, staff will evaluate the request on a substantive basis.

The Joint ALECs apparently believe that since both remedy plans presented in the case included a severity component to address the extent of any discrimination, the Commission erred by excluding a severity component. Staff believes that the Commission made its decision after determining that both severity calculations were flawed, leaving no other reasonable option but to exclude the component for the time being. The Joint ALECs seem to want the Commission to reweigh the evidence and point to testimony by BellSouth witness Taylor in his deposition, which may have not been fully considered. The Joint ALECs allege that witness Taylor acknowledged that the quadratic equation of the ALEC's penalty plan could be "tuned" to "float upward" to reflect the relative severity

of the violation, which would overcome his principal objection. A review of the deposition transcript reveals that the "tuning" was designed to reflect the relative importance of the measure, not the relative severity of the violation. (EXH 7, p. 34) In addition, this concept of "tuning" was never fully explored, and staff notes that no specific evidence was presented on how to implement this concept. Finally, and importantly, staff notes pages 161 and 162 of the Order, quoting witness Taylor:

"a z-score that is twice as distant from a critical value than another could easily be for reasons other than simply that one of the performance means is twice as large as the other." . . . [Z]-scores are influenced by "the mean performance when BellSouth serves itself, the mean performance when BellSouth serves the ALEC, the standard deviations for both, and the number of measurements made in each case."

Staff does not believe that "tuning" could alleviate this concern. "Tuning" was merely a concept offered by witness Taylor to address a different concern, namely that the ALEC remedy plan did not consider the relative importance of the measure.

For all of the above reasons, staff believes that no error of fact or law was made by the Commission in rendering its decision.

ISSUE 5: Should the Commission clarify, on its own Motion, the appropriate "trunk orders" benchmark for the "Firm Order Confirmation Timeliness" and "Reject Interval" Service Quality Measures?

RECOMMENDATION: Yes, the Commission should clarify that the appropriate "trunk orders" benchmark for "Firm Order Confirmation Timeliness" is 95% ≤ 48 hours, and the appropriate "trunk orders" benchmark for "Reject Interval" is 95% ≤ 36 hours. (FUDGE, HARVEY)

STAFF ANALYSIS: In the ALECs' Comments to BellSouth's Proposed Performance Plan, the ALECs noted an inconsistency in the Final Order. For the "Firm Order Confirmation Timeliness" Service Quality Measurement, page 48 of the Order (Attachment 3), the Commission ordered BellSouth to change the benchmark for "trunk orders" to 95% ≤ 36 hours. On page 71 of the Order (Attachment 5), the Commission ordered BellSouth to change the "trunk orders" benchmark for this same measure to 95% ≤ 48 hours. Staff notes the inconsistency in the Order and contends that Attachment 5 should take precedence. Attachment 5 presented staff's recommendations for benchmarks and standards, whereas attachment 3 merely presented a summary of the ALEC Coalition's proposed changes to the performance measures and staff's recommendation on those changes. Therefore, the "trunk orders" standard for the "Firm Order Confirmation Timeliness" Service Quality Measurement should be 95% ≤ 48 hours.

Staff also notes a similar inconsistency between Attachments 3 and 5 regarding the "Reject Interval" Service Quality Measurement. On page 47 of the Order (Attachment 3), the benchmark for "trunk orders" is 95% ≤ 24 hours, whereas on page 70 of the Order (Attachment 5), the benchmark is 95% ≤ 36 hours. Again, Attachment 5 should take precedence, and the "trunk orders" standard for the "Reject Interval" Service Quality Measurement should be 95% ≤ 36 hours.

DOCKET NO. 000121-TP
DATE: November 19, 2001

ISSUE 6: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open. (FUDGE)

STAFF ANALYSIS: Further action is required in this docket; therefore, it should remain open.