



Public Service Commission

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

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN, KEATING) *JK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS) *JK*

RE: DOCKET NO. 990649A-TP - INVESTIGATION INTO PRICING OF UNBUNDLED NETWORK ELEMENTS (BELLSOUTH TRACK).

AGENDA: 09/03/02 - REGULAR AGENDA - PARTICIPATION DEPENDENT UPON DECISION ON ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\990649Ainterim.RCM

CASE BACKGROUND

Pursuant to the federal Telecommunications Act of 1996 (Act), the Federal Communications Commission (FCC) implemented its pricing rules which require that state commissions establish unbundled network element (UNE) rates. On December 10, 1998, a group of carriers, collectively called the Competitive Carriers, filed their Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that this Commission set deaveraged UNE rates. The petition was addressed in Docket No. 981834-TP.

On May 26, 1999, this Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part the Competitive Carriers' petition. Specifically, the Commission granted the request to open a generic UNE pricing docket for the three major incumbent local exchange providers, BellSouth Telecommunications, Inc. (BellSouth), Sprint-Florida, Incorporated (Sprint), and GTE

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Florida Incorporated (GTEFL, now Verizon). Accordingly, Docket No. 990649-TP was opened to address the deaveraged pricing of UNEs, as well as the pricing of UNE combinations and nonrecurring charges.

Subsequently, by Order No. PSC-01-2132-PCO-TP this docket was divided into sub-dockets in an effort to alleviate confusion as to whether filings are intended for the BellSouth track of this Docket or the Sprint/Verizon track of this Docket. Filings directed towards the BellSouth track would be placed into 990649A-TP, and filings directed towards the Sprint/Verizon track would be placed into 990649B-TP.

On May 25, 2001, the Commission issued its Final Order on Rates for Unbundled Network Elements Provided by BellSouth, Order No. PSC-01-1181-FOF-TP. The Order addressed the appropriate methodology, assumptions, and inputs for establishing rates for unbundled network elements for BellSouth. The Commission ordered that the identified elements and subloop elements be unbundled for the purpose of setting prices, and that access to those subloop elements should be provided. The Commission also determined that the inclusion of non-recurring costs in recurring rates should be considered where the resulting level of non-recurring charges would constitute a barrier to entry. In addition, it defined xDSL-capable loops, and found that a cost study addressing such loops may make distinctions based upon loop length. The Commission then set forth the UNE rates, and held that they would become effective when existing interconnection agreements are amended to incorporate the approved rates, and those agreements become effective.

Of significance to this recommendation, the Commission ordered BellSouth to file, within 120 days of the issuance of the Order, a cost study for hybrid copper/fiber xDSL-capable loops and revisions to its cost studies for network interface devices (NIDs). BellSouth was also ordered to file a "bottoms-up" loop cost study, explicitly modeling engineering, structures and cable installation. Finally, BellSouth was directed to submit a study of an SL1 loop that excluded a design layout record and a test point, but would be guaranteed not to be converted to alternate facilities. The Company has provided a cost study for a new loop type, the Unbundled Copper Loop-Nondesignated (UCL-ND) to satisfy these requirements.

Subsequent to the issuance of Order No. PSC-01-1181-FOF-TP, BellSouth determined, through proceedings in other states, that

changes were needed to the inputs for the Daily Usage Files (DUF) cost studies. As a result, that issue has been incorporated into this proceeding as well.

On September 24, 2001, BellSouth filed the revisions to its cost studies in response to Order No. PSC-01-1181-FOF-TP. On October 8, 2001, BellSouth filed revisions to the cost study to reflect those changes necessary as a result of the Commission's decision on reconsideration, reflected in Order No. PSC-01-2051-FOF-TP.

On November 2, 2001, BellSouth again filed revised cost studies, to update Daily Usage File (DUF) information.

Parties filed a number of requests for extensions to file testimony and discovery responses. Additionally, on January 28, 2002, two days before the scheduled hearing, BellSouth refiled its cost study. As a result, the hearing was postponed and was held on March 11 and 12, 2002.

On June 13, 2002, the Commission considered staff's recommendation on this matter at a Special Agenda Conference. At that Agenda, the Commission expressed concern that the recommended rates, even incorporating input changes suggested by our staff, still appeared to be too high to provide a meaningful incentive for local telecommunications competition in Florida, which the Commission has been statutorily mandated by the Legislature to foster for the benefit of Florida consumers.¹ Consequently, the Commission voted to hold further consideration of this matter in abeyance for a period of 60 days from June 13, 2002, the date of its consideration of this matter. This decision was based on the belief that a negotiated resolution is in the best interest of the parties and Florida consumers, because the parties are in the best position to determine the needs of their respective businesses. Accordingly, by Order No. PSC-02-0841-PCO-TP, issued June 19, 2002, the parties were required to discuss a negotiated resolution of UNE rates in Florida during the 60-day period.

The parties were unable to negotiate a mutually agreeable resolution of this matter. On August 22, 2002, AT&T Communications of the Southern States, LLC, (AT&T) filed its Petition for Interim

¹See Section 364.01, Florida Statutes.

DOCKET NO. 990649A-TP

DATE: August 27, 2002

Rates. On August 26, 2002, staff filed a recommendation addressing the matters at issue in BellSouth's 120-day filing. On that same day, BellSouth filed its response to AT&T's Petition. This recommendation addresses AT&T's Petition for Interim Rates.

DISCUSSION OF ISSUES

ISSUE 1: Should parties be allowed to participate in the discussion of this matter?

RECOMMENDATION: No. No request for oral argument has been filed in accordance with Rule 25-22.058, Florida Administrative Code.
(KEATING)

STAFF ANALYSIS: Rule 25-22.058, Florida Administrative Code, states, in pertinent part:

(1) The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute a waiver thereof.

Staff believes that this rule is applicable to the subject pleading filed by AT&T, because it is a post-hearing request for relief. In failing to file a separate request for oral argument, staff believes that oral argument has been waived in accordance with the Rule.

Furthermore, staff does not believe that oral argument will assist the Commission in its consideration of this matter. The issues are well-pled and clearly set forth; as such, staff does not believe additional oral argument will bring any clarity to the discussion. Also, this is a post-hearing matter. Much, if not all, of what AT&T has raised goes to matters addressed at hearing. Staff has some concern that if oral argument is heard on this pleading, such argument may result in improper supplementation of the record with information not presented at hearing.

For these reasons, staff recommends that participation be limited to Commissioners and staff.

ISSUE 2: Should the Commission grant AT&T Communications of the Southern States, LLC, Petition for Interim Rates?

RECOMMENDATION: No. The Commission should deny AT&T Communications of the Southern States, LLC, Petition for Interim Rates. (CHRISTENSEN, KEATING)

STAFF ANALYSIS: As stated in the Case Background, the Commission set permanent rates for UNEs by its Final Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, in this docket. However, in addition to ordering final rates, the Commission also requested that BellSouth make a filing in 120 days to revise certain portions of its cost studies regarding its loops, to model cable and structures engineering and installation using a "bottoms up" approach. After a hearing on BellSouth's 120 day filing, a recommendation was filed for the June 13, 2002, Agenda Conference. At the June 13, 2002, Agenda Conference, the Commission decided to hold the proceedings in abeyance for 60 days to give the parties the opportunity to negotiate rates. Currently, a special agenda conference is scheduled for September 6, 2002, to consider the issues associated with BellSouth's 120 day filing.

As noted in the Case Background, on August 22, 2002, AT&T Communications of the Southern States, LLC, (AT&T) filed its Petition for Interim Rates. In its Petition AT&T requests that this Commission establish interim UNE rates at the level recommended by AT&T and WorldCom in the 120-day phase of this docket. Further, AT&T asks that once interim rates are established that the Commission should:

- 1) Consider other factors affecting the current market place in Florida and/or other incentives for BellSouth to reduce wholesale rates.
- 2) Require BellSouth to file the data, assumptions, input values, and revisions to its cost study consistent with the "bottoms up" approach previously ordered by the Commission in Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, in this docket.
- 3) Consider additional evidence and/or re-examine evidence on rates for loops and the UNE Platform.

(Petition at pp. 9-10.)

In its Petition, AT&T also argues that Florida's UNE rates are too high and that the rates proposed by it and WorldCom in this phase of the proceeding should be adopted by the Commission as interim rates. However, the Commission has yet to make a final determination on whether any rates proposed in this phase of the proceeding should be adopted, including the rates requested by AT&T and WorldCom.

AT&T also quotes Chairman Jaber statement "[a]nd I think philosophically if I ever expect to have competition in the local telecommunications market, then I've got to recognize that UNE prices cannot be higher in some areas than BellSouth's retail offerings" to support its position that UNE prices must go down and that they cannot be higher than BellSouth's retail rates. (Petition p. 3; Agenda Transcript, June 13, 2002, p. 7). However, staff notes that Chairman Jaber's comment was made in the context of encouraging the parties to negotiate UNE prices. The Chairman also clearly recognized that many factors go into the development of a competitive market, and that the Commission's ultimate decision on UNE prices would need to be based on the record, if the parties were unable to reach agreement during the negotiation period--which they did not. Nothing, however, precludes the application of the philosophy expressed at the June 13th Agenda Conference from being applied to the record in this matter at the upcoming September 6th Agenda Conference.

In its Response, BellSouth contends that AT&T's pleading is untimely and should be stricken as such. If the Commission does not strike AT&T's pleading, BellSouth argues that the Commission should deny the Petition, because it is "premised upon the erroneous contention that there is 'virtually no' local competition in BellSouth's Florida service area." BellSouth also believes the Petition should be denied, because it ignores the fact that a proceeding to establish rates has already been conducted. BellSouth notes that no state commission has set UNE rates at the levels proposed by AT&T.

Specifically, BellSouth contends that AT&T's Petition is actually a supplemental brief. While it suggests interim rates, BellSouth emphasizes that the Petition only discusses why the rates AT&T proposed at hearing should be adopted. BellSouth argues that the Petition is untimely, and that AT&T has not shown any change in circumstances that would serve as a basis for its Petition. BellSouth argues that the only thing that has changed is that the

Commission's votes on UNE rates, BellSouth's 271 application, and the Third-Party OSS Test are approaching and AT&T is in search of a new "roadblock."

BellSouth also argues that AT&T's Petition is based on incorrect information, particularly with regard to the level of competition in BellSouth's Florida service area. Furthermore, BellSouth maintains that AT&T's profit margin in Florida is irrelevant to the establishment of UNE rates and that the Commission is bound by the TELRIC standard, as specifically recognized by Chairman Jaber and Commissioner Deason at the June 13, 2002, Special Agenda Conference. BellSouth adds that it believes the ALECs can actually earn a profit at current UNE rate levels.

For these reasons, BellSouth asks that AT&T's Petition be denied.

Based on the foregoing, staff believes that the request for interim rates is inappropriate. As noted previously, final rates for UNEs were set by the Commission in May 2001. The appropriate method by which to seek a change in rates would be to request that the Commission revisit those rates, as is being done to a limited extent in this phase of the proceeding. Most of the rates AT&T seeks to have replaced with its interim rates are still subject to the Commission's determination at the September 6th Agenda Conference. Thus, as to those rates, AT&T's Petition is premature.

As to those rates AT&T seeks to have reconsidered that were not identified in this phase of the proceeding, as stated above, staff believes that a request for interim rates is an inappropriate way to seek revisitation of those rates. If AT&T wishes to seek a change in those rates not currently subject to consideration at the September 6th Agenda Conference, it should file a petition requesting that the Commission revisit the rates for those elements and set forth specific reasons that warrant this Commission re-examining rates that were established barely a year ago.² Further, if rates are modified at the September 6th Agenda Conference, staff believes that it would be reasonable to allow those new rates to be in effect at least 12 months to determine their effect on local

² See McCaw Communications of Florida, Inc., Appellant vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996).

DOCKET NO. 990649A-TP

DATE: August 27, 2002

competition, prior to consideration of any petition asking the Commission to revisit those rates.

Since the Petition is essentially requesting a new hearing and reconsideration of the UNE rates, the Petition is either a thinly veiled request for reconsideration or a motion for a new hearing. As such, the Petition is untimely and premature. Staff recommends that the Commission, therefore, should deny AT&T Communications of the Southern States, LLC, Petition for Interim Rates.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending further proceedings. (CHRISTENSEN)

STAFF ANALYSIS: Whether the Commission approves or denies staff's recommendation on Issue 1, this docket should remain open pending further proceedings.