

State of Florida



Public Service Commission

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DATE: NOVEMBER 20, 2002

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

FROM: OFFICE OF THE GENERAL COUNSEL (KEATING, KNIGHT) *WK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (MARSH, P. *ce*)
DAVIS, DOWDS, KING *N*
DIVISION OF ECONOMIC REGULATION (LEE) *197*

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

AGENDA: 12/02/02 - REGULAR AGENDA - MOTION FOR RECONSIDERATION OF
FINAL DECISION - ORAL ARGUMENT NOT REQUESTED; HOWEVER,
ORAL ARGUMENT MAY BE ENTERTAINED AT THE COMMISSION'S
DISCRETION PURSUANT TO RULE 25-22.060(1)(f), FLORIDA
ADMINISTRATIVE CODE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

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FPSC-COMMISSION CLERK

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DATE: November 20, 2002

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 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 were intended for the BellSouth track of this Docket or the Sprint/Verizon track of this Docket. Filings directed towards the BellSouth track were to be placed into 990649A-TP, and filings directed towards the Sprint/Verizon track were to 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.

In its decision, 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 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. The hearing 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. 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. Thus, by Order No. PSC-02-1311-FOF-TP, issued September 27, 2002, and amended by Order No. PSC-02-1311A-FOF-TP, the Commission rendered its decision on the issues presented with regard to BellSouth's 120-day filing.

On October 14, 2002, AT&T and MCIWorldCom filed a Motion for Reconsideration of the Commission's decision, as well as a request for clarification. On October 21, 2002, BellSouth filed its Response in Opposition to the Motion. This recommendation addresses the Motion and Response.

This Commission has jurisdiction to act in this proceeding pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Sections 364.161 and 364.162, Florida Statutes.

¹See Section 364.01, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion for Reconsideration, including the request for clarification, be granted?

RECOMMENDATION: No. AT&T and MCIWorldcom have not demonstrated that the Commission overlooked or made a mistake of fact or law in rendering its decision on the issues presented. Furthermore, staff does not believe clarification of the Commission's decision is warranted. (KEATING)

STAFF ANALYSIS: 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. 3rd 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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

I. MOTION

AT&T and Worldcom (hereafter "Movants") ask that the Commission reconsider its decision not to use the more recent inflation data provided by the Movants in the record of this proceeding. The Movants argue that BellSouth did not contest that the more recent inflation rates were accurate, and that the Commission erred in simply relying upon consistency as the basis to approve the 1998 base year projections for inflation for 2000-2002.

The Movants contend that the more recent inflation information demonstrates that BellSouth's projected rates were greatly overstated, causing UNE loop rates to be higher than they would have been using the more recent data. The Movants contend that this is a particularly detrimental decision in view of the Commission's decision to allow BellSouth to recover inflation through material prices and the cost of capital.

The Movants also note that BellSouth has argued use of the 1998 projections is appropriate because the Phase I study, as well as the 120-day filing, were both based upon the 1998 projections; thus, consistency requires the use of the 1998 projection. The Movants argue, however, that this argument has little merit in this case, since BellSouth itself has on numerous occasions throughout this proceeding revised and updated information in its filing, including revisions to the ODUF/ADUF/EODUF cost studies and to its engineering factors. The Movants emphasize that the Commission in each instance allowed these revisions, which would have been otherwise precluded by strict adherence to a principle of consistency. They maintain that there has been "no rule or practice of consistency" in this proceeding. Thus, the Movants contend that the Commission erred in rejecting, for purposes of consistency, the updated inflation data available in the record in favor of the 1998 projections offered by BellSouth.

The Movants also ask that the Commission clarify BellSouth's subsequent cost studies. Specifically, they explain that the Commission has agreed that the methodology proposed by the Movants will produce a more accurate bottoms-up cost study, but that the record was insufficient to approve and implement such a methodology. Thus, the Movants ask that the Commission clarify its order to require BellSouth in all future cost study filings to "present a true bottoms-up analysis that includes not only those changes required by the Order," but also the list of changes set forth below:

- (1) Section I.A.1 - Engineering Factor - Require BellSouth to modify the BSTLM logic to have engineering costs reflect a correlation to internal direct labor and contract direct labor, but exclude material costs.
- (2) Section I.A.2.a - Structure Costs - Require BellSouth to group costs by type of placement.
- (3) Section I.A.2.d - Buried Excavation Contract Labor - Require BellSouth to file a study that allows detailed findings that would support detailed individual inputs for each type of buried excavation rather than use a "one size fits all" approach.
- (4) Section I.A.2.h - Underground Excavation Contract Labor - Require BellSouth to allocate restoration costs for asphalt,

concrete, and sod to the appropriate underground excavation categories instead of spreading the cost of all three across all categories of excavation.

(5) Section I.A.2.i - Conduit Material - Require BellSouth to provide enough support to perform a reasonable allocation of conduit costs.

(6) Section I.A.3.a.iii - Copper Stub Cable Investment - Require BellSouth to remove this item.

(7) Section I.B. - Modifications to Loop Rates or Rate Structure - Require all subsequent cost filings to adhere strictly to the bottoms-up approach.

The Movants contend that Order No. PSC-02-1311-FOF-TP acknowledged that each of these changes has merit, but that there was insufficient record support for their implementation. Thus, the Movants ask that the Commission clarify its decision to require that all of these changes be implemented in any future cost filings by BellSouth. The Movants contend that this clarification will limit the need for the parties to continue to "litigate the same flaws in BellSouth's 'bottoms-up' studies over and over again."

II. RESPONSE

BellSouth argues that the Movants have not even referenced the standard for a Motion for Reconsideration, much less met the standard. BellSouth emphasizes that with regard to the matter of the inflation rates, the Movants have not identified anything the Commission overlooked in rendering its decision, or any mistake of fact or law. Instead, argues BellSouth, the Movants reargue points that they have already made to the Commission and that the Commission rejected. Thus, BellSouth contends the Movants have not identified a basis for reconsideration on this point.

BellSouth further argues that it has consistently used the 1998 data in its filings, and that revising the cost studies to use updated information in only one set of inputs would result in inaccurate cost projections. BellSouth notes that while the nature of cost studies sometimes raises questions of the timeliness of data used, the FCC has acknowledged that this is part of the

process and that it is not proper to constantly revise and update selective information.²

BellSouth also emphasizes that this phase of this proceeding addresses primarily UNE loop rates. The rates for other UNEs have already been set using the 1998 data. Thus, BellSouth believes it is more appropriate to use the same data to set rates for loops as that which was used to set rates for other UNEs in this proceeding.

As for the Movants' arguments that BellSouth has itself revised its own filings on numerous occasions throughout this proceeding, BellSouth contends that its revisions actually resulted in consistent inputs for the DUF study. In contrast, BellSouth maintains that the Movants' suggested changes would result in inconsistent inputs for UNE loops, because all inputs would be based on 1998 data, with the exception of the inflation rates.

Responding to the Movants' arguments regarding its cost study revisions filed on January 28, 2002, BellSouth argues that it did not make revisions to include information not available at the time the study was conducted; rather, it made revisions to correct errors it had identified.

BellSouth also contends that the Movants' request for clarification should be denied. BellSouth first argues that what the Movants request is much more than simple clarification. BellSouth further contends that rates have now been set, and there will not be future filings in this Docket; thus, there is no need for BellSouth to make any revisions to its costing methodology at this time. BellSouth emphasizes that there is no evidence that it could even accomplish the requested revisions, and that it would be unfair if it were not allowed to be heard regarding the practicality and merits of the requested changes before such changes were required to be implemented.

²Citing In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150, 2002 FCC LEXIS 4629, FCC 02-260, ("Five State 271 Order"), at ¶ 101. (Staff notes ¶100 actually appears to be the appropriate reference.)

Specifically, BellSouth has the following comments with regard to each requested change:

(1) Engineering Factor - BellSouth contends the Commission did not conclude that it would be appropriate to modify BSTLM to yield engineering costs that eliminate material costs as a driver. The merits of such an approach were never discussed in the Order; thus, to implement the Movants' request would require much more than clarification of the Commission's decision.

(2) Structure Costs - BellSouth contends that this request is odd in that the stated purpose would be to obtain more granular costs to allow BellSouth to recoup costs the Commission specifically disallowed in this proceeding. While BellSouth questions the motive behind this request, it maintains that it is also not clear whether it can even accomplish the grouping of costs necessary to implement this change. Thus, BellSouth contends that the decision to implement this change should not be mandated by the Commission, but should be at BellSouth's discretion should the need for future cost filings arise.

(3) Buried Excavation Contract Labor - BellSouth contends there is no basis for this change, particularly since the Commission recognized that BellSouth does use a "melded, one price fits all approach for excavation work."

(4) Underground Excavation Contract Labor - BellSouth maintains that the Commission did not accept witness Donovan's proposal to reapportion restoration costs in the model, as contended by the Movants, but rather stated that there may be merit to the witness's proposed approach. BellSouth argues it does not have the inputs on the percentage of time each type of restoration occurs. As such, it does not believe there is a basis to require a change to BellSouth's methodology that the Commission itself only acknowledged may have merit.

(5) Conduit material - BellSouth contends that the Commission did not conclude that BellSouth should have provided information to support a distribution of conduit between copper and fiber cable, contrary to the Movants' contentions. Thus, BellSouth argues there is no reason for the information to be required for future filings.

(6) Copper Stub Cable Investment - BellSouth argues that, again, the Movants have mischaracterized the Commission's decision on the elimination of copper stub cable investment. BellSouth emphasizes that the Commission declined to adopt changes to this input; thus, there is nothing to clarify.

(7) Modifications to Loop Rates or Rate Structure - BellSouth notes that while the Movants request future filings to be strictly "bottoms-up," the FCC has concluded that the use of loadings does not violate TELRIC standards. BellSouth adds that certain costs that it incurs simply cannot be developed without the use of some linear loadings, and notes that no state commission has required the complete elimination of such factors. BellSouth argues, therefore, that the Commission should not implement this requirement.

III. ANALYSIS AND RECOMMENDATION

A. Reconsideration

Staff recommends that the Movants have failed to identify anything the Commission overlooked or any mistake of fact or law in rendering its decision on the propriety of using the 1998 inflation data. The Commission thoroughly considered the Movants' arguments regarding the use of updated inflation data, as set forth at pages 107-108, and 113 of Order No. PSC-02-1311-FOF-TP. The Commission found that:

For consistency, BellSouth continued its use of inflation rates based on 1998 projections. We also note that the UNE prices reflected in Order 1181 and the Reconsideration Order are based on 1998 data and inflation projections. Only loop rates are being considered for revision in this case as a result of the "bottoms-up" cost approach. For consistency between all UNE rates, we believe 1998 projected inflation rates should continue to be used.

Order at p. 113. While the Movants disagree with the Commission's conclusion, they have not identified an error in it. Thus, staff recommends that reconsideration on this point be denied.

B. Clarification

As for the requested clarifications, when considering whether to grant a motion for clarification, the Commission typically determines whether its order requires further explanation to fully make clear the Commission's intent. See, e.g., Order No. PSC-02-0095-PCO-TP, issued January 16, 2002, in Dockets Nos. 010409-TP and 010564-TX; and Order No. PSC-01-1930-PCO-EI, issued September 25, 2001, in Dockets Nos. 010994-EI and 001148-EI.

In this instance, staff believes that the clarifications requested by the Movants go well beyond simple "clarifications" and instead require the Commission to reach conclusions that it declined to reach in its Final Order. Having reviewed the areas in which the Movants have requested clarification, staff emphasizes that the Commission has already specifically rejected the Movants' proposals for purposes of this proceeding. Thus, staff does not believe clarifications as requested by the Movants, even for purposes of future filings, is appropriate.

Specifically, with regard to the proposed changes pertaining to engineering factors, the Commission rejected the Movants' proposal due to the time necessary to implement the changes. Order at p. 14. For structure costs, the Commission rejected the Movants' proposal because it was not clear what impact this change might have in some areas, and because the record did not provide sufficient clarity on the issue. Order at p. 17. As for buried and underground excavation labor, the Commission rejected the Movants' proposals on these factors because of lack of evidentiary support, particularly on the matter of implementation. Order at pp. 25, 30-31. Regarding the allocation of conduit loading costs, the Commission simply found there was no record support for the Movants' proposal. Order at p. 32. As for copper stub cable investment, the Commission concluded that witness Donovan's proposal had "some merit," but that the witness had not identified a quantifiable investment input that could be modified to accomplish his proposal. Order at p. 52. Finally, regarding the requirement that future BellSouth cost filings be completely "bottoms-up," the Commission did not reach this conclusion in its Order. Instead, it acknowledged that BellSouth's 120-day filing was to try "to determine the 'magnitude of discrepancies' between linear loadings and a bottoms-up approach." Order at p. 57. The Commission acknowledged that it had reservations about BellSouth's use of linear loadings, but found that sufficient adjustments could be made to the inputs to bring BellSouth's filing more closely into compliance with Order No. PSC-01-1181-FOF-TP. Order at p. 58.

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Thus, while the Commission has the authority to direct BellSouth to use a "bottoms-up" approach in future filings, as it did in Order No. PSC-01-1181-FOF-TP, staff does not believe that this would be a proper clarification of the Commission's decision in Order No. PSC-02-1131-FOF-TP.

For the foregoing reasons, staff does not believe that the Commission's Order requires clarification on the points identified by the Movants. The requested clarifications actually appear akin to requests for reconsideration with a prospective effect. Staff, therefore, recommends that the Movants' request for clarification be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Whether the Commission approves or denies staff's recommendation on Issue 1, this Docket should remain open because an administrative appeal of the Commission's decision on AT&T's Petition for Interim Rates was filed on October 3, 2002.
(KEATING)

STAFF ANALYSIS: Whether the Commission approves or denies staff's recommendation on Issue 1, this Docket should remain open because an administrative appeal of the Commission's decision on AT&T's Petition for Interim Rates was filed on October 3, 2002.