



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED
MAY 29 PM 2:04
COMMISSION CLERK
AT PSC

DATE: MAY 29, 2003
TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)
FROM: OFFICE OF THE GENERAL COUNSEL (TEITZMAN) AT PSC
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (T. BROWN)
RE: DOCKET NO. 981834-TP - PETITION OF COMPETITIVE CARRIERS FOR COMMISSION ACTION TO SUPPORT LOCAL COMPETITION IN BELLSOUTH TELECOMMUNICATIONS, INC.'S SERVICE TERRITORY.

DOCKET NO. 990321-TP - PETITION OF ACI CORP. D/B/A ACCELERATED CONNECTIONS, INC. FOR GENERIC INVESTIGATION TO ENSURE THAT BELLSOUTH TELECOMMUNICATIONS, INC., SPRINT-FLORIDA, INCORPORATED, AND GTE FLORIDA INCORPORATED COMPLY WITH OBLIGATION TO PROVIDE ALTERNATIVE LOCAL EXCHANGE CARRIERS WITH FLEXIBLE, TIMELY, AND COST-EFFICIENT PHYSICAL COLLOCATION.

AGENDA: 06/03/03 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION TO STRIKE REBUTTAL TESTIMONY - PARTIES MAY PARTICIPATE

CRITICAL DATES: Surrebuttal Testimony is currently due on 6/18/03.

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\981834.RCM

CASE BACKGROUND

By Proposed Agency Action Order No. PSC-99-1744-PAA-TP, issued September 7, 1999, the Commission adopted a set of procedures and guidelines for collocation, focused largely on those situations in which an incumbent local exchange company (ILEC) believes there is no space for physical collocation. The guidelines addressed: A. initial response times to requests for collocation space; B.

DOCUMENT NUMBER-DATE
04801 MAY 29 03
PSC-COMMISSION CLERK

DATE: MAY 29, 2003

application fees; C. central office tours; D. petitions for waiver from the collocation requirements; E. post-tour reports; F. disposition of the petitions for waiver; G. extensions of time; and H. collocation provisioning time frames.

On September 28, 1999, BellSouth filed Protest/Request for Clarification of Proposed Agency Action. That same day, Rhythms filed a Motion to Conform Order to Commission Decision or, in the Alternative, Petition on Proposed Agency Action. Commission staff conducted a conference call on October 6, 1999, with all of the parties to discuss the motions filed by BellSouth and Rhythms, and to formulate additional issues for the generic proceeding to address the protested portions of Order No. PSC-99-1744-PAA-TP. By Order No. PSC-99-2393-FOF-TP, issued December 7, 1999, the Commission approved proposed stipulations resulting from that call and identified the portions of the protested Order that could go into effect by operation of law.

Thereafter, the Commission conducted an administrative hearing to address collocation issues beyond the issues addressed in the approved collocation guidelines. By Order No. PSC-00-0941-FOF-TP, issued May 11, 2000, the Commission rendered a post-hearing decision on these additional issues. Therein, the Commission addressed the following: 1) ILEC responses to an application for collocation; 2) the applicability of the term "premises"; 3) ILEC obligations regarding "off-premises" collocation; 4) the conversion of virtual to physical collocation; 5) response and implementation intervals for changes to existing space; 6) the division of responsibilities between ILECs and collocators for sharing and subleasing space between collocators and for cross-connects between collocators; 7) the provisioning interval for cageless collocation; 8) the demarcation point between ILEC and ALEC facilities; 9) the parameters for reserving space for future use; 10) whether generic parameters may be established for the use of administrative space; 11) equipment obligations; 12) the timing and detail of price quotes; 13) ALEC participation in price quote development; 14) the use of ILEC-certified contractors by ALECs; 15) the automatic extension of provisioning intervals; 16) allocation of costs between multiple carriers; 17) the provision of information regarding limited space availability; 18) the provision of information regarding post-waiver space availability; 19) forecasting requirements for CO expansions and additions; and 20) the application of the FCC's "first-come, first-served" Rule upon denial of waiver or modifications.

On May 26, 2000, Verizon filed a Petition for Reconsideration. BellSouth and Sprint also filed separate Motions for Reconsideration and Clarification of the Commission's Order. On June 7, 2000, Sprint filed its Response to Verizon and BellSouth's Motions for Reconsideration. BellSouth also filed its Response to Sprint's Motion for Reconsideration and/or Clarification. MCI/WorldCom and Rhythms Links also filed timely Responses to all three Motions for Reconsideration. In addition, that same day FCCA and AT&T filed a Joint Response to the Motions for Reconsideration and a Cross-Motion for Reconsideration. On June 14, 2000, BellSouth filed its Response to FCCA and AT&T's Cross-Motion for Reconsideration. By Order No. PSC-00-2190-PCO-TP, issued November 17, 2000, the various motions for reconsideration and/or clarification were addressed by the Commission. By that Order, this Docket was left open to address pricing issues for collocation, which is one of the purposes of this instant proceeding.

By Order No. PSC-02-1513-PCO-TP, issued November 4, 2002, the procedural schedule and hearing dates were established for this phase of this proceeding in which the Commission will address the remaining technical and pricing issues regarding collocation (Order Establishing Procedure). On February 7, 2003, Commission staff filed a Motion to Revise Order Establishing Procedure. By Order No. PSC-03-288-PCO-TP, issued March, 4 2003, Staff's Motion to Revise Order Establishing Procedure was granted.

On May 15, 2003, pursuant to Rules 1.160 and 1.280 of the Florida Rules of Civil Procedure and Rule 28-106.204, Florida Administrative Code, Verizon and Sprint (Joint Movants) filed an Emergency Joint Motion to Strike, or in the Alternative for an Extension of Time (Joint Motion). Verizon and Sprint request that the Commission strike the prefiled rebuttal testimony of AT&T witness Steven E. Turner, with respect to the portions of Mr. Turner's testimony recommending the imposition of the BellSouth cost model on all ILECs operating in the state of Florida. On May 19, 2003, BellSouth filed its response to the Joint Motion, stating it supported the Joint Motion to Strike and did not take a position on the Request for an Extension of Time to file surrebuttal testimony. On May 22, 2003, AT&T filed its Response to the Joint Motion, by which it stated its opposition to both the Joint Motion to Strike and the Extension of Time. Sprint and Verizon's Joint Motion are the subject of this recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Verizon and Sprint's Emergency Joint Motion to Strike, or in the Alternative for an Extension of Time?

RECOMMENDATION: No. The Commission should not grant Sprint and Verizon's request to strike certain portions of AT&T witness Turner's testimony. The testimony the Joint Movants seek to have stricken, which discusses imposition of a single cost model on all ILECs operating in the state of Florida, is relevant to the issues being addressed in this proceeding and therefore should not be stricken from the record. However, staff recommends the Commission extend the deadline for filing surrebuttal testimony to June 30, 2003, and prehearing statements to July 7, 2003, so that parties may have adequate time to file surrebuttal testimony. If the date to file surrebuttal testimony is extended, staff recommends the Commission order that all further discovery responses be due fifteen (15) days after service of the request, with no additional time for mailing. (TEITZMAN)

STAFF ANALYSIS:

Joint Motion

On April 18, 2003, AT&T witness Steven E. Turner filed rebuttal testimony which advocates the imposition of the BellSouth cost calculator on all ILECs operating in the state of Florida. Joint Movants assert that witness Turner's proposal is not properly considered in this proceeding. In support of their assertion, Joint Movants argue the filing of witness Turner's rebuttal testimony is procedurally inappropriate in addition to being complicated and far-reaching, and therefore should not be considered in this proceeding.

Joint Movants assert the proper place to evaluate witness Turner's proposal would be the Commission's ongoing workshop exploring the possible use of a uniform model for unbundled network element (UNE) costs¹. Joint Movants cite to the Verizon UNE

¹In re: Undocketed Standardization of Unbundled Network Element Costing.

DATE: MAY 29, 2003

proceeding² in which the discussion of a standardized UNE cost model led the Commission to initiate the workshop. Furthermore, Joint Movants assert that, along with BellSouth, they were never put on notice that the Commission might consider the adoption of a unified collocation cost model, or that any party might advocate such a model in this proceeding. Joint Movants contend that during the issue identification stage of this proceeding, they specifically noted that their collocation offerings differed from BellSouth, and that their cost studies would address only their own collocation offerings. Joint Movants assert that AT&T was obliged to raise the issue of a unified collocation cost model at the issue identification stage when the parties undertook discussions to develop a common understanding of the nature and scope of the cost submissions in this proceeding. (Joint Motion 2-3)

Joint Movants assert that to the extent witness Turner's testimony is not procedurally barred, this is not the appropriate proceeding for it to receive consideration. (Joint Motion at 4) Joint Movants argue witness Turner's testimony fails to provide any evidence BellSouth's cost model would be appropriate for Joint Movants. Joint Movants assert several preliminary examples of the differences in how ILECs choose to provision collocation. In order to fully flesh out all the differences in the ILECs' provisioning methods, Joint Movants assert they would need to undertake significant discovery to understand (1) how BellSouth provisions collocation; (2) how BellSouth captured these processes into its cost studies; and (3) how Verizon's or Sprint's processes and costs could be reflected in the BellSouth model, if at all. Additionally, Joint Movants assert it would be necessary to conduct additional discovery on AT&T in order to defend BellSouth's model against attacks. (Joint Motion at 6)

Joint Movants argue even if they undertook the "significant" effort to understand all the different ways each ILEC provisions collocation and how the BellSouth cost model reflects the BellSouth collocation process, it may be impossible to use BellSouth's model to account for Verizon's or Sprint's costs without requiring Verizon and Sprint to change the way they provision collocation to ALECs. Joint Movants contend such a result is outside the scope of this proceeding. Joint Movants assert the Commission has an obligation to set rates that reflect the actual cost incurred by

²See In the Matter of Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track), Docket No. 990649B-TP

DATE: MAY 29, 2003

ILECs in making network elements available to new entrants,³ and such decisions must be supported by substantial evidence⁴. Joint Movants assert there is no substantial evidence to support witness Turner's proposal and therefore they request that the Commission strike those portions of witness Turner's testimony which reference the unified model proposal and confirm that this proceeding is limited to considering the three ILEC cost studies. (Joint Motion at 7-8)

However, if the Commission determines that witness Turner's unified cost model proposal is appropriate in this proceeding, Joint Movants request an additional six (6) months to conduct discovery before the filing of surrebuttal testimony. Joint Movants contend they would need to conduct extensive discovery to derive a clearer understanding of the BellSouth cost model. Joint Movants assert the extension of time is necessary for them to submit counter proposals using the BellSouth cost model. Joint Movants assert further that they must be granted sufficient notice and an adequate opportunity to comment before the Commission may take action, and the eight weeks provided for surrebuttal testimony is not sufficient to respond appropriately to witness Turner's unified cost model proposal. (Joint Motion at 9)

AT&T's Response to Motion to Strike or in the Alternative Extension of Time

AT&T asserts the Joint Movants' procedural arguments miss the mark. AT&T cites the Order Establishing Procedure in which it states ". . . this Docket was left open to address pricing issues for collocation, which is one of the purposes of this proceeding upon which we now commence." In further support of its assertion that the proposal of a unified cost model is not procedurally barred, AT&T cites the following cost methodology issues identified to be addressed in this portion of the proceeding:

Issue 9A: For which collocation elements should rates be set for each ILEC?

³See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 154999, 15849 ¶ 685 (1996)

⁴See US WEST Communications, Inc. v. MFS Intelenet, Inc., 193 F.3d 1112, 1124, n.15 (9th Cir. 1999), cert. denied 530 U.S. 1284 (2000)

DATE: MAY 29, 2003

Issue 9B: For those collocation elements for which rates should be set, what is the proper rate and the appropriate application of those rates?

Issue 10: What are the appropriate definitions, and associated terms and conditions for the collocation elements to be determined by the Commission?

AT&T argues the Joint Movants fail to mention the Order Establishing Procedure in their Joint Motion because witness Turner's testimony indisputably falls within the scope of the proceeding as defined by the Order Establishing Procedure and within the issues identified by the parties and appended to the Order Establishing Procedure. (AT&T Response at 2-3)

AT&T asserts witness Turner, in varying degrees, disagrees with the rates and methodologies advanced by the Joint Movants in direct testimony, and consequently has proposed rates and elements that are different for each ILEC than each ILEC proposed for itself. AT&T argues witness Turner's proposals are both within the scope of this proceeding and appropriate for rebuttal testimony. Furthermore, AT&T asserts witness Turner has simply presented the methodology by which he determined the rates he advocates. This too, AT&T argues, is appropriate rebuttal testimony. (AT&T Response at 3)

AT&T contends there are no limits either express or implied in the Order Establishing Procedure that would limit consideration of an ILEC's collocation rates solely to the model each ILEC advocated for itself. In fact, AT&T argues that such a limitation would be inappropriate and a denial of due process. Additionally, AT&T asserts the Joint Movants' contention that witness Turner's proposal should have been filed as direct testimony is without merit because the ILECs have the initial burden of producing information to support their desired rates. If AT&T disagrees with an ILEC's initial showing then it is AT&T's burden to produce information to contest the ILEC's proposal. AT&T asserts this is the essence of a rebuttal case and is exactly what it has done in this proceeding. (AT&T Response at 3-4)

In addressing the Joint Movants' contention that witness Turner's testimony should be stricken due to its "complicated and potentially far-reaching" nature, AT&T argues such reasoning cannot legitimately be the basis for striking witness Turner's

DATE: MAY 29, 2003

testimony. AT&T asserts it defies "credulity" in the telecommunications arena to strike testimony due to its complicated or far-reaching nature, and points out the Joint Movants failed to provide any support in the law for such a contention. Rather, AT&T argues the Joint Movants provide a series of arguments which reflect unsubstantiated allegations as to the merits of witness Turner's testimony. AT&T contends such allegations are appropriate as surrebuttal testimony or in a brief based on the record; however, they are not an appropriate basis upon which to grant a motion to strike testimony. (AT&T Response at 5-6)

In its response, AT&T also addresses the request for an extension of six months to file surrebuttal testimony. AT&T argues the Joint Movants' request is inappropriate and should be denied. AT&T raises three contentions in opposition to the Joint Movants' request:

(1) Six months is far more than was allowed for AT&T to analyze and respond to the three ILEC models filed February 4, 2003.

(2) Joint Movants have had BellSouth's cost model for as long as AT&T and have had the same opportunities to analyze the model and conduct discovery.

(3) Joint Movants have had witness Turner's testimony since April 18, 2003 and have at no point served discovery on BellSouth.

AT&T asserts the lack of action by Joint Movants to avail themselves of the discovery they claim to need is sufficient justification to deny the request for extension of time. Additionally, AT&T asserts that due to activities from both the state and federal level, it is very likely that if the extension is granted it will result in a delay of this proceeding of much more than six months. (AT&T Response at 6)

Analysis

As stated earlier, the Order Establishing Procedure directed ". . . this Docket was left open to address pricing issues for collocation . . ." Accordingly, pursuant to the Order Establishing Procedure and the issues attached thereto, staff believes the rebuttal testimony filed by AT&T witness Turner, which discusses use of a unified cost model, is both logically and legally relevant to this proceeding, and therefore should not be stricken. In

addition, staff agrees with AT&T that the Order Establishing Procedure did not place any express or implicit limit on parties filing a unified cost model proposal, and consequently such testimony is not procedurally inappropriate.

Joint Movants raise several merit-based assertions by which they argue portions of witness Turner's testimony should be stricken; however, in attacking the merits of the testimony, Joint Movants strengthen staff's belief that witness Turner's testimony has relevance in this proceeding and therefore should not be stricken. Furthermore, staff agrees with AT&T that it is inappropriate to address the merits of witness Turner's rebuttal testimony in a motion to strike. Rather, the Joint Movants should address the merits of the testimony in surrebuttal testimony or in their post-hearing briefs.

Staff acknowledges the complexity of witness Turner's proposal and the need for the Joint Movants to have sufficient time to conduct discovery. Staff also notes that the Joint Movants waited nearly a full month after the filing of rebuttal testimony to file their Joint Motion. During this time, the Joint Movants have had ample time to serve discovery on BellSouth regarding its cost model but have failed to do so. Staff believes the Joint Movants may have placed "all their eggs in one basket" by not conducting discovery which they now seek additional time to conduct. Certainly due process requires the parties, have ample time to conduct discovery; however, the Joint Movants right to due process is not violated if they fail to act during the time allotted for discovery. Clearly if the additional time the Joint Movants request is necessary, staff believes Joint Movants should have already commenced serving discovery on BellSouth prior to the date they filed their Joint Motion.

Currently, surrebuttal testimony is due to be filed on June 18, 2003. Staff believes that during the pendency of the Joint Motion the parties may have experienced delay in their preparation of surrebuttal testimony. Accordingly, staff recommends that the Commission grant all parties an extension to the end of the month (June 30, 2003) to file surrebuttal testimony and reschedule the date to file prehearing statements to July 7, 2003. Furthermore, by extending the date to file surrebuttal testimony, staff believes it is reasonable to place new time constraints on all parties if they choose to serve an additional round of discovery following the filing of the surrebuttal testimony. Therefore, staff recommends

the Commission order that all further discovery responses be due fifteen (15) days after service of the request, with no additional time for mailing.

Conclusion

The Commission should not grant Sprint and Verizon's request to strike certain portions of AT&T witness Turner's testimony. The testimony the Joint Movants seek to have stricken, which discusses imposition of a single cost model on all ILECs operating in the state of Florida, is relevant to the issues being addressed in this proceeding and therefore should not be stricken from the record. However, staff recommends the Commission extend the deadline for filing surrebuttal testimony to June 30, 2003, and prehearing statements to July 7, 2003, so that parties may have adequate time to file surrebuttal testimony. If the date to file surrebuttal testimony is extended, staff recommends the Commission order that all further discovery responses be due fifteen (15) days after service of the request, with no additional time for mailing.

ISSUE 2: Should this docket be closed?

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

STAFF ANALYSIS: This matter is currently scheduled for hearing. Thus, this docket should remain open pending further proceedings.