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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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_____)
In re: Implementation of Requirements Arising)
From Federal Communications Commission)
Triennial UNE Review: Location-Specific Review)
For DS1, DS3, and Dark Fiber Loops and Route-)
Specific Review for DS1, DS3, and Dark Fiber)
Transport)
_____)

Docket No. 030852-TP
Filed: January 14, 2004

**FLORIDA COMPETITIVE CARRIERS ASSOCIATION MOTION TO STRIKE
BELLSOUTH TESTIMONY
(Public Version)**

Pursuant to Rule 28-106.204, Florida Administrative Code, the Florida Competitive Carriers Association ("FCCA"), by its undersigned counsel, moves to strike portions of the testimony of Shelley W. Padgett ("Padgett Testimony") submitted by BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned proceeding.¹ After finding on a nationwide basis that requesting carriers are impaired without access to unbundled loops and unbundled transport at the dark fiber, DS3, and DS1 levels, the FCC delegated to state commissions "the fact-finding role to determine on a route-specific basis where alternatives to the incumbent LECs' networks exist such that competing carriers are no longer impaired."² The

¹ See BellSouth Telecommunications, Inc., Direct Testimony of Shelley W. Padgett, Docket No. 030852-TP (Dec. 22, 2003); BellSouth Telecommunications, Inc., Supplemental Direct Testimony of Shelley W. Padgett, Docket No. 030852-TP (Jan. 9, 2004) (collectively, "Padgett Testimony"). Attachment A to this motion lists the specific portions of the Padgett Testimony that the Commission should strike from the record. Among other portions of the testimony, the Commission should strike BellSouth's testimony on issues 1, 3, 7, 8, 11, 12, 16, 17, and 18, and the related attachments.

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147,*

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FCC emphasized that when states conduct their route-specific analysis, state commissions “need only address routes for which there is *relevant evidence in the proceeding* that the route satisfies one of the triggers.” Triennial Review Order, ¶¶ 339, 417 (emphasis added). As explained below, the Padgett Testimony fails to present any route-specific evidence that wholesale service is available on the challenged routes or at certain customer locations, and therefore BellSouth has failed to present any “relevant evidence” that the route or location satisfies the wholesale trigger. The Commission should strike BellSouth's generalized assertions of wholesale availability from the record.

ARGUMENT

Florida’s Administrative Procedure Act requires the exclusion of irrelevant, immaterial, or unduly repetitious evidence from the proceeding. Section 120.569(2)(g), Florida Statutes. In this case, BellSouth has filed and has supplemented its Direct Testimony presenting its evidence challenging the FCC’s findings of impairment. BellSouth also has had access to the responses to the Commission’s data requests, and has propounded discovery to all CLEC parties in this case. Yet, in the case of the wholesale triggers for both loops and transport, BellSouth has failed to produce any relevant evidence to support its assertion that the carriers make their own facilities available at wholesale or that these carriers are operationally ready to provide facilities on a wholesale basis on the routes in issue (for transport) or to the customer locations (for loops) identified.

Despite the fact that the FCC has required that a wholesale transport route or customer location only will be removed from availability as a UNE when there are *actual* alternatives to ILEC services already in use on that route or to that customer location, BellSouth

Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 398 (Aug. 21, 2003) ("Triennial Review Order").

has invented a new standard: BellSouth is asking the Commission to eliminate UNEs on transport routes and at customer locations based on a CLEC's *mere presence* in a given Central Office ("CO"). BellSouth has ignored the plain language of the *Triennial Review Order* and the FCC's rules, which require the evidence to be produced on a customer-specific and location-specific basis, and instead claims that the test should be carrier-, not location- or route-specific. BellSouth's effort to avoid its evidentiary burden here is like the effort of a high school student to avoid taking a final exam by assuring his teacher that he should not have to take the test because if he took it, he would surely do well. The Commission should reject BellSouth's transparent effort to ignore the tests set forth in the *Triennial Review Order*, and should strike Padgett's Testimony accordingly.³

BellSouth does not present the "particularized, location-specific [or route-specific] evidence" of wholesale availability on any transport route or to any customer location for any carrier, but instead classifies a carrier as a wholesale provider if the carrier, according to BellSouth, has deployed facilities on routes or at locations in Florida.⁴ Using this structure and

³ In fact, in adopting the triggers, the FCC specifically rejected tests that BellSouth proposed that were neither route- nor location-specific. *See, e.g.*, *Triennial Review Order* ¶¶ 397 (rejecting a collocation-based trigger, specifically, the existence of pricing flexibility, because the "measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices. The measure may only indicate that numerous carriers have provisioned fiber from their switch to a single collocation rather than indicating that transport has been provisioned to transport traffic between incumbent LEC central offices."); ¶ 401 (rejecting BellSouth's and other BOC fiber-based collocation proposals and stating that the proposal is "based solely on the presence of alternative transport at one end of a route such that when one end of a route is competitive (a central office with fiber-based collocation), no unbundled transport would be available into or out of that competitive central office." The FCC recognized that these "proposals would effectively leverage the existence of competition without any evidence that a requesting carrier could self-provide or utilize alternative transport to reach those other locations.").

⁴ Padgett Testimony at 9-10, 20-21. BellSouth asks the Commission to rely on evidence of a carrier's general willingness to provide wholesale service as a substitute for

ignoring the tests set out by the FCC, BellSouth classifies entities as wholesale carriers for loops and transport based on the following: (1) "carriers' discovery responses, indicating the offer or purchase of wholesale loops and/or transport"; (2) BellSouth's "experience in losing wholesale contracts to another carrier"; (3) carrier's "own advertisements offering wholesale services"; (4) public statements "indicating willingness to wholesale or revenues from wholesaling"; and (5) analyst and industry reports that purportedly identify carriers as wholesalers.⁵ BellSouth then claims that "[s]ince dedicated transport and high-capacity loops are two components of the same wholesale product, commonly known as dedicated access or special access, the carriers that offer dedicated transport on a wholesale basis, where they have facilities are the same as for loops."⁶ This argument, such as it is, bears no resemblance to the FCC's requirement of route-specific (or location-specific) evidence, and the Commission should strike the testimony from the record. *See* Triennial Review Order, ¶¶ 339, 417.

The Triennial Review Order requires states to conduct a granular, route-specific analysis of impairment with respect to unbundled loops and unbundled transport. As the FCC explained, it made "affirmative national findings of impairment and non-impairment for transport at the national level, as supported by the record." Triennial Review Order, ¶ 394. The FCC found, however, that the evidence in the record was not sufficiently detailed for it to identify those specific routes "where carriers likely are not impaired without access to unbundled

particularized, location-specific evidence. BellSouth essentially claims that carriers offer wholesale service because it makes sense to do so. *See id.* at 10 (stating that "if a carrier is willing to wholesale high-capacity loops at a given customer location, it is also likely to be willing to wholesale high-capacity loops at all other customer locations where it has deployed its own loop facilities."). BellSouth also does not provide specific evidence as to the capacity levels at which the carrier provides wholesale service, but instead claims that the carrier provides wholesale service on all capacity levels. *Id.* at 20-23.

⁵ Padgett Testimony at 9.

⁶ Padgett Testimony at 20.

transport in some particular instances.” *Id.* Therefore, it delegated to the states, “the fact-finding role of identifying on which routes requesting carriers are not impaired ... when there is evidence that two or more competing carriers, not affiliated with each other or the incumbent LEC, offer wholesale transport service completing that route.” Triennial Review Order, ¶ 412 (emphasis added). As a legal matter, the Commission only can delist a route or customer location under the wholesale trigger if, and only if, there are at least two unaffiliated carriers that provide access on a wholesale basis on each and every route or customer location identified by BellSouth.

BellSouth ignores the FCC's test and claims that "the analysis to determine which competitive carriers offer facilities on a wholesale basis can be conducted by carrier, rather than by customer location...."⁷ The purpose of state application of the triggers is to enable the impairment analysis to be conducted at a granular, route-specific level, in order to identify where actual deployment demonstrates that requesting carriers would not be impaired. This fact-finding role requires that the Commission receive evidence relating to each specific route that is challenged by a carrier. Here, BellSouth has failed to present the granular evidence necessary for the Commission to do so. Although BellSouth presents route-specific evidence that CLEC-owned facilities exist on an “A to Z” route or at a particular customer location, nowhere in its testimony does BellSouth assert that a carrier, in fact, provides wholesale transport on the route or at that customer location.⁸ On the key question of whether the identified facilities are made “readily available” on the route (*see* Triennial Review Order at ¶ 414 n.1279), BellSouth is

⁷ Padgett Testimony at 10.

⁸ BellSouth’s evidence concerning facilities deployment is flawed in its own respect, including by way of illustration, BellSouth’s erroneous assumption that two collocations necessarily indicate a transport route. Because the testimony is route-specific, however, CLECs will respond to these assertions in their testimony.

silent. BellSouth asks the Commission to infer wholesale availability on all routes based on its own non-granular assertions that a carrier potentially offers some form of "wholesale", or where a carrier has facilities that BellSouth claims qualify for the self-provisioning trigger. In the latter scenario, BellSouth claims that the carrier could "choose" to offer transport on a wholesale basis. This evidence, even if credited, would not establish that the carrier offers wholesale service on the particular routes in question. Because BellSouth has failed to connect its wholesale evidence with any of the transport routes or customer locations challenged, its testimony on wholesale availability should be stricken as irrelevant.

It is not sufficient for the ILEC challenging the FCC finding to cite to a general willingness to wholesale. The FCC test avoids reliance on a general willingness in favor of actual availability on the route. As the FCC explained in the Triennial Review Order, the competitive wholesale facilities trigger safeguards *against* "counting alternative fiber providers that may offer service, but ... are otherwise unable immediately to provision service along the route" and *avoids* "counting alternative transport facilities owned by competing carriers not willing to offer capacity to their network on a wholesale basis." Triennial Review Order, ¶ 414. In short, the test "ensures that transport can readily be obtained from a firm using facilities that are not provided by the incumbent LEC." Triennial Review Order, ¶ 412. Without route-specific evidence, and evidence that a carrier actually provides wholesale services on the specified routes, these purposes cannot be satisfied.

Through discovery, BellSouth specifically requested information from CLECs about their wholesale practices, including, for example:

- Whether the carrier offered dedicated transport to other carriers on a wholesale basis between ILEC central offices using the carrier's own facilities (Interrogatory No. 2);

- A list of all ILEC CO to ILEC COs along which the carrier provided dedicated transport on a wholesale basis (Interrogatory No. 5);
- Whether the carrier offered DS1 and/or DS3 loops on a wholesale basis to other carriers (Interrogatory No. 9); and
- A list of each customer location where the carrier provided wholesale loops (Interrogatory No. 12).

In response to BellSouth's discovery, several carriers, including *** [REDACTED] [REDACTED] *** among others, specifically indicated that they did not provide wholesale service in Florida.⁹ BellSouth chose to ignore these responses, and instead identified these carriers as providing wholesale service within Florida. Furthermore, BellSouth chose to ignore the route-specific evidence it received in response to its requests, presumably because it severely undermines its efforts to show wholesale availability on any routes. By eschewing route-specific information, BellSouth has substantially inflated the number of transport routes that it challenges. More importantly, despite its intensive efforts to find such information, BellSouth has failed to provide any evidence of wholesale alternatives on the specific transport routes or to the specific customer locations.

Moreover, BellSouth's evidence fails even to make a *prima facie* case of wholesale availability as defined by the triggers. At least several of the enumerated transport criteria – "BellSouth's experience in losing wholesale contracts to another carrier", "carrier's public statements and filings indicating willingness to wholesale or revenues from wholesaling"; and analyst and industry reports – do not offer any evidence that the carrier uses its own facilities to provision transport. Even if the carrier offered service at wholesale (which BellSouth's

⁹

*** [REDACTED]

evidence does not show), the carrier satisfying these criteria could be reselling special access services of the ILEC. *See* Triennial Review Order, ¶ 334 (stating that special access circuits do not qualify as a carrier's own facilities). Furthermore, a carrier's own advertisements that it offers wholesale services do not necessarily indicate that the carrier uses its own facilities to provide wholesale services. As such, even if the information upon which BellSouth relied indicated that a carrier provided wholesale service on certain routes, which it does not, that information in no way indicates that the carrier provides wholesale services using its own facilities and not the facilities of another carrier.

In sum, BellSouth's evidence of wholesale availability is irrelevant to the granular analysis required by the FCC's triggers. Because BellSouth has been given every opportunity to develop and present relevant evidence that wholesale facilities are made available on the routes it challenges, and BellSouth has failed to do so, the Commission should strike those portions of BellSouth's testimony relating to wholesale facilities (including testimony pertaining to both loops and transport). CLECs should not be made to refute, on a "particularized, location-specific basis," evidence that does not address those locations in the first place.

CONCLUSION

For the reasons explained above, BellSouth fails to present any relevant evidence on which the Commission could rely to conclude that competitive facilities are made available at wholesale on any of the transport routes or to any of the customer locations identified by

BellSouth in its testimony. Accordingly, the Commission should strike those portions of BellSouth's testimony that relate to wholesale facilities.


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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Motion of Florida Competitive Carriers Association Motion to Strike BellSouth Testimony has been provided by (*) hand delivery, (**)email and U.S. Mail this 14th day of January, 2004 to the following:

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Attachment A
Portions of BellSouth Testimony
To be Stricken

Padgett Testimony (December 22, 2003)

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SWP-3	Entire
SWP-4	Wholesale Trigger Column
SWP-6	Entire
SWP-7	Entire
SWP-8	Entire
SWP-9	Wholesale Trigger Column
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Padgett Supplemental Testimony (January 9, 2004)

Supplemental Direct Exhibit SWP-1	Entire
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Supplemental Direct Exhibit SWP-4	Wholesale Trigger Column
Supplemental Direct Exhibit SWP-6	Entire
Supplemental Direct Exhibit SWP-7	Entire
Supplemental Direct Exhibit SWP-8	Entire
Supplemental Direct Exhibit SWP-9	Wholesale Trigger Column
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