

Matilda Sanders

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Sent: Tuesday, June 01, 2004 4:51 PM
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Subject: Re: Docket No. 040443 -- CLEC Coalition Motion to Dismiss
Importance: High



040443

Motion to Dis

Docket 040443 -- Petition for establishment of new transaction-based performance assessment plan by BellSouth Telecommunications, Inc. Attached please find for electronic filing the CLEC Coalition's Motion to Dismiss Petition of BellSouth for Petition for Establishment of New Transaction-based Performance Assessment Plan. The cover letter, certificate of service and the CLEC's Petition are a total of 15 pages. The attached document should be considered the official version for purposes of the docket file. As indicated in the cover letter, copies of the CLEC Coalition's Motion to Dismiss are being distributed to parties via electronic and U.S. Mail. Thank you for your assistance in this matter.

<<040443 CLEC Motion to Dismiss FINAL 6-1-04.doc>>

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June 1, 2004

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 040443-TP

Dear Ms. Bayó:

Enclosed for filing is the CLEC Coalition's Motion to Dismiss Petition of BellSouth Telecommunications, Inc. for the Opening of a Docket to Establish a New Performance Assessment Plan in the above-referenced docket. Pursuant to the Commission's Electronic Filing Requirements, this version should be considered the official copy for purposes of the docket file. Copies of this document will be served on all parties via U.S. Mail.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Tracy W. Hatch

Tracy W. Hatch

TWH/las
Enclosure
cc: Parties of Record

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for establishment of new)	
transaction-based performance assessment)	Docket No. 040443-TL
plan by BellSouth Telecommunications, Inc.)	Filed: June 1, 2004
)	

CLEC COALITION MOTION TO DISMISS PETITION OF BELL SOUTH TELECOMMUNICATIONS, INC. FOR THE OPENING OF A DOCKET TO ESTABLISH A NEW PERFORMANCE ASSESSMENT PLAN

I. INTRODUCTION

Competitive Local Exchange Carriers (“CLECs”) AT&T Communications of the Southern States, LLC; Birch Telecom; Covad Communications Company; LecStar Telecom, Inc.; MCImetro Access Transmission Services, LLC, MCI WORLDCOM Communications, Inc.; Network Telephone Corp.; NuVox Communications, Inc.; and ITC DeltaCom Communications, Inc., hereinafter collectively referred to as the “CLEC Coalition”, move that the Florida Public Service Commission (“Commission”) dismiss, without prejudice, the Petition of BellSouth Telecommunications, Inc. (“BellSouth”) For the Opening of a Docket to Establish a New Performance Assessment Plan, filed on May 12, 2004 (“the Petition”). For the reasons set forth below, BellSouth has not proved substantially changed circumstances warranting abandonment of the existing Commission-approved performance assessment plan, a sound plan which has operated for over two years and accumulated much data. The relief requested in the Petition is more appropriately considered within the mechanism of the existing plan, which contains procedures to address the concerns, specious though many are, raised by BellSouth.

Rather than granting the Petition, the Commission should dismiss it and order BellSouth to raise its issues within the six-month review process of the existing plan.

II. BELLSOUTH HAS NEITHER ALLEGED NOR PROVED SUBSTANTIALLY CHANGED CIRCUMSTANCES WHICH WARRANT ABANDONMENT OF THE EXISTING PLAN

As BellSouth itself delineates in its Petition, the existing performance assessment plan is the result of much time and effort by the parties and this Commission in Docket Nos. 000121A-TP and 000121-TP. A number of instructive workshops were held in 2000, followed by a three-day hearing in April 2001 which resulted in thorough post-hearing briefs. Its two parts, the Service Quality Measurement Plan (“SQM”) and the Self-Effectuating Enforcement Mechanism Administrative Plan (“SEEM”), were then established by Order No. PSC-01-1819-FOF-TP, issued September 10, 2001 (“Final Order”). BellSouth’s proposed plan to comply with the Final Order was filed in January 2002 and thereafter approved by the Commission in Order No. PSC-02-0187-FOF-TP, issued February 12, 2002, later amended by Order No. PSC-0187A-FOF-TP, issued March 13, 2002 (collectively, “Plan Approval Order”). The existing Plan called for periodic reviews every six months following its adoption. Within the framework of the existing Plan, data has been collected since May 2002; BellSouth has paid penalties since July 2002; and through workshops held as part of the initial six-month periodic review, the parties and Commission Staff have worked to refine changes.

There is no question that the Commission adopted a comprehensive performance assessment plan. While the Commission may modify that decision under appropriate circumstances, such circumstances are not present here. Under Florida law, final orders such as the Plan Approval Order have the effect of *res judicata*. This principle of

“administrative finality” ensures that a Commission decision is considered the final disposition of all matters litigated such that parties and the public are free to rely upon them. See Peoples Gas Systems, Inc. v. Mason, 187 So.2d 335 (Fla. 1966); Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979). As the Court noted in *Peoples Gas*,

This power [to modify orders prior orders] may only be exercised after proper notice and hearing and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified.

Peoples Gas, p. 339 (emphasis added). Commission decisions are entitled to great deference so that parties will be not be allowed to re-litigate matters considered and decided adversely. This principle discourages forum shopping for a new trier of fact and law and promotes the efficient use of Commission resources. A final Commission order is not to be overturned lightly. Proof of “substantially changed circumstances” is required before this Commission can abandon an earlier order.

BellSouth’s Petition fails to allege and demonstrate any “substantially changed circumstances” which warrant this Commission’s ignoring its Plan Approval Order, which would be the case if the Petition is granted and a new docket opened to consider an entirely new plan. This is not surprising, because that standard cannot be met in this case. There simply is no change of circumstances such that the matters previously litigated and decided have significantly evolved, justifying fresh scrutiny. Instead, for reasons discussed in Section III.B. below, BellSouth wants a plan more to its liking. This is therefore the classic case of why the principle inherent in the doctrine of administrative finality must be followed: without sufficient justification, there is no reason for this

Commission to reverse its previous orders and abandon the Plan that has collected data for two years.

Because BellSouth has failed to allege or prove the standard which warrants abandoning the Commission's Plan Approval Order, the CLEC Coalition recommends that the Petition be dismissed and BellSouth ordered to take up its concerns in the six-month review process, as addressed in Section III.A.

III. BELLSOUTH'S FOUR REASONS PURPORTING TO JUSTIFY A NEW PLAN ARE WITHOUT MERIT

A. The six-month review process of the existing plan is the appropriate avenue to address BellSouth's concerns, not an entirely new docket and plan.

BellSouth's first reason for why a new plan is necessary is that "periodic review and modification of the Plan as originally envisioned by this Commission is not occurring and appears unattainable, particularly with respect to the SEEM plan."¹ BellSouth's characterization of the six-month review process as somehow broken is wrong. As described in detail below, its own behavior has been an impediment to the process, but there is nothing inherently unworkable in its design. It presents a useful framework for resolving issues, so long as the parties are motivated to use it for that purpose.

The Plan contemplates a review by a "collaborative work group, which will include BellSouth, interested CLECs and the Commission [to] review the Performance Assessment Plan for additions, deletions or other modifications."² Thus, BellSouth's fourth reason for why a new plan is necessary, that "many of the Plan's measurements are unnecessary..."³ is precisely the type of detailed issue that can and was intended to be addressed in the collaborative workshops. It is not necessary for this Commission to

¹ Petition at pp. 1-2.

² SEEM, Section 3.1 (Modification to Measures).

³ Petition at p. 2.

parse through the details and minutiae of these measures when the subject matter experts of the parties and Commission Staff are equipped to resolve these issues in collaborative workshops. As a result, the CLEC Coalition will not file a detailed response to that claim in this Motion, as that matter clearly can be addressed in the upcoming six-month review process.

In order to have a successful six-month review process, however, the parties must be motivated that this is the avenue to achieve results and that efforts at delay will backfire. That is why it is important for this Commission to support its already approved process by rejecting BellSouth's petition and directing that as the venue for addressing BellSouth's concerns. A review of the history of that process will demonstrate why this is the case.

The review of varying severity mechanism components for inclusion in the SEEM plan has been particularly challenging and extended. One of the reasons for the extended timeframe is the technical complexity of the issue. When proposals are presented, parties cannot assess their appropriateness or validity without conducting time consuming, individual analysis based on actual BellSouth data. Second, key participants in the severity component evaluations were side-tracked with heavy involvement in the Triennial Review Order proceedings.⁴ Over the last five months, after Staff's January 22, 2004 recommendation, BellSouth has caused delay by repeatedly rejecting Staff's attempts to offer compromise proposals which, solely as an accommodation for the purpose of moving forward, CLECs were willing to accept.

⁴ *In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Market Customers*, Docket No. 030581 and *In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local-specific review for DS1, DS3 and Dark Fiber Loops, Route-Specific Review for DS1, DS3 and Dark Fiber Transport*, Docket No. 030852.

As a result, while there has been an extended time frame in the review process, the process is not flawed. Motivated parties can work together with the Commission's staff to address changes or modifications needed in the Plan.

B. Rather than improving its performance in order to reduce its penalty payments, BellSouth wants a new plan structured to reduce them, abandoning the Plan that it touted for support of 271 approval.

The remaining two reasons BellSouth maintains a new performance assessment plan is necessary are that there has been no backsliding in its performance since it received 271 approval and that the existing plan has caused excessive penalties. Neither claim has merit. In fact, an examination of both reveals the opposite, that there are good reasons to continue, not abandon, the existing plan.

Although BellSouth's Petition devotes several pages (pp. 6-8) toward the point that its "performance has been at or above the level of performance the FCC considered in granting Section 271 authority",⁵ its reasoning is illogical. Whether this is true or not, the point is that if there has been no backsliding, this can be attributed to the presence of the existing plan, and it certainly does not warrant obliterating it with a new one. BellSouth's efforts to show that its performance has not deteriorated since it received 271 approval does not lead to the conclusion that the current plan should be ditched.

The real 271 lesson is how telling it is that BellSouth is now anxious to scrap the very plan it endorsed in order to obtain its much desired long distance approval. When presented to the FCC, BellSouth touted the Florida SEEM plan as including "clearly articulated, pre-determined measurements and standards that encompass a comprehensive range of carrier-to-carrier performance. The SEEM encompasses measurements of key outcomes where a failure to produce that outcome would have a direct, significant effect

⁵ Petition at p. 7.

on competition.”⁶ Indeed, the FCC relied on the existing plan in its Order granting BellSouth 271 authority in Florida and Tennessee:

The state commissions also adopted a broad range of performance measures and standards, as well as Performance Assurance Plans designed to create financial incentives for BellSouth’s post-entry compliance with section 271. Moreover, the state commissions have committed themselves to actively monitor BellSouth’s continuing efforts to open the local markets to competition.⁷

The Florida plan structure was developed with input from the Florida Commission’s staff, BellSouth, and the competitive LECs. We believe that competitive LECs had sufficient opportunity to raise any issues in the Florida proceeding, and that the issues were appropriately handled by the workshops and the Florida Commission. . . In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth’s SEEMs. We anticipate that the parties will continue to build on their own work and the work of other states to ensure that such measures and remedies to accurately reflect actual commercial performance in the local marketplace.⁸

With its much coveted 271 authority in hand, BellSouth is no longer constrained to behave reasonably. Instead of meeting the FCC’s expectation that “the parties will build on their own work,” BellSouth wants this Commission to essentially start over on a performance assessment plan. BellSouth wants to throw out the Commission’s work that it publicly supported and instead have the Commission rubber stamp a plan independently designed by BellSouth to satisfy its own objectives. This would render useless all of the data and information collected over the past two years, a record necessary to be able to compare BellSouth’s future performance to its historical

⁶ BellSouth Application, Affidavit of Alphonso J. Varner at para. 184.

⁷ *Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, (BellSouth Application), WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828 (2002) at para.2 (citations omitted).

⁸ *Id.* at para. 170 (*sic*) (citations omitted).

performance.⁹ This latest¹⁰ attempt by BellSouth to shed its 271 obligations should therefore be denied.

What BellSouth characterizes as “excessive penalties,” its fourth reason for why a new plan is necessary actually supports why the current plan should be maintained. BellSouth’s motivation for spending a great deal of time on a new, completely different plan that would be structured to lower its penalty payments¹¹ is precisely that: instead of reducing its payments by way of improved performance, it better suits BellSouth’s purposes for this Commission to relax its standards.

In contrast to BellSouth’s claims that there has been no backsliding because its performance has not deteriorated, the Commission should be concerned that BellSouth is evidently willing to make the same level of payments month after month--obviously it still has no incentive to avoid payments by improving its performance. The chart below depicts BellSouth’s reported payments since May 2002 through June 2003 for Florida:

⁹ The FCC has stressed the desirability of using a consistent performance assessment approach, stating that “[w]e find it reasonable to use the Florida Interim SQM because this is what the Florida Commission used and it will enable us to conduct a more ‘apples-to-apples’ evaluation of BellSouth’s performance. Similarly, we used substantially the same measures and standards to evaluate BellSouth’s performance in the past seven applications. By using the Florida Interim SQM we can best evaluate whether BellSouth has maintained its performance or whether performance has deteriorated.” *Id.* at para.13.

¹⁰ This follows BellSouth’s attempt to remove line-sharing from its SEEM obligations. In its Amended Motion to Modify the SEEM (Self-Effectuating Enforcement Mechanism) Plan and Request to Offset or Escrow Penalty Payments filed in Docket No. 000121A dated December 18, 2003, BellSouth ignored its 271 obligation to include line-sharing in SEEM. This was rejected by the Commission in Order No. PSC-04-0511-PAA-TP issued on May 19, 2004.

¹¹ Although the proposed new plan has not been filed in Florida, a new performance assurance plan was filed on May 13, 2004 in Tennessee in *Re: BellSouth’s Motion for the Establishment of a New Performance Assurance Plan*, Docket No. 04-00150.

FL Payments

	Tier 1	Tier 2	Total
May-02	\$1,572,690	None	\$1,572,690
June-02	\$1,710,550	None	\$1,710,550
July-02	\$1,402,550	\$179,000	\$1,581,550
August-02	\$2,042,050	\$212,800	\$2,254,850
September-02	\$1,817,947	\$171,000	\$1,988,947
October-02	\$2,359,722	\$433,450	\$2,793,172
November-02	\$2,266,365	\$209,050	\$2,475,415
December-02	\$2,059,852	\$203,850	\$2,263,702
January-03	\$2,153,743	\$195,300	\$2,349,043
February-03	\$2,057,050	\$173,350	\$2,230,400
March-03	\$2,156,450	\$218,800	\$2,375,250
April-03	\$2,191,500	\$261,500	\$2,453,000
May-03	\$2,785,866	\$250,700	\$3,036,566
June-03	\$2,516,697	\$160,450	\$2,677,147
Total	\$29,093,032	\$2,669,250	\$31,762,282

Additionally, on page 7 of its Petition, BellSouth points out that it has paid approximately \$2.3 million per month in Tier 1 SEEM payments in 2003 and through the first two months of 2004. (BellSouth received 271 approval from the FCC for Florida on December 18, 2002).

Further, the above data appear to indicate that BellSouth has indeed “back-slid” since it received 271 approval. For the months before it received 271 approval, as well as months after, BellSouth violated this Commission’s performance standards. **The focus** by this Commission should be on modifying the current plan to establish a level of remedies that will better motivate BellSouth to provide non-discriminatory treatment, not on BellSouth’s proposed plan that will alleviate its current obligations. For the reasons discussed above, this can be adequately addressed in the six-month review process.

IV. THE COMMISSION SHOULD REJECT BELLSOUTH'S EFFORT TO DIVERT RESOURCES AND FOCUS AT A CRITICAL TIME IN THE TELECOMMUNICATIONS INDUSTRY

As this Commission is well aware, the telecommunications industry is in a state of collective uncertainty. The resources of the CLEC Coalition are focused on negotiations with BellSouth and the legal and regulatory issues raised by these negotiations. Yet in the middle of such an intense time, BellSouth has filed a Petition requesting that the Commission open a docket to establish a new transaction-based performance assessment plan, a completely different approach and plan from the current plan which BellSouth agreed to adopt, and indeed, touted, just two years ago. Those circumstances, coupled with BellSouth's recent specious attempt to remove line-sharing from SEEM¹², certainly suggest that this Petition is one more part of BellSouth's attempt to become an unregulated monopoly. Such vexatious litigation diverts the Commission's attention from dealing with other critical issues, such as unbundled switching and associated matters.

V. CONCLUSION

For the reasons set forth above, BellSouth's Petition lacks merit and should be denied by the Commission. Further, BellSouth should be directed to raise its concerns within the six-month review process.

¹² Fn. 7, *infra*.

Respectfully submitted this the 1st day of June 2004.

CLEC COALITION:

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**CERTIFICATE OF SERVICE
DOCKET NO. 040443-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail and U.S. Mail or as indicated this 1st day of June 2004, to the following parties of record:

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s/ Tracy Hatch
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