

State of Florida



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DATE: October 7, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Banks) *RB BK*
Division of Competitive Markets & Enforcement (Lee, Dowds) *DM*

RE: Docket No. 040530-TP – Petition for expedited ruling requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to file for review and approval any agreements with CLECs concerning resale, interconnection, or unbundled network elements, by Florida Competitive Carriers Association, AT&T Communications of the Southern States, LLC d/b/a AT&T, MCI metro Access Transmissions Services LLC, and MCI WorldCom Communications, Inc.

AGENDA: 10/19/04 – Regular Agenda – Decision Prior to Hearing- Procedural- Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040530.RCM.DOC

Case Background

On June 7, 2004, the Florida Competitive Carriers Association, AT&T Communications of the Southern States, LLC, MCI metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, Joint CLECs) filed a petition requesting an expedited ruling to require BellSouth Telecommunications, Inc. (BellSouth) and Verizon Florida, Inc. (Verizon) (collectively, the ILECs) to file for Commission review and approval, any agreements between the ILECs and other carriers that have not been publicly filed with the Commission and that address in whole or in part terms, conditions, or pricing in Florida for resale, interconnection, or Unbundled Network Elements (UNEs), including, but not limited to, the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreements (Petition). The Petition also requests that the Commission enter an order asserting its jurisdiction over commercially negotiated agreements under state law, federal

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law, or both. Finally, the Petition requests that the ILECs be required to make all commercially negotiated agreements publicly available and posted on the Commission's website.

On June 28, 2004 and July 2, 2004, respectively, BellSouth and Verizon each filed a Response in Opposition and Motion to Dismiss to the Petition. BellSouth and Verizon do not dispute any facts raised by the Joint CLECs in the Petition.

The Joint CLECs filed responses to both the BellSouth and Verizon Motions to Dismiss on July 6 and July 14, 2004, respectively. In its responses, the Joint CLECs argue that neither ILEC raises anything in the respective pleadings that supports dismissal of the petition, but instead argue the merits of the petition. For this reason, the Joint CLECs urge that the Motions to Dismiss be denied.

On August 20, 2004, the Federal Communications Commission (FCC) released its Order and Notice of Proposed Rulemaking (*FCC Order and Notice*, FCC 04-179), *In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313) and *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338). In the *FCC Order and Notice*, the FCC solicits comment on alternative unbundling rules that will implement the obligations of Section 251(c)(3) of the Telecommunications Act of 1934, as amended, in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.¹ Among other things, the *FCC Order and Notice* indicated that the FCC will address the requests filed by SBC and BellSouth for a declaratory ruling on whether ILECs are required to file non-251 agreements, BellSouth's petition requesting forbearance from enforcement of Section 252 with respect to non-251 commercially negotiated agreements, and a BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action.²

This recommendation addresses whether the Commission should hold this Docket in abeyance pending the proceedings resulting from the *FCC Order and Notice*.

The Commission is vested with jurisdiction pursuant to Section 252 of the Telecommunications Act of 1996 and Section 364.162, Florida Statutes.

¹ 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*). The USTA II mandate issued on June 16, 2004.

² The petition regarding declaratory ruling and state preemption requests that the FCC find that state commissions have no jurisdiction over elements provided pursuant to Section 271 for which no impairment finding has been made under Section 251.

Discussion of Issues

Issue 1: Should this Docket be held in abeyance?

Recommendation: Yes. This Docket should be held in abeyance pending resolution of the FCC's proceedings resulting from the *FCC Order and Notice*. The Commission should decline to rule on any pending motions until such time as the proceeding in this Docket resumes. **(Banks, P. Lee, Dowds)**

Staff Analysis: The central issue in this case is whether state commissions have authority to review and approve agreements addressing elements de-listed by the TRO. These agreements have been referred to as "commercial" agreements. In their petition, the Joint CLECs contend that the commercial agreements that BellSouth and Verizon have entered into with a number of competitive local exchange carriers meet the definition of agreements for interconnection, resale, and access to unbundled elements that are required to be filed with the Commission pursuant to federal and state law.

BellSouth and Verizon respond that the state commissions do not have authority to review and approve non-251 commercial agreements. ILECs explain that commercial agreements are unrelated to the obligations of the 1996 Act and do not fall within the category of agreements that are required to be filed with state commissions for review and approval.

As stated in the Case Background, on August 20, 2004, the *FCC Order and Notice* was released in which the FCC is soliciting comments on the provision of certain unbundled network elements. Among other things, the proceedings resulting from this Order and Notice will address the requests for declaratory ruling filed with the FCC by SBC and BellSouth. The FCC is also seeking comment on ILEC obligations to file commercial agreements under Section 252, governing access to network elements for which there is no Section 251 unbundling obligation. The FCC indicated that it anticipates the issuance of final rules within six months.

Having considered the pleadings filed in this case, staff believes that the issues that the Joint CLECs have included in the Petition are essentially the same issues to be addressed in the proceedings from the *FCC Order and Notice*. It appears that the FCC's proceedings may potentially impact state commissions' authority to review and approve agreements, which is the central issue in this Docket.

Staff believes that this Docket should be held in abeyance until a final decision has been reached in the proceedings resulting from the *FCC Order and Notice*. Given that the FCC is considering state commissions' jurisdiction over commercial agreements, we believe that to proceed with this case at this time could potentially lead to a decision that is contrary to the FCC's ruling. Therefore, staff recommends that this Docket should be held in abeyance pending resolution of the FCC's proceedings resulting from the *FCC Order and Notice*. As such, the Commission should decline to rule on any pending motions until such time as the proceedings in this Docket resume. Upon resolution by the FCC of the questions posed in the SBC and BellSouth Petitions, staff will confer with the parties regarding the most efficient means to proceed and will advise the Commission accordingly.

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Issue 2: Should this Docket be closed?

Recommendation: No. This Docket should remain open pending the outcome of the proceedings in the *FCC Order and Notice*. Thereafter, staff will bring this matter to the attention of the Commission. **(Banks)**

Staff Analysis: This Docket should remain open pending the outcome of the proceedings in the *FCC Order and Notice*. Thereafter, staff will conduct a status conference call to address any issues pending at that time. In the event there are any issues that remain unresolved, staff will bring this matter to the attention of the Commission in the form of a recommendation or any action deemed appropriate to resume this proceeding.