

ORIGINAL

Matilda Sanders

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Sent: Tuesday, March 08, 2005, 2:10 PM
To: Filings@psc.state.fl.us
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Subject: RE: 000121A -- CLEC Action Item Response
Attachments: FL Filing 03-08-2005 Docket No. 000121A-TP.pdf

Docket No. 000121A-TP -- In re: Investigation into the Establishment of Operations Support System Permanent Performance

Measures for Incumbent Local Exchange Telecommunications Companies (BellSouth track)

Attached please find for electronic filing the CLEC Coalition's Response to Action Items for filing in the above-referenced docket. The cover letter, certificate of service, and the CLEC Coalition's Response are a total of 13 pages. The attached document should be considered the official version for purposes of the docket file.

As indicated in the cover letter, copies of this filing are being distributed to parties via electronic filing cases where e-mail addresses are available and U.S. Mail. Thank you for your assistance in this matter.

<FL Filing 03-08-2005 Docket No. 000121A-TP.pdf>

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 OTH _____ 3/8/2005

DOCUMENT NUMBER DATE

02331 MAR-8 05

FPSC-COMMISSION CLERK

ORIGINAL



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March 8, 2005

BY ELECTRONIC FILING

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. 000121A-TP

Dear Ms. Bayó:

Attached please find the CLEC Coalition's Response to Action Items from the February 21, 2005 Informal Conference with Staff on proposed changes to the SEEM 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 electronic and U.S. Mail.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Tracy W Hatch

Tracy W. Hatch

TWH/scd
Attachment
cc: Parties of Record

DOCUMENT NUMBER-DATE

02331 MAR-8 2005

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the CLEC's Reply was served by electronic and U.S. Mail this 8th day of March 2005 to the following:

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s/ Tracy W Hatch
Tracy W Hatch

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)
)
Performance Measurements) Docket No. 000121A-TP
for Telecommunications)
Interconnection, Unbundling) March 8, 2005
and Resale)

CLEC COALITION'S RESPONSE TO ACTION ITEMS

Competitive Local Exchange Carriers ("CLECs"), AT&T Communications of the Southern States, LLC; DIECA Communications Company d/b/a Covad Communications Company ("Covad"); ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom/BTI"); MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc. and Nuvox Communications hereinafter collectively referred to as the "CLEC Coalition," hereby provides the attached responses to Action Items from the February 21, 2005 Informal Conference with Staff.

Respectfully submitted this 8th day of March, 2005.

CLEC COALITION

s/ Tracy Hatch
Tracy Hatch
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CLEC Action Item Responses
from February 21, 2005 Call

Action Item 1

For Item 34, subsection 4.52 of SEEM non-technical matrix, CLECS to propose alternative language to BellSouth's current redline that states "BellSouth shall provide each CLEC . .with reasonable notice "

Response: See highlighted and mark-up language below.

<p>34</p>	<p>Enforcement Mechanisms Limitation of Liability 4.5.2: BellSouth will not be <u>obligated to pay Tier-1 or Tier-2 ... if such noncompliance results from failure to follow established and documented procedures.</u> 11/23/04 BAI #5</p>	<p>Clarifies current provisions by stating additional specific instances where BellSouth should not be obligated to pay SEEM</p>	<p>> CLECs DISAGREE The language, "failure to follow established and documented procedures", is very broad. Therefore, the rationale provided by BellSouth does not address the proposed change</p>	<ul style="list-style-type: none"> • Staff agrees with BellSouth's with modifications per the CLEC comments and additional language provided in BellSouth's 11/23/04 action item 5 > Staff recommends that Section 4.5 Enforcement Mechanisms Limitations of Liability, item 4.5.2 should be 4.5.1 and be revised to state: BellSouth will not be obligated to pay Tier 1 or Tier 2 Enforcement Mechanisms for non-compliance with a performance measure if such non-compliance results from a CLECs acts or omissions that cause or contribute towards failed or missed performance measures. These acts or omissions include but are not limited to, accumulation and submission of orders at unreasonable quantities or times, failure to follow publicly available procedures, or failure to submit accurate orders or inquiries. BellSouth shall provide each CLEC and the Commission with reasonable notice of, and supporting documentation for, such acts or omissions. Each CLEC shall have 14 days from the filing of such Notice to advise BellSouth
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CLEC Action Item Responses
from February 21, 2005 Call

				<p>and the Commission in writing of its intent to challenge through the dispute resolution provisions of this plan, the claims made by BellSouth. BellSouth shall not be obligated to pay any amounts subject to such disputes until the dispute is resolved</p> <p>NOTE: In consideration of this, staff is revisiting dispute resolution policy proposed in section 4.9 (see number 42 below)</p>
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CLEC Action Item Responses
from February 21, 2005 Call

Action Item 2

CLECs to review and provide comments and/or alternative language to BellSouth's current Force Majeure provision as proposed in Staff Position column in the matrix

Response See mark-up below, which is based on the language from the BellSouth/AT&T ICA agreement (which is also provided below for reference)

Proposed SEEM language	Current AT&T ICA
<p>4 5 2 BellSouth shall not be obligated to pay Tier-1 or Tier-2 Enforcement Mechanisms for non-compliance with a performance measurement if such non-compliance was the result of any event that performance under this SQM/SEEM Plan is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts or any other circumstances beyond the reasonable control and without the fault or negligence of BellSouth BellSouth, upon giving prompt notice to the Commission and CLECs, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference, provided, however, that BellSouth shall use diligent efforts to avoid or remove such causes of non-performance</p>	<p>14. Force Majeure 14.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement caused by a Force Majeure condition, including acts of the United States of America or any state, territory or political subdivision thereof, acts of God or a public enemy, fires, floods, disputes, freight embargoes, strikes, labor disputes, earthquakes, volcanic actions, wars, civil disturbances, or other causes beyond the reasonable control of the Party claiming excusable delay or other failure to perform Force Majeure shall not include acts of any Governmental Authority relating to environmental, health or safety conditions at Work Locations If any Force Majeure condition occurs, the Party whose performance fails or is delayed because of such Force Majeure condition shall give prompt notice to the other Party, and upon cessation of such Force Majeure condition, shall give like notice and commence performance hereunder as promptly as reasonably practicable</p> <p>14 2 Notwithstanding Section 14.1 of this Agreement, no</p>

Deleted: unavailability of equipment from vendor, changes requested by a CLEC.

CLEC Action Item Responses
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delay or other failure to perform shall be excused pursuant to this Section 14 by the acts or omission of a Party's subcontractors, material persons, suppliers or other third persons providing products or services to such Party unless (i) there is a Force Majeure condition that affects the performance of said subcontractors, material persons, suppliers or other third persons, (ii) such acts or omissions do not relate to environmental, health or safety conditions at Work Locations and, (iii) unless such delay or failure and the consequences thereof are beyond the control and without the fault or negligence of the Party claiming excusable delay or other failure to perform.

Notwithstanding the foregoing, this Section 14 shall not excuse failure or delays where either Party is required to implement Disaster Recovery plans to avoid such failures and delays in performance

CLEC Action Item Responses
from February 21, 2005 Call

Action Item 3

CLECs to provide comments on applying Force Majeure provision only to benchmarks and not retail analogs.

Response: **BellSouth is required to provide non-discriminatory or parity service. This obligation should exist in extraordinary as well as ordinary circumstances.** It is a reasonable expectation that any force majeure event should affect BellSouth and CLECs equally. Additionally, not holding BellSouth accountable for providing parity service in a force majeure event provides great potential for unfair discrimination.

Following are excerpts from Orders from other states addressing this issue

Michigan

“For example, several performance measurements proposed by Ameritech Michigan include a force majeure exclusion. Several of the parties have argued that this exclusion should be rejected because parity is equally important in force majeure conditions as it is in normal conditions. The Commission agrees. Exclusions for force majeure conditions must be rejected. Although the time for performance may lengthen, it is important that the ILEC not discriminate against the CLECs even under unusual circumstances.”

Order on performance measures-

*BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION –In the matter of Ameritech Michigan's submission on performance measures, reporting, and benchmarks, pursuant to the October 2, 1998)Case No U-11830 order in Case No U-11654)
May 27, 1999*

“The Commission concludes that Ameritech Michigan’s plan provides unjustified exclusions. As the Staff notes, the performance measure business rules should define when noncompliance is excused, and force majeure events should not affect Ameritech Michigan’s service to the CLECs any differently than they affect its service to its retail customers. Furthermore, the May 27, 1999 order rejected the view that force majeure should be an excuse for discriminatory performance. May 27, 1999 order, p. 16. The same analysis holds for problems with third-party systems and equipment. If Ameritech Michigan has designed its systems so that

CLEC Action Item Responses
from February 21, 2005 Call

unexpected events disproportionately affect service to the CLECs, or has permitted third parties to design its systems in that manner, that is not a reason to excuse the discriminatory conduct.”

Order adding remedies to the performance plan-

*BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION--In the matter of Ameritech Michigan's submission on performance measures, reporting, and benchmarks, pursuant to the October 2, 1998 Case No U-11830 order in Case No U-11654)
April 17, 2001*

Colorado

15.0 Waiver of Payments

15 1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds.

- (1) Force majeure, as defined Qwest's retail tariffs (as to benchmark standards, but not as to parity submeasures)
- (2) A work stoppage (as to benchmark standards, but not as to parity submeasures),
- (3) An act or omission by a CLEC that is in bad faith and designed to "game" the payment process; or
- (4) A material CLEC failure to follow the applicable business rules.

15 2 Any waiver request must contain an explanation of the circumstances that justify the waiver, and any and all relevant documentation relied upon to support the request To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved

CLEC Action Item Responses
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CLEC must respond to any such waiver requests within 10 business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in section 17 0.

*DOCKET NO 011-041T – IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO
September 26, 2001*

Arizona

“120. Staff recommends Qwest’s inclusion of Section 13.3 force majeure language that corresponds to the SGAT language for benchmark standards. However, Staff believes that Qwest should not be forgiven for parity misses. Staff further recommends that the PAP clarify that the plan will resume in the month following the force majeure event

121. We find that the force majeure language in the PAP should more closely mirror that in the SGAT in that it should specify that inability to secure products or services of other persons or transportation facilities or act or omissions of transportation carriers should be force majeure events to the extent any delay or failure in performance caused by these circumstances is beyond Qwest’s control and without Qwest’s fault or negligence. We concur with Staff that force majeure language is appropriate for benchmark standards, but that force majeure events should not excuse parity failures. Any qualifying event should affect Qwest and CLECs equally, otherwise, there would be great potential for unfair discrimination. Qwest should revise its PAP accordingly.”

DOCKET NO T-00000A-97-0238

New York

“CLECs are understandably concerned that Verizon provide parity service, even in extraordinary circumstances, to assure that their ability to compete effectively is not impeded. WorldCom points out that, even in a work stoppage, Verizon has the ability to adjust or reassign resources so that parity can be met. Recognizing that this latter suggested action may at times be difficult, on balance, maintaining parity performance is a critical element in the competitive fabric. In light of the importance of the PAP’s pro-competitive goals, waivers should be reserved as an extreme remedy for relief from

CLEC Action Item Responses
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circumstances clearly beyond Verizon's control and should apply only to absolute measures. The examples Verizon submitted in support of its proposal, given as they are solely in the context of a work stoppage, are not compelling and do not justify deletion of the existing prohibition on waivers for parity metrics."

STATE OF NEW YORK PUBLIC SERVICE COMMISSION

CASE 99-C-0949 - Petition Filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, filed in C 97-C-0271.

ORDER AMENDING PERFORMANCE ASSURANCE PLAN (Issued and Effective January 24, 2003)

CLECs will provide copies of these Orders upon request