BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	DOCKET NO. 041269-TP ORDER NO. PSC-05-1127-FOF-TP ISSUED: November 8, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

ORDER DENYING SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.'S EMERGENCY MOTION

BY THE COMMISSION:

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*[1] *(TRO)*, which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in *USTA I*.[2]

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in *United States Telecom Ass'n v. FCC*[3] *(USTA II)*, which vacated and remanded certain provisions of the *TRO*. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper.

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, rel. August 21, 2003 (*Triennial Review Order or TRO*).

[2] United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA I).

[3] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied, 160 L. Ed. 2d 223, 2004 U.S. LEXIS 671042 (October 12, 2004).

The FCC released an *Order and Notice*[4] *(Interim Order)* on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops, and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after publication of the *Interim Order* in the Federal Register. On February 4, 2005, the FCC released an *Order on Remand (TRRO)*, wherein the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to the decisions handed down in *USTA II* and the FCC's *Interim Order*, BellSouth Telecommunications, Inc. (BellSouth) filed, on November 1, 2004, its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that we determine what changes are required in existing, approved interconnection agreements between BellSouth and competitive local exchange carriers (CLECs) in Florida as a result of *USTA II* and the *Interim Order*.

By Order No. PSC-05-0492-FOF-TP, issued May 5, 2005, we found that the *TRRO* is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005.[5] (*No-New-Adds Order*) On August 22, 2005, Supra Telecommunications and Information Systems, Inc. (Supra) filed its Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base. Supra requests that the Commission issue a ruling declaring that BellSouth must continue to accept Section 251 UNE orders submitted to serve Supra's embedded customer base until a new agreement is negotiated between the parties, or until the FCC-mandated transition period expires, whichever occurs first. BellSouth filed its Response in Opposition to Supra's Emergency Motion (Response) on August 29, 2005.

Arguments

Supra's Motion

In its Motion, Supra claims that the *TRRO* does not permit BellSouth to refuse Section 251 UNE orders for the purpose of serving customers already in a CLEC's embedded customer base. Supra argues that we should interpret the FCC's *TRRO* according to its plain language and intent. Supra claims that during this one-year transition, BellSouth must provision UNE-P at TELRIC rates plus one dollar for Supra's embedded customer base, and not merely for Supra's existing lines. Supra argues that this was not clarified in Order No. PSC-05-0492-FOF-TP,

[4] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 *(Interim Order)*.

[5] The No-New-Adds Order is currently under appeal to the Federal District Court for the Northern District of Florida, NuVox Communications, et al. v. Florida Public Service Commission, et al., Case No. 4:05 CV 189, and the Supreme Court of Florida, NuVox Communications, et al. v. Braulio Baez, etc., et al., Case No. SC05-1025, where it is held in abeyance pending resolution by the Federal District Court for the Northern District of Florida.

issued May 5, 2005. Supra cites to paragraph 199 of the *TRRO* in support of preserving Section 251 UNEs for existing CLEC customers:

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base . . . During the twelve-month transition period . . . competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LEC's switches or to alternative access migrations negotiated by the carriers.

TRRO ¶199. Supra also cites paragraph 29 of the *TRRO* in support of distinguishing between embedded base and embedded lines:

> . . . incumbent LECs must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements

TRRO ¶29. Supra claims that numerous state commissions, while agreeing that the TRRO ended CLEC access to Section 251 UNEs for new customers, have nonetheless ordered ILECs to continue providing mass-market local circuit switching and UNE-P combinations to existing customers. Supra cites to the North Carolina Utilities Commission and the Indiana Utility Regulatory Commission to support its argument that the twelve-month transition period is to allow a CLEC's existing UNE-P customers to continue with its current type of service arrangement while the CLEC begins the necessary steps to convert these customers to an alternative service arrangement in a manner that will prevent service interruptions.

Supra claims that BellSouth has denied Supra the ability to provide its embedded base customers with new UNE-P lines, and has denied Supra the ability to provide its embedded base customers with requested location changes. Supra argues that these disruptions to its embedded base are unnecessary, and that BellSouth's refusal to provision UNE-P is anti-competitive and is in violation of the *TRRO*.

BellSouth's Response

In its Response, BellSouth argues that Supra's Motion is contrary to, and inconsistent with, the text of the *TRRO*. In short, BellSouth argues that when a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching, which is prohibited under the plain language of the FCC's order and rules. BellSouth cites to paragraph 227 of the *TRRO* to support its argument that the transition plan "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)." BellSouth also argues that FCC rules provide that "[r]equesting carriers may not obtain new local switching as an unbundled network element." C.F.R § 51.319(d)(2)(iii). In

further support of BellSouth's argument, it cites to a Kentucky Injunction Order,[6] a Federal Court Opinion from Mississippi,[7] and an Order from Georgia.[8] BellSouth argues that all three Orders stand for the notion that the language and intent of the *TRRO* equates to an unqualified elimination of new UNE-P orders as of March 11, 2005.

In addition, BellSouth points out that other state commission decisions are not binding on this Commission. For example, the Georgia Commission decision to require BellSouth to process and provide new UNE-P arrangements was overturned by a federal court in Georgia. Pursuant to that decision, BellSouth is rejecting all UNE-P orders in Georgia. BellSouth argues that state commissions, such as the Tennessee and California Commissions, have ruled in favor of the ILECs.

BellSouth also argues in its response that the purpose of the transition plan is to encourage the CLECs to move away from unlawful unbundling rules. In short, BellSouth argues that allowing Supra to add new UNE-P arrangements is contrary to the FCC's goal to transition CLECs off UNE-P platforms. BellSouth supports its arguments by citing to paragraph 227 of the *TRRO*. BellSouth argues that paragraph 227 illustrates the purpose of the transition period which is to "perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut-overs or other conversions."

BellSouth argues that in light of its previously filed pleadings, Supra cannot legitimately argue that we have not ruled on this issue. BellSouth argues that this Commission, has already addressed this matter at its April 5, 2005, Agenda Conference, and rested the subsequent Order's analysis on paragraph 233 of the *TRRO*. BellSouth specifically points to the language regarding "no new adds."[9] In light of this Order, BellSouth argues that Supra cannot order new UNE-P lines for existing customers, nor can Supra order new UNE-P lines at different locations.

Next, BellSouth disputes Supra's allegations of service disruptions and anti-competitive behavior. First, BellSouth argues that Supra's claim that it cannot provide its customers with UNE-P lines and/or service location changes is meritless. Specifically, BellSouth points to paragraph 199 of the *TRRO* wherein the FCC recognized that CLECs, such as Supra, can deploy their own switches to serve a customer base. Second, BellSouth argues that Supra can enter into

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[6] BellSouth Telecommunications, Inc. v. Cinergy Communications Co., No. 3:05-CV-16-JMH (E.D. Ky. April 2005)

[7] BellSouth Telecommunications, Inc. v. Mississippi Pub. Serv. Comm., 3:05CV173LN, 2005 WL 1076643 (S.D. Miss. April 2005)

[8] BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, LLC, 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. April 2005)

[9] ". . . any other interpretation would render the TRRO-language regarding 'no new adds' a nullity, which would, consequently, render the prescribed 12-month transition period a confusing morass ripe for further dispute." PSC-05-0492-FOF-TP, issued May 5, 2005.

similar commercial agreements for UNE-P.[10] Third, BellSouth argues that it does not participate in anti-competitive behavior and is in full compliance with the *TRRO* and relevant federal district court decisions.

In conclusion, BellSouth notes that it is ready, willing and able to switch UNE-P customers to alternative arrangements. BellSouth also notes that this can be done via an individual or batch hot cut process as noted in paragraphs 200 and 201 of the *TRRO*.

Decision

In the *TRRO*, the FCC concluded that a twelve-month transition period applied to the embedded base of UNE-P customers and that CLECs may not obtain any new local switching (no-new-adds) as an unbundled network element, effective March 11, 2005. *TRRO* ¶ 227. In the *No-New-Adds Order*, we found that the *TRRO* is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005. *No-New-Adds Order*, p. 6. Therefore, we agree with BellSouth that we have already addressed this specific matter and reach a consistent finding here.

That said, the *No-New-Adds Order* did not explicitly address whether adding new lines, modifications, or rearrangements to serve the CLEC's embedded customer base is permitted or prohibited after March 11, 2005. While we found that "further prolonging the availability of UNE-P and other de-listed UNEs could cause competitive carriers to further defer investment in their own facilities, a result that would be clearly contrary to the FCC's intent, as well as the Court's decision in USTA II," the Order did not specify whether no-new-adds applies just to new customers or to the embedded customer base as well. *No-New-Adds Order*, p. 7.

Several paragraphs in the *TRRO*, as well as the rules attached thereto provide guidance in addressing this dispute. The *TRRO* specifically establishes a twelve-month transition period for the CLEC to migrate its embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement. *TRRO* ¶226. Additionally, the *TRRO* states that the twelve-month transition period applies only to the CLEC embedded customer base and ". . . does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching . . .". *TRRO* ¶5, ¶227. We also note that footnote 625 in the *TRRO* states "[sic] transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order." (emphasis added) Referring to the rules attached to the *TRRO*, we observe that they require ILECs to provide access to unbundled local circuit switching to serve a CLEC's embedded base of end-user customers during the twelve-month transition period, while also prohibiting the addition of any new switching UNEs. *TRRO* Appendix B, p. 148.

Based on the foregoing analysis, we find that the embedded customer base referenced in the *TRRO* means customers being served by unbundled local circuit switching on March 11,

[10] BellSouth claims it has over one hundred commercial agreements with CLECs.

2005. We also find that the *TRRO* prohibits CLECs from adding any new local switching UNE arrangements, not merely for new UNE customers as asserted by Supra. For example, assume a CLEC customer receiving UNE-P service on March 11, 2005, requested an additional line in August. The customer would be considered part of the CLEC's embedded customer base because it was being served by UNE-P on March 11, 2005. By definition then, a new UNE-P line – an unbundled local circuit switching arrangement – ordered in August was not serving the CLEC's embedded customer on March 11, 2005, and therefore is prohibited by the *TRRO*.

In conclusion, the Motion is denied. While CLECs retain access to unbundled local circuit switching during the 12-month transition period for their embedded end-user customers, that access is limited to the arrangements existing on March 11, 2005. Orders requiring a new UNE-P arrangement, such as a customer move to another location or an additional line, are not permitted pursuant to the FCC's *TRRO*.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Supra Telecommunications and Information Systems, Inc.'s Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base is denied. It is further

ORDERED that the *Triennial Review Remand Order* prohibits CLECs from adding any new local switching UNE arrangements. It is further

ORDERED that Docket No. 041269-TP shall remain open to address the remaining open issues.

By ORDER of the Florida Public Service Commission this 8th day of November, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.