State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: June 17, 2004

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

FROM: Division of Competitive Markets & Enforcement (Pruitt)
Office of the General Counsel (Susac)

RE: Docket No. 031038-TL – Petition for approval to revise customer contact protocol by BellSouth Telecommunications, Inc.

AGENDA: 06/29/04 – Regular Agenda – Decision Prior to Hearing – Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\031038.RCM.DOC

Case Background

By Proposed Agency Action Order No. PSC-04-0115-PAA-TL, issued January 30, 2004, and Amendatory Order No. PSC-04-0115A-PAA-TL, issued on May 19, 2004, this Commission granted the petition of BellSouth Telecommunications, Inc. (BellSouth) to amend its customer contact protocols. This amendment allows the company to recommend its intraLATA toll service to new customers who call the Business Office, after informing them that they have a choice of local toll providers and offering to read a list of all available intraLATA toll providers.

The Commission found that the underlying objectives of the customer contact restrictions, assuring customer awareness of their intraLATA choices and allowing intrastate interexchange telecommunications companies to establish themselves in the intraLATA market, had been met. On February 18, 2004, Americatel Corporation (Americatel), holder of Competitive Local Exchange Certificate No. 8420 and Intrastate Interexchange Telecommunications Company Registration No. TJ049, filed a timely protest of the Order. Americatel Corporation's Petition for the Initiation of Proceedings raises specific issues with respect to a change in BellSouth's customer contact protocols and requests a formal hearing. On March 8, 2004, BellSouth filed a Response to Americatel's Petition and asked the Commission to deny Americatel's Petition. On March 15, 2004, Americatel filed a reply to BellSouth's

response. On that same day, BellSouth filed a Motion to Strike Americatel's Reply to BellSouth. Americatel did not respond to the Motion to Strike.

Staff's recommendation in Issue 1 addresses BellSouth's Motion to Strike Americatel's Reply. In Issue 2, staff recommends that the Commission dismiss, on its own motion, Americatel's Petition for failure to state a cause of action for which relief can be granted in this proceeding.

Essentially, staff recommends in Issue 2 that Americatel's Petition should be dismissed because: (1) it raises issues regarding interLATA service that will not be remedied by restrictions on the marketing of intraLATA service and for which the Commission cannot provide another remedy; and (2) it raises allegations of anti-competitive conduct that are entirely unrelated to BellSouth's petition that initiated this docket and are not alleged injuries that this proceeding was designed to address.

The Commission is vested with jurisdiction in this matter pursuant to Section 364.01, Florida Statutes, and Section 364.0252, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion to Strike Americatel Corporation's Reply to BellSouth's Response to Americatel's Petition protesting Order No. PSC-04-0115-PAA-TL?

Recommendation: Yes. The Commission should grant BellSouth Telecommunications, Inc.'s Motion to Strike Americatel Corporation's Reply, because the Uniform Rules of Procedure do not expressly authorize replies. **(SUSAC)**

Staff Analysis: As stated above, on March 15, 2004, Americatel filed a reply to BellSouth's response. On that same day, BellSouth filed a Motion to Strike Americatel's Reply. BellSouth argues that there is no provision within the Florida Administrative Code that allows a reply to be filed in response to an answer to a petition. BellSouth notes that in similar situations, the Commission has recognized that the Florida Administrative Code does not contemplate that a party can file a reply to a response in opposition to a Motion. See Rule 28-106.204, Florida Administrative Code; and In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. for violations of the Telecommunications Act of 1996, Order No. PSC-00-1777-PCO-TP, Docket 980119-TP, issued, September 28, 2000, at p. 3 ("neither the Uniform Rules nor [the Commission's] rules contemplate a reply to a response to a Motion.")

In addition, BellSouth points out that a party must seek leave before filing a reply that is not otherwise contemplated by rule; however, Americatel has not done so. BellSouth adds that the Commission generally refuses to allow a reply even when leave is sought. Id.; see also, In re: ITC-DeltaCom Communications, Inc. Order No. PSC-00-2233-FOF-TP, Docket No. 990750-TP, November 22, 2000, p. 2. BellSouth argues that the same rationale the Commission has generally applied in the cited cases is equally applicable to Americatel's Reply in this case.

After reviewing the arguments put forth by both parties, staff recommends granting BellSouth's Motion to Strike Americatel's Reply. The Commission has stated that ". . . neither the Uniform Rules nor our rules contemplate a reply to a response to a Motion."[1] This rationale is equally applicable in this case; while Rule 28-106.203, Florida Administrative Code, permits an answer (response) to a petition, there is no provision that permits a further reply.[2] Americatel has not provided this Commission with any reason to deviate from application of this rationale in this case. Therefore, staff recommends that the Commission should grant BellSouth's Motion to strike Americatel's Reply because the Uniform Rules of the Administrative Procedure Act do not expressly authorize replies.

[1] Order No. PSC-00-1777-PCO-TP, issued September 28, 2000; See also, Order No. PSC-04-0511-PAA-TP, page 2, issued May 19, 2004, BellSouth filed its Reply to the CLEC Response on November 14, 2003. "However, we do not have rules which allow for a Reply to a Response." Order No. PSC-04-0343-FOF-TP, Issued April 2, 2004, "…our rules do not contemplate any pleadings filed in reply to a response to a motion."

[2] Staff notes, however, that had BellSouth instead filed a Motion to Dismiss in response to Americatel's Petition, then Americatel would have been allowed, by rule, to file a response to that Motion.

Issue 2: Should the Commission dismiss Americatel Corporation's Petition for the Initiation of Proceedings on its own motion for failure to state a cause of action upon which relief could be granted?

Recommendation: Yes. Taking all of the petitioner's allegations as true, Americatel has failed to sufficiently state a cause of action upon which relief could be granted. The Petition should, therefore, be dismissed, and Order Nos. PSC-04-0115-PAA-TL and PSC-04-0115A-PAA-TL should be made final and effective as of the date of the Commission's decision at the Agenda Conference. **(SUSAC, PRUITT)**

Staff Analysis:

A. Americatel's Petition for the Initiation of Proceeding

Pursuant to Rule 25-22.029, Florida Administrative Code, Americatel seeks a formal proceeding in this matter. According to its Petition, Americatel provides both domestic and international telecommunications service, and is an Internet Service Provider. Americatel also asserts that it provides the majority of its service through dial-around while also offering presubscribed (1+) service and private line and other high-speed services to its business customers. Finally, Americatel argues that it is a competitor of BellSouth in Florida and will likely be harmed competitively if the PAA Order goes into effect, because BellSouth could use its position as a dominant LEC to its advantage in the long distance market.

Americatel argues that this Commission based its decision primarily on three factors:

1. BellSouth's assertion that, from an analysis of its August and September 2003 new service orders, only 18% of new customers chose BellSouth as their preferred intraLATA carrier;

2. BellSouth is not restricted in marketing its service in other jurisdictions in the same manner as it is in Florida; and

3. The PSC previously granted similar relief to Verizon Florida.

Americatel's petition addresses only the first and third factors.

i. Argument Regarding First Factor

The first factor concerning BellSouth's data on its intraLATA market share, was cited by Americatel as "hollow or, at least, very confusing." In support of this argument, Americatel refers to the 2002 Securities and Exchange Commission (SEC) report, which shows that BellSouth had 34.4% of the residential access lines in the BellSouth operating territory on the Complete Choice® local calling plan, and that BellSouth sold 1.2 million Answers℠ calling packages, which include local and toll service. Americatel states that the figures predate the Federal Communications Commission's (FCC) decision to permit BellSouth to provide interLATA telecommunications service in Florida. Americatel states that BellSouth also provides a bundled local and intraLATA service called Area Plus®. Americatel speculates that BellSouth's market share is greater now.

Americatel also refers to BellSouth's Fourth Quarter 2003 Earnings Report, which states that BellSouth "added approximately 3 million long distance customers during 2003, for a total of 3.96 million customers and almost 30 percent penetration of its mass-market customers by year-end." Americatel states that the SEC report and the 2003 Fourth Quarter report "appear to contradict" the figures presented to this Commission and suggests that the Commission "use the Herfindahl-Hirschman Index to determine market concentration." Americatel also alleges that "BellSouth has been aggressively seeking to drive out a la carte competition." As an example of alleged anti-competitive activities, Americatel uses BellSouth's appeals to federal court and requests to the FCC for reversal of this Commission's orders to continue to provide DSL service to Florida consumers who choose another company for voice telecommunications service.

ii. Argument Regarding Third Factor

In response to the third factor, Americatel argues that Verizon was never restricted by the mandates of "Section 271 of the Communications Act of 1934, as amended ('34 Act'), which placed strict standards on the BOC's provision of various services, including interLATA." Americatel further argues that this Commission should consider this distinction in determining to amend the protocol for Verizon Florida but not for BellSouth. Americatel states that the initial audit report on BellSouth's 272 Affiliate "noted some deficiencies in BellSouth's compliance with applicable safeguards…" Examples given are the sharing of Operations, Installation and Maintenance (OI&M) functions by BellSouth and its 272 Affiliate, and the manner in which BellSouth's customer service representatives did not inform customers of their choice in selecting a long distance company other than BellSouth's 272 Affiliate.

As a competitor and to ensure ". . . BellSouth's neutrality during the order-taking process," Americatel requests a formal hearing in the instant docket.

B. BellSouth's Response to Americatel Corporation's Petition for the Initiation of Proceedings

Responding to Americatel's first argument concerning market share, BellSouth states that Americatel is confusing the marketing of intraLATA telecommunication services to new contacts with the marketing of bundled packages, many of which are sold to existing customers. Further, BellSouth alleges that "Americatel also appears to be confused regarding the distinction between intraLATA and interLATA services."

BellSouth also argues that this Commission's orders on DSL service have no relevance to the requested relief regarding customer contact protocols.

As for Americatel's argument that the basis for granting Verizon Florida relief can be distinguished from BellSouth's situation, BellSouth contends that the restrictions on the provision of interLATA service are completely irrelevant and inapplicable to the issue of intraLATA services. Further, BellSouth emphasizes that Verizon Florida and BellSouth have been subject to the same intraLATA customer contact protocols. BellSouth refers to

Commission Order No. PSC-98-0710-FOF-TP, which required Verizon to use the same protocols as BellSouth.

BellSouth also addresses the FCC 272 Audit and states that it pertained to interLATA services and that Americatel's arguments should be rejected as irrelevant. BellSouth states that the 272 Audit was not relevant to the customer contact protocols for intraLATA service. Furthermore, argues BellSouth, the FCC agreed that during an inbound call to a Bell Operating Company (BOC), a BOC could recommend its own long distance (interLATA) affiliate.[3] BellSouth is requesting that it be allowed to do the same for its intraLATA service. (BellSouth Petition, p. 3)

C. Analysis of Staff

i. Standard of Review

As stated by the Court in Varnes v. Dawkins, "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, at 350. Staff believes that this standard is also applicable when the agency dismisses a petition on its own motion.

ii. Analysis

Staff recommends that Americatel has failed to state a cause of action upon which relief can be granted for two reasons: (1) Americatel's argument regarding the market share figures offered by BellSouth in this proceeding and those in BellSouth's SEC Report and Earnings Report compares "apples to oranges" and by itself, does not state a cause of action; and (2) Americatel's remaining arguments regarding the increased level of scrutiny that should be placed on BellSouth because of Section 271 and 272 requirements raise questions regarding the provision of interLATA service, rather than intraLATA service, and therefore, raise issues for which the Commission cannot grant relief.

Staff believes that the first argument comparing market share figures simply fails to state a cause of action. Not only does Americatel ask the Commission to consider market share figures that do not identify the specific market segment at issue here, which is the market for new customers for intraLATA long distance service, but it also fails to explain what it is about the mismatch in the figures that should cause the Commission to take action. As such, even

[3] Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934 as amended, to Provide In-Region, InterLATA Services in South Carolina, Memorandum Op. & Order, FCC 97-418, at para. 237, issued December 24, 1997.

accepting Americatel's allegations as true, it has not identified a cause of action that would warrant rejecting BellSouth's requested protocol change.

In particular, Americatel's specific factual assertions that the market share figures provided by BellSouth in its SEC Report and Earnings report "appear to contradict" the figures presented to this Commission are not relevant to the case at hand. The figures used by Americatel represent the percentage of all BellSouth customers on bundled service packages. Therefore, the figures do not separately distinguish figures relating to new customers, which is at issue in this docket. In addition, the aforementioned figures in no way relate to the subscription decisions of new consumers calling the BellSouth Business Office to establish service and BellSouth's requested change in protocol to recommend its intraLATA service.

As for the latter arguments regarding Sections 271 and 272 of the federal Telecommunications Act, these arguments raise issues regarding the provision of interLATA service, a service not regulated by this Commission, and cite federal provisions that do not govern the provision of intraLATA service in Florida. Because the Commission lacks jurisdiction over interLATA service, Americatel has failed to state a cause of action upon which the Florida Commission could grant relief.

Americatel seems to confuse the requirements applicable to interLATA service with those applicable to intraLATA services. For example, Americatel argues that this Commission premised its decision, in part, on the fact that a request for the identical protocol change was previously granted to Verizon Florida for its customer contacts for intraLATA service. Americatel emphasizes that Verizon Florida is not under the same Section 271 and 272 restrictions of the federal Telecommunications Act of 1996. Americatel argues, implicitly, that the PSC should not grant the request to revise BellSouth's protocols because BellSouth should be held to stricter customer contact protocols. Americatel also infers that stricter standards are required based on the initial 272 audit report for BellSouth. Sections 271 and 272 of the Act are not, however, applicable to the provision of intraLATA service.[4] Therefore, even taking the allegations stated by Americatel to be true, Americatel fails to state a cause of action upon which relief can be granted by this Commission.

Finally, Americatel seems to make another, separate argument that the Commission should take action, because BellSouth's decision to appeal an Order of this Commission amounts to anti-competitive conduct. That argument also fails to identify a cause of action because the Telecommunications Act of 1996 includes a statutory right to appeal to the federal district courts, as set forth in §252 (e)(6) of the Act. Exercising that right is not, by itself, the basis for a cause of action.[5] Furthermore, the Commission is without state statutory authority to remedy any abuse of the appellate process set forth in the Act.

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[4] Further, Americatel notes that the initial audit report on BellSouth's 272 affiliate identifies deficiencies regarding BellSouth and its affiliate sharing OI&M functions and the marketing of interLATA service. That prohibition has been repealed, and the FCC stated that the elimination of the OI&M sharing prohibition would not discriminate against unaffiliated rivals in price or performance; Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates, Report and Order in WC Docket No. 03-228, FCC 04-228, at para. 18, and 1-32.

[5] But see, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)(pattern of repetitive, baseless claims may be deemed an abuse of process and a potential antitrust violation). Cf., McGowan v. Parish, 228 U.S. 312 (1913)(if the basis for the appeal is frivolous, the appellant may be deprived of that statutory right);

iii. Conclusion

Based on the foregoing analysis and viewing the Petition in the light most favorable to the petitioner, staff believes that Americatel's Petition must be dismissed, because accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. Therefore, staff recommends that Americatel Corporation's Petition for the Initiation of Proceedings should be dismissed.

Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 2, then no other issues will remain for the Commission to address in this docket. This docket should, therefore, be closed. **(SUSAC)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, no valid protest will exist, and the PAA order, as amended, should be made final and effective as of the date of this Agenda Conference.

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and Tigertail Quarries, Inc. v. Ward, 154 Fla. 122 (Fla. 1944)(noting that a statutory right to appeal is subject to all the limitations and restrictions set forth in the statute).