

State of Florida



Public Service Commission

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

DATE: January 20, 2005

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

FROM: Office of the General Counsel (Teitzman)
Division of Competitive Markets & Enforcement (King)

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 02/01/05 – Regular Agenda – Motion to Dismiss - Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041269.RCM.DOC

Case Background

On November 1, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth requests that the Commission determine what changes are required in existing approved interconnection agreements between BellSouth and competitive local exchange carriers (CLECs) in Florida by recent decisions¹ from the Federal

¹ See 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 (TRO); *United States Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (USTA II); In the Matter of Unbundling 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)

Communications Commission (FCC) and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

On November 22, 2004, the Florida Competitive Carriers Association and Competitive Carriers of the South (collectively "CompSouth") filed their Motion to Dismiss BellSouth's Petition to Establish Generic Docket. Also on November 22, 2004, Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corp., and KMC Telecom V, Inc. and KMC Telecom III, LLC (Joint CLECs), filed their Joint Opposition to BellSouth's Petition.²

On November 24, 2004, BellSouth requested a 14-day extension to respond to CompSouth's Motion to Dismiss. On December 6, 2004, BellSouth filed an Amended Motion for Extension of Time requesting an additional 4 days to respond to the Motion. By Order No. PSC-04-1219-PCO-TP, issued December 9, 2004, BellSouth was granted until December 17, 2004 to respond. On December 17, 2004, BellSouth filed its Response to CompSouth's Motion to Dismiss.

² Although not styled as a Motion to Dismiss, the Joint CLECs request the Commission dismiss BellSouth's Petition. Accordingly, the Joint CLECs' dismissal request will be addressed in this recommendation.

Discussion of Issues

Issue 1: Should the Commission grant CompSouth's Motion to Dismiss and the Joint CLECs' request for dismissal?

Recommendation: No. The Commission should deny CompSouth's Motion to Dismiss and the Joint CLECs' request for dismissal because BellSouth has stated a cause of action for which relief may be granted. (TEITZMAN)

Position of the Parties

CompSouth: In their Motion, CompSouth contends that BellSouth in its Petition requests this Commission to engage in an exercise that: (1) is inconsistent with BellSouth's interconnection agreements with CLECs in Florida; (2) is destined to result in duplicative and unnecessary litigation; and (3) would result in a substantial waste of Commission resources. Additionally, CompSouth argues that BellSouth's Petition fails to identify any legal basis for this proceeding in the provisions of the Telecommunications Act of 1996 or Florida Law.

CompSouth states that discussions were held between BellSouth and CLECs, including representatives of CompSouth, regarding the filing of a generic proceeding. CompSouth asserts that no consensus was reached regarding the filing of a generic proceeding before the Commission. Consequently, CompSouth argues that BellSouth has acted unilaterally in filing its Petition and does not have the agreement of CLECs to waive their contractual rights, which include the normal operation of contractual Change of Law provisions.

CompSouth asserts its members were first presented with BellSouth's proposed interconnection agreement amendment language in late September 2004. CompSouth contends that none of its members have negotiated for a period of time sufficient to trigger dispute resolution by this Commission under the terms of existing interconnection agreements, and as a result, BellSouth is attempting to "skip over" the contractual Change of Law process by suggesting a generic proceeding to resolve disputes that may not even have been subject to good faith negotiations with many CLECs at the time of its filing.

CompSouth asserts further that this Commission lacks jurisdiction to grant the relief requested by BellSouth. CompSouth asserts that BellSouth seeks a generic Commission decision imposing its proposed Interim Rules Amendment upon all carriers. CompSouth argues this Commission may not lawfully entertain such a case under the rationale of Pacific Bell v. West Telecomm, Inc., 325 F.3d 1114, 1127 (9th Cir. 2003) (Pac-West Telecomm). CompSouth asserts that in Pac-West Telecomm, the Ninth Circuit Court of Appeals held that a state utility commission does not have the authority to engage in dispute resolution proceedings in a generic proceeding without reference to the specific terms and conditions of the agreements. CompSouth contends that contrary to the holding of Pac-West Telecomm, BellSouth requests the Commission enter an order amending all interconnection agreements without taking account of the particular change in law procedures in those agreements.

Citing Verizon North, Inc. v. Strand, 309 F3d 935, 942 (6th Cir. 2002) (Strand), CompSouth asserts that a state utility commission is expressly forbidden from providing an

alternative route around the entire interconnection agreement process required by sections 251 and 252, including the attendant negotiation/arbitration, state commission approval, FCC oversight and federal court review procedures. CompSouth argues BellSouth's Petition attempts to create just such an alternative route around the negotiation and arbitration process required by the Act. CompSouth contends the interconnection agreements of its members require any dispute regarding the implementation of legally binding changes in law to be resolved through informal dispute resolution, and then if the matter is not resolved, to be addressed via formal dispute resolution. Consequently, CompSouth contends the process suggested in BellSouth's Petition eliminates the entire negotiation and arbitration process established by the Act and embodied in its interconnection agreements with CLECs; therefore, it is in violation of controlling law.

Finally, CompSouth contends that even if the Commission finds it has jurisdiction to conduct this generic proceeding, BellSouth's Petition is premature and will result in a waste of resources. CompSouth cites a recent order by the North Carolina Utility Commission (NCUC) in which they found that a generic proceeding "would be premature at this point," and CompSouth urges that the Commission make a similar finding. CompSouth argues the Commission should not proceed to act on BellSouth's erroneous interpretations of the Triennial Review Order, USTA II, or the FCC Interim Order and should take no action until the FCC issues an order adopting permanent rules. CompSouth asserts BellSouth's Petition seeks to have this Commission anticipate the outcome of the FCC's rulemaking and proceed to implementation before the fact. Consequently, CompSouth argues the Commission should dismiss BellSouth's Petition and not allow any refiling of this matter until after the FCC adopts its final rules and BellSouth complies with the Change of Law and dispute resolution provisions of the parties' interconnection agreements.

Joint CLECs: In opposition to the BellSouth Petition, the Joint CLECs state they have a pending arbitration with BellSouth in Docket No. 040130-TP. The Joint CLECs assert that as contemplated by Sections 251 and 252 of the Act, the Joint CLECs negotiated with BellSouth and then sought arbitration of issues that could not be resolved through voluntary negotiation.

The Joint CLECs argue that the Commission should require, as the Federal Act does, that parties negotiate first and arbitrate only if such negotiations fail. The Joint CLECs assert that although they have resolved a majority of BellSouth's proposed issues through voluntary negotiations, BellSouth has raised additional issues in this proceeding that have not been negotiated. The Joint CLECs contend that the Commission should not endeavor to address issues in a generic proceeding that are more likely to be the subject of negotiated resolution, and at the very least should require BellSouth to first abide by statutory and contractual negotiation requirements.

The Joint CLECs argue further that parties cannot effectively negotiate with respect to federal law that does not exist. The Joint CLECs contend that although the FCC will soon adopt final unbundling rules, it is still not clear what legal requirements will be adopted or whether those requirements will voluntarily translate into contract language and others that will result in arbitration issues. Accordingly, the Joint CLECs argue expending resources in an attempt to

resolve these issues now will be wasteful and inefficient; thus, they request dismissal of Bellsouth's Petition.

BellSouth: In its response, BellSouth asserts that it engaged in a significant amount of negotiations with CLECs in order to implement the changes in federal law relevant to their interconnection agreements and, therefore, has clearly abided by the dispute resolution process in place in those agreements. BellSouth contends it has sent letters giving notice of the change of law and attached to its response several letters BellSouth received in which CLECs did not agree that the FCC's recent orders constituted a change of law. BellSouth contends that contrary to the assertions of CompSouth and the Joint CLECs, it seeks the Commission's assistance in getting the change of law process on "the right track and moving."

BellSouth argues that CompSouth has grossly mischaracterized the Order of the North Carolina Utility Commission by characterizing it as an Order dismissing BellSouth's Petition. BellSouth argues that, in fact, the NCUC Order specifically opens a generic docket, requires BellSouth to provide additional information and states that a schedule for the proceeding will be set at a later date.

BellSouth points out to the Commission that members of CompSouth have sought the opening of generic dockets in Florida and cites as an example Docket No. 041338-TP, in which ITC^DeltaCom, Birch, Covad and FDN have petitioned the Commission to convene a generic proceeding to set rates and terms for hot cuts. BellSouth asserts further its proposed generic docket is not a novel approach and cites Docket Nos. 990649-TP (UNE docket), 981834-TP and 990321-TP (Collocation dockets) as examples of proceedings that dealt with issues arising from Section 252 of the Act. BellSouth contends that the PacWest-Telecomm decision cited by CompSouth does not prohibit all such proceedings, particularly a proceeding such as this where BellSouth contends it simply seeks to resolve the questions of law and fact relating to the TRO, Interim Order and USTA II. BellSouth asserts that under CompSouth's rationale, the Commission would have also been prohibited from holding a generic UNE rate docket.

Additionally, BellSouth contends that the Strand decision is equally inapplicable. BellSouth argues it does not seek to create an alternative route around the negotiation and arbitration process required in the Act; rather, it seeks Commission resolution of common questions of law relating to the federal decisions that follow from the change of law letters it has forwarded to CLECs.

Lastly, BellSouth argues that its Petition is not premature and more specifically, the changes allowed by the TRO and the USTA II decision should have been implemented months ago. With regard to the Interim Rules Order, BellSouth asserts the first six-month period established by the FCC in its Interim Rules Order will expire in March 2005 or earlier in the event that the FCC's final unbundling rules become effective prior to that date. BellSouth contends the Interim Rules Order specifically notes that ILECs were free to initiate change of law proceedings that "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime" as set forth the Interim Order. BellSouth notes further that the FCC has voted to establish final unbundling rules and that the FCC announced its findings on December 15, 2004.

For these reasons, BellSouth requests the Commission accept its Petition, establish a procedural schedule, and hear its Petition in an expeditious manner so that at the appropriate time modifications to existing interconnection agreements can be made without further delay.

Staff Analysis:

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 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, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

Discussion

In its Motion, CompSouth argues that the Commission does not have jurisdiction to hear this matter and even if it does, BellSouth's Petition is premature. Staff does not agree with either of these contentions.

First, staff believes it is within this Commission's authority to address this matter and that it conforms with the prior practice of this Commission. As pointed out by BellSouth, the Commission's UNE proceedings and the Commission's recent Collocation proceeding dealt with matters which addressed Section 252 obligations. Furthermore, staff agrees with BellSouth that the Pac-West Telecomm decision cited by CompSouth is not directly on point. In that case, the California Public Utility Commission (CPUC) found that reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic in California. The court held that the CPUC "acted arbitrarily and capriciously in purporting to interpret standard interconnection agreements." In the instant case, BellSouth requests the Commission resolve questions of law and fact resulting from the TRO, Interim Rules Order and USTA II, and does not require this Commission to interpret BellSouth's interconnection agreements.

Additionally, staff does not agree with CompSouth's contention that BellSouth's Petition is an attempt to create an alternative route around the negotiation and arbitration process required by the Act. BellSouth asserts in its response that it has sent letters giving notice of the change of law and most CLECs have not agreed to negotiate. Clearly, nothing would preempt the parties from entering into or continuing negotiations during the pendency of this proceeding. Furthermore, staff believes a generic proceeding is appropriate in this matter because it provides

an efficient process where all affected parties may participate in one proceeding rather than create duplicative litigation.

Second, staff does not believe BellSouth's Petition is premature.³ Rather, staff believes that it is appropriate for the Commission to address the changes affected by the TRO which were either not appealed, or were upheld by USTA II. Staff does note, however, that it may be appropriate to address certain issues regarding UNEs once the FCC has issued its final unbundling rules, and the parties have had an opportunity to enter into negotiations addressing those final rules.⁴ Staff will work with the parties to discuss how the docket should proceed pending issuance of the FCC's final unbundling rules and bring a recommendation to the Prehearing Officer.

For the reasons set forth above, staff believes BellSouth's Petition states a cause of action upon which relief may be granted and, therefore, CompSouth's Motion to Dismiss and the Joint CLECs' request for dismissal should be denied.

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open. Staff will work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer. (TEITZMAN)

Staff Analysis: No. This docket should remain open. Staff will work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer.

³ Staff notes that the Georgia Public Service Commission and the South Carolina Public Service Commission have commenced generic change of law proceedings to address the issues BellSouth has raised in this proceeding. Furthermore, upon review of the NCUC's order referenced in CompSouth's Motion, it appears CompSouth overstated the NCUC's holding. The NCUC directed BellSouth to provide supplemental information but did not rule out the commencement of a generic proceeding.

⁴ On December 15, 2004, the FCC issued a press release stating it had adopted new UNE rules. As of the date of this recommendation, an order had yet to have been issued.