

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: June 2, 2005

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

FROM: Office of the General Counsel (Banks, Susac)
Division of Competitive Markets & Enforcement (Vinson, Dowds, Harvey)

RE: Docket No. 041338-TP – Joint petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine; Birch Telecom of the South, Inc. d/b/a Birch Telecom and d/b/a Birch; DIECA Communications, Inc. d/b/a Covad Communications Company; Florida Digital Network, Inc.; LecStar Telecom, Inc.; MCI Communications, Inc.; and Network Telephone Corporation ("Joint CLECs") for generic proceeding to set rates, terms, and conditions for hot cuts and batch hot cuts for UNE-P to UNE-L conversions and for retail to UNE-L conversions in BellSouth Telecommunications, Inc. service area.

Docket No. 040301-TP – Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc.

AGENDA: 06/14/05 – Regular Agenda – FDN's Motion for Reconsideration and Request for Oral Argument - Participation is at the discretion of the Commission, in accordance with Rule 25-22.0376(5), F.A.C.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Bradley

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041338.RCM.DOC

Case Background

On June 23, 2004, Supra Telecommunications and Information Systems, Inc. (Supra) filed its Amended Petition for Arbitration¹ with BellSouth Telecommunications, Inc. (BellSouth). BellSouth filed its Answer and Response on July 21, 2004. The matter was then set for a two-day hearing (December 1-2, 2004) and later reduced to a one-day hearing scheduled for December 2, 2004.

On November 23, 2004, ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine; Birch Telecom of the South, Inc. d/b/a Birch Telecom and d/b/a Birch; DIECA Communications, Inc. d/b/a Covad Communications Company; Florida Digital Network, Inc. d/b/a FDN Communications; LecStar Telecom, Inc.; MCI Communications, Inc.; and Network Telephone Corporation (Joint CLECs) filed a petition for a generic proceeding to set rates, terms and conditions for hot cuts and batch hot cuts for UNE-P to UNE-L conversions and for retail to UNE-L conversions in BellSouth Telecommunications, Inc.'s service area.

On November 29, 2004, BellSouth filed an Emergency Motion for Continuance of the hearing in Docket No. 040301-TP. In addition to asking the Commission for a continuance, BellSouth also requested that this docket be consolidated with Docket No. 041338-TP. BellSouth's Motion was granted in part, as to the request for continuance, by Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004.

On February 8, 2005, Order No. PSC-05-0157-PCO-TP was issued. The Order granted BellSouth's Emergency Motion for Continuance and consolidation of Docket Nos. 040301-TP and 041338-TP, denied Supra's Motion for Partial Summary Final Order, and denied Supra's Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP.

On April 8, 2005, Supra filed an Emergency Motion for an Order to Establish a Hearing Schedule. In this Motion, Supra requested that the Commission set an expedited hearing schedule in this proceeding or alternatively, set an expedited schedule for hearing on Supra's Issues 3 and 4 in Docket No. 040301-TP. On April 19, 2005, the Prehearing Officer conducted a conference call with the parties to discuss the procedures and schedule for the Docket. On April 20, 2005, the Order Establishing Procedure was issued² in this docket, denying Supra's Motion to the extent it requested a more expedited hearing schedule than the Order provided. The OEP also provided that the hearing in this case will be bifurcated based on the discussions with parties and Commission staff. Specifically, Issues 1-23 are currently scheduled to be addressed in the October 2005 (Phase I) hearing. Because parties advised Commission staff that Issues 24-26 would likely be resolved informally, the OEP provided that the parties would have 60 days from the date of the OEP to negotiate Issues 24-26. In the event that parties do not reach a settlement on these issues by June 20, 2005, a separate order regarding the procedural dates for Phase II will be issued.

¹ Order No. PSC-04-0752-PCO-TP, issued August 4, 2004, determined that Supra's allegations arise from language in an existing agreement and therefore, as a procedural matter, will be processed as a complaint instead of an arbitration.

² The Order Establishing Procedure was amended by Order No. PSC-05-0433A-PCO-TP, which corrected the issues to be addressed in Phase I and Phase II of this proceeding.

On April 29, 2005, FDN filed its Motion for Reconsideration of Order Establishing Procedure, or, in the alternative Motion to Establish True-Up (FDN Motion). By separate pleading, on that same date, FDN filed a request for oral argument on its Motion. On May 6, 2005, BellSouth filed an Unopposed Motion of Extension of Time to file its response to FDN's Motion. BellSouth's Unopposed Motion for Extension of Time was granted by Order No. PSC-05-0543-PCO-TP. On May 13, 2005, BellSouth filed its Response to FDN's Motion.

This recommendation addresses FDN's Motion for Reconsideration and Request for Oral Argument and BellSouth's Response thereto.

Jurisdiction

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.161 and 364.162, Florida Statutes, which authorize the Commission to arbitrate unbundling disputes, as well as disputes involving rates, terms and conditions within interconnection agreements.

Discussion of Issues

Issue 1: Should the Commission grant FDN Communications' request for oral argument regarding its Motion for Reconsideration of the Order Establishing Procedure, or in the alternative, Motion to Establish True-Up?

Recommendation: Yes. Because this matter has not yet been to hearing and the questions presented are somewhat unique, staff recommends that the Commission entertain oral presentations from the parties. The length of such presentations is at the Commission's discretion. Staff recommends that they be limited to 10 minutes per party. **(BANKS, SUSAC)**

Staff Analysis: The issues in this case are complex and somewhat unique. As such, staff believes that oral argument may be helpful to the Commission in rendering its decision in this matter. Furthermore, in accordance, with Rule 25-22.0021(1), Florida Administrative Code, the Commission typically entertains oral argument on issues brought for consideration prior to hearing on the matter. Thus, for these reasons, staff recommends that the Commission entertain oral argument. If preferred, the Commission may wish to establish a limitation on the length of presentations, in which case, staff recommends a limitation of 10 minutes per party.

Issue 2: Should the Commission grant FDN's Motion for Reconsideration of the Order Establishing Procedure?

Recommendation: No. FDN has not demonstrated that when addressing the procedural schedule in this docket, the Prehearing Officer overlooked a point of fact or law in rendering the Order Establishing Procedure, Order No. PSC-05-0433-PCO-TP, issued April 20, 2005. **(BANKS, SUSAC)**

STAFF ANALYSIS

Positions of the Parties

FDN: In its Motion, FDN asserts the Commission should reconsider and reverse its decision that allows for a hearing to take place October 11-13, 2005. FDN states that the OEP fails to bring Phase I of this case to conclusion in sufficient time to perform batch hot cuts of UNE-P services to UNE-L services before the March 11, 2006 deadline set in the TRRO. Consequently, FDN asserts the current hearing schedule in this proceeding will harm CLECs in obtaining a competitive hot cut rate. FDN explains that the OEP fails to consider establishing a hearing for Phase I on non-consecutive days, which would significantly shorten the case schedule.

Further, FDN argues that the OEP erroneously relies on the premise that BellSouth has a right to submit an entirely new cost study to support hot cut rates. FDN states that BellSouth proceeded to hearing in Docket No. 040301-TP (Supra hot cut case) using the cost studies BellSouth had filed in Docket No. 990649-TP, *Investigation into Pricing of Unbundled Network Elements*, knowing the Commission would consider setting new hot cut rates. If BellSouth was willing to go to hearing in the Supra case on the basis of existing cost studies, FDN contends, the merger of the Supra case and the BellSouth generic hot cut proceeding should not be used by BellSouth as a pretext for a delay to conduct a new cost study. Moreover, FDN contends that BellSouth could have started the cost study in November 2004, when the CLECs initiated the BellSouth generic hot cut proceeding.

FDN explains that even if BellSouth ramps up its staffing, as BellSouth said it could and would do in Docket No. 030851-TP (TRO implementation for unbundled switching), it is inconceivable that BellSouth could convert the hundreds of thousands of UNE-P lines in Florida to UNE-L in the span of a few weeks (between January and March 2006).

BellSouth: In its Response, BellSouth states that FDN's Motion for Reconsideration should be denied because it fails to identify a point of fact or law that the Prehearing Officer overlooked in rendering his decision. BellSouth states that FDN erroneously asserts that it can not begin the conversion process (from UNE-P to UNE-L) until a final order is rendered in this proceeding. To the contrary, BellSouth contends that it has a process in place with applicable rates that are found in FDN's Interconnection Agreement with BellSouth. If FDN is truly concerned about the conversion process, BellSouth contends, it should go ahead and start the process now. BellSouth indicates that over 120 CLECs have entered into commercial agreements which allow them to obtain competitive wholesale switching rates from BellSouth.

BellSouth contends that FDN's logic that the sole purpose of ratemaking activities is to reduce existing rates is flawed.

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the trial court or administrative agency failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317. This standard is equally applicable to orders issued by the Prehearing Officer.

Discussion

Staff believes that FDN has not demonstrated that the Prehearing Officer overlooked a point of fact or law in rendering his Order Establishing Procedure for several reasons.

First, FDN's assertion that the Prehearing Officer did not consider non-consecutive hearing dates for Phase I is incorrect. As indicated previously, there are 23 issues for Phase I. As with any case, staff discussed with the parties the avenues for going forward with this case as expeditiously as possible. Specifically, staff conducted several informal meetings with the parties in this case between February and March 2005 to establish the issues. Thereafter, there were a number of informal talks between the parties and a host of e-mail exchanges took place to finalize the issues list. During the course of this process, parties were given several opportunities to submit issues lists and to propose hearing schedules. Further, staff encouraged the parties to attempt to resolve the minor issues, as well as to discuss the potential for a negotiated true-up. Though the parties made progress in narrowing some of the issues for Phase I, they were not able to reach any settlement on a true-up.

Thereafter, staff discussed the situation with the Prehearing Officer, including the nature and complexity of the issues and the number of parties in this proceeding. As a result, it was determined that three days would be needed for hearing, and the Prehearing Officer then set what he determined to be an appropriate schedule. Though the OEP does not explicitly state that consideration was given to non-consecutive hearing dates, it was necessarily considered because the Prehearing Officer made every effort to schedule this case as soon as possible.³ However,

³ Staff notes that the CLECs made a request to conduct an expedited hearing in their petition but failed to comply with the Rule 25-22.0365, *Expedited Dispute Resolution Process for Telecommunications Companies*.

given that this case is appropriately scheduled for a full Commission hearing, the dates were much more difficult to obtain whether non-consecutive dates were requested or not.

Second, FDN's allegation that the OEP erroneously relies on the premise that BellSouth requires and has a right to start over and submit an entirely new cost study to support hot cut rates is factually unsupported. FDN states that BellSouth could have used its cost study from Docket No. 990649-TP, which it intended to use in the Supra hot cut case. However, since that time, the individual and generic hot cut cases have been consolidated, the number of issues has increased and the scope of the case has expanded. While staff acknowledges that it is possible that BellSouth may have utilized a part of its Docket No. 990649-TP cost study for the instant case, we believe that the issues in this case necessitate an expanded cost study. Regardless, this argument does not identify a point of fact or law upon which the Prehearing Officer erred or that he overlooked.

Based on the foregoing reasons, staff recommends the Commission deny FDN's Motion for Reconsideration of the Order Establishing Procedure.

Issue 3: Should the Commission grant FDN's Motion to Establish True-Up?

Recommendation: No. Staff recommends that the Commission deny FDN's Motion to Establish True-Up. If the Commission denies staff on Issue 2, this issue becomes moot.

STAFF ANALYSIS

Positions of the Parties

FDN: FDN states that if the Commission does not reconsider its OEP, the Commission should establish a true-up mechanism. FDN contends that this true-up will allow the current rates to be true-up to the rates the Commission ultimately approves in Phase I, effective as of a date certain. FDN explains that a true-up mechanism is the best way to balance the interests of all affected persons. For example, if the Commission approves lower hot cut rates, the CLECs would receive the benefit. However, FDN contends that BellSouth should not be able to true-up if the Commission approves higher rates because this situation would present a windfall to BellSouth. Consequently, FDN believes that the true-up should be an option available to CLECs. For these reasons, FDN requests that the Commission grant its Motion for Reconsideration, or in the alternative, Motion to Establish True-Up.

BellSouth: BellSouth states that FDN's request for a true-up is unsupported and inequitable. BellSouth explains that FDN seeks a one-sided true-up as an alternative form of relief. BellSouth contends that FDN only wants a true-up that is advantageous to the CLECs. BellSouth argues that FDN does not cite any legal authority which authorizes the Commission to set rates retroactively. BellSouth emphasizes that there are existing Commission-approved rates for conversions from UNE-P to UNE-L. Citing *In Re: Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, BellSouth states that the Commission has determined that rates established in a generic proceeding should be applied only prospectively. As such, BellSouth requests that FDN's Motion to Establish True-Up be denied.

Discussion

FDN requests that if the Commission does not grant its Motion for Reconsideration, it should establish a true-up mechanism as of a date certain. To date, the Commission has not established a true-up mechanism in this context. Staff would be hesitant to recommend that the Commission do so for a couple of reasons. First, staff believes that the parties are in the best position to negotiate the terms and conditions of a true-up mechanism. Second, staff believes that FDN has not provided an adequate basis for the Commission to establish a true-up. Although staff believes that the Commission has a colorable claim of jurisdiction under Section 364.162, Florida Statutes, for setting interim rates or establishing a true-up mechanism, there is no specific statutory authority directly on point. As such, staff recommends that the Commission deny FDN's Motion to Establish True-Up mechanism for hot cut rates.

Docket Nos. 041338-TP, 040301-TP

Date: June 2, 2005

Issue 4: Should these dockets be closed?

Recommendation: No. Whether or not the Commission denies staff on Issues 2 or 3, staff recommends these dockets should remain open pending the resolution of the issues set for hearing. **(BANKS, SUSAC)**

Staff Analysis: Whether or not the Commission denies staff on Issues 2 or 3, staff recommends these dockets should remain open pending the resolution of the issues set for hearing.