

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: June 8, 2006

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

FROM: Division of Competitive Markets & Enforcement (Harvey, Hallenstein)
Office of the General Counsel (Teitzman, Scott)

RE: Docket No. 000121A-TP – Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies. (BELLSOUTH TRACK)

AGENDA: June 20, 2006 – Regular Agenda – Proposed Agency Action –Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\000121A.RCM.DOC

Case Background

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121A-TP, the Commission adopted a Performance Assessment Plan for purposes of monitoring nondiscrimination in Operations Support Systems provided to CLECs by BellSouth. The Performance Assessment Plan is comprised of a Service Quality Measurement Plan (SQM) and a Self-Effectuating Enforcement Mechanism (SEEM) Administrative Plan. The SQM is a comprehensive and detailed description of BellSouth's performance measurements. BellSouth's current SQM Plan, revised on October 1, 2005, consists of 50 measurements with each related to a specific portion of BellSouth's Operations Support Systems. Of these 50 measurements, BellSouth's SEEM Plan includes 35 measures to which remedy payments are applied if

BellSouth fails to meet the performance standards as agreed by the parties and approved by the Commission.

Pursuant to Section 4.5.2 of the SEEM Administrative Plan, BellSouth is not obligated to pay penalties under the Tier 1 or Tier 2 Enforcement Mechanism for noncompliance with a performance measure if such noncompliance is the result of a force majeure event. This recommendation seeks an exemption to this provision to hold BellSouth accountable for paying penalties in a force majeure event for noncompliance with performance measures that have a standard of parity service.

Jurisdiction

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01 (3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that the Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.

Discussion of Issues

Issue 1: Should BellSouth be required to pay penalties for noncompliance with performance measures where the performance standard is parity with analogous retail services (retail analogs) during a claim of force majeure?

Recommendation: Yes. Staff believes that Section 4.5.2 of BellSouth's SEEM Administrative Plan should be revised to hold BellSouth accountable for paying penalties during a force majeure event for noncompliance with retail analog performance measures. Staff's recommended revisions to BellSouth's force majeure provision is found in Attachment A. **(Hallenstein, Harvey)**

Staff Analysis: BellSouth's service provided to CLECs is gauged by specified performance standards. The standards are either in the form of a retail analog or a benchmark. A retail analog is a similar service or function that BellSouth provides for its retail customers that is analogous to a service or function that BellSouth provides to CLECs. For example, when a CLEC orders a loop, the interval of time it takes BellSouth to provision the loop for the CLEC customer is compared to the interval of time it takes BellSouth to provision the same loop for its retail customers.

When no retail analog exists, BellSouth's performance standards are set and measured in the form of a benchmark. For example, upon receipt of a CLEC order, BellSouth must return a Firm Order Confirmation back to the CLEC in a response time of three hours or less. The hourly benchmark is needed because a Firm Order Confirmation is not used in the retail ordering process.

To ensure nondiscriminatory treatment, BellSouth pays penalties for failure to meet the performance standards (retail analogs and benchmarks) for key performance measures. Tier 1 penalties are paid directly to each CLEC when BellSouth delivers noncompliant performance. Tier 2 penalties are paid to the state of Florida and are triggered by a performance measure failing for three consecutive months.

A provision in the SEEM Plan exempts BellSouth from paying Tier 1 or Tier 2 penalties if the noncompliance occurred during a claim of a force majeure event, such as a hurricane. Pursuant to Section 4.5.2 of BellSouth's SEEM Administrative Plan, the current language states:

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.

4.5.2.1 To invoke application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Commission wherein BellSouth identify the Force Majeure Event, the affected measures, and the impacted areas including affected NPAs and NXXs.

4.5.2.2 No later than ten (10) business days after BellSouth provides written notice in accordance with Section 4.5.2.1 affected parties must file written comments with the Commission to the extent they have objections or concerns with the application of Section 4.5.2

4.5.2.3 BellSouth's written notice of the applicability of Section 4.5.2 would be presumptively valid and deemed approved by the Commission effective thirty (30) calendar days after BellSouth provides notice in accordance with Section 4.5.2.1. The Commission may require BellSouth to provide a true-up of SEEM fees to affected carriers if a Force Majeure declaration is found to be invalid by the Commission after it has taken effect.

4.5.2.4 During the pendency of a Force Majeure Event, BellSouth shall provide the Commission with periodic updates of its restoration/recovery progress and efforts as agreed upon between the Commission Staff and BellSouth

BellSouth invoked its force majeure provision seven times between August 13, 2004 and January 3, 2006, for its entire service area or selected portions of it. SEEM penalties were not paid for any provisioning or maintenance and repair performance measure failures during the claim of force majeure. Over this 18-month period, a total of 271 days were impacted by enforcement of the force majeure provision.

While a force majeure situation is by definition outside of the control of BellSouth, the company's provision of equal service to both retail and wholesale customers is within BellSouth's control. CLECS are forced to rely on BellSouth to provide restoration of service to its customers. Even in situations where CLECs provide their own switching, they still, in many situations need to rely on BellSouth for provisioning either transport or loops. In many situations, there is typically no party other than BellSouth to provide or service these critical components. Although provisioning and restoration times for performance measures may lengthen during force majeure situations, it is important that BellSouth's restoration of service to

CLEC customers is not treated any differently than restoration of service to BellSouth's retail customers.

Upon restoration of services during a force majeure event, BellSouth has stated that it continues to provide parity service to CLECs. If wholesale and retail services are at parity, then no SEEM payments would be paid. However, without protection of the SEEM plan, CLECs are put at a greater risk of not receiving parity treatment. Obligating BellSouth to pay penalties on performance measures with retail analogs provides a means of preventing and monitoring any discrimination that may occur even under unusual circumstances. To require payment for these performance measure failures during a force majeure event, staff believes that BellSouth's force majeure provision in the SEEM plan should be revised to only allow exemption of penalties for benchmark performance measures and not retail analog performance measures.

Staff would note that the issue of examining the force majeure provision would normally be raised in the collaborative six-month review process ordered by the Commission in Docket No. 000121A. However, the next review cycle and series of collaborative workshops are only in the beginning phases and will not be completed until well into the hurricane season that began on June 1. Furthermore, staff expected BellSouth to have addressed and resolved by now this issue through negotiations. Therefore, staff believes that it is imperative to address this issue at this time to assure that the CLECs' ability to compete effectively is not impeded as a result of a force majeure event.

Currently, 15 provisioning and maintenance repair performance measures are exempt from penalties during a force majeure event. Seven of these measures use retail analogs to measure performance. For each of these seven measures, BellSouth paid an average of \$9,096 monthly for Tier 1 penalties during January through March 2006. In sum, BellSouth's existing force majeure language is appropriate for benchmark standards, but force majeure events should not excuse penalties for retail analog performance measures noncompliance. Parity service is equally important in force majeure conditions as it is in normal conditions. Not holding BellSouth accountable for providing parity service in a force majeure event provides the potential for unfair discrimination at a critical time period for both CLECs and ILECs.

Conclusion

Staff believes that Section 4.5.2 of BellSouth's SEEM Administrative Plan should be revised to hold BellSouth accountable for paying penalties during a force majeure event for noncompliance with retail analog performance measures. Staff's recommended revisions to BellSouth's force majeure provision is found in Attachment A.

Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. This Docket should remain open thereafter to continue the review process as adopted in the BellSouth's Performance Assessment Plan. **(Teitzman, Scott)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. Staff recommends that this Docket should remain open thereafter to continue the existing monitoring of and annual reviews of BellSouth's Performance Assessment Plan.

ATTACHMENT A

4.5.2 BellSouth shall not be obligated to pay Tier 1 or Tier 2 Enforcement Mechanisms for non-compliance with a performance measurement **where the performance standard is a specified benchmark**. 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. **However, BellSouth shall be obligated to pay Tier 1 or Tier 2 penalties under the above listed circumstances where the performance standard is a retail analog**. 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.

4.5.2.1 To invoke application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Commission wherein BellSouth identify the Force Majeure Event, the affected measures, and the impacted areas including affected NPAs and NXXs.

4.5.2.2 No later than ten (10) business days after BellSouth provides written notice in accordance with Section 4.5.2.1 affected parties must file written comments with the Commission to the extent they have objections or concerns with the application of Section 4.5.2

4.5.2.3 BellSouth's written notice of the applicability of Section 4.5.2 would be presumptively valid and deemed approved by the Commission effective thirty (30) calendar days after BellSouth provides notice in accordance with Section 4.5.2.1. The Commission may require BellSouth to provide a true-up of SEEM fees to affected carriers if a Force Majeure declaration is found to be invalid by the Commission after it has taken effect.

4.5.2.4 During the pendency of a Force Majeure Event, BellSouth shall provide the Commission with periodic updates of its restoration/recovery progress and efforts as agreed upon between the Commission Staff and BellSouth.