

State of Florida



Public Service Commission

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

DATE: November 3, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Harvey, Hallenslein)
Office of the General Counsel (Brooks)

RE: Docket No. 090430-TP – Amended petition for verified emergency injunctive relief and request to restrict or prohibit AT&T from implementing its CLEC OSS-related releases.

AGENDA: 11/10/09 – Regular Agenda – Issue 1– Partial Motion to Dismiss – Oral Argument Not Requested; Issue 2 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: OSS Release – November 14, 2009

SPECIAL INSTRUCTIONS: None

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Case Background

Following the BellSouth and AT&T merger, AT&T began plans to migrate and consolidate the former BellSouth 9-state southeast OSS platform into a single pre-ordering and ordering operations support systems (OSS) platform for use across AT&T's 22-state region. AT&T determined that the 13-state OSS system would produce greater efficiencies for the benefit of both AT&T and its customers throughout the 22-state region.

In 2007, AT&T started the process of providing official notification to Competitive Local Exchange Carriers (CLECs) of its consolidated 22-state OSS Release plan. The plan involves a

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phased-in approach over several years. The first phase commenced on April 19, 2008 (April Release). On November 14, 2009, AT&T's plans to implement and phase-in a front-end CLEC ordering interface. The interface, known as the Local Service Request Exchange System (LEX), is a web-based ordering application used for online creation, submittal, and maintenance of Local Service Requests (LSRs). The LEX interface will replace the Local Exchange Navigator Service (LENS) interface currently available for use by CLECs in AT&T's 9-state region (the former BellSouth region).

On September 3, 2009, Saturn Telecommunication Services, Inc. ("STS"), a CLEC, filed an Emergency Petition for Injunctive Relief and a Request for Stay of AT&T's CLEC November 2009 OSS release. According to STS, the LEX ordering interface does not allow for the same pre-order edit-checking capabilities that are currently being provided and made available to CLECs via the LENS ordering interface. As a result, STS claims that it "will be irreparably harmed by erosion of customer confidence, inability to efficiently add, convert and service its customers on Petitioner's network, and loss of customers to Respondent [AT&T]."

On September 22, 2009, AT&T filed a Partial Motion to Dismiss and Answer and Affirmative Defenses to STS' petition. AT&T asserts that the LEX interface includes additional features that are comparable to, and in some instances exactly like, the LENS interface. AT&T further denies that STS should be entitled to any relief in its petition.

On October 2, 2009, staff conducted a conference call with the parties to present and discuss a proposed stipulation that it could recommend to the Commission. On the call, the parties agreed to review staff's proposal and enter into discussions to resolve the issues presented in STS' petition.

After failure to resolve the issues at hand, on October 13, 2009, STS filed an Amended Petition for Injunctive Relief and Request to Restrict or Prohibit AT&T from Implementing its CLEC OSS-Related Releases. In its petition, STS claims that LEX continues to lack adequate edit checking capabilities.

In its amended petition, STS is specifically requesting:

- a. A Commission order to restrain or prohibit AT&T from implementing the AT&T 22-State OSS Alignment in November 2009, and/or file an action in circuit court for an injunction, until such time as AT&T can demonstrate through an independent third-party testing that they have provided pre-order edits substantially equal to what they provide to themselves in their retail order system "RNS";
- b. A Commission order requiring that AT&T Florida cannot retire LENS without this Commission's approval;

- c. A Commission order requiring that LEX has the same pre-order edits and that it has the same quality and capabilities as LENS, prior to retiring LENS;
- d. A Commission order requiring AT&T to correct any further deficiencies in LEX and Verigate which may be discovered during the course of these proceedings and as determined by this Commission through testing and otherwise, prior to the Commission's recommendation for the retirement of LENS;
- e. A Commission order prohibiting AT&T from retiring LENS until this Commission completes an audit of LEX and Verigate and AT&T corrects all deficiencies found by this Commission;
- f. A Commission order assessing penalties against Respondent pursuant to s. 364.03, Florida Statutes;
- g. A Commission order requiring that AT&T make its LENS OSS with its edit checking capabilities available to STS and other CLECs until any new OSS replacement system contains the same capabilities;
- h. A Commission order requiring that AT&T continue to provide its LENS OSS with all of its current capabilities available until such time as the Commission has verified that AT&T has complied with paragraph (e), and;
- i. A Commission order for costs and for such further relief as the Commission deems just and appropriate.

On October 23, 2009, AT&T filed a Partial Motion to Dismiss and Answer and Affirmative Defenses to STS' Amended Petition filed on October 13, 2009. In its Partial Motion, AT&T asserts the following:

- a. STS' Petition fails to state a cause of action upon which relief may be granted.
- b. STS lacks standing to allege violation of a Commission Order to which it was not a party.
- c. The provisions of s. 364.14, Florida Statutes, are not applicable to AT&T Florida and the Commission has no authority to find AT&T Florida in violation of this statute.
- d. Section 364.15, Florida Statutes, is limited solely to the provision of "basic local telecommunications services" and is not applicable to the systems at issue in the Petition.

On October 29, 2009, STS filed its response to AT&T's Partial Motion to Dismiss STS Amended Petition. In its response, STS is requesting of the Commission to deny AT&T's Partial Motion.

This recommendation addresses whether the Commission should grant AT&T's partial motion to dismiss and STS' request to restrict or prohibit AT&T from implementing its November 2009 OSS Release.

Jurisdiction

The Commission is vested with jurisdiction over this matter pursuant to ss. 364.01(3) and (4)(g), F.S. Pursuant to s. 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, s. 364.01(4)(g), F. S., 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 the Commission grant AT&T's Partial Motion to Dismiss?

Recommendation: Yes, in part. Staff believes that STS' request supported by s. 364.15, F.S. and request for costs should be dismissed. Staff believes that STS has incorrectly relied on s. 364.15, F.S. to support its request that the Commission stay AT&T's November OSS Release. Additionally, staff does not believe the Commission has subject matter jurisdiction to award costs as requested by STS.

However, staff believes that the Commission, in its continuing oversight role of AT&T's operations support systems (OSS) and its exclusive authority to prevent anticompetitive behavior amongst telecommunication providers, may at its discretion, require AT&T to stay its November 10, 2009 release in the form requested by STS. **(Brooks)**

Staff Analysis:

AT&T's Partial Motion to Dismiss

AT&T alleges that several portions of STS' Petition should be dismissed or stricken for failure to state a claim for which relief can be granted. Specifically, AT&T argues that the portion of STS' Petition seeking injunctive relief should be dismissed or stricken. AT&T contends that the Commission has acknowledged that it lacks authority to issue injunctions. Therefore, because STS' Petition seeks a remedy that the Commission has no authority to provide, AT&T argues that portion of the Petition seeking injunctive relief should be dismissed or stricken.

AT&T further requests that the portion of STS' Petition that asks for "[a]n order for costs and for such other relief as the Commission deems just and appropriate" should also be dismissed or stricken because it has failed to state a claim for which relief can be granted. AT&T argues that the Commission has no statutory authority to award costs, and that STS has not cited any statute or contractual basis which authorizes the Commission to award costs. AT&T argues that, as a legislative agency, the Commission may not entertain STS' request that the Commission act like a court and award costs. Therefore, again AT&T contends that because STS' Petition seeks a remedy that the Commission has no authority to provide, the portion of the Petition seeking costs should be dismissed or stricken.

Furthermore, AT&T contends that it is not subject to the provisions of s. 364.14, F.S., and that any allegation that AT&T violated s. 364.14(2), F.S., should be dismissed or stricken. AT&T argues that, by the express terms of s. 364.051(c), F.S., it is not subject to the provisions of s. 364.14, F.S. In its argument, AT&T cites s. 364.051(c), F.S., which states that "each company subject to this section is exempt from rate base, rate of return regulation, and the requirements of ss. 364.03, 364.035, 364.037, 364.05, 364.055, **364.14**, 364.17, 364.18, and

364.19, F.S. (*Emphasis added*) Therefore, as a matter of law, the Commission cannot find that AT&T violated s. 364.14(2), F.S. because AT&T is subject to s. 364.051(c), F.S.³

Lastly, AT&T argues that STS' allegation that AT&T violated 364.15, F.S., should be dismissed or stricken. AT&T argues that the express language of s. 364.15, F.S. limits the application of the statute to "basic local telecommunications services" and, thus, it has no application to the systems at issue that AT&T provides to STS in Florida. Therefore, as a matter of law, the Commission cannot find that AT&T violated s. 364.15, F.S.

STS Response

STS argues that assuming the allegations in the Petition are true, STS has stated a cause of action. STS contends that AT&T has taken its injunctive relief request out of context and states that what it is asking is for the Commission to invoke its statutory right to enjoin and seek an injunction under Rule 25-22.030, Florida Administrative Code and ss. 364.015 and 364.285(2), F.S. STS further argues that it is not asking the Commission to act as a court by issuing injunctive relief and costs itself.

STS argues that AT&T is incorrect in its assertion that a request for costs is inappropriate. STS cites s. 120.69(7), F.S., which states that "[i]n any final order on a petition for enforcement, the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such award is appropriate. STS asserts that it is requesting this Commission assert its order (Order No. PSC-98-1001-FOF-TP in Docket No. 980119-T) ("Supra Order") in circuit court, and in the event that the Commission chooses to do so and prevails, the circuit court has the statutory authority to award attorney's fees to the prevailing parties under s.120.69(7), F.S. STS additionally argues that the parties' interconnection agreement allows for an award of reasonable attorneys' fees and costs to the prevailing party.

STS also contends, in addition to its statutory right to seek an injunction, the Commission may seek enforcement of an action by filing a petition for enforcement in the circuit court where the subject matter of the enforcement is located. See s. 120.69(1)(a), F.S. STS further asserts that a petition for enforcement of any agency action may also be filed by any substantially interested person, such as STS, who is a resident of Florida within 60 days after it notifies the Commission. See s. 120.69(1)(b), F.S.

Furthermore, STS asserts that, in considering the arguments cited by AT&T regarding STS' allegation that it violated s. 364.14(2), F.S., it agrees to voluntarily withdraw its request that the Commission find that AT&T violated s. 364.14(2), F.S.

Lastly, STS argues that AT&T is incorrect in its assertion that s. 364.15, F.S., is inapplicable to the instant Amended Petition. STS argues that AT&T's OSS-Related Releases will directly impact the basic local telecommunications services that STS offers its customers

³ As noted in STS' argument to follow, STS has voluntarily withdrawn its request that the Commission find that AT&T violated s. 364.14 (2).

and end users, and that it is thus, a nonsensical argument for AT&T Florida to claim that s. 364.15, F.S., is inapplicable.

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. 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 (Fla. 2nd DCA 1960).

Section 364.15, F.S.

In its Petition, STS cites s. 364.15, F.S. to support its proposition that the Commission may require AT&T to stay its OSS release or require changes to the release. This statute provides:

Whenever the commission finds, on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications facility ought reasonably to be made, or that any additions or extensions should reasonably be made to any telecommunications facility, in order to promote the security or convenience of the public or employees or in order to secure adequate service or facilities for basic local telecommunications services consistent with the requirements set forth in this chapter, the commission shall make and serve an order directing that such repairs, improvements, changes, additions, or extensions be made in the manner to be specified in the order. This section authorizes the commission to impose only those requirements that it is otherwise authorized to impose under this chapter.

The express language of s. 364.15, F.S., limits the application of the statute to “basic local telecommunications services” and, thus, it has no application to the systems at issue in this proceeding. Staff believes this section is not applicable in the instant proceeding because the statute does not apply to wholesale customers. The OSS is a system provided to wholesale customers, therefore s. 364.15 is not applicable.

Accordingly, staff believes that STS’ request that the Commission should take action pursuant to this statute should be dismissed.

Award Costs

STS has requested that the Commission issue an Order awarding “costs” associated with this proceeding. Staff notes that the Commission has consistently held that as an administrative body, it lacks statutory authority to assess costs and attorney’s fees. See In re: Application of George Dorman and M. Pate Snively for a certificate of public convenience and necessity to operate as a radio common carrier in the Winter Haven, Florida area, Docket No. 72401-RCC, Order No. 5579 (Commission found no statutory authority to assess costs against applicants); See also In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) (dismissing petition requesting attorney fees for lack of subject matter jurisdiction); See also In re: Application for certificates to provide water and wastewater service in Alachua County under grandfather rights by Turkey Creek, Inc. & Family Diner, inc. d/b/a Turkey Creek utilities., Docket No. 921098, Order No. PSC-93-0816-FOF-WS (Commission does not have authority to sanction a blanket award for attorney’s fees and costs); See also Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof., Docket No. 050194, Order No. PSC-05-0762-PCO-TL (we acknowledge a lack of subject matter jurisdiction to award attorney’s fees). Accordingly, staff believes that STS’ request that the Commission award costs should be dismissed.

Injunctive Relief

In its Motion, AT&T, citing several Orders in which the Commission has found that it lacks authority to issue injunctive relief, asserts that the Commission should dismiss the portion of STS’ Petition that requests the Commission issue an order restraining or prohibiting AT&T from proceeding with its OSS. In its Motion, STS asserts that the Commission should invoke its statutory right to enjoin and seek an injunction in circuit court under Rule 25-22.030, F.A.C., and ss. 364.015 and 364.285(2), F.S. However, staff believes the parties’ arguments fail to take into consideration the Commission’s continuing oversight of AT&T’s OSS systems. Oversight which neither party to this proceeding disputes and which plays an integral role in the Commission’s exclusive authority to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior.⁴

⁴ Staff notes the Commission established permanent performance measures and benchmarks as well as a voluntary self executing enforcement mechanism (Performance Assessment Plan) for Bellsouth, by Order No. PSC-01-1819-FOF-TP, issued September 10, 2001 and has continued to exercise its authority over the Performance Assessment Plan. See PSC- 02-1094-PAA-TP (implementing change request metrics and revising due date for tier 1 and tier 2 payments); See also Order No. PSC-02-1736-PAA-TP (implementing proposed revisions to Bellsouth’s Performance Assessment Plan); See also Order No. PSC-03-0529-PAA-TP (directed Bellsouth to implement changes to the Performance Assessment Plan); See also PSC-05-0488-PAA-TP (approving stipulated changes to Bellsouth’s performance assessment plan); See also PSC-07-0286-PAA-TP (approving changes to Bellsouth’s performance assessment plan) The Commission has approved each version of AT&T’s OSS Performance Assessment Plan in Docket No. 000121A.

Staff believes the Commission retains broad discretion to take the remedial actions it deems necessary and appropriate in fulfilling its statutory obligations. Such actions may include requiring changes to the OSS plan, requiring refunds to CLECs, conducting audits, or in the instant case, if appropriate, requiring AT&T to stay its November OSS release. Without the ability to require such actions, staff believes the Commission would be severely impaired in fulfilling its statutory obligation to prevent anticompetitive behavior. The Commission's authority to stay AT&T's November release makes seeking an injunction in circuit court unnecessary under these circumstances. Accordingly, staff believes the Commission should not dismiss STS' request that the Commission stay AT&T's OSS release to the extent such request is related to the Commission's oversight role of AT&T's OSS system, as STS' cause of action is one for which relief may be granted by the Commission. However, staff believes the Commission should take the remedial action regarding AT&T's OSS release as addressed in Issue 2 of this recommendation.

Conclusion

As set forth above, staff believes that STS' request supported by s. 364.15, F.S. and request for costs should be dismissed. Staff believes that STS has incorrectly relied on s. 364.15 to support its request that the Commission stay AT&T's November OSS Release. Additionally, staff does not believe the Commission has subject matter jurisdiction to award costs as requested by STS.

However, staff believes that the Commission, in its continuing oversight role of AT&T's operations support systems (OSS) and its exclusive authority to prevent anticompetitive behavior amongst telecommunication providers, may at its discretion, require AT&T to stay its November 10, 2009 release in the form requested by STS. Staff recommends the Commission take the remedial action regarding AT&T's OSS release as addressed in Issue 2 of this recommendation.

Issue 2: Should the Commission grant STS' request to restrict or prohibit AT&T from implementing its OSS Release scheduled for implementation in Florida on November 14, 2009?

Recommendation: No. The Commission should not restrict or prohibit AT&T from implementing its OSS release scheduled for November 14, 2009, under the condition that staff is allowed to conduct a post implementation review. Additionally, AT&T should be required to run the existing OSS ordering interface (LENS) in parallel until completion of staff's review and any Commission decision on this matter. **(Harvey, Hallenstein)**

Staff Analysis: On November 14, 2009, AT&T plans to implement its next OSS software release in the nine-state former BellSouth region as part of AT&T's 22-state OSS consolidation plan. AT&T has invited CLECs to participate in testing of the software to determine the CLECs' impact on their ability to interface with AT&T's new OSS. The testing will be completed on November 9, 2009.

STS' Original and Amended Emergency Petitions

In its amended petition, STS is seeking to restrict or prohibit AT&T from implementing the November 14, 2009 OSS release. According to STS, the LEX ordering interface does not have the same edit checking capabilities as the LENS interface currently in place for use by CLECs in the AT&T nine-state region. The pre-order edit checking capabilities available in LENS notify the CLEC of errors in the order and will not allow the CLEC to continue processing an order until the pre-order error is corrected. STS claims that many of these pre-order edit checks programmed into the LENS interface are omitted from the LEX interface. As a result, the omission of these prompts or edit checks in LEX would, in effect, cause orders with errors to be rejected or returned for clarification by AT&T after the order is completed. STS asserts that the delay in processing the order erodes customer confidence and may ultimately result in the loss of the customer.

According to STS, there are as many as 25 edits within LENS that will no longer be provided for in LEX. STS asserts that these edit checks available in LENS prevent CLEC customer service representatives from moving to the next page/screen until the error is corrected. Because of the lack of these edit checks in LEX, a CLEC customer service representative must work an order back-and-forth in LEX. In other words, the LEX system allows for a CLEC order to be submitted to AT&T with errors, rejected by AT&T, reworked by the CLEC, resubmitted by the CLEC, and possibly rejected by AT&T again, over and over. STS claims that it is highly unlikely for a CLEC to process an order through the system in a timely manner without errors. As a result, the CLEC's ability to satisfy and retain the end user will ultimately be affected.

LENS is comparable to AT&T Florida's Retail Navigation System (RNS), the ordering system used by AT&T customer service representatives for its own retail customers. According to STS, the pre-ordering OSS (Verigate) and LEX applications that will replace LENS are inferior or not at parity with AT&T's retail RNS.

AT&T's Response to STS' Original and Amended Petitions

AT&T argues that the new LEX interface will provide for all necessary functionality to create, manage, track, maintain, change or supplement orders. According to AT&T, the new LEX interface will also provide for a number of enhancements that are not currently available for use by CLECs via the LENS ordering interface. In sum, AT&T claims that the new LEX interface is every bit as efficient as the existing LENS interface.

AT&T notes that AT&T Florida began the testing phase for the new LEX interface on October 12, 2009, with testing scheduled to be completed by November 9, 2009. According to AT&T, only two CLECs, so far, have chosen to use the LEX testing environment for the November release. One of the testers is STS. AT&T's implementation plan calls for operating the existing LENS ordering interface in parallel to the LEX interface until at least March 22, 2010, as a means of providing additional time for CLECs to train their personnel on the LEX interface.

Commission Staff Conference Call

On October 2, 2009, staff conducted a conference call with the parties to discuss a proposed stipulation in response to STS' petition. On the call, staff proposed to conduct a post implementation evaluation of the LEX and LENS interfaces to determine if LEX provides the same or similar edit capabilities as LENS. The review would be conducted in lieu of recommending a stay of the November 14, OSS Release. Additionally, staff proposed that AT&T run LENS in parallel with LEX for a nine month period.

Staff proposed that upon completion of the review, staff will bring a recommendation back to the Commission regarding the results of its evaluation and conclusions and any corrective or regulatory action, if necessary. Additionally, staff proposed that the specific date of LENS retirement will be addressed in staff's follow-up recommendation. Staff's proposal also recommended removal of STS' request for the assessment of attorney fees and deferred the assessment of injunctive relief.

It is staff's understanding that the parties have since agreed for staff to conduct the review. However, AT&T would not agree to operating the LENS ordering interface any longer than its original planned retirement date of March 22, 2010. Staff will proceed expeditiously; however, staff is concerned that it will not have the review completed, published, and brought before the Commission for decision by AT&T's scheduled LENS retirement date. Factors affecting this timeline include workload, scheduling requirements, company availability, and the Commission confidentiality review requirements. Therefore, staff recommends AT&T should be required to run the existing LENS interface in parallel until completion of staff's review and any Commission decision on this matter.

Conclusion

The Commission should not restrict or prohibit AT&T from implementing its OSS release scheduled for November 14, 2009, under the condition that staff is allowed to conduct a post implementation review. Additionally, AT&T should be required to run the existing OSS ordering interface (LENS) in parallel until completion of staff's review and any Commission decision on this matter.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1 the resulting decision will be issued as a Final Agency Action.

If the Commission approves staff's recommendation in Issue 2, the resulting decision will be issued as a Proposed Agency Action. The decision 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. Additionally, the remaining requests in STS' amended petition should be put in abeyance until staff brings a recommendation back to the Commission after completion of the review.⁵ **(Brooks)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1 the resulting decision will be issued as a Final Agency Action.

If the Commission approves staff's recommendation in Issue 2, the resulting decision will be issued as a Proposed Agency Action. The decision 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. Additionally, the remaining requests in STS' amended petition should be put in abeyance until staff brings a recommendation back to the Commission after completion of the review.

⁵ See pages 2 and 3 of this recommendation for the list of STS' Petition Requests. Items c., d., e., g., and h. would remain in abeyance until the staff audit review is completed.