

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

APRIL 24, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BARONE) *MCB RMT*
DIVISION OF COMMUNICATIONS (GREER) *SAS for SLG*

RE: DOCKET NO.- 960786-TL - CONSIDERATION OF BELLSOUTH
TELECOMMUNICATIONS, INC.'S ENTRY INTO INTERLATA SERVICES
PURSUANT TO SECTION 271 OF THE FEDERAL TELECOMMUNICATIONS
ACT OF 1996

AGENDA: MAY 6, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\960786.RCM

CASE BACKGROUND

On July 19, 1996, the Prehearing Officer in this matter issued Order No. PSC-96-0945-PCO-TL, Initial Order Establishing Procedure, which established that discovery in this docket would begin prior to BellSouth Telecommunications, Inc. (BellSouth) filing a petition for interLATA service authority with the Federal Communications Commission (FCC).

Accordingly, the Florida Interexchange Carriers Association (FIXCA) filed its First Set of Interrogatories and a First Request for Production of Documents on July 25, 1996. BellSouth filed responses to these discovery requests on August 5, 1996. On August 23, 1996, FIXCA filed a Motion to Compel relating to its First and Second Set of Interrogatories and its First Request for Production of Documents. On August 30, 1996, BellSouth filed its Response in Opposition to FIXCA's Motion to Compel.

A telephonic hearing on FIXCA's Motion to Compel was held on September 4, 1996. (Hereinafter referred to as Tr.) Upon consideration of FIXCA's Motion, BellSouth's response and arguments of the parties during the telephonic hearing, the Prehearing Officer issued an Order Granting FIXCA's Motion to Compel on September 9, 1996. See Order No. PSC-96-1135-PCO-TL (Order).

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On September 19, 1996, BellSouth filed its Motion for Reconsideration of Order Granting the Florida Interexchange Carriers Association's Motion to Compel and Request for Oral Argument. On September 30, 1996, FIXCA filed its Response to BellSouth's Motion for Reconsideration of Order No. PSC-96-1135-PCO-TL.

STANDARD OF REVIEW

The purpose of a Motion for Reconsideration is to bring to the attention of the Commission some point which it overlooked or failed to consider when it rendered its Order in the first instance. Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). It is not intended to be used to re-argue the case merely because the losing party disagrees with the Order.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's request for oral argument before the full Commission on its Motion for Reconsideration?

RECOMMENDATION: No. The Commission should deny BellSouth's request for oral argument since interested persons are, pursuant to Rule 25-22.0021(1), Florida Administrative Code, afforded the opportunity to participate at the agenda.

STAFF ANALYSIS: Rule 25-22.0376, Florida Administrative Code, Reconsideration of Prehearing Officer Orders, provides that oral argument on any motion filed pursuant to this rule may be granted at the discretion of the Commission. Staff believes BellSouth's Motion for Reconsideration clearly articulates the company's position and that Oral argument is not necessary to assist the Commission in comprehending the issues to be determined. Since this matter has not gone to hearing parties may participate at the agenda pursuant to Rule 25-22.0021(1), Florida Administrative Code to answer questions.

ISSUE 2: Should the Commission grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel answers to Interrogatories 1, 2, 3, 5, and 14 and Item 4 of FIXCA's First Request for Production of Documents?

RECOMMENDATION: No. The Commission should not grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel answers to Interrogatories 1, 2, 3, 5, and 14 and Item 4 of FIXCA's First Request for Production of Documents.

STAFF ANALYSIS: Both FIXCA and BellSouth acknowledge that the discovery items in this issue are derivative of Interrogatory 1. Interrogatory 1 and BellSouth's response read:

REQUEST: Does BellSouth intend to assert in this proceeding that it has met the requirements of Section 271(c)(1)(A)? If the answer is yes, identify each agreement between BellSouth and an unaffiliated competing provider of

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telephone exchange service on which BellSouth intends to rely in support of its contention.

RESPONSE: At the time BellSouth files its petition in this proceeding, it will have met the requirements of Section 271(c)(1)(A). As of today, however, the Commission has not approved an agreement which BellSouth believes meets all of the requirements of Section 271(c)(1)(A).

The Prehearing Officer found:

BellSouth did not answer the question posed. BellSouth was asked whether it intends to assert in this proceeding that it has met the requirements of Section 271(c)(1)(A). BellSouth shall answer this question. If BellSouth's response is in the affirmative, it should identify the agreement or agreements that BellSouth intends to rely upon at this stage. However, should BellSouth desire to argue, at a later date in this proceeding, that another agreement or additional agreements satisfy Section 271(c)(1)(A), it will not be precluded from doing so. Accordingly, FIXCA's Motion to Compel is granted with respect to interrogatories 1,2,3,5 and First Request for Production of Documents, item 4.

BellSouth's Motion for Reconsideration relies on a central argument: because BellSouth has not yet filed a petition for interLATA service authority and does not know with any certainty what agreements it will rely upon when it files for such authority, it cannot provide definitive answers to these interrogatories. This same argument was advanced by BellSouth in its response to FIXCA's Motion to Compel and was rejected by the Prehearing Officer. See Order at pp 1-2.

Rather than arguing the standard of review, FIXCA argues that BellSouth's Motion does not provide a complete picture of the issue associated with its responses to the discovery requests. FIXCA argues that in its Motion to Compel FIXCA demonstrated both an unresponsive answer and a double standard in the way BellSouth

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approaches responses to discovery by parties and staff. For these reasons, FIXCA argues, the Prehearing Officer's ruling was correct.

FIXCA further argues that the interrogatories that are derivative of Interrogatory 1, relate directly to information which will spotlight the extent to which BellSouth has or has not complied with the criteria of the checklist. According to FIXCA, by dodging Interrogatory 1, BellSouth has attempted to avoid the requirement that it provide specific information regarding services, arrangements, and facilities associated with criteria which BellSouth must meet and with the extent of competing service by affiliated competitors. FIXCA concludes that Interrogatory 1 and the additional interrogatories that build upon Interrogatory 1 to develop the status of BellSouth's arrangements with unaffiliated competitors constitute fundamental, core information requests that bear on the central subjects of this docket.

Staff notes that much of FIXCA's argument go to the relevancy of the interrogatories rather than to the standard for reconsideration. Under this standard, BellSouth's Motion for Reconsideration should be granted only if there is some point which was overlooked or not considered by the Prehearing Officer when the Order was rendered. Here, BellSouth asserts the same arguments that it made before the Prehearing Officer. See Tr. p. 14. In fact, BellSouth does not allege that the Prehearing Officer overlooked or failed to consider any point of fact or law when the Order was rendered.

It is therefore Staff's recommendation that BellSouth's Motion for Reconsideration be denied as to Interrogatories 1, 2, 3, 5, and 14 of FIXCA's First Set of Interrogatories and Item 4 of FIXCA's First Request for Production of Documents. As noted in the Order and in FIXCA's Response, BellSouth is not precluded from arguing, at a later date, that it intends to rely on another agreement or additional agreements when it petitions for interLATA service authority.

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ISSUE 3: Should the Commission grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel an answer to Interrogatory 4?

RECOMMENDATION: No. The Commission should not grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel an answer to Interrogatory 4.

STAFF ANALYSIS: Interrogatory 4 and its response read:

REQUEST: Describe in detail the technical and operational measures BellSouth has taken specifically to implement the competitive checklist of §271(c)(2)(B) prior to the filing of BellSouth's petition in this docket. Include all changes made to the network; all features installed for the purpose; and any capabilities added to its network and/or provisioning systems.

RESPONSE: BellSouth has not developed any operational measures specifically to implement §271(c)(2)(B). Any such operational measures have been undertaken to promote local competition as Congress intended or to meet the request of specific parties identified during negotiations.

FIXCA argued in its Motion to Compel that BellSouth's answer was evasive and incomplete. During the hearing on this matter, BellSouth agreed to identify the technical and operational measures it has taken to implement agreements it has entered into with unaffiliated competitors. FIXCA agreed to this compromise. The Order recognizes this agreement and requires that BellSouth's response identify the specific checklist items that any of the technical and operational measures involve.

BellSouth's Motion for Reconsideration claims that the Order, by requiring BellSouth to identify the specific checklist items related to the technical and operational measures taken, forces BellSouth to analyze and interpret information rather than solely provide information. BellSouth seems to argue, although somewhat vaguely, that the agreement between it and FIXCA did not include the identification of related checklist items, and, therefore, that the Order should not have required it to provide this additional information.

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Staff believes that implicit in FIXCA's Interrogatory 4 is the request that BellSouth relate each identified technical and operational measure to a specific checklist item. The Prehearing Officer clearly considered this implication when the Order was rendered. See Tr. pp 17-33. The Order merely served to clarify what was required of BellSouth's response.

FIXCA states that the oral argument on FIXCA's Motion to Compel gravitated toward a discussion of suggestions for a substitute to language that would moot BellSouth's attempt to exploit the double meaning provided by the use of the word "specifically." FIXCA asserts that without conceding either the validity of BellSouth's refusal to answer or the necessity of rewording the question, FIXCA accepted a compromise wording by Staff. FIXCA argues, however, that it accepted the substitute wording as a means of accomplishing the same objective as FIXCA's original interrogatory. According to FIXCA, interrogatory 4 could not be answered without reference to the individual components of the checklist.

Staff does not believe BellSouth has met the standard of review previously cited. BellSouth objects to analyzing whether certain checklist items have been met. This clearly does not meet the standard for reconsideration since, as discussed above, the Prehearing Officer considered this in rendering the Order. Staff notes that this is the very type of information that the Commission must review in fulfilling its consultative role. Staff therefore recommends that BellSouth's Motion for Reconsideration be denied as to Interrogatory 4 of FIXCA's First Set of Interrogatories.

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ISSUE 4: Should the Commission grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel answers to Interrogatories 15 and 16?

RECOMMENDATION: No. The Commission should not grant BellSouth's Motion to Reconsider Order No. PSC-96-1135-PCO-TL, granting FIXCA's Motion to Compel answers to Interrogatories 15 and 16.

STAFF ANALYSIS: Interrogatories 15 and 16 ask BellSouth whether it has ever refused to provide or has ever limited a network function, feature, service, or arrangement that was requested by a competitive provider of telephone exchange service. These interrogatories also request that BellSouth provide a full explanation, including the nature of the request and the basis or reason for the denial, for each instance where it has refused or limited a requested item.

BellSouth responded that it has never refused to provide to anyone, and has never limited or constrained, requested network functions, features, services, or arrangements that were appropriate under the Telecommunications Act of 1996. BellSouth qualifies this response by stating that it does not imply that requests have not been made for items not technically feasible under the Act.

The Prehearing Officer found that BellSouth's answers were unresponsive and ordered:

... BellSouth to identify those instances where it has not ultimately provided a competitor with what it has requested. BellSouth's response should not be limited to negotiations that have resulted in arbitration proceedings.

BellSouth's Motion for Reconsideration argues that the information requested is much too detailed to gather. BellSouth claims that it is impossible to gather the requested information because BellSouth does not have adequate records of the events (e.g., negotiations) during which refusals or limitations were made. BellSouth recognizes that the Order does not require BellSouth to provide information regarding every incremental step in negotiations, but claims that it does not have adequate guidance to answer the interrogatories otherwise. This same line of argument was advanced by BellSouth in its response to FIXCA's

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Motion to Compel and was rejected by the Prehearing Officer. See Order at p. 4.

FIXCA argues that BellSouth's answers to the interrogatories beg a significant question. FIXCA states that during the oral argument it pointed out that BellSouth was free to contend that its refusals to honor requests are justified by its contention that the item was not technically feasible, but that it is nonetheless obligated to identify those instances in which a request by a competitive provider was not met in the form it was presented. FIXCA points out that BellSouth argued that it should not be required to disclose instances because FIXCA is aware of arbitration proceedings and FIXCA was attempting to require BellSouth to identify each "incremental" step of each negotiation that BellSouth had conducted with any competitive provider. FIXCA states that the prehearing officer correctly observed that requests for arbitration do not necessarily constitute the entire universe of such refusals. FIXCA asserts that it made it clear during argument that the purpose of its question was not to require BellSouth to reconstruct "incremental" steps. FIXCA states this requirement was not a part of FIXCA's interrogatory, nor was it a part of the Prehearing Officer's ruling. FIXCA asserts that BellSouth faulted the Prehearing Officer for providing "little guidance as to how BellSouth could adequately answer this question in any other way." FIXCA states that BellSouth did not seek either clarification or guidance from the Prehearing Officer. It has filed a Motion for Reconsideration asking the full Commission to overturn the Prehearing Officer.

BellSouth's Motion for Reconsideration again asserts an argument that was made before and rejected by the Prehearing Officer. In fact, BellSouth does not allege that the Prehearing Officer overlooked or failed to consider any point of fact or law when the Order was rendered. Further, staff notes that weekly status conferences are available and BellSouth could have asked for clarification. Staff does not believe a Motion for Reconsideration is the proper avenue for requesting clarification. Based on the foregoing, staff recommends that BellSouth's Motion for Reconsideration be denied as to Interrogatories 15 and 16 of FIXCA's First Set of Interrogatories.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the outcome of the Commission's hearing in this docket.

STAFF ANALYSIS: This docket should remain open pending the outcome of the Commission's hearing in this docket.