

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth
Telecommunications, Inc. for
arbitration of an
interconnection agreement with
US LEC of Florida, Inc. pursuant
to the Telecommunications Act of
1996.

DOCKET NO. 000084-TP
ORDER NO. PSC-00-2340-PCO-TP
ISSUED: December 6, 2000

ORDER DENYING MOTION TO STRIKE, REQUEST FOR CONTINUANCE OF
HEARING, REQUEST TO FILE SURREBUTTAL TESTIMONY, AND
REQUEST TO IMPOSE SANCTIONS

On November 9, 2000, US LEC filed a Motion to Strike in the above-referenced docket, alleging that portions of the prefiled rebuttal testimony of BellSouth's witness, Cynthia K. Cox, are improper in this proceeding. On November 16, 2000, BellSouth filed its Response. Also on November 16, 2000, Prehearing Order No. PSC-00-2183-PHO-TP was issued. This matter is currently set for an administrative hearing on December 14, 2000.

US LEC'S ARGUMENTS

BellSouth witness Cynthia K. Cox submitted prefiled rebuttal testimony concerning the appropriate reciprocal compensation rate to be applied to Internet Service Provider (ISP)- bound traffic. US LEC argues that BellSouth's Petition and its proposed language for an interconnection agreement failed to raise any issue regarding an alternative lower reciprocal compensation rate for the transport and termination of ISP-bound calls as now advanced in the rebuttal testimony of Ms. Cox. Moreover, US LEC argues that it did not raise the issue of a different reciprocal compensation rate for ISP-Bound traffic in its Response to BellSouth's Petition.

US LEC also asserts that BellSouth did not raise any issue concerning the appropriate rate for ISP-bound traffic in its Proposed Issues List. Rather BellSouth proposed that Issue 7 be defined as: "what is the appropriate definition of local traffic for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act."

DOCUMENT NUMBER-DATE

15587 DEC-68

FPSC-RECORDS/REPORTING

US LEC argues that the ISP-bound reciprocal compensation rate issue was not addressed in the pre-filed direct and rebuttal testimony of any US LEC witness, or in the prefiled direct testimony of BellSouth's witness, Ms. Cox. US LEC asserts that the only position either party had taken on this issue in the record of this docket was US LEC's position that reciprocal compensation should be paid for ISP-bound traffic and BellSouth's position that there should be no payment of reciprocal compensation for ISP-bound traffic pending final resolution of this issue by the Federal Communications Commission.

US LEC claims that Ms. Cox had ample opportunity to raise the issue of a different rate for ISP-bound traffic in her direct testimony. US LEC argues that BellSouth's attempt to raise for the first time, at this stage of the proceeding, the issue of the appropriate ISP-bound reciprocal compensation rate through Ms. Cox's rebuttal testimony is entirely inappropriate and, therefore, should be stricken. US LEC asserts section 252(b)(4)(C) of the Act limits the Commission's jurisdiction in this matter to resolving issues raised in the arbitration petition and response.

Finally, US LEC asserts that the appropriate forum to resolve the question is Docket No. 000075-TP, Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Act. US LEC adds that both it and BellSouth are parties to that docket.

In the alternative, however, US LEC asks that, if the Commission denies its motion, it be granted the opportunity to conduct discovery and respond in surrebuttal testimony. In support of this position, US LEC argues that due process requires that it be afforded the opportunity to respond. In addition, the Commission would benefit from input from both parties on this issue.

For these reasons, US LEC requests its Motion to Strike be granted, and the rebuttal testimony of BellSouth witness, Cynthia K. Cox be stricken from page 23, line 18, through page 25, line 24, including Exhibit CKC-4. In the alternative, US LEC requests the scheduled hearing be continued for a minimum of 30 days to permit it to propound discovery to BellSouth on the factual predicate for its newly stated position.

BELLSOUTH'S ARGUMENTS

In its Response, BellSouth requests that US LEC's Motion to Strike and alternative request to file surrebuttal testimony be denied. BellSouth asserts that the rate for ISP-bound traffic is an issue in this case since Issue 7 states "Should ISP-bound traffic be treated as local traffic for the purposes of reciprocal compensation, or should it be otherwise compensated?" Further, BellSouth asserts that Mr. Gates, US LEC's witness, squarely addresses the issue in his direct testimony by discussing the amount and method of compensation. Moreover, BellSouth asserts that its rebuttal testimony is directly responsive to the issues raised by US LEC in Mr. Gates' direct testimony and, therefore, proper.

To the extent that US LEC argues that the scope of this docket is determined solely by BellSouth's Petition and US LEC's Response, BellSouth asserts that US LEC is apparently suggesting that the Issue Identification and Order Establishing Procedure, Order No. PSC-00-1483-PCO-TP are irrelevant. For these reasons, BellSouth requests that US LEC's Motion to Strike and the alternative request to file surrebuttal testimony be denied. Moreover, BellSouth requests that the Commission consider whether it is appropriate to assess sanctions against US LEC for the costs BellSouth incurred in responding to US LEC's baseless Motion to Strike.

DECISION

Order No. PSC-00-1483-PCO-TP, Order Establishing Procedure, issued September 17, 2000, sets forth the issues to be addressed by the witnesses in this proceeding. Issue 7 reads:

Should ISP-bound traffic be treated as local traffic for the purposes of reciprocal compensation, or should it be otherwise compensated? (Emphasis added.)

In his direct testimony, Mr. Gates, addresses US LEC's position on Issue 7 and argues that the Commission should not differentiate the compensation to be paid for ISP-bound traffic from the rate paid for local voice traffic. In rebuttal testimony, Ms. Cox, challenges Mr. Gates' position and addresses what BellSouth believes should be the compensation rate for ISP-bound

traffic. Clearly, Ms. Cox's rebuttal testimony is in response to Mr. Gates' direct testimony concerning Issue 7. As such the rebuttal testimony of Ms. Cox is relevant to this arbitration proceeding in that it properly rebuts the direct testimony of Mr. Gates and addresses Issue 7. Accordingly, US LEC's Motion to Strike portions of Ms. Cox's rebuttal testimony is denied.

In considering US LEC's request to file surrebuttal testimony, I note that the parties and staff agreed to the issues identified in the Order Establishing Procedure at an issue identification meeting prior to the issuance of that Order. No Motion for Reconsideration was filed regarding the contents of that Order. Further, as noted above, the direct testimony of Mr. Gates addresses the issue of reciprocal compensation for ISP-bound traffic, which is the subject of Issue 7. Therefore, US LEC was afforded sufficient opportunity to present testimony on Issue 7. Accordingly, the request to file surrebuttal testimony is denied. As such, US LEC's request to continue the hearing is also denied.

BellSouth requested that costs be assessed against US LEC for filing a baseless Motion to Strike. Pursuant to Section 120.569(2)(e), Florida Statutes, all pleadings, motions or other papers filed in this proceeding must be signed by the party, the party's attorney or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading and it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose . . ." BellSouth makes a bare assertion that US LEC has filed a baseless motion, but has not adequately demonstrated that the Motion to Strike is baseless or has been filed frivolously. Accordingly, BellSouth's request to impose sanctions is hereby denied.

Based on the foregoing, it is


ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that the Motion to Strike filed by US LEC of Florida, Inc. is denied. It is further

ORDERED that US LEC of Florida, Inc.'s request to file surrebuttal testimony and request for continuance of hearing are also denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s request to impose sanctions on US LEC of Florida, Inc. is denied.

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By ORDER of Commissioner Lila A. Jaber as Prehearing Officer,
this 6th day of December, 2000.


LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

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Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.