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Public Service Commission

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COMMISSION CLERK

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DATE: October 14, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of Auditing and Performance Analysis (Harvey, Hallenstein) *Harvey*
Office of the General Counsel (Teitzman, Evans) *Teitzman*

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

AGENDA: 10/26/10 – Regular Agenda – Decision on Motion for Clarification of PAA Order - Oral Argument Not Requested.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

The Commission adopted a wholesale Performance Assessment Plan (Plan) for the purpose of monitoring performance levels of Operations Support Systems (OSS) provided to Competitive Local Exchange Companies (CLECs) by Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121A-TP. The Order also recognized the Commission's vested authority, per Section 364.01(3), Florida Statutes, to provide regulatory oversight necessary to ensure effective competition in the telecommunications industry. This docket has remained open since that time to address issues and concerns arising from OSS performance.

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FPSC-COMMISSION CLERK

This Commission has jurisdiction over wholesale competition and has the responsibility to ensure that BellSouth Telecommunications Inc. d/b/a AT&T Florida (AT&T) is providing nondiscriminatory wholesale services at parity. AT&T is required to participate in review cycles which evaluate Service Quality Measure (SQM) and Self Effectuating Enforcement Mechanism (SEEM) Plans, pursuant to Order No. PSC-01-1819-FOF-TP. Commission staff has held four reviews since the Plans were first implemented in September 2001. Staff's fourth review was initiated in May 2009, when proposed changes were solicited from parties.

From August to September 2009, AT&T, on its own initiative, and interested parties to the docket attempted to negotiate and resolve the proposed changes to the SQM and SEEM Plans that were submitted to staff. After failed negotiations, the parties requested that staff initiate informal Commission workshops to discuss in detail the areas of agreement and disagreement. Staff conducted workshops in November and December 2009 with approximately 15 parties participating, including representatives from Competitive Carriers of the South (CompSouth), Saturn Telecommunications Services (STS), and Florida Cable Telecommunications Association (FCTA).

After the workshops, on March 22, 2010, AT&T and CompSouth filed a Settlement Agreement and Revised SQM and SEEM Plans in this docket. STS and FCTA did not participate in the settlement negotiations, and both opposed this agreement. In June 2010, after further negotiations, AT&T and STS were able to consummate an agreement. The First Revised SQM and SEEM Plans were filed with the Commission on July 9, 2009, reflecting this agreement.

On August 2, 2010, FCTA was also able to reach an agreement with AT&T. The Second Revised SQM and SEEM Plans document the changes mutually agreed to by all parties. The Second Revised SQM and SEEM Plans were filed on August 2, 2010, and replaced the First Revised SQM and SEEM Plans.

On August 12, 2010, FCTA filed a letter with the Commission. FCTA clarifies for the record that FCTA's joint filing with AT&T represents consensus on what the Commission should approve in the revised SQM and SEEM Plans. FCTA clarifies that its consensus is not a settlement agreement. Additionally, the consensus between FCTA and AT&T only reflects operations in Florida and does not apply in any other state.

At the August 17, 2010 Agenda Conference, the Commission approved the Settlement Agreement filed on March 22, 2010, incorporating the Second Revised SQM and SEEM Plans filed on August 2, 2010. The docket remains open for monitoring.

On August 25, 2010, the Commission issued Order No. PSC-10-0545-PAA-TP approving the Settlement Agreement which incorporated the Second Revised SQM and SEEM Plans. On September 15, 2010, FCTA filed a Motion to Clarify Order No. PSC-10-0545-PAA-TP, in which FCTA advised that the Motion was not a formal protest to the Order and that it supported the Order.

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On September 22, 2010, AT&T filed its Response in Opposition to FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP. AT&T based its opposition on substantive and procedural defects in FCTA's Motion.

This recommendation addresses whether the Commission should approve FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP.

Jurisdiction

The Commission is vested with jurisdiction over this matter pursuant to Section 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, 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 approve FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP or its request for the issuance of an amendatory order?

Recommendation: No. The Commission should deny FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP and its request for the issuance of an amendatory order. **(Teitzman, Evans)**

Staff Analysis:

FCTA's Position

On September 15, 2010, FCTA filed its Motion to Clarify Order No. PSC-10-0545-PAA-TP. In its Motion, FCTA requested that the Commission issue an amendatory order to clarify that the settlement provisions of Order No. PSC-10-0545-PAA-TP pertained only to the parties that executed the settlement with AT&T and not to non-signatory parties on the docket such as FCTA and its members. Specifically, FCTA seeks clarification that (1) FCTA and its members are not signatories to the Settlement Agreement between AT&T Florida and CompSouth; (2) FCTA and its members are not signatories to the separate Settlement Agreement between AT&T Florida and STS; and (3) FCTA and its members are not governed by the terms of the Settlement Agreements in any other states.

FCTA asserts that its Motion is not an objection to the implementation of the Second Revised SQM and SEEM Plans. FCTA supports its motion by stating that (1) it was an active participant in the process that led to the development and submission of the Second Revised SQM and SEEM plans approved by Order No. PSC-10-0545-PAA-TP; (2) it was not a party to the Settlement Agreement filed by CompSouth on March 22, 2010; (3) attachments filed with the Settlement Agreement contained specific revisions to the SQM and SEEM plans that those parties had developed; (4) FCTA filed a clarification letter with the Commission on August 12, 2010, because Staff's recommendation could be read to imply that FCTA was a party to the Settlement Agreement; and (5) by not being a party to any settlement, the FCTA's consensus regarding the Second Revised SQM and SEEM plans was binding only in Florida.

FCTA stated that it did not oppose the Commission's approval of the Second Revised SQM and SEEM plans, but wanted the record to establish that it did not execute any Settlement Agreement with AT&T and that its consensus with respect to the Second Revised SQM and SEEM plans cannot and should not be construed or interpreted as acquiescence to be bound by the terms of the Settlement Agreement.

Therefore, FCTA requested that the Commission issue a brief amendatory order clarifying that the terms of the Settlement Agreement did not apply to FCTA or any of its members. FCTA also requests that the amendatory order states that neither FCTA nor any of its member companies are signatories to the separate AT&T-CompSouth bi-lateral agreement, or any other agreement.

AT&T's Position

On September 22, 2010, AT&T filed its Response in Opposition to FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP. AT&T asserts that for both substantive and procedural reasons, FCTA's Motion should be denied. AT&T asserts that FCTA was provided ample opportunity at the August 17, 2010 Agenda Conference to address the Commission regarding any clarification it might have needed. AT&T further asserts that a PAA order, once issued, can be modified only through one of two mechanisms, namely (1) a party seeking modification or alteration may file a petition for formal proceeding, that is, a formal protest, or (2) the Commission on its own motion may withdraw the PAA Order before the order becomes final. Since neither event occurred here, AT&T asserts that FCTA's Motion is not a protest to the PAA Order, noting that the Motion expressly stated that FCTA did not object to the approval and implementation of the Second Revised SQM and SEEM Plans. AT&T asserts also that FCTA's Motion did not comply with the formal proceedings requirements of Rule 25-22.036, Florida Administrative Code (F.A.C.), or Rule 28-106.201, F.A.C. and must therefore be denied.

AT&T further asserts that motions for clarification are typically treated by the Commission as motions for reconsideration, and based on the Commission's standards for reconsideration, FCTA's Motion is procedurally and substantively defective. According to AT&T, a motion for reconsideration must be filed within 15 days and FCTA's Motion was filed 21 days after the issuance of the order. Additionally, AT&T proposes that Rule 25-22.060(1), F.A.C. prohibits the Commission from considering motions for reconsiderations of a Notice of Proposed Agency Action Order. Therefore, AT&T summarizes that FCTA's Motion must be denied for these procedural reasons as well. AT&T also asserts substantive grounds for denying FCTA's Motion as it failed to point to any error of fact or law upon which consideration or clarification can be grounded.

Finally, AT&T asserts that the record clearly shows that FCTA and its members are not signatories to either the CompSouth Settlement Agreement or the STS Settlement Agreement, and the CompSouth and STS agreements do not govern FCTA or its members. AT&T also stated that the Commission's order does not bind or govern the parties in other states as the parties are governed by the jurisdiction of the other states' commissions. Therefore, AT&T argues that no clarification is needed and FCTA's Motion should be denied.

Staff's Analysis

Staff recommends that FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP should be denied as the record sufficiently clarifies that: (1) FCTA and its members are not signatories to the Settlement Agreement between AT&T Florida and CompSouth; (2) FCTA and its members are not signatories to the separate Settlement Agreement between AT&T Florida and STS; and (3) the Commission has jurisdiction over the parties in Florida only.¹

¹ See Order No. PSC-10-0545-PAA-TP, page 7 under Ruling which states: "ORDERED by the Florida Public Service Commission that the Settlement Agreement filed on March 22, 2010, incorporating the Second Revised SQM and SEEM Plans filed on August 2, 2010, **as it relates to Florida only**, is approved."

Staff further recommends that the Commission deny FCTA's Motion requesting that the Commission issue a brief amendatory order clarifying that the terms of the Settlement Agreement do not apply to FCTA or any of its members. Staff recommends that FCTA's request be denied as the record sufficiently shows that FCTA and its members are not signatories to the Settlement Agreements. Order No. PSC-10-0545-PAA-TP did not state that FCTA was a signatory to the AT&T and CompSouth or AT&T and STS Settlement Agreements. Therefore, Staff believes that clarification is not necessary.

Staff recommends that the Commission also deny FCTA's request that an amendatory order be issued to clarify that FCTA and its members are not governed by the terms of the Settlement Agreements in any other states. The Commission only has jurisdiction in Florida. Moreover, Order No. PSC-10-0545-PAA-TP specifically stated that the Order approved the March 22, 2010 Settlement Agreement incorporating the Second Revised SQM and SEEM Plans as it related to Florida only.² In addition, FCTA in its letter filed on August 12, 2010, clarified that FCTA's consensus and joint filing on the SEEM and SQM Plans reflects operators in Florida and not other states.³ FCTA also asserts in its letter filed on August 12, 2010 that it had no ability to forge a consensus on behalf of operators in states other than Florida.⁴ FCTA also clarified that there was no agreement or consensus between FCTA and AT&T that the terms of their consensus should apply in any other states. Therefore, no further clarification is necessary.

In addition, in its Motion, FCTA requests clarification and not reconsideration of Order No. PSC-10-0545-PAA-TP. FCTA asserts that it did not object to the Commission's approval of the Second Revised SQM and SEEM Plans. Therefore, Staff does not believe that FCTA's Motion should be considered as a motion for reconsideration. However, if FCTA's Motion was considered a motion for reconsideration, then Staff recommends that it be denied because motions for reconsiderations are not available for Notice of Proposed Agency Action Orders.

Rule 25-22.0376, F.A.C. provides that the Commission will not entertain a motion for reconsideration of a notice of proposed agency action. Therefore, FCTA's Motion, if considered as a motion for reconsideration, should be denied as the Commission may not entertain a motion for reconsideration on a Notice of Proposed Agency Action Order.

Conclusion

Staff recommends that the Commission deny FCTA's Motion to Clarify Order No. PSC-10-0545-PAA-TP and its request for the issuance of an amendatory order.

² See footnote 1 above.

³ See page 1 of FCTA's letter filed on August 12, 2010, as Document No. 06665-10 in this docket.

⁴ See page 2 of FCTA's letter filed on August 12, 2010, as Document No. 06665-10 in this docket.

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Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation, the resulting Order will be issued as a procedural final order. This docket should remain open for purposes of future performance measure monitoring. **(Teitzman, Evans)**

Staff Analysis: If the Commission approves staff's recommendation, the resulting Order will be issued as a procedural final order. This docket should remain open for purposes of future performance measure monitoring.