

State of Florida



# Public Service Commission

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COMMISSION  
CLERK

**DATE:** September 6, 2012

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Cowdery) *R SML*  
 Division of Economics (King) *AD*  
 Office of Telecommunications (Bates, Fogleman) *J.W.D. B.A.T. M.S.*

**RE:** Docket No. 120208-TX – Petition to initiate rulemaking to revise and amend Rule 25-22.0365, F.A.C., by Competitive Carriers of the South, Inc.

**AGENDA:** 09/18/12 – Regular Agenda – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Balbis

**CRITICAL DATES:** September 18, 2012 (30-day statutory deadline waived to this date)

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\120208.RCM.DOC

### Case Background

On July 31, 2012, Competitive Carriers of the South, Inc., (CompSouth) filed a Petition to Initiate Rulemaking to revise and amend portions of Rule 25-22.0365, Florida Administrative Code (F.A.C.), Expedited Dispute Resolution Process for Telecommunications Companies. CompSouth asks that rulemaking be initiated to amend Rule 25-22.0365, F.A.C., to revise portions of the rule in order to enable quicker resolution of cases in which a consumer is without service or suffers impaired service as a result of a dispute between telecommunications carriers. On August 17, 2012, pursuant to Rules 25-22.039 and 28-106.205, F.A.C., BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T Florida), filed a Petition for Leave to Intervene.

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Pursuant to subsection 120.54(7), Florida Statutes (F.S.), the Commission has 30 days, following the date of filing the Petition to Initiate Rulemaking, to either initiate rulemaking proceedings, otherwise comply with the requested action, or deny the Petition with a statement of its reasons for the denial. Thirty days from the date of filing is August 30, 2012. However, CompSouth waived the 30-day time period in order to allow the staff recommendation to be heard by the Commission at the September 18, 2012, agenda conference.

This recommendation addresses whether the Commission should grant CompSouth's Petition to Initiate Rulemaking and whether the Commission should grant AT&T Florida's Petition for Leave to Intervene. The Commission has jurisdiction pursuant to sections 120.54 and 364.16(6), F.S.

### Discussion of Issues

**Issue 1:** Should the Commission grant CompSouth's Petition to Initiate Rulemaking to amend Rule 25-22.0365, F.A.C.?

**Recommendation:** Yes, the Commission should grant the Petition to Initiate Rulemaking to amend Rule 25-22.0365, F.A.C. (Cowdery, Bates, Fogleman)

**Staff Analysis:** As set forth in Section 364.16, F.S., Local Interconnection, Unbundling, and Resale, the Commission is required to resolve disputes between telecommunications companies, including resale of service, local interconnection, unbundling, number portability, dialing parity, access to rights-of-way, access to poles and conduits, and reciprocal compensation. Subsection 364.16(6), F.S., requires the Commission to implement an expedited process to facilitate the quick resolution of such disputes. The Commission must, to the greatest extent feasible, minimize the time necessary to reach a decision on the dispute and make its determination within 120 days after a petition is filed.

The statute also requires the Commission adopt rules to administer the provisions of Section 364.16, F.S. Rule 25-22.0365, F.A.C., establishes an expedited process for resolution of disputes between telecommunications companies, as required by Section 364.16(6), F.S. To be considered for an expedited proceeding, the companies involved in the dispute must have attempted to resolve their dispute informally. The rule sets forth the information which must be filed with the Commission by the complainant company as part of a request for expedited proceeding, and allows the respondent company to file a response to the request. The rule gives the time schedule which must be followed for each expedited case unless otherwise provided by order of the Prehearing Officer, based on the unique circumstances of the case. In addition, the rule addresses closing arguments, post-hearing briefs, discovery, and service of documents. The applicability of Rule 25-22.0365, F.A.C., to a proceeding will be reassessed as relevant factors change during the proceeding, and a Prehearing Officer may make a determination that the case is no longer appropriate for an expedited proceeding, based on the factors as set forth in the rule.

CompSouth states that it is a competitive local exchange carrier (CLEC) trade association representing CLECs and others affiliated with the CLEC industry in the southeastern United States, including Florida. CompSouth further states that each of its CLEC members is a telecommunications company as defined by Section 364.02(14), F.S., and is subject to the regulatory jurisdiction of the Commission as prescribed by Chapter 364, F.S., including Section 364.16, F.S. CompSouth states that the substantial interests of its members are, therefore, directly affected by Rule 25-22.0365, F.A.C., and will also be affected by the Commission's disposition of the Petition to Initiate Rulemaking because CLECs' ability to promptly resolve disputes with other carriers will be determined.

CompSouth believes that the current rule is not as "customer friendly" as it could be, and that when a customer is without service or has impaired service as a result of an intercarrier dispute, 120 days is not a reasonable time frame for adjudication for either the customer or the carriers involved. CompSouth states that when a customer is without service or has impaired service as a result of a carrier dispute, the customer is not going to wait very long for the problem

to be resolved, and will take service from whichever provider can expeditiously supply a substitute service, regardless of which carrier may have been the customer's first choice and regardless of which carrier is to blame for the customer's problem. Further, CompSouth alleges that once an inter-carrier dispute does arise, a carrier may not be motivated to identify and cure the customer's problem, particularly if it impacts another carrier's customer, and may blame the other carrier or may ignore the problem by blaming a down-stream or up-stream provider. CompSouth believes that when the customer is caught in the middle of an intercarrier dispute, the Commission can and should help to solve the problem quickly. For these reasons, CompSouth requests that the Commission initiate rulemaking to amend Rule 25-22.0365 and suggests rule language which it believes would: (a) expressly encourage parties to resolve disputes on their own, pursuant to any contractual dispute resolution procedures that the parties may have; (b) focus and facilitate solutions by utilizing Commission staff early in the dispute process in a joint meeting with the parties; and (c) shorten the adjudication process in cases such as a customer suffering an out-of-service or impaired service condition as a result of a carrier dispute. A copy of CompSouth's suggested amendments to Rule 25-22.0365, F.A.C., is appended to this recommendation as Attachment A.

Pursuant to paragraph 120.54(7)(a), F.S., any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to amend a rule. The petition is required to specify the proposed rule and action requested. CompSouth's Petition to Initiate Rulemaking meets the requirements of subsection 120.54(7), F.S. Further, pursuant to Section 364.16(6), F.S., the Commission has authority to implement the rule amendments proposed by CompSouth. Therefore, staff recommends that the Commission grant CompSouth's Petition to Initiate Rulemaking.

Staff notes that a Commission decision to grant the Petition to Initiate Rulemaking merely begins the rulemaking process. It does not mean that the Commission has proposed or adopted any rule amendment. If the Commission follows staff's recommendation, then a Notice of Rule Development will be issued and a staff rule development workshop will be held. This will allow all interested persons to participate and discuss the potential rule amendment and will give staff an opportunity to collect information that is needed to evaluate the proposed changes. Staff will return at a later date with a recommendation for the Commission on whether to propose amendments to Rule 25-22.0365, F.A.C.

**Issue 2:** Should AT&T Florida's Petition for Leave to Intervene be granted?

**Recommendation:** No, it is not necessary to grant petitions to intervene in a rulemaking docket. (Cowdery)

**Staff Analysis:** On August 17, 2012, AT&T filed a Petition for Leave to Intervene in this docket. Neither the Commission's rules nor Chapter 120, F.S., however, require interested persons to formally intervene in a rulemaking proceeding.<sup>1</sup> Therefore, it is not necessary to grant AT&T's petition. AT&T and any other interested person may participate in these rulemaking proceedings without formally seeking intervention. Further, AT&T will be advised of matters in this docket pursuant to the Commission's standard practice of sending copies of all notices of workshop and proposed rules to all PSC regulated utilities affected by the rulemaking.

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<sup>1</sup> See Docket No. 010810-TP, Order No. PSC-01-1575-PCO-TP, issued July 30, 2001, In re: Petition by MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC to initiate rulemaking pursuant to Section 364.01 and 364.603, F.S., to Mandate Use of Electronic Authorization as a Permissible Method for Consumers to Lift Preferred Carrier Freezes; Docket No. 951145-TL, Order No. PSC-95-1403-FOF-TL, issued November 16, 1995, In Re: Petition to Initiate Rulemaking Proceeding to Address Imputation Requirements Under Recently Revised Chapter 364, Florida Statutes, by GTE Florida Incorporated; and Docket No. 950778-TL, Order No. 95-1093-FOF-TL, issued September 5, 1995, In Re: Petition to Initiate Investigation of Potential Changes to Rules 25-4.066 Through 25-4.080, F.A.C., by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company.

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**Issue 3:** Should this docket be closed?

**Recommendation:** No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open to proceed with the rulemaking process. (Cowdery)

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 1 and initiates rulemaking on Rule 25-22.0365, F.A.C., this docket should remain open to proceed with the rulemaking process, which would include a staff rule development workshop.

1 **25-22.0365 Expedited Dispute Resolution Process for Telecommunications Companies.**

2 (1) The purpose of this rule is to establish an expedited process for resolution of  
3 disputes between telecommunications companies (“companies”). For purposes of this rule, an  
4 “immediate and negative effect on a customer” includes, but is not necessarily limited to, any  
5 out-of-service or any impeded service condition which significantly hinders the customer’s  
6 ability to utilize the service within design parameters.

7 (2) To be considered for an expedited proceeding, the companies involved in the  
8 dispute must have attempted to resolve their dispute informally and are encouraged to follow  
9 applicable terms of any agreements between the companies for dispute resolution.

10 (3) To initiate the expedited dispute resolution process, the complainant company must  
11 file with the Commission a request for expedited proceeding, direct testimony, and exhibits,  
12 and must simultaneously serve the filing on the other company involved in the dispute. The  
13 request for expedited proceeding is in lieu of the petition required by Rule 28-106.201, F.A.C.  
14 At least seven days prior to filing the request, the companies shall first conduct an informal  
15 meeting with the Commission staff for the purpose of discussing the matters in dispute, the  
16 positions of the parties, possible resolution of the dispute, any immediate customer-impacting  
17 effects from the dispute, any unique or exigent circumstances for the dispute, anticipated  
18 discovery needs, and anticipated case schedule. Any agreements resulting from such informal  
19 staff meeting will be in writing and, if deemed necessary by staff, approved by the  
20 Commission.

21 (4) The request for expedited proceeding must include:

22 (a) The name, address, telephone number, facsimile number and e-mail address of the  
23 complainant company and its representative to be served, if different from the company;

24 (b) A statement of the specific issue or issues to be litigated and the complainant  
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- 1 company's position on the issue or issues;
- 2 (c) The relief requested;
- 3 (d) A statement attesting to the fact that the complainant company attempted to resolve
- 4 the dispute informally; and
- 5 (e) An explanation of why the use of this expedited process is appropriate. The
- 6 explanation of why use of the expedited process is appropriate shall include a discussion of the
- 7 following:
- 8 1. The number and complexity of the issues;
  - 9 2. The policy implications that resolution of the dispute is expected to have, if any;
  - 10 3. The topics on which the company plans to conduct discovery, including a
  - 11 description of the nature and quantity of information expected to be exchanged;
  - 12 4. The specific measures taken to resolve the dispute informally; and
  - 13 5. Any other matter the company believes relevant to determining whether the dispute
  - 14 is one suited for an expedited proceeding.
- 15 (5) Any petition for intervention shall provide the information required by paragraphs
- 16 (4)(a)-(c) and (e) as it applies to the intervener.
- 17 (6) The request for expedited proceeding shall be dismissed if it does not substantially
- 18 comply with the requirements of subsections (2), (3) and (4), above. The first dismissal shall
- 19 be without prejudice.
- 20 (7) The respondent company may file a response to the request. The response must be
- 21 filed within 14 days of the filing of the request for expedited proceeding.
- 22 (a) The response shall include the name, address, telephone number, facsimile number
- 23 and e-mail address of the respondent and the respondent's representative to be served, if
- 24 different from the respondent.

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1 (b) The response to the request may include any information that the company believes  
2 will help the Prehearing Officer decide whether use of the expedited dispute resolution process  
3 is appropriate. Such information includes, but is not limited to:

- 4 1. The respondent's willingness to participate in this process;
- 5 2. Statement of the specific issue or issues to be litigated from the respondent's  
6 perspective, and the respondent's position on the issue or issues;
- 7 3. A discussion of the topics listed in subparagraphs (4)(b)-(e)1.-5. above.

8 (8) No sooner than 14 days after the filing of the request for expedited proceeding, but  
9 promptly thereafter, the Prehearing Officer will decide whether use of the expedited  
10 proceeding is appropriate. The decision will be based on the factors provided in Section  
11 364.058(3), Florida Statutes, the materials initially filed by the complainant company and, if a  
12 response is filed, the materials included in the response.

13 (9) Disputes with an immediate and negative effect on a customer will be scheduled  
14 for hearing and disposition as early as the Commission's calendar will accommodate. Unless  
15 otherwise provided by an order of the Prehearing Officer, based on the unique circumstances  
16 of the case, the schedule for all other each expedited cases ease will be as follows:

- 17 (a) Day 0 – request for expedited proceeding, direct testimony and exhibits are filed;
- 18 (b) Day 14 – deadline for filing a motion to dismiss, and a response to the request for  
19 expedited proceeding;
- 20 (c) Day 21 – deadline for filing a response to the motion to dismiss, if one is filed; and,  
21 deadline for filing petitions to intervene, and intervenor testimony and exhibits;
- 22 (d) Day 42 – deadline for the Commission staff to file testimony;
- 23 (e) Day 56 – deadline for the respondent to file rebuttal testimony.

24 (10) The Prehearing Officer shall decide whether post-hearing briefs will be filed or if  
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1 closing arguments will be made in lieu of post-hearing briefs. In making this decision the  
2 Prehearing Officer will consider such things as the number of parties, number of issues,  
3 complexity of issues, preferences of the parties, ~~and~~ the amount of testimony stipulated into  
4 the record, and the presence of any immediate and negative effects on a customer.

5 (11) The Commission shall make a decision on the dispute within 120 days of the  
6 complainant company's filing of the request for expedited proceeding, direct testimony and  
7 exhibits. Cases involving an immediate and negative effect on a customer will be scheduled  
8 for hearing and disposition as soon as the Commission's calendar will accommodate, with a  
9 goal of a vote on a final Commission decision within - days of the initial dispute filing,  
10 even if meeting this goal requires a bench decision and assignment to a panel of two or more  
11 commissioners.

12 (12) Responses to discovery requests shall be made within 15 days of service of the  
13 discovery requests, unless the Prehearing Officer decides otherwise based on the presence of  
14 any immediate and negative effects on a customer or the unique circumstances of the case.

15 (13) Service of all documents on the parties shall be by e-mail, facsimile or hand  
16 delivery. An additional copy shall be furnished by hand delivery, overnight mail or U.S. mail  
17 if the initial service was by e-mail or facsimile. Filing of all documents with the Commission  
18 shall be by hand delivery, overnight mail or any method of electronic filing authorized by the  
19 Commission.

20 (14) The applicability of this rule to the proceeding will be reassessed as factors  
21 affecting the complexity of the case, number of issues, ~~or~~ number of parties or immediate and  
22 negative effects on a customer change during the proceeding.

23 (15) Once the Prehearing Officer has determined that use of an expedited proceeding is  
24 appropriate, nothing in this rule shall prevent the Prehearing Officer from making a later  
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1 determination that the case is no longer appropriate for an expedited proceeding based on the  
2 number of parties, number of issues or the complexity of the issues, or based on the removal  
3 of all immediate and negative effects on a customer. Nothing in this rule shall prevent the  
4 Commission from initiating an expedited proceeding on its own motion.

5 *Specific Authority 350.127(2), 364.058(3) FS. Law Implemented 364.058 FS. History—New 8-*  
6 *19-04, amended*

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