

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BlueStar Networks, Inc. for arbitration of certain unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

DOCKET NO. 991838-TP
ORDER NO. PSC-00-0141-PCO-TP
ISSUED: January 21, 2000

ORDER ESTABLISHING PROCEDURE AND
GRANTING IN PART AND DENYING IN PART
BLUESTAR'S MOTION FOR EXPEDITED DISCOVERY RESPONSE TIMES

On December 7, 1999, BlueStar Networks, Inc. (BlueStar) filed a Petition for arbitration of certain unresolved issues in its interconnection negotiations with BellSouth Telecommunications, Inc. (BellSouth). On January 3, 2000, BellSouth filed its Response. On January 12, 2000, BlueStar filed a Motion for Expedited Discovery Response Times (Motion). On January 18, 2000, BellSouth filed its Response to the Motion and a Motion to Remove Issues from Arbitration. Accordingly, the matter has been set for hearing on March 2-3, 2000.

This Order establishes certain procedural matters in this case and addresses BlueStar's Motion for Expedited Discovery Response Times. BellSouth's Motion to Remove Issues from Arbitration will be addressed at a later date to allow BlueStar the opportunity to respond to the motion.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case,

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and all administrative rules applicable to this Commission.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DISCOVERY

A. BLUESTAR'S MOTION FOR EXPEDITED DISCOVERY RESPONSE TIMES

1. BlueStar's Motion

In its Motion, BlueStar states that two of the issues it seeks to arbitrate involve the appropriate recurring and nonrecurring rates of certain items. Therefore, BlueStar argues, quick access to BellSouth's cost studies is critical to its case and the filing of its direct testimony, which is due on January 25, 2000. BlueStar argues that the requested cost studies and information it seeks to discover are "solely within the possession of BellSouth," and that it is "extremely prejudiced in its case preparation without them."

BlueStar states that on December 29, 2000, it provided BellSouth with a draft of the discovery requests it intended to file, along with a proposal for "streamlining the discovery process." According to BlueStar, on January 5, 2000, it formally served BellSouth its First Set of Interrogatories and First Set of Requests for Production, in which it requested certain cost studies and other information relating to the issues it seeks to arbitrate. BlueStar further states that at the issue identification meeting held in this matter on January 10, 2000, it "requested that BellSouth expeditiously provide certain cost studies (a subset of Production Request Nos. 7, 8) so that BlueStar could prepare its direct testimony, due in less than two weeks." According to BlueStar, it suggested that BellSouth provide, on an expedited basis, cost studies that were already in existence and required no work on the part of BellSouth, and that had already been filed with the Federal Communications Commission or this Commission. BlueStar states, however, that BellSouth refused to comply with its request. BlueStar adds that it is willing to sign a protective agreement to gain access to the studies.

BlueStar argues that due to the complexity of the issues and the short preparation time before the filing of its direct testimony, BellSouth should be required to provide the cost studies described above, along with responses to Production Requests Nos. 12, 18, and 21, and Interrogatories Nos. 7, 10, 17, and 23 by January 18, 2000, which is 20 days from the time BellSouth received the informal draft, instead of the 30 days set forth in Rule 1.350, Florida Rules of Civil Procedure. BlueStar argues that pursuant to the Telecommunications Act of 1996 (the

Act), expedited time frames are appropriate under these circumstances.

Further, BlueStar requests an expedited 20-day response time for all other discovery requests in this docket. It reiterates that such a time frame is appropriate under the Act, and argues that BellSouth would not be prejudiced by the shortened time frames as it is familiar with the issues in this case and has access to the items requested.

2. BellSouth's Response

On January 14, 2000, BellSouth filed its Response to the Motion. BellSouth states that BlueStar served it with voluminous discovery requests, including subparts and over 90 requests for production, which are overbroad, e.g. all documents relating to BellSouth's planning efforts with regard to its retail ADSL offering, and irrelevant, e.g. contracts with BellSouth's 20 largest suppliers. According to BellSouth, the discovery requests demanded a response within 20 days, 10 days less than applicable rules permit.

BellSouth further states that at the issue identification meeting held on January 10, 2000, BlueStar requested that BellSouth be compelled to respond to the discovery by January 18, 2000, "a week less than the expedited 20 day period they demanded in their discovery requests." According to BellSouth, "BlueStar had waited 29 days after filing its complaint to propound discovery, [and] now wished to give BellSouth less than two weeks in which to respond." Further, BellSouth states, the Commission staff attempted to help BlueStar resolve its dilemma by suggesting that the parties could agree to move the hearing to a later date, thus giving BlueStar the time it claimed it needed, but that BlueStar refused to consider this option. Therefore, BellSouth argues that "the Commission should not prejudice BellSouth as BlueStar requests, just to relieve BlueStar of the ill effects of its own failure to plan ahead."

Additionally, BellSouth states that BlueStar's argument that BellSouth should be compelled to provide responses within 20 days of the time BellSouth received BlueStar's draft copies of its requests is misleading. While BellSouth admits that it did receive "data requests" from BlueStar on December 29, 1999, it states that BlueStar indicated that the drafts were for discussion purposes only, and that it was never expected to respond to the drafts,

which were never filed or served. BellSouth states that on January 5, 2000, it was served with discovery requests, but they were different from the drafts. Therefore, BellSouth argues, "it's time for responding did not begin to run until BlueStar had served discovery it intended BellSouth to answer."

BellSouth states, however, that it does not object to the shortened time frame of 20 days for responses to all discovery requests. It states that contrary to the assertions in BlueStar's Motion, it never refused to provide the cost studies, but merely objected "to BlueStar's suggestion that BellSouth be ordered to respond to BlueStar's mountain of discovery requests less than two weeks after they were served." BellSouth states that it is now aware that BlueStar only seeks responses to some of its discovery requests in less than two weeks, but states that BlueStar's willingness to limit the number of its unreasonable demands does not render them reasonable. BellSouth maintains that "if BlueStar's preparation will be hindered by receiving BellSouth's responses within the expedited 20-day period BlueStar requested, its problems are of its own making" because it must have known that it would be prejudiced if it waited too long to conduct discovery.

Finally, BellSouth argues that BlueStar would not be prejudiced, even if BellSouth were permitted an entire 30 days to respond. It states that the information BlueStar seeks relates primarily to "the rates to be adopted for various loops and related services." It further states that it will file direct testimony on January 25, 2000, supported by cost studies, and that BlueStar will presumably use the information it obtains from discovery, not for direct testimony, but to dispute, in rebuttal testimony, the rates and supporting cost studies BellSouth submits in its direct testimony. Since rebuttal testimony is not due until February 8, 2000, BellSouth argues that it is difficult to see how BlueStar would be prejudiced if BellSouth provided the requested information on an expedited 20-day basis.

3. Decision

In its January 5, 2000, discovery requests served upon BellSouth, BlueStar requested responses within 20 days of the service of the requests. Additionally, BlueStar, in its motion, requested an expedited 20-day response time for all discovery requests served in this docket, with the exception of certain items discussed in detail below. BlueStar argues that such a shortened time frame is appropriate under the Act and that BellSouth would

not be prejudiced because BellSouth is already familiar with the issues in this case and has access to all of the items requested.

Due to the expedited scheduling of the hearing in this case, and after reviewing the parties' pleadings, I find that an expedited discovery response time of 20 days is both reasonable and necessary. Further, BellSouth, in its response to BlueStar's motion, stated that it did not object to a 20-day expedited time frame. Therefore, BlueStar's motion is hereby granted in that regard.

BlueStar's motion is denied, however, with regard to its request that BellSouth be required to provide cost studies, along with responses to Production Requests Nos. 12, 18, and 21, and Interrogatories Nos. 7, 10, 17, and 23 by January 18, 2000. I agree with BellSouth, informal draft notwithstanding, that "[BellSouth's] time for responding did not begin to run until BlueStar had served discovery it intended BellSouth to answer."

Also, as pointed out by BellSouth, BlueStar did not actually serve discovery upon BellSouth until 29 days after it filed its petition. As such, it cannot now expect BellSouth to respond within 13 days, even if, as BlueStar claims, it would require no work on the part of BellSouth.

Based on the foregoing, responses to discovery requests shall be served within 20 days of service of the request. No additional time shall be allowed for mailing.

B. OTHER DISCOVERY MATTERS

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes. Additionally, to facilitate the processing of this proceeding, and based on the decision on BlueStar's motion, the party to whom a discovery request is served shall serve the answer within 20 days after service of the request. As previously stated, there shall be no additional time for mailing. Furthermore, in view of the expedited nature of this proceeding, parties shall serve discovery requests and responses by either express mail, facsimile, or hand delivery.

The hearing in this docket is set for March 2-3, 2000. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by February 24, 2000. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 100, and requests for production of documents, including all subparts, shall be limited to 100.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, Florida Statutes.

DISKETTE FILINGS

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

PREFILED TESTIMONY AND EXHIBITS

Each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning

with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting, by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

PREHEARING STATEMENT

All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

- (a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony;
- (b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;
- (c) a statement of basic position in the proceeding;

- (d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (e) a statement of each question of law the party considers at issue and the party's position on each such issue;
- (f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (g) a statement of issues that have been stipulated to by the parties;
- (h) a statement of all pending motions or other matters the party seeks action upon; and
- (I) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

PREHEARING CONFERENCE

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held in this docket at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

PREHEARING PROCEDURE: WAIVER OF ISSUES

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to

enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

DOCUMENT IDENTIFICATION

Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____
Cost Studies for Minutes of Use by Time of Day

TENTATIVE ISSUES

Attached to this order as Appendix "A" is a tentative list of the issues which have been identified in this proceeding. Prefiled testimony and prehearing statements shall address the issues set forth in Appendix "A".

CONTROLLING DATES

The following dates have been established to govern the key activities of this case.

- | | |
|------------------------------------|-------------------|
| 1) Direct testimony and exhibits | January 25, 2000 |
| 2) Rebuttal testimony and exhibits | February 14, 2000 |
| 3) Prehearing Statements | February 15, 2000 |
| 4) Prehearing Conference | February 21, 2000 |
| 5) Hearing | March 2-3, 2000 |
| 6) Briefs | March 23, 2000 |

USE OF CONFIDENTIAL INFORMATION AT HEARING

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183(4), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information.

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Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

POST-HEARING PROCEDURE

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

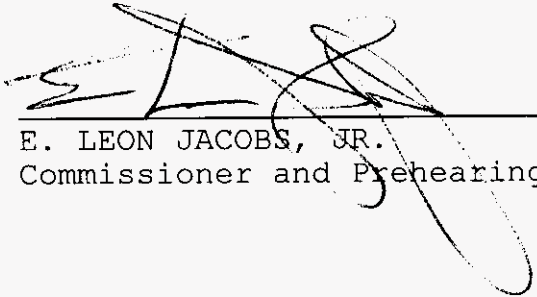
Based upon the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that BlueStar Networks, Inc.'s Motion for Expedited Discovery Response Times is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the provisions of this Order shall govern this proceeding unless modified by the Commission.

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By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 21st day of January, 2000.



E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

DMC

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, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review

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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.

APPENDIX A

TENTATIVE LIST OF ISSUES

ISSUE 1: How should an unbundled copper loop ("UCL") be defined?

RESOLVED

ISSUE 2: Should BellSouth be required to:

- a) conduct a trial of line sharing with BlueStar, and if so, when?
- b) conduct a trial of electronic ordering and provisioning of line sharing with BlueStar, and if so, when?

ISSUE 3: What information should BellSouth be required to provide to BlueStar on loop orders that are rejected because the requested facilities are unavailable?

ISSUE 4: When should the information identified in Issue 3 be provided?

ISSUE 5: Should BellSouth be required to implement a process whereby xDSL loop orders that are rejected are automatically converted to orders for UCLs without requiring BlueStar to resubmit the order?

ISSUE 6: For xDSL orders, should BellSouth be required to provide real time access to the following, and if so, when?

- a) OSS for loop makeup information qualification;
- b) preordering;
- c) provisioning;
- d) repair/maintenance, and
- e) billing.

ISSUE 7: Should the interconnection agreement include a time interval for BellSouth provisioning of xDSL loops and UCLs?

ISSUE 8: Can xDSL loops retain repeaters at the ALEC's option?

RESOLVED

ISSUE 9: Should the interconnection agreement include expedited procedures for repairs?

ISSUE 10: What are the TELRIC-based rates for the following:

- a) 2-wire ADSL compatible loops, both recurring and nonrecurring;
- b) 2-wire HDSL compatible loops, both recurring and nonrecurring;
- c) "UCL" loops, both recurring and nonrecurring;
- d) loop conditioning for each of the loops listed above, as well as the 4-wire HDSL loop.

ISSUE 11: What are the TELRIC-based recurring and nonrecurring rates for the high frequency portion of a shared loop?

ISSUE 12: For purposes of reciprocal compensation, should the parties be required to adopt bill and keep for transport and termination of local, intraLATA and interLATA voice traffic?

RESOLVED

ISSUE 13: What, if any, provisions should the agreement include for performance measures?

RESOLVED

ISSUE 14: (The parties could not agree upon the wording of this issue, and the matter is to be determined at a later date by the Prehearing officer.)

BlueStar's proposed issue:

Should the interconnection agreement include the liquidated damages provisions filed by BellSouth in Tennessee in Docket Nos. 99430 and 99377 as Exhibit No. AJV-1 which relate to BellSouth's Service Quality Measurements (SQMs)?

BellSouth's proposed issue:

What, if any, provisions should the agreement include for liquidated damages?

ISSUE 15: What, if any, provisions should the agreement include for alternative dispute resolution?

ISSUE 16: What is the appropriate method for BlueStar to gain access to BellSouth's riser cables, allowing BlueStar to provision its digital subscriber line access multiplexer (DSLAM)?