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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 (BAYO)

FROM: DIVISION OF COMMUNICATIONS (GREER)
DIVISION OF LEGAL SERVICES (BARONE)

RE: DOCKET NO. 960833-TP - PETITION BY AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC. (AT&T) FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. (BELLSOUTH) CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996

AGENDA: MAY 5, 1997 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\CMU\WP\960833TP.RCM

CASE BACKGROUND

Part II of the Federal Telecommunications Act of 1996 (Act), 47 USC § 151 et. seq., provides for the development of competitive markets in the telecommunications industry. Section 251 of the Act concerns interconnection with the incumbent local exchange carrier, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements established by compulsory arbitration. Section 252(b)(1) states:

> (1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(c) states that the State commission shall resolve each issue set forth in the petition and response by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

By letter dated March 4, 1996, AT&T on behalf of its subsidiaries providing telecommunications services in Florida, requested that BellSouth begin good faith negotiations under Section 252 of the Act. On July 17, 1996 AT&T filed its request for arbitration pursuant to the Act.

MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. (MCI) requested that BellSouth begin good faith negotiations by letter dated March 26, 1996. Docket No. 960846-TP was established in the event MCI filed a petition for arbitration of the unresolved issues. On July 30, 1996, AT&T and MCI filed a joint motion for consolidation with AT&T's request for arbitration with BellSouth. By Order No. PSC-96-1039-FOF-TP, issued August 9, 1996, the joint motion for consolidation was granted. On August 15, 1996, MCI filed its request for arbitration under the Act.

On August 8, 1996, the Federal Communications Commission (FCC) released its First Report and Order in CC Docket No. 96-98 (Order). The Order established the FCC's requirements for interconnection, unbundling and resale based on its interpretation of the 1996 Act. This Commission appealed certain portions of the FCC order, and requested a stay of the Order pending that appeal. On October 15, 1996, the Eighth Circuit Court of Appeals granted a stay of the FCC's rules implementing Section 251(i) and the pricing provisions of the Order.

On October 9 through 11, 1996, the Commission conducted an evidentiary hearing for the consolidated dockets. On December 31, 1997, the Commission issued Order No. PSC-96-1579-FOF-TP in which it arbitrated the remaining unresolved issues between AT&T and BellSouth. In the Order, the Commission directed the parties to file agreements memorializing and implementing its arbitration decision within 30 days.

On January 15, 1997, BellSouth filed its Motion for Reconsideration of Order No. PSC-96-1579-FOF-TP. On January 27, 1997, AT&T filed its response to BellSouth's Motion for Reconsideration. In addition to a response to BellSouth's Motion, AT&T also filed a Cross Motion for Reconsideration. BellSouth responded to AT&T's Cross Motion on February 4, 1997. In Order No. PSC-97-0298-FOF-TP, issued March 21, 1997, the Commission addressed

the various motions for reconsideration.

The parties filed their arbitrated agreement with the Commission on January 30, 1997 and identified the sections where there were still disputes on the specific language. On March 21, 1997, the Commission issued Order No. PSC-97-0300-FOF-TP wherein it approved various sections of the agreement that the parties were able to agree on, rejected sections that were not arbitrated, and established language for sections that were arbitrated and still in dispute. This order specifically identified the exact language that was to be contained in the arbitrated agreement.

Although the Commission specifically identified all of the language that was to be included in the arbitration agreement, the parties still refuse to sign the agreement due to some dispute about proposed language by BellSouth. On April 2, 1997, both parties filed **separate** versions of an agreement. This recommendation addresses the parties continuing refusal to sign the arbitrated agreement as the Commission has required them to do.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission approve AT&T's proposed agreement filed on April 2, 1997, as the final, binding arbitration agreement in this proceeding between AT&T and BellSouth?

RECOMMENDATION: Yes. The Commission should approve the agreement filed by AT&T on April 2, 1997, except as modified in the staff analysis.

STAFF ANALYSIS: Staff is frustrated with the continued dispute between the parties on the development and execution of an agreement for this arbitration proceeding. As discussed in the Case Background, the Commission resolved the unresolved issues in the proceeding on December 31, 1997 and directed the parties to file an agreement memorializing and implementing its arbitration decision within 30 days. The parties were unable to agree to all of the language that should be included in the agreement. Therefore, the parties filed their version of the language that each believed should be part of the final arbitrated agreement. The Commission in Order No. PSC-97-0300-FOF-TP established all of the language that should be included in the arbitration agreement for Docket No. 960833-TP. Even though the Commission established the language, the parties not only have included language that the Commission has not approved, but continue to argue over what language should be in the agreement. The Commission painstakingly went through the proposed language for each section in the parties' agreement in order to determine what language should be included in the arbitration agreement. Staff is unsure about how to make it any clearer to the parties what language should be included in the agreement.

Although staff believes that the parties have directly violated Commission Order No. PSC-97-0300-FOF-TP by not signing the agreement, staff will once again attempt to settle the disputes between the parties on the appropriate language that should be included in the agreement.

The various sections in the agreements filed by AT&T and BellSouth on April 2, 1997, can be separated into the four following categories:

1. Sections that the parties agreed to and should be approved by the Commission.

2. Sections that were rejected by the Commission in its order since it was not agreed to and was not part of an arbitrated issue, but the parties have negotiated language subsequent to the issuance of the Commission's

Order for Commission approval. This language has not been approved.

3. Sections that were addressed by the Commission in its Order, but the parties have included different language than the order in their agreement, and the language in each party's version of the agreement does not match.

4. Sections that are in dispute and were not arbitrated.

CATEGORY 1

These sections have been approved by the Commission via issuance of Order No. PSC-97-0300-FOF-TP or agreed to subsequent to the Commission's order. Staff believes the Commission should approve all sections of AT&T's agreement except for the sections discussed in Categories 2-4.

CATEGORY 2

The language for the sections identified in Table A was rejected by the Commission in Order No. PSC-97-0300-FOF-TP. In the parties' initial agreement these sections were not arbitrated, and the parties were unable to agree on specific language that should be included in the agreement. However, since the Commission's decision, the parties have agreed to specific language for these sections. Although this action essentially allows the parties a second chance in getting Commission approval of their agreement, staff believes approving these sections at this time would be more expedient than requiring the parties to remove the language and file an amendment to the arbitrated agreement in a different docket. Staff believes the sections identified in Table A comply with Section 252(e)(2)(B) of the Act and should be approved by the Commission for inclusion in the arbitrated agreement.

Table A

Agreement ID	Section	Title
Preface	1st Paragraph	Affiliates
General Terms and Conditions	12.1, 12.2, 12.3	Performance Measurement

Agreement ID	Section	Title
Attachment 3	3.8.3	Processing of Applications
Attachment 3	3.10.2.2	Construction of AT&T's Facilities
Attachment 7	6	Lost, Damaged, Destroyed Message Data
Attachment 9	2.2, 2.3	Revenue Protection
Attachment 12	1-6	Performance Measurement

CATEGORY 3

The language for this section was established by the Commission in Order No. PSC-97-0300-FOF-TP. The language contained in the latest agreements filed by the parties on April 2, 1997 is different; and therefore, it should track the language approved by the Commission which is the language contained in BellSouth's agreement. Since the Commission has already approved language for these sections, staff believes the parties should incorporate the language previously approved for the sections identified in Table B. If the parties want to amend these sections, the parties should file an amendment to the arbitrated agreement in a different docket.

TABLE B

Attachment	Section	Title
Part IV	Table 3	Rights of Way

CATEGORY 4

The language contained in this category appears to be the major dispute between the parties. BellSouth's latest agreement includes language associated with cost recovery of any additional performance standards, and the pricing of rebundled network elements to duplicate a resold service.

COST RECOVERY FOR HIGHER LEVEL PERFORMANCE STANDARDS

BellSouth's latest version of the agreement includes the following language (Section 12.4) to address cost recovery of any additional performance standards AT&T requires that BellSouth does not provide itself.

> If AT&T requests, in writing, a higher level of performance than BellSouth provides to its own subscribers, BellSouth shall inform AT&T, in writing, of the amount AT&T's desired performance level exceeds that which BellSouth provides to its subscribers as well as a reasonable estimate of what it would cost BellSouth to meet, measure, and report these standards. If AT&T then communicates, in writing, to BellSouth that it desires such higher levels of performance, AT&T shall pay BellSouth for the costs incurred in providing such higher level of service. Moreover, AT&T shall pay for all mechanisms necessary to capture and report data, required to measure, report or track any performance measurement that BellSouth does not, as of the Effective Date, measure, report or track for itself or its own subscribers. In the event such system is not developed exclusively for AT&T, but rather is developed for use with other CLECs, as well as AT&T, BellSouth shall allocate to AT&T, on a competitively neutral basis, AT&T's share of the costs associated with such system.

BellSouth states that this language incorporates the decision of the Commission in Order No. PSC-96-1579-FOF-TP, page 87, as it relates to performance standards sought by AT&T that are not part of the performance standards BellSouth regularly reports or utilizes itself. It is clear from the language that BellSouth is misrepresenting the Commission's order. The language specifically states:

> Based on the foregoing, each party shall bear its own cost of developing and implementing electronic interface systems, because those systems will benefit all carriers. If a system or process is developed exclusively for a certain carrier, however, those costs shall be recovered from the carrier who is requesting the customized system.

Staff believes the language clearly does not even discuss cost recovery for higher level performance standards. Although there was some discussion at the agenda conference, the Commission clearly stated that it did not arbitrate the cost recovery of higher level performance standards; and therefore, the issue of pricing of these higher level performance standards would either be negotiated or arbitrated in a subsequent proceeding. Therefore, staff believes the Commission should not include in AT&T's

agreement the language proposed by BellSouth for this section of the agreement.

PRICING FOR REBUNDLED UNEs THAT DUPLICATE A RESOLD SERVICE

BellSouth proposes to include the following language (Section 36.1) associated with the pricing of rebundled UNEs.

> Any BellSouth non-recurring charges shall not include duplicate charges or charges for functions or activities that AT&T does not need when two or more Network Elements are combined in a single order. BellSouth and AT&T shall work together to mutually agree upon the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple Network Elements. **Further negotiations between the parties should address the price of a retail service that is recreated by combining UNEs. Recombining UNEs shall not be used to under cut the resale price of the service recreated.** If the parties cannot agree to the total non-recurring and recurring charge(s) to be paid by AT&T when ordering multiple Network Elements within sixty (60) days of the Effective Date, either party may petition the Florida Public Service Commission to settle the disputed charge or charges.

BellSouth proposes to include the bold language above based solely on the Commission's discussion during its decision on BellSouth's Motion for Reconsideration in this proceeding. The Commission did express some concern with the potential pricing of UNEs to duplicate a resold service, and the Commission's Order reflects that concern in dicta, but the Commission stated that the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated. It declined to make a determination on the matter and it did not include any language in its arbitrated agreement on the issue. Therefore, staff does not believe it is appropriate for the Commission to include BellSouth's proposed language in AT&T agreement, and BellSouth's refusal to sign the agreement without such language is completely unacceptable.

ISSUE 2: Should AT&T and BellSouth be required to sign the agreement within 14 days of the issuance of the order or show cause why they should not be fined for willful refusal to comply with the Commission's order?

RECOMMENDATION: Yes. AT&T and BellSouth should be required to sign an agreement that incorporates **exactly** what language the Commission has approved within 14 days of the issuance of the order from this recommendation or an Order to Show Cause will be issued against the non-signing party to show in writing within 20 days why it should not be fined $25,000 per day for willful refusal to comply with the Commission's order pursuant to Section 364.285, Florida Statutes.

STAFF ANALYSIS: As discussed earlier, the Commission has already identified all of the specific language that should be included in the arbitrated agreement between AT&T and BellSouth. The Commission has directed the parties to file an agreement memorializing and implementing the arbitration decision within 30 days. Neither party has complied with the Commission's order. Instead, the parties have negotiated different language than what was ordered by the Commission, attempted to include language that was not ordered by the Commission, and are still disputing language that was not even an issue in the arbitration. The Commission specifically identified what language should be included and excluded from the arbitrated agreement, but the parties have completely ignored that fact and decided they could continue to submit whatever language they felt like submitting. Staff is not sure how to make it any clearer for the parties. Staff believes that the parties have violated Section 252(b)(5) of the Act. That Section states:

> Refusal to Negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State Commission shall be considered a failure to negotiate in good faith.

Staff believes the parties should include the decisions above in a signed agreement, incorporating the exact language identified here, within 14 days of the issuance of the order from this recommendation, or an Order to Show Cause should be immediately issued against the non-signing party to show in writing why it should not be fined $25,000 per day for willful refusal to comply with the Commission's order pursuant to Section 364.285, Florida

Statutes.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open until the parties have filed their signed arbitration agreement. When the signed agreement is submitted, staff will review it to ensure that it is consistent with the Commission's orders in this docket. If the agreement comports with the Commission's orders, an administrative order should be issued acknowledging that a signed agreement has been filed and that the agreement will be deemed approved on the date the administrative order is issued. If the signed agreement does not comport with the Commission's Orders, staff will file a recommendation for the Commission's consideration.

STAFF ANALYSIS: This docket should remain open until the parties have filed their signed arbitration agreement. When the signed agreement is submitted, staff will review it to ensure that it is consistent with the Commission's orders in this docket. If the agreement comports with the Commission's orders, an administrative order should be issued acknowledging that a signed agreement has been filed. If the agreement comports with the Commission's orders, it will be deemed approved on the date the administrative order is issued. If the signed agreement does not comport with the Commission's orders, staff will file a recommendation for the Commission's consideration.