

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising
from Federal Communications Commission's
Triennial UNE review: Local Circuit Switching
for Mass Market Customers

DOCKET NO. 030851-TP

JANUARY 9, 2004

RESPONSE OF Z-TEL COMMUNICATIONS, INC. TO
BELLSOUTH'S MOTION TO STRIKE
TESTIMONY OF MICHAEL REITH

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Z-Tel Communications, Inc. ("Z-Tel"), through its undersigned counsel, submits its response in opposition to the Motion of BellSouth Telecommunications, Inc. ("BellSouth") to strike the prefiled testimony of Z-Tel witness Michael Reith. The Commission should summarily deny the motion to strike Z-Tel's testimony.

With respect to its contention regarding Z-Tel's testimony, BellSouth's "argument" consists of a bare six sentences. BellSouth states:

Z-Tel filed the direct testimony of witness Michael Reith. Mr. Reith filed 22 pages of testimony plus seven exhibits. Absolutely none of Mr. Reith's testimony or his exhibits address the issues set forth in the Second Order on Procedure. Rather, Mr. Reith's testimony consists of nothing more than a history of Z-Tel and the services it provides and a plea to the Commission to maintain the status quo. Z-Tel has completely missed the mark and has not responded to any of the issues set forth by the Second Order on Procedure. All of Mr. Reith's testimony should be stricken.

At the outset, Z-Tel notes that BellSouth's depiction of Mr. Reith's testimony as a "plea . . . to maintain the status quo" is particularly superficial: Given the national finding of impairment regarding the availability of unbundled local switching, Z-Tel could as easily brand the whole of BellSouth's testimony a "plea to alter the status quo!" An analysis of Mr. Reith's testimony—entirely lacking in BellSouth's motion--

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establishes that it is BellSouth's characterization, not Mr. Reith's testimony, that misses the mark.

Mr. Reith's testimony serves two purposes, both of which are legitimate and germane to the scope of this proceeding:

- (1) Mr. Reith describes how Z-Tel's substantial interests will be affected by the Commission's decision in this case. In the course of doing so, necessarily Mr. Reith describes Z-Tel's business activities; one cannot explain an *impact* without describing fully that which would be *impacted*.
- (2) Mr. Reith provides information relevant to Issues Nos. 1 and 2(a-c), as set forth in Order No. PSC-03-1265-PCO-TP, issued on November 7, 2003. Without referring to each word of each line of his testimony, in this Response Z-Tel will demonstrate precisely and amply how Mr. Reith's statements relate to these issues and sub-issues. (In its motion, BellSouth says the Order on Procedure includes issues on "market definition." BellSouth's description of the issues is as scant is its characterization of Mr. Reith's testimony is conclusory. In the discussion that follows, Z-Tel will relate the testimony individually to Issues 1, 2(a), 2(b), and 2(c)).

Issue No. 1 states: For purposes of this proceeding, what are the relevant markets for purposes of evaluating mass market impairment and how are they defined? Mr. Reith endorses the testimony of FCCA witness Joseph Gillan (who testifies the geographic market area should be coextensive with the ILEC service area) on the subject (Reith at page 17, lines 13-14), and proceeds to support that view by advocating that the market's geographic area should be defined broadly. He testifies that a broad geographic reach is

necessary to the ability to offer service ubiquitously, and shows this ability is in turn essential to innovation and competition.

Mr. Reith relates the very concept of “mass market” to the presence of a geographic market sufficiently large to enable a provider to generate efficiencies and economies. (page 4, line 13.) This testimony bears directly on the question posed by Issue 1.

Further, Mr. Reith points out that Z-Tel does not “redline” customers on the basis of geographic location. (Page 4, lines 9-10) He warns that an effort by an ILEC to eliminate the availability of UNE-P (which would be the effect of limiting unbundled local switching) on the basis of geographic distinctions could mean the end of competition, not only in the areas in which the access to unbundled switching (in the form of UNE-P) is eliminated, but also in areas outside those locales that would be directly affected by a regulatory limitation. (page 4, lines 13-18). He does so by demonstrating the relationship between UNE-P, which requires the availability of unbundled local switching, and the ability to provide service on a ubiquitous basis. (page 17, line 23-page 18, line 4.) The connection between the availability of unbundled switching (a necessary component of UNE-P) and ubiquitous service is therefore relevant to the issue concerning the geographic definition of the market. In this regard, Mr. Reith’s testimony is consistent with and relevant to the provisions of the TRO that emphasize the necessity of ubiquity in the context of the impairment analysis. (See, for instance, TRO footnote 1549).

Mr. Reith testifies that the Commission’s decision regarding the boundaries of the geographic markets should take into account the fact that only UNE-P (possible only with

the availability of unbundled local switching) provides a scale and scope that is necessary to support broad, “mass market” competition. (page 17, lines19-21). Again, this testimony is relevant to the appropriate size of the geographic market, the subject of Issue No. 1.

Issue 2(a) asks how “the locations of mass market customers actually being served by CLECs” should be taken into consideration in defining the relevant geographic areas to include in each of the markets. Mr. Reith testifies that Z-Tel accepts customers located throughout an ILEC’s service area. He testifies that Z-Tel’s policy of accepting customers in *all* geographical locations within the service area would be jeopardized by geographical limitations imposed on UNE-P (which requires unbundled local switching). Page 4, lines 7-18. Thus, Mr. Reith testifies that the Commission should take into consideration the desirability of a carrier’s ability to maintain the practice of accepting and serving customers throughout the CLEC’s service area, and the necessity of a broad market to maintain that ability, when assessing the appropriate size of the geographic market. This testimony is directly relevant to Issue 2(a).

Issue 2(b) asks how the definition of the relevant geographic areas should take into consideration the variation in factors affecting CLECs’ ability to serve each group of customers. Mr. Reith’s point that Z-Tel’s ability to serve customers in less profitable geographic areas is dependent on access to unbundled local switching (in UNE-P) in other areas, discussed above in the context of Issue 2(a), also responds directly to this issue. His testimony supports the contention that the variations should be taken into account by defining the market broadly in geographic terms.

Issue 2(c) asks how the definition of the geographic market should take into consideration CLECs' ability to target and serve specific markets *profitably and efficiently* using currently available technologies. (Emphasis added) Mr. Reith's description of aspects of Z-Tel's business of bundling specialized software with local service is relevant to this sub-issue. In his testimony, Mr. Reith discusses the need for broad distribution channels through which to reach such specific, targeted, far-flung potential clients of Z-Tel's specialized services as chain restaurants and multi-office banks (page 13, lines 5-19). This testimony relates directly to the discussion of CLEC Z-Tel's ability to target and serve specific markets profitably and efficiently. Further, at page 16, Mr. Reith testifies specifically that a broad distribution channel --- another way of saying a large geographic market --- is essential to enable Z-Tel to spread costs of software development over a large customer base and to utilize advertising channels efficiently and cost-effectively. (page 16, lines 2-18). Such considerations bear on Z-Tel's costs of acquiring customers (page 16) and thus its ability to serve targeted markets profitably, which is the subject of Issue 2(c). Mr. Reith explains that the limitations on available capital preclude Z-Tel from being able to finance the expensive, up-front software development costs *and* the costs of its own network, including switching. The evolution of Z-Tel as a software development company (page 5-6); the opportunity created by the 1996 Act to combine that expertise with "dialtone" (page 6-7); the description of Z-Tel's investment of tens of millions of dollars in software development and back office processes to take advantage of this opportunity (pages 7-8); the description of Z-Tel's "PVA" software and the related services that Z-Tel offers (pages 9-10); the explanation that the software development activities require enormous *up front*

investments (page 8; page 12, lines 1-3) and the references to the limited availability of capital (page 20, line 5) are thus relevant to Issue 2(c). At the same time the large investments in the development of specialized software position Z-Tel to provide innovative services, they necessitate broad, cost-effective “distribution channels” to enable Z-Tel to provide its combination of specialized software and local exchange service to customers efficiently and profitably. This testimony—and the testimony describing Operation Iraqi Freedom (page 14), Community services (page 15) and Z-Tel’s other awards and services ---is also germane to Issues 1 and 2 because it indicates, at once, both the type of innovation and competition that the broad availability of unbundled switching and UNE-P have made possible and the type of innovation and competition that could be lost if an overly narrow definition of the geographic market renders Z-Tel’s ability to offer ubiquitous service infeasible.

SUMMARY AND CONCLUSION

Evidence is relevant if it tends to prove or disprove a material fact. Section 90.401, Florida Statutes. Mr. Reith’s testimony tends to prove that the availability of unbundled local switching on a broad basis, in the form of UNE-P, is essential to the very concept of a mass market; is necessary to the ability to offer ubiquitous service throughout the ILEC’s service area; has made possible competition in the form of innovative services; and is essential to a CLEC in the business of combining expensive, specialized software development with local exchange service efficiently and profitably. His testimony tends to prove that all of these attributes of nascent but growing competition would be jeopardized if the Commission were to restrict the availability of unbundled switching based on narrowly defined geographic market boundaries. In short, Mr. Reith advocates

a broadly defined geographic market, and provides proof of the need for such markets by references to real world, carrier-specific experiences and considerations, all of which statements are material to, and indeed, go to the heart of, Issues 1, 2(a), 2(b), and 2(c). BellSouth's motion must therefore be denied.



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Z-TEL Communications, Inc.'s Response to BellSouth's Motion to Strike Testimony of Michael Reith has been provided by hand delivery and email this 12th day of January, 2004, to the following:

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