

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport.

DOCKET NO. 030852-TP  
ORDER NO. PSC-04-0150-PCO-TP  
ISSUED: February 12, 2004

**ORDER DENYING MOTION TO STRIKE**

BY THE COMMISSION:

**I. Case Background**

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements.

The Florida Competitive Carriers Association (FCCA) prefiled the direct testimony of Gary J. Ball on December 22, 2003. NewSouth Communications Corp. (NewSouth) prefiled the amended direct testimony of Jake Jennings on December 29, 2003. On January 8, 2004, BellSouth Telecommunications, Inc. (BellSouth), filed its Motion to Strike Portions of the Direct Testimony of both witness Ball and witness Jennings. On January 15, 2004, NewSouth and FCCA filed their responses to BellSouth's motion.

**II. BellSouth's Motion to Strike**

BellSouth asserts the amended direct testimony of Jake Jennings consists of 16 pages, none of which cites to an issue in the Second Order on Procedure. BellSouth argues the only portion of witness Jennings' testimony that marginally relates to the issues as set forth in this docket concern the transitional issue (issue 20).

Likewise, BellSouth asserts that the direct testimony of Gary Ball fails to cite to a single issue set forth in the Second Order on Procedure. BellSouth argues in its motion that witness Ball's testimony is nothing more than a regurgitation of the TRO, various descriptions of CLEC networks, and self-serving interpretations of the TRO that fail to provide useful evidence. BellSouth contends the only portion of Mr. Ball's testimony that should not be stricken as irrelevant is as follows: i) Page 1, line 1 through page 2, line 15; and ii) Page 23, line 5 through page 36, line 8.

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### **III. Responses in Opposition to BellSouth's Motion to Strike Testimony**

#### **A. FCCA's Response**

In its response, FCCA counters that there is no requirement in the Order Establishing Procedure that a party to cite must the specific issues its testimony addresses. However, FCCA asserts in the interest of increased convenience, it has attached the revised direct testimony of witness Ball containing specific cites to the issues in this proceeding. Further, FCCA contends witness Ball's testimony addresses two key considerations before state commissions implementing the TRO: 1) the factual findings made by the FCC in determining the national findings of impairment and the trigger analyses and 2) the architecture of ALEC networks, which are not typically "routes" providing "transport" as defined by the TRO.

#### **B. NewSouth's Response**

Like FCCA, NewSouth also asserts that the Order Establishing Procedure does not require parties to cite to the specific issues its testimony addresses. Additionally, NewSouth argues Mr. Jennings' testimony goes directly to proving or disproving material facts related to the matters before the Commission concerning the CLECs' ability to serve the mass market. Accordingly, NewSouth contends witness Jennings' testimony is material and relevant to the overarching issues in this proceeding, and to the specific issues set forth in the Second Order on Procedure. NewSouth asserts further that BellSouth has not demonstrated any factual or legal basis for the extraordinary and extremely onerous measure they seek in attempting to have Mr. Jennings' testimony stricken.

### **IV. Analysis**

Section 120.569(2)(g), Florida Statutes, states that "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible whether or not such evidence would be admissible in a trial in the courts of Florida." Section 90.401, Florida Statutes, states that "Relevant evidence is evidence tending to prove or disprove a material fact." Additionally, Section 90.402, Florida Statutes, provides that "all relevant evidence is admissible, except as provided by law." However, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence." Section 90.403, Florida Statutes.

### **V. Decision**

Upon consideration of the above arguments, I find that a decision to preclude the pre-filed testimony filed by FCCA and NewSouth would be premature at this time. Although

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proceeding. Both parties have made it quite clear in their filings that there is a significant difference in opinion as to what evidence constitutes satisfaction of the FCC's "triggers". However, such questions will be addressed by this Commission in our final order and do not constitute the proper rationale for striking testimony in this proceeding.

Accordingly, I find that FCCA's motion to strike portions of BellSouth's prefiled direct testimony is denied.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that the Florida Competitive Carriers Association's Motion to Strike BellSouth Testimony is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 12th day of February, 2004.

  
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CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

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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.

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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; or (2) 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 the Commission Clerk and Administrative Services, 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 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.