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January 11, 2002

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Mrs. Blanca S. Bayó
Division of the Commission Clerk and
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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 011077-TP (Competitive Practices)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Comments and Modified Issue List, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.


Sincerely,


James Meza III (JA)

cc: Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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CERTIFICATE OF SERVICE
Docket No. 011077-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U. S. Mail this 11th day of January, 2002 to the following:

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James Meza III (KA)

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| | | |
|------------------------------------|---|-------------------------|
| Generic Investigation Into Whether |) | Docket No. 011077-TP |
| Competitive Practices of Incumbent |) | |
| And Alternative Local Exchange |) | |
| Carriers Comply with Section |) | |
| <u>364.01(4)(G), F.S.</u> |) | Filed: January 11, 2002 |

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
COMMENTS AND MODIFIED ISSUE LIST**

Pursuant to the Florida Public Service Commission Staff's ("Staff") December 20, 2001 memorandum, BellSouth Telecommunications, Inc. ("BellSouth") submits the following comments regarding the procedure Staff has indicated will be utilized in this docket. While BellSouth appreciates Staff's efforts to develop a procedure to expeditiously resolve anticompetitive complaints, for the reasons discussed in detail below, BellSouth requests that Staff reconsider implementing the proposed procedure. In addition, attached as Exhibit A is modified list of issues for Staff's consideration in this docket. BellSouth has identified those issues that are being addressed in the collaborative or in other dockets and thus should not be considered in this proceeding. Notwithstanding this fact and assuming for the sake of argument that the duplicative issues remain in this docket, BellSouth has prioritized certain issues and has added new issues in its modified list. Finally, BellSouth requests that the Commission identify those issues that are company specific and describe in detail those subissues that are going to be addressed via a particular topic or issue.

I. PROCEDURAL COMMENTS

A. Staff's Proposed Procedure

Based on the December 12, 2001 conference call between Staff and several parties, BellSouth understands that the procedure to be utilized in this docket will consist of the following:

1. Staff will notify the parties that it will address a specific issue via a conference call.

2. On the conference call, the interested parties, with Staff's assistance, will attempt to resolve any disputes the parties may have regarding the specific issue in question.

3. If a resolution cannot be achieved, Staff will issue a recommended Proposed Agency Action ("PAA") on the specific topic in question, which will go before the Commission for a vote. Staff's decision in the PAA will be based, in whole or part, on the information it received and heard during the preceding conference call.

4. If an interested party is dissatisfied with the PAA issued by the Commission, then, pursuant to the procedure set forth in the Florida Administrative Procedure Act ("APA") and Rule 25-22.029, Florida Administrative Code, that party can protest the PAA and request a formal hearing.

Staff indicated that the purpose of this procedure was to quickly resolve anticompetitive complaints and to provide finality and certainty to generic competitive issues. In addition, Staff indicated that the docket would remain

open indefinitely, thereby allowing parties and Staff to continue to raise issues in the docket.

B. Concerns

BellSouth has the following concerns regarding the above-described procedure.

1. Staff's Procedure Constitutes an Invalid Rule

The APA sets forth the rulemaking procedure to be followed by agencies, including the Commission. The APA provides that rule making is not a matter of agency discretion; rather, each agency statement must be adopted by the rule-making procedure set forth in the APA. Section 120.54(1)(a), Florida Statutes. A "rule" is defined by the APA as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency" Section 120.52(15), Florida Statutes. A proposed or existing rule is an invalid exercise of delegated legislative authority if the agency failed to follow the applicable rulemaking procedures or requirements set forth in the APA in adopting the rule. Section 120.52(8)(a), Florida Statutes: See Section 120.52(8)(a), (16); Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991) (Department of Natural Resources' letter imposing new requirements and procedures was an invalid rule not adopted in manner required by law).

In the instant matter, Staff's proposed procedure constitutes an invalid rule because it sets forth a new Commission procedure improperly promulgated in violation of the APA's rule-making procedures. Specifically, the proposed

procedure creates a new procedural vehicle in which to resolve carrier complaints for anticompetitive or improper carrier behavior. Such a procedure is not specifically required by statute or by existing rule and no such procedure is currently in place.

Further, because the instant docket will remain open indefinitely and the scope of competitive issues that parties can raise in this docket are currently not limited, Staff's proposed procedure could apply to all future anticompetitive complaints and thus is a statement of general applicability. Indeed, Staff appeared to recognize this fact as it indicated in the December 12, 2001 conference call that parties could use this generic docket to resolve anticompetitive complaints instead of filing a complaint pursuant to Rule 25-22.036, Florida Administrative Code.

Accordingly, based on Staff's initial description of the procedure to be used in this docket, it appears that such a procedure would constitute an invalid rule because Staff would be implementing a new Commission procedure without following the required rule-making process.

Section 120.80(13)(d), Florida Statutes does not require a different conclusion. This statute provides, in pertinent part, that notwithstanding the requirements of the APA, the Commission, in implementing the Telecommunications Act of 1996 ("Act"), "is authorized to employ procedures consistent with that act." Section 120.80(13)(d).

This docket, as the caption suggests, is limited to the determination of whether incumbent and alternative local exchange carriers are in compliance

with Section 364.01(4)(g), Florida Statutes, which requires the Commission to prevent anticompetitive behavior. Thus, in addressing competitive issues raised in this docket, the Commission will not be implementing the Act; rather, the Commission will be implementing state law. Accordingly, Section 120.80(13)(d) is inapplicable to the instant proceeding.

In addition, to the extent carriers raise issues derived from the Act in this docket that are not addressed in their Interconnection Agreements, the Act requires resolution of these issues through the Act's arbitration procedures and not the procedure Staff proposed in this docket. Consequently, imposition of the proposed procedure as to these new issues would be inconsistent with the Act and thus impermissible under Section 120.80(13)(d).

Simply put, the proposed procedure Staff will utilize in this docket creates an alternative means in which to resolve carrier complaints. Such a procedure, especially in light of the unlimited scope and duration of this docket, constitutes a new Commission procedure that must be promulgated pursuant to the APA's rule-making procedures.

2. Evidentiary/Procedural/Administrative Problems

Assuming arguendo that the proposed procedure is not an invalid rule, said procedure is ripe with evidentiary, procedural and/or administrative problems.

First, based on Staff's description of the proposed procedure, BellSouth understands that, if an issue cannot be resolved on the conference call, Staff will issue a recommended PAA on the issue, which will be based on whole or part on

the information and/or argument provided in the conference call. Although no specifics have been given, BellSouth believes that this information will presumably consist of unsworn witness testimony and/or arguments by counsel. Thus, Staff will conceivably be basing its recommendation on hearsay evidence and potentially uncredible, unreliable, and incomplete witness testimony heard in a conference call. If Staff is going to base a recommendation on information provided by the parties to resolve disputed issues of fact and law, that information should be credible, complete, reliable, and subject to cross-examination, all of which are not available under the proposed procedure. Without these protections, Staff's recommendation and eventually the Commission's decision will be, at a minimum, suspect, and potentially incorrect as it could be based on invalid or incomplete information.¹

Second, while no specifics have been given, BellSouth envisions the conference call procedure becoming a "free for all," because the call would be the first time the parties would have an opportunity to present their position before Staff. However, unlike a formal hearing, there are no procedures in place to govern such a proceeding.

For instance, Staff's proposed procedure does not address whether or not direct testimony will be permitted; whether or not rebuttal testimony will be permitted; the time period for the submission of such testimony; whether a party has the right to object to certain testimony; or even whether a party has a right to conduct discovery. Without rules addressing these issues, parties would be able

¹ In such a situation, the proposed procedure would be a waste of the Commission's and the parties' time and resources because the errors made in the PAA would have to be corrected via a

to say whatever they want, whenever they want without challenge from other parties. Further, without a limitation on the submission of information, including testimony and exhibits, or adequate time in which to prepare and defend a case, the proposed procedure will be extremely burdensome on the parties and the Commission as the parties would, in effect, be routinely trying cases on an expedited schedule.

Third, the proposed procedure results in unnecessary duplication of efforts and resources. While BellSouth commits to negotiate in good faith, some issues simply cannot be settled. Consequently, for these issues, it is likely that one or both parties will oppose Staff's recommended PAA before the Commission and then, depending on the Commission's decision, protest the Commission's PAA and request a formal hearing. As a result, a party could find itself effectively trying the case three times: (1) before the Staff in the conference call; (2) before the Commission at the agenda addressing Staff's PAA; and (3) before the Commission again at the formal hearing. Not only does this scenario tax the parties and the Commission's resources, it unnecessarily delays the resolution of the issues in question.

Fourth, there is no guarantee that resolution of an issue through the generic proceeding will resolve the issue in the future, which frustrates another intended purposes of this generic docket – to provide finality to generic competitive issues. Specifically, if an issue is resolved through this docket, the doctrines of res judicata or collateral estoppel would arguably apply to the parties

formal hearing.

and thus prohibit those parties from relitigating the same or similar issues in a future proceeding.²

However, if the decision was rendered prior to a party intervening and participating in the generic docket, then res judicata or collateral estoppel would be inapplicable because it would not involve the same parties. Accordingly, an ILEC, like BellSouth, could find itself relitigating the same issues with different ALECs simply because an ALEC did not participate in the original proceeding. The Commission is fully aware of this possibility as it has repeatedly arbitrated and decided the same issues on numerous occasions because each instance involved a different party – i.e. reciprocal compensation for ISP traffic, POI, tandem switching.

In sum, while BellSouth appreciates Staff's efforts to develop a process that expeditiously resolves anticompetitive complaints, there are several evidentiary, administrative, and procedural problems that need to be addressed in order for the docket to achieve its desired result. Without addressing these problems, the proposed procedure will create uncertainty and be subject to abuse.

II. Modified Issue List

Attached as Exhibit A is a modified issue list. In this list, BellSouth has identified those issues that are already being addressed in the collaborative or other pending dockets. Staff should exclude all issues that are currently being

² Res judicata is claim preclusion and bars a later suit between the same parties upon the same cause of action. Collateral estoppel, on the other hand, is issue preclusion and is applicable only in cases where the parties are the same in the second suit but the cause of action

addressed via other dockets and/or the collaborative. To find otherwise would undermine the collaborative process, result in the unnecessary duplication of efforts, and result in the waste of the Commission's and parties' time and resources. Simply put, keeping these issues in this proceeding violates the concept of judicial economy and the Commission's responsibility to eliminate unnecessary regulation. Nonetheless, assuming for the sake of argument that duplicative issues remain in the docket, BellSouth has prioritized certain issues and added new issues for Staff's consideration.

Finally, to remove any ambiguity and potential confusion, regardless of which issues are ultimately approved, BellSouth respectfully requests that Staff identify those issues that apply to a particular party – i.e. all complaints against BellSouth only and not the other ILECs-- and describe in detail the specific subissue(s) that are going to be addressed in a particular topic or issue. Such detail is necessary to insure that all related issues are identified in each litigated issue.

is different. In re: Nocatee Util. Corp., Order No. PSC-01-1916-FOF-WS, 2001 WL 1512766 *21 (Sept. 24, 2001).

Respectfully submitted this 11th day of January, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



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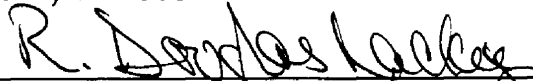
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