



Public Service Commission

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DATE: JUNE 27, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (FUDGE) *FF* *JK* *SAS*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (SIMMONS, *MS*
HARVEY)

RE: DOCKET NO. 000121A-TP - INVESTIGATION INTO THE ESTABLISHMENT OF OPERATIONS SUPPORT SYSTEMS PERMANENT PERFORMANCE MEASURES FOR INCUMBENT LOCAL EXCHANGE TELECOMMUNICATIONS COMPANIES. (BELLSOUTH TRACK)

AGENDA: 07/09/02 - REQUEST FOR OFFSET - ORAL ARGUMENT NOT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\000121A.RCM

CASE BACKGROUND

The Commission opened Docket No. 000121-TP to develop permanent performance metrics for the ongoing evaluation of operations support systems (OSS) provided for alternative local exchange carriers' (ALECs) use by incumbent local exchange carriers (ILECs). Associated with the performance metrics is a monitoring and enforcement program that is to ensure that ALECs receive nondiscriminatory access to the ILEC's OSS. Performance monitoring is necessary to ensure that ILECs are meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner. Additionally, it establishes a standard against which ALECs and this Commission can measure performance over time to detect and correct any degradation of service provided to ALECs.

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DOCKET NO. 000121A-TP

DATE: June 27, 2002

Docket No. 000121-TP consists of three phases. Phase I began with workshops conducted by staff with members of the ALEC and ILEC communities. These workshops were held on March 30, 2000, August 8, 2000, and December 13, 2000. The purpose of Phase I was to determine and resolve any policy and legal issues in this matter. Phase II involved establishing permanent metrics for BellSouth Telecommunications, Inc. (BellSouth), including a specific monitoring and enforcement program. With the completion of Phase II, the Commission is beginning Phase III of this docket, which entails the establishment of performance metrics and a performance monitoring and evaluation program for the other Florida ILECs.

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, (Final Order), the Commission established permanent performance measures and benchmarks as well as a voluntary self-executing enforcement mechanism (Performance Assessment Plan) for BellSouth. By Order No. PSC-02-0187-FOF-TP, issued February 12, 2002, as amended by Order No. PSC-01-0187A-FOF-TP, issued March 13, 2002, BellSouth's Performance Assessment Plan was approved.

By Order No. PSC-02-0503-PCO-TP, issued April 11, 2002, Docket No. 000121-TP was divided into three sub-dockets: (1) 000121A-TP, in which filings directed towards the BellSouth track would be placed; (2) 000121B-TP, in which filings directed towards the Sprint track would be placed; and (3) 000121C-TP, in which filings directed towards the Verizon track would be placed.

On June 4, 2002, BellSouth filed an Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP. Rule 28-106.204(1), Florida Administrative Code, states that responses to a motion are due within seven days of receipt of that Motion. The Petition was served via Federal Express on June 4, 2002, which according to Rule 28-106.103, Florida Administrative Code, adds one day to the response period, making the response due June 12, 2002. As of the filing of this recommendation, Supra has not filed a response.

DISCUSSION OF ISSUES

ISSUE 1: Should BellSouth Telecommunications, Inc.'s Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP be granted?

RECOMMENDATION: No, BellSouth should endeavor to meet all performance metrics. For those metrics that BellSouth does not meet, it should make payments as required by the Performance Assessment Plan. (FUDGE)

STAFF ANALYSIS: In its Petition, BellSouth requests that it be relieved of the requirement to make payments under the Performance Assessment Plan to Supra until: "(1) Supra demonstrates that it intends to make full and complete restitution to BellSouth; (2) Supra makes full and complete restitution to BellSouth; and (3) Supra remains current in its bill payments for at least six months."

BellSouth alleges that Supra has abused the litigation process to avoid its payment obligations to BellSouth. BellSouth maintains that due to the magnitude of the debt owed by Supra, it would be inequitable for BellSouth to make payments to Supra when Supra refuses to pay for wholesale services it receives.

Staff notes that the purpose of the Performance Assessment Plan is to encourage BellSouth to provide nondiscriminatory service by compensating ALECs for additional costs they incur when BellSouth's performance falls short. There is no provision in the Plan to offset the penalties owed by BellSouth against alleged debts owed by Supra, or any other ALEC. As the Commission stated in its Final Order, "[w]e agree with BellSouth that in general, disputes under agreements are to be remedied by a complaint to this Commission or pursuant to the terms of those agreements."

Staff believes that allowing BellSouth to offset would be contrary to the self-effectuating nature of the Plan. The self-effectuating provision of the Plan was established to provide timely incentives to correct non-compliant behavior. Allowing BellSouth to offset the amount of penalties owed, would diminish the effectiveness of the penalty. Moreover, a determination of the appropriate amount to offset would have to be made. While the amount, if any, BellSouth would owe was established by the Final Order and is readily calculable, the amount Supra allegedly owes

DATE: June 27, 2002

BellSouth remains in dispute. In addition, BellSouth and Supra's billing dispute is being resolved through different forums, which are outside the control of this Commission. Consequently, waiting for a determination of the amount, if any, Supra owes BellSouth would result in delayed correction of the offending behavior.

Under the Plan, BellSouth is relieved of its payment obligations, if an ALEC's acts or omissions cause a performance measure to be missed or failed. "In addition to these specific limitations of liability, BellSouth may petition the Commission to consider a waiver based upon other circumstances." However, staff believes that the provision should be interpreted to require that the ALEC's acts or omission caused BellSouth to miss or fail a performance measure. In this instance, BellSouth is not alleging that Supra's acts or omissions have caused BellSouth to miss or fail a performance measure. Instead, BellSouth is simply arguing that because Supra owes BellSouth money, it would be inequitable for BellSouth to pay.

Staff believes that any billing dispute should be pursued through a separate proceeding. Furthermore, while allowing BellSouth to place any penalty amount due to Supra in escrow would appear to be an equitable solution, the amount, if any, that Supra might owe still remains in dispute. Thus, there is no equitable way to determine how much BellSouth should be allowed to escrow. Although the Commission could allow BellSouth to escrow the entire amount it may owe Supra, this would deny Supra compensation for the additional costs it may incur because of BellSouth's poor performance. Therefore, staff believes that the most effective way for BellSouth to avoid payments to Supra during resolution of the billing dispute, is by ensuring that it meets all its performance metrics. As such, staff recommends that BellSouth's request be denied.

DOCKET NO. 000121A-TP
DATE: June 27, 2002

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open to conduct the six month review process outlined in the Final Order. (FUDGE)

STAFF ANALYSIS: This docket should remain open to conduct the six month review process outlined in the Final Order.