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Subject: RE: 000121A -- CLEC Coalition Issues List and Comments



000121A
Comments SQ

> Docket No. 000121A-TP -- In re: Investigation into the
> Establishment of Operations Support system Permanent Performance
> Measures for Incumbent Local Exchange Telecommunications Companies
> (BellSouth track)

> Attached please find for electronic filing the CLEC Coalition's Issues List
> and Comments in the above-referenced docket. **The cover letter, certificate of service and**
> **the CLEC Coalition's Comments are a total of 15 pages. The attached document should be**
> **considered the official version for purposes of the docket file.**

> As indicated in the cover letter, copies of the CLEC Coalition's Comments are
> being distributed to parties via electronic (in cases where e-mail addresses are
> available) and U.S. Mail. Thank you for your assistance in this matter.

> <<000121A CLEC Comments SQMObligations 9-13-04.pdf>>

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FPSC-COMMISSION CLERK

ORIGINAL



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September 13, 2004

BY ELECTRONIC FILING

Ms. Blanca Bayó, Director
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Tallahassee, Florida 32399-0850

Re: Docket No. 000121A-TP

Dear Ms. Bayó:

Pursuant to Staff's request at the September 2, 2004 Workshop, attached please find the CLEC Coalition's Issues List and Comments addressing BellSouth's SQM obligations and the Commission's continued activity in the above-referenced docket. Pursuant to the Commission's Electronic Filing Requirements, this version should be considered the official copy for purposes of the docket file. Copies of this document will be served on all parties via electronic and U.S. Mail.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Tracy W. Hatch

Tracy W. Hatch

TWH/las
Attachment
cc: Parties of Record

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment)	
of Operations Support System Permanent)	Docket No. 000121A-TP
Performance Measures for Incumbent)	
Local Exchange Telecommunications)	Filed: September 13, 2004
Companies (BellSouth Track))	

CLEC COALITION'S ISSUES LIST AND COMMENTS

The Competitive Local Exchange Carrier Coalition ("CLEC Coalition"), consisting of ACCESS Integrated Networks Inc. ("AIN"), AT&T Communications of the Southern States, LLC ("AT&T"), Birch Telecom, Inc., MCImetro Access Transmission Services, LLC ("MCI"), DIECA Communications Company d/b/a Covad Communications Company ("Covad"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom/BTI"), NewSouth Communications, Corp., and Nuvox Communications Inc., hereby submits its issues list and comments addressing BellSouth's SQM obligations and the Commission's continued activity in this docket pursuant to Staff's request at the workshop held on September 2, 2004.

ISSUES LIST

ISSUE 1: Should BellSouth be allowed to abandon its performance measures obligations for those wholesale elements or services required by the Telecommunications Act of 1996 or state law?

CLEC RESPONSE: No. Separate from its obligations under Section 251, BellSouth continues to be obligated to provide non-discriminatory access to certain elements and services under Section 271 of the Telecommunications Act of 1996 and Florida statutes. To ensure BellSouth's compliance with these requirements of non-

discriminatory access, performance measures such as those implemented by this Commission are crucial. Further, excusing BellSouth from providing non-discriminatory access to these wholesale elements and services is against the public interest and the purpose of service quality measurements.

I. The Purpose of the SQM is to Discourage Anti-Competitive Behavior, Encourage Fair and Effective Competition, and Enforce BellSouth's Section 271 Obligations.

Both federal and state law require BellSouth's continued adherence to the performance measures plan established by this Commission. Yet, BellSouth's position, evident from BellSouth's discussions at the workshop and based on past filings, that the SQM is narrowly tailored to enforce BellSouth's section 251 obligations without regard to its 271 obligations or other requirements of the Telecommunications Act of 1996 and Florida law. BellSouth's position is contrary to this Commission's established authority to implement performance measures under both federal and state law and is contrary to BellSouth's own previous position that performance measures are to ensure no backsliding occurs once it was granted Section 271 interLATA authority.

A. This Commission Has Authority To Enforce Performance Measures Under Both State and Federal Law.

In its first Performance Measures Order, this Commission acknowledged that state and federal law requires the Commission to ensure the incumbent opens its network to competitors.

Authority to Implement Measures and Benchmarks:

Both Chapter 364, Florida Statutes, as amended in 1995, and the Telecommunications Act of 1996 mandate the opening of local telecommunications markets to competition. Both statutes require incumbent local exchange companies to provide access to and interconnection with their facilities to competitive carriers. Both statutes contemplate a central role for the state commission in implementing these requirements. Both statutes authorize state

commission review and authority over interconnection agreements between incumbents and competitors.

See also Section, 364.19, Florida Statutes, (stating that [t] he commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.") In this proceeding, the appropriate terms to encourage non-discriminatory access are adequately defined measures, benchmarks and analogs. Consequently, we have the authority under state and federal law to implement the measures, benchmarks, and analogs contained in this Order. (Emphasis Supplied)¹

Further, this Commission has emphasized that its authority to implement performance measures is based on its duty to ensure “the development of fair and effective competition” ((F.S.A. §364.01(3)) and to preclude anticompetitive behavior (F.S.A. §364.01(4)(g)).

We are vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01(3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that we shall exercise exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.²

¹ FPSC Order No. PSC-01-1819-FOF-TP in Docket No. 000121-TP issued on September 10, 2001.

² Order No. PSC-04-0511-PAA-TP issued in Docket No. 000121A-TP on May 19, 2004.

B. BellSouth Acknowledges That The Purpose of Performance Measures Is To Ensure BellSouth's Continuing Compliance With Section 271 Obligations.

Indeed, BellSouth has acknowledged that performance measures are to ensure its own continued compliance with Section 271 obligations. In addition to discouraging anti-competitive behavior and encouraging fair and effective competition, in BellSouth's own words, "the purpose of the enforcement provisions of the [SEEM] plan is to prevent 'backsliding' after BellSouth obtains authority to provide interLATA service."³

In its original Performance Measures Order, this Commission discusses BellSouth's position that performance measures are needed after BellSouth was granted Section 271 relief.

XV. EFFECTIVE DATE

Here, we address when the Performance Assessment Plan' becomes effective. BellSouth believes it should not become effective until interLATA authority is granted to BellSouth. However, the ALECs believe it should be effective immediately. (Emphasis Supplied).

Arguments

BellSouth witness Cox states that it is appropriate that no part of the enforcement mechanism proposal take effect until the plan is necessary to serve its purpose – that is, until BellSouth receives interLATA authority. (Emphasis Supplied).⁴

BellSouth is now anxious to scrap the very plan it endorsed in order to obtain its much desired long distance approval. When presented to the FCC, BellSouth touted the Florida SEEM plan as including "clearly articulated, pre-determined measurements and standards that encompass a comprehensive range of carrier-to-carrier performance. The

³ BellSouth Telecommunications, Inc. Brief of the Evidence, FPSC Docket 000121-TP, filed May 31, 2001, p. 1.

⁴ FPSC Order No. PSC-01-1819-FOF-TP in Docket No. 000121-TP issued on September 10, 2001.

SEEM encompasses measurements of key outcomes where a failure to produce that outcome would have a direct, significant effect on competition.”⁵ Indeed, the FCC relied on the existing plan in its Order granting BellSouth 271 authority in Florida and Tennessee and recognized the need for compliance with those measures to continue:

The state commissions also adopted a broad range of performance measures and standards, as well as Performance Assurance Plans **designed to create financial incentives for BellSouth’s post-entry compliance with section 271.** Moreover, the state commissions have committed themselves to actively monitor BellSouth’s continuing efforts to open the local markets to competition.⁶

The FCC also noted that:

The Florida plan structure was developed with input from the Florida Commission’s staff, BellSouth, and the competitive LECs. We believe that competitive LECs had sufficient opportunity to raise any issues in the Florida proceeding, and that the issues were appropriately handled by the workshops and the Florida Commission...In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth’s SEEMs. We anticipate that the parties will continue to build on their own work and the work of other states **to ensure that such measures and remedies to accurately reflect actual commercial performance in the local marketplace.** (Emphasis Supplied)⁷

This Commission should therefore deny BellSouth’s attempt to shed its 271 obligations.

Further, when the FCC granted BellSouth interLATA authority in Georgia and Louisiana, it again emphasized the necessity of BellSouth’s compliance with performance measures post Section 271 approval. The FCC stated:

⁵ BellSouth Application, Affidavit of Alphonso J. Varner at para. 184.

⁶ *Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, (BellSouth Application), WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828 (2002) at para.2 (citations omitted).

⁷ *Id.* at para. 170 (*sic*) (citations omitted).

In prior Orders, the [Federal Communications] Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentive to continue to satisfy the requirements of Section 271 after entering the long distance market. Although it is not a requirement for Section 271 Authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after grant of such authority.⁸

Indeed, Section 251 obligations are not even mentioned by the FCC. Manifestly then, performance measures are intended to enforce BellSouth's 271 obligations following the grant of 271 authority.

In contravention of its own previous advocacy and FCC precedent, BellSouth now attempts to avoid any relationship to its 271 obligations or the jurisdictional basis of the SQM. However, the law is clear that BellSouth remains obligated to provide non-discriminatory access to UNEs and other services and performance measures are crucial to ensure BellSouth's compliance with those obligations.

II. BellSouth's Obligation to Provide Non-Discriminatory Access to UNEs Under Section 271 is Independent of its Obligation to Provide Access Under Section 251.

BellSouth's argument that the delisting of a UNE under Section 251 means it has no further obligations concerning those UNEs is without merit. BellSouth continues to have obligations pursuant to Section 271 and state law. Despite BellSouth's reasoning, the FCC expressly held that "BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis."

⁸ *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Red 9018, 9181082, ¶ 291 (2002) (emphasis added).

TRO at ¶ 655. Moreover, the FCC expressly addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under 251, and yet continue the identical requirement under section 271:

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be “impaired” without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that **section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251**, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

TRO at ¶ 659 (emphasis added).

In short, although the *price* for a “de-listed” UNE may change, if that UNE falls under 271(c)(2)(B)(iii)-(vi) and (x), the obligation to provide non-discriminatory *access* remains. BOCs who continue to sell long distance must continue to provide non-discriminatory access to all checklist items “de-listed under 251.”⁹ Whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

III. Because BellSouth Remains Obligated to Provide Non-Discriminatory Access to Wholesale Elements and Services Pursuant to Section 271 and State Law, BellSouth’s Performance Measures Obligations Continue.

In accordance with the purposes of the SQM and the continuing obligation of BellSouth to provide non-discriminatory access to certain wholesale elements and

⁹ With the exception of checklist item numbers 1 and 2, as these items are directly tied to section 251 UNEs.

services, BellSouth's obligation to comply with the existing SQM requirements continues and is unaffected by any de-listing of UNEs under Section 251. It is strongly in the public interest that the customers of competitive carriers are protected from discriminatory treatment by BellSouth. Further, the Florida Commission has authority under Section 364.161(1) F.S. to impose an independent state obligation upon ILECs to unbundle their networks upon request by a CLEC.

What BellSouth is really asking this Commission to do is grant BellSouth unfettered discretion to abandon its obligations under the Telecommunications Act of 1996 and state law. The SQM is necessary for the very reasons that underlie the Commission's jurisdiction: discouraging anti-competitive behavior and encouraging fair and effective competition. As long as BellSouth is obligated to provide non-discriminatory treatment to its competitors and its competitors' customers, performance measures are required to enforce that obligation.

Respectfully filed this the 13th day of September 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the CLEC's Presentation

was served by U.S. Mail this 13th day of September 2004 to the following:

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