

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 17, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Salak)
Office of the General Counsel (Teitzman, Wiggins) *AT* *MS*

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 02/28/06 – Regular Agenda – Posthearing Procedural Decision – Parties May Participate

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041269.RCM.DOC

Case Background

On August 21, 2003, the FCC released its Triennial Review Order (TRO), which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in USTA I.

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in USTA II, which vacated and remanded certain provisions of the TRO. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

The FCC released an Order and Notice (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops, and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after publication of the Interim Order in the Federal Register. On February 4, 2005, the FCC released the Triennial Review Remand Order (TRRO), wherein the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to the decisions handed down in USTA II and the FCC's Orders, BellSouth Telecommunications, Inc. (BellSouth) filed on November 1, 2004, its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that the Commission determine what changes are required in existing, approved interconnection agreements between BellSouth and CLECs in Florida as a result of changes in law. Pursuant to Order No. PSC-05-0736-PCO-TP, Order Establishing Procedure, issued on July 11, 2005, 31 issues were identified.

On May 5, 2005, the Commission issued the No-New-Adds Order, finding that the TRRO is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005.

On July 15, 2005, BellSouth filed a Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling. On July 22, 2005, CompSouth responded to the Motion and filed a Cross Motion for Summary Final Order or Declaratory Ruling.

On August 22, 2005, Supra Telecommunications and Information Systems, Inc. filed its Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base. On November 8, 2005, the Commission issued its Embedded Base Order, which denied Supra's motion and found that the TRO prohibits CLECs from adding any new local switching UNE arrangements.

On September 29, 2005, parties filed prehearing statements. The administrative hearing was conducted on November 2-4, 2005. At the commencement of the administrative hearing, the Commission denied BellSouth's Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling and CompSouth's Cross-Motion or Declaratory Ruling. Post-hearing briefs were filed on November 30, 2005.

On January 26, 2006, staff filed its recommendation addressing the remaining unresolved issues. At the February 7, 2006 Agenda Conference, the Commission considered and approved staff's recommendations on all remaining issues with exception of issue 13 upon which staff was denied. Parties are currently scheduled to file their signed interconnection agreements and amendments on February 27, 2006, for Commission approval.

Subsequent to the Commission's consideration of staff's recommendation at the February 7, 2006 Agenda Conference, the Inspector General completed an investigation into alleged misconduct by a staff member, Ms. Doris Moss, who was assigned to this docket. The Inspector General concluded that Ms. Moss had sent, under fictitious names, unauthorized e-mail communications to Commissioners and BellSouth which constituted violations of Commission

policy and State and Commission rules including conduct unbecoming a state employee (under Rule 60L-36.005(3)(f), F.A.C.) and improper communication between a Commission employee and a party (under Rule 25-22.033, F.A.C.) Ms. Moss' employment was promptly terminated following conclusion of the investigation.

On February 14, 2006, the Chairman's office received a letter from Covad Communications Company (Covad) requesting that the Commission, *sua sponte*, withdraw all portions of the staff recommendation in this docket that were the responsibility of Doris Moss, as well as those she discussed in her e-mails, assign new staff to those issues, and direct such staff to prepare an independent recommendation for the Commission's de novo consideration to ensure fair and impartial consideration of the affected issues. The affected issues are 5, 13, 16-18, and 22(b).

On February 16, 2006, the Chairman's office received a letter from BellSouth in response to Covad's letter and request. BellSouth states in its letter that although it does not believe reconsideration of the affected issues is necessary to ensure fairness and impartiality to the parties, BellSouth has no objection to *sua sponte* reconsideration of the affected issues. BellSouth further requests that the Commission neither withdraw or suspend its rulings on the issues while additional review is being conducted.

This recommendation addresses the appropriate action for the Commission to take in light of the identified employee misconduct.

Discussion of Issues

Issue 1: Should the Commission, on its own motion, vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct staff to assign new staff members to review the existing record and prepare a new recommendation on those issues for the Commission's de novo consideration?

Recommendation: Yes. Staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the existing record and prepare a new recommendation on these issues for the Commission's de novo consideration. (TEITZMAN)

Staff Analysis:

The Commission Code of Ethics requires that, consistent with their role as public servants of the State of Florida, Commissioners and Staff of the Commission shall aspire to "provide fair and impartial analyses, recommendations, and decisions regarding all Commission matters." The Code of Ethics also clearly identifies that its purpose is "to communicate to the public that the Commissioners and Staff of the Florida Public Service Commission are dedicated to the highest standards of professional integrity and conduct and that, individually and collectively, we are fair and honest with all parties in all Commission-related business and professional activities."

Staff believes that the conduct of Ms. Moss has created a perception of bias and raises reasonable concerns regarding the impartiality of her analyses and recommendations addressing Issues 5 and 16-18. Additionally, her actions raise concern regarding the handling of Issues 13 and 22(b) on which she improperly communicated with a party. Staff believes the perception of bias in this case contravenes the purpose of the Commission Code of Ethics and that the Commission should take aggressive action to ameliorate these concerns.

Accordingly, staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the record and prepare a new recommendation on these issues for the Commission's de novo consideration.

Issue 2: Should the Commission issue a Final Order on the non-vacated issues?

Recommendation: ~~Yes. If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.~~

~~If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission.~~

Yes. The Commission should direct that a Final Order on all non-vacated issues be issued immediately. The Prehearing Officer issued an order on February 21, 2006, requiring the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues by March 10, 2006.

Because it would be impractical for the Commission to grant administrative approval to these agreements before the March 11, 2006 date specified in the TRRO, staff further recommends that the Commission require the agreements and amendments to specify that they will take effect as of March 11, 2006, provided they are ultimately approved by the Commission. (TEITZMAN)

Staff Analysis: ~~If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.~~

~~If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission.~~

The Commission should direct that a Final Order on all non-vacated issues be issued immediately. Pursuant to the Prehearing Officer's order issued on February 21, 2006, the deadline for the parties to file interconnection agreements or amendments incorporating the Commission's decisions in this docket was extended, with the agreement of BellSouth and Covad, from February 27, 2006 to March 10, 2006.

Because it would be impractical for the Commission to grant administrative approval to these agreements before the March 11, 2006 date specified in the TRRO, staff further

recommends that the Commission require the agreements and amendments to specify that they will take effect as of March 11, 2006, provided they are ultimately approved by the Commission.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission.
(TEITZMAN)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission.