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

DATE: March 1, 2007

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

FROM: Division of Competitive Markets & Enforcement (Hartley, Hallenstein) *PH*
Office of the General Counsel (Teitzman) *PH*

RE: Docket No. 000121A-TP – Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies. (BELLSOUTH FLORIDA TRACK)

AGENDA: 03/13/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

Case Background

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121A-TP, the Commission adopted a Performance Assessment Plan for purposes of monitoring performance levels of Operations Support Systems provided to CLECs. The Performance Assessment Plan is comprised of a Service Quality Measurement Plan (SQM) and a Self-Effectuating Enforcement Mechanism (SEEM) Administrative Plan. The SQM is a comprehensive and detailed description of BellSouth's performance measurements. The SEEM Plan includes key measures to which remedy payments are applied if BellSouth fails to meet the performance standards as agreed by the parties and approved by the Commission.

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On September 6, 2006, BellSouth filed a letter with the Commission to identify an issue with the process for paying penalties associated with the interpretation of Section 4.4.3 of BellSouth's SEEM plan. In the letter, BellSouth specifically stated that the auditing firm of PricewaterhouseCoopers LLP (PWC) completed an audit of BellSouth's 2004 SEEM payments and determined that BellSouth may be subject to penalties for paying a portion of the Tier 2 SEEM payments late.

This recommendation addresses whether or not BellSouth should be assessed a penalty for Tier 2 SEEM payments made after the due date.

Jurisdiction

The Commission is 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 the Commission shall exercise its 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.

Discussion of Issues

Issue 1: Should the Commission accept BellSouth's offer to pay penalties of \$66,300 to the Commission for deposit in the State General Revenue Fund as a settlement pursuant to Section 4.4.3 of BellSouth's Self-Effectuating Enforcement Mechanism (SEEM) Administrative Plan for late remittance of certain Tier 2 payments made in 2004?

Recommendation: Yes. Staff recommends that the Commission accept BellSouth's offer to pay \$66,300 to the Commission for deposit in the State General Revenue fund as a settlement for penalties resulting from Tier 2 SEEM payments made after the due date. (Hallenstein, Teitzman)

Staff Analysis:

BellSouth's SEEM Plan lists the specific service quality measurements that are subject to remedy payments if BellSouth fails to meet a specified level or standard of performance. Failure to meet the standards may trigger two separate categories of remedy payments. If one or more measures indicate that BellSouth has provided non-compliant service to a specific CLEC, BellSouth will make Tier 1 remedy payments directly to that CLEC for each performance measurement that failed. Similarly, if BellSouth provides non-compliant service for one or more performance measurements over a consecutive three-month period for CLECs in the aggregate, BellSouth pays Tier 2 remedies to the Commission for deposit in the State General Revenue fund for each performance measure that failed.

On September 6, 2006, in Docket 000121A-TP, BellSouth filed a letter self-reporting findings of a Generally Accepted Accounting Principle (GAAP) audit of BellSouth's 2004 SEEM payments. The audit was conducted by the firm of PricewaterhouseCoopers LLP (PWC). In the audit, PWC concluded that BellSouth was late in paying a portion of Tier 2 SEEM payments.

According to BellSouth's SEEM Plan, and as agreed to by the parties to this docket, both Tier 1 and Tier 2 SEEM payments and accompanying reports are to be posted to BellSouth's Performance and Analysis Platform website by the 15th of every month. Also included in the SEEM Plan is a provision for penalties if Tier 2 SEEM payments are made after the due date. Specifically, section 4.4.3 of the SEEM Plan states:

For each day after the due date that BellSouth fails to pay the Tier 2 Enforcement Mechanisms, BellSouth will pay to the Commission an additional \$1,000 per day.

As previously noted, PWC discovered that BellSouth, on several occasions, was late in paying a portion of the Tier 2 SEEM payments. There were six additional Tier 2 late payments which totaled \$171,950 and were identified by BellSouth based on a rerun of SEEM data subsequent to the payment due date. The payments were delayed as a result of manual transactions that were entered into BellSouth's SEEM production cycle too late to meet the payment due date on the 15th of each month.

The late payments for Tier 2 SEEM payments raise two basic questions with respect to the penalty provisions of section 4.4.3 of the SEEM Plan. First, do these late postings actually trigger the penalty provisions given that they were not intentional, they were not due to negligence, and they were discovered only as a result of BellSouth's self-audit (which reflects BellSouth's overarching commitment to comply with the plan). Staff believes the penalty provisions are triggered, although BellSouth disagrees.

The second question (assuming that the penalty provisions are triggered) is how many late days do the Tier 2 late postings represent. This is important because section 4.4.3 provides for a penalty of \$1,000 per late day. Staff believes the six late payments represent 246 late days, and thus BellSouth is liable under the plan for \$246,000 in penalties.

In the audit, PWC determined that the maximum "late-day" count was 663.¹ Staff does not believe that this is the appropriate number for the purpose of implementing section 4.4.3. This is an inflated number because PWC treated the six late payments as 29 separate failures. In short, while PWC's approach may have been appropriate for the purpose of advising BellSouth's maximum exposure, it is not appropriate for the purpose of enforcing the SEEM plan.

BellSouth Objects To Any Penalty

BellSouth contends that the intent of Section 4.4.3 of the SEEM Plan is that a fine would apply when BellSouth intentionally fails to make a required Tier 2 payment or when BellSouth is negligent in processing the underlying measurement data to calculate the penalties. In each of the late payment occurrences, BellSouth discovered that certain additional Tier 2 amounts were owed and were paid following such discovery. BellSouth argues that these SEEM payments were not knowingly withheld and, on the contrary, were the result of data reruns and due diligence.

BellSouth believes that it owes no fine for the Tier 2 late payments. However to resolve this issue BellSouth first proposed to pay \$385 in fines based on the same criteria used for determining penalties associated with late Tier 1 payments. Tier 1 late payments are subject to 6% simple interest per annum for each day late after the due date BellSouth fails to pay a CLEC. Additionally, in light of the difference in interpretation of Section 4.4.3 of the SEEM Plan, BellSouth further proposed to amend Section 4.4.3 to parallel the SEEM provision for Tier 1 late payments (i.e., a 6% simple interest per annum for late Tier 2 payments).

BellSouth Settlement Proposal

Staff disagreed with BellSouth's proposal to pay \$385 in penalties using a 6% simple interest rate. It is staff's position that BellSouth is obligated to pay penalties in the context of the existing provision language as ordered in this docket per Order No. PSC-01-1819-FOF-TP. In other words, staff believes that BellSouth is obligated to pay \$1,000 per day in the aggregate for

¹ Thus PWC advised BellSouth that its maximum exposure for penalties under section 4.4.3 was \$663,000, based on assessing a penalty for each late measure (29 occurrences).

each "late-day." To settle this dispute, BellSouth has offered to pay a penalty in the amount of \$66,300.

Staff is recommending acceptance of BellSouth's offer of \$66,300 to the Commission. We make this recommendation for four basic reasons.

First, the payment of \$66,300 for late payments of \$171,950 amounts to a penalty of 38.5%. Staff believes this penalty is meaningful and consistent with the purposes of the plan and specifically, Section 4.4.3.

Second, the settlement potentially avoids litigation, while allowing the proper operation of Section 4.4.3 of the SEEM Plan to be clarified, along with other provisions, in a future recommendation on the BellSouth Performance Assessment Plan.

Third, although staff believes that section 4.4.3 is a "strict liability" provision, the settlement offer does take into account mitigating factors. BellSouth performed a due diligence review, discovered that additional remedies were owed, and immediately paid the remedies. BellSouth subsequently came forward and reported the findings of the audit to the Commission. It is appropriate to take BellSouth's good faith efforts into account when determining whether to accept a settlement offer.

And fourth, a reasonable settlement will avoid discouraging BellSouth from continued self-auditing and self-reporting.

Conclusion

Staff recommends that the Commission accept BellSouth's offer to pay \$66,300 to the Commission for deposit in the State General Revenue fund as a settlement for penalties resulting from Tier 2 SEEM payments made after the due date.

Docket No. 000121A-TP

Date: March 1, 2007

Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. This Docket should remain open thereafter to continue the review process as adopted in the BellSouth's Performance Assessment Plan. (Teitzman)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the resulting Order will be issued as Proposed Agency Action. The Order will become final upon issuance of a Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. Staff recommends that this Docket should remain open thereafter to continue annual reviews of BellSouth's Performance Assessment Plan.