

ORIGINAL

Matilda Sanders

From: Smith, Debbie N. [Debbie.N.Smith@BELLSOUTH.COM]
 Sent: Tuesday, June 08, 2004 2:54 PM
 To: Filings@psc.state.fl.us
 Cc: Holland, Robyn P.; Nancy Sims; Fatool, Vicki; Bixler, Micheale; Peters, Evelyn; Culpepper, Robert; Slaughter, Brenda
 Subject: Florida Docket No. 040443-TL
 Importance: High

<<BST's Response to CLEC Coalition's Motion to Dismiss>> <<BST Response.doc>>

- A. Debbie Smith
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- B. Docket No. 040443-TL: In Re: Petition of BellSouth Telecommunications, Inc. for the Opening of a Docket to Establish a New Performance Assessment Plan

- C. BellSouth Telecommunications, Inc.
 on behalf of Robert A. Culpepper

- D. 16 pages total (including exhibits) (PDF Official Filing Copy)
 10 pages - WORD (in lieu of disk)

- E. BellSouth Telecommunications, Inc.'s Response to CLEC Coalition's Motion to Dismiss

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ORIGINAL

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June 8, 2004

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

Re: Docket No. 040443-TL
**Petition of BellSouth Telecommunications, Inc. for the Opening
Of a Docket to Establish a New Performance Assessment Plan**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response to CLEC Coalition's Motion to Dismiss. We ask that you file this document in the referenced docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely



Robert A. Culpepper

Enclosures

cc: Attached service list
Marshall M. Criser, III
Nancy B. White
R. Douglas Lackey

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**CERTIFICATE OF SERVICE
Docket No. 040443-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

Electronic Mail and First Class U. S. Mail this 8th day of June, 2004 to the following:

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Robert A. Culpepper

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth)
Telecommunications, Inc. for the)
Opening of a Docket to Establish a)
New Performance Assessment Plan.)

Docket No.: 040443-TL

Filed: June 8, 2004

✽

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE
TO CLEC COALITION'S MOTION TO DISMISS

BellSouth Telecommunications, Inc., ("BellSouth") hereby files this response to the Motion to Dismiss Petition of BellSouth Telecommunications, Inc. for the Opening of a Docket to Establish a New Performance Assessment Plan ("*Motion to Dismiss*"), filed by the CLEC Coalition¹ on June 1, 2004. For the reasons set forth below, the Florida Public Service Commission ("Commission") should deny the *Motion to Dismiss* and proceed with establishing a new performance assessment plan for BellSouth in Florida.

As stated more fully in BellSouth's Petition for the Establishment of a New Performance Assessment Plan filed on May 12, 2004 ("Petition"), a new performance assessment plan is necessary because: (i) the current performance assessment plan ("Current Plan") generates excessive and irrational payments; (ii) BellSouth is not backsliding in the level of service provided to CLECs; (iii) anticipated modification of the Current Plan has not occurred and appears unattainable; and (iv) many of the Current Plan's measurements are unnecessary and tracking such measurements unduly complicates the Current Plan.

¹ The CLEC Coalition is comprised of AT&T Communications of the Southern States, LLC; Birch Telecom; Covad Communications Company; LecStar Telecom, Inc.; MCI metro Access Transmission Services, LLC, MCI WORLDCOM Communications, Inc; Network Telephone Corp.; NuVox Communications Inc.; and ITC DeltaCom Communications, Inc.

DOCUMENT NUMBER-DATE

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I. STANDARD OF REVIEW

In considering the CLEC Coalition's *Motion to Dismiss*, the Commission should adhere to the following well-established principles of review:

The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them.²

Among other things, BellSouth's Petition alleges that: (i) the Commission has the power to revise the Current Plan in the manner set forth in the Petition; (ii) the Commission contemplated that the Current Plan would evolve; (iii) the Current Plan's "Change Mechanism" provision is not working as anticipated; and (iv) despite no performance backsliding, the Current Plan generates excessive and irrational penalty payments. Given the aforementioned allegations and the applicable standard of review, the *Motion to Dismiss* must be denied.

II. CLEC COALITION'S MOTION TO DISMISS

As discussed below, the various reasons given by the CLEC Coalition in support of its *Motion to Dismiss* are unsubstantiated, misleading, inapplicable, and appear designed simply to maintain the *status quo*.

² *Sobi v. Fairfield Resorts*, 846 So.2d 1204, 1206 (Fla. Dist. Ct. App. 2003)(citations omitted).

A. BellSouth's Petition is Consistent With the Letter and Intent of the Commission's Final Order issued in Docket No. 000121-TP .

As an initial matter, the CLEC Coalition claims that BellSouth's Petition is contrary to Florida law regarding the effect of *res judicata* and the "administrative finality" of Commission Orders. Specifically, the CLEC Coalition, quoting *Peoples Gas System v. Mason*, 187 So.2d 335, 339 (Fla. 1966), contends that BellSouth's Petition should be dismissed because BellSouth must demonstrate "substantially changed circumstances" before the Commission "can abandon an earlier order."³ The CLEC Coalition mischaracterizes BellSouth's Petition.

BellSouth has not suggested for the Commission to ignore its prior Orders. Rather, BellSouth urges the Commission to draw upon the data collected over the past two years of operating under the Current Plan and to use such data to craft a performance assessment plan that complies with the Commission's vision of an efficient and effective performance assessment plan. As such, BellSouth's Petition is completely consistent with the Commission Order that resulted in the Current Plan, Commission Order No. PSC-01-1819-FOF-TP, issued September 10, 2001 ("*Final Order*"). The *Final Order* contemplated a "living" plan that would be appropriately modified as CLEC activity grew and the needs of the CLEC industry evolved.⁴ As such, the Current Plan contains a six-month periodic review provision.⁵

³ *Motion to Dismiss*, at p. 4

⁴ *See Final Order*, at p. 204 (ordering "that this docket shall remain open for the periodic reviews of the Performance Assessment Plan")

⁵ SEEM, Section 3.1 (Modification to Measures)

The periodic review process has resulted in some changes in the Service Quality Measurement (“SQM”) portion of the Current Plan. However, fundamental SQM problems, such as the number of measures and the SQM’s level of disaggregation, have not been addressed. Further, and notwithstanding the best efforts of the Commission Staff, the periodic review process has not produced any revisions to the enforcement aspect of the Current Plan, i.e. the Self-Effectuating Enforcement Mechanism Administrative Plan (“SEEM”). For example, and as discussed in BellSouth’s Petition, the severity aspect of SEEM -- an issue identified by the Commission almost three years ago in the *Final Order* -- remains open.

Contrary to the CLEC Coalition’s assertion, the *Final Order* contains no requirement of a showing of “substantially changed circumstances” before the Commission may consider revising or revamping the Current Plan. Rather, the Current Plan and the *Final Order* expressly recognize that the Current Plan can, and will, change over time, albeit through the periodic review process. Experience has proved that the Current Plan’s change mechanism, i.e. the periodic review process, is not producing timely and appropriate plan revisions. The Petition simply asks that the Commission begin the process required to implement a more efficient and rational performance assessment plan, in part by relying on the experience gained over the past two years of operating under the Current Plan.

Finally, the facts of the *Peoples Gas System* case cited by the CLEC Coalition in its *Motion to Dismiss* are distinguishable and the case’s holding is not applicable. The facts involved a dispute between two gas companies over the terms contained in a territorial service

area agreement that the Commission initially approved, but later rescinded in part.⁶ Under the facts of the case, the Court found the Commission's partial withdrawal of its prior approval improper:

Among the points presented by the petitioner, we settle on one question which is basic and decisive of this cause. It is simply whether the commission may, some four and one-half years after entry of an order approving a service area agreement, modify that order on the ground that it initially lacked the power to enter such an order. We find the answer to be in the negative, which makes answers to the other questions presented unnecessary.⁷

Here, in contrast, the *Final Order* and the Current Plan anticipate and explicitly authorize plan revisions. In any event, Commission precedent plainly authorizes the Commission to correct clerical errors in prior orders to "preserve settled expectations."⁸ Consistent with such precedent, the Petition asks the Commission to take the "corrective" action necessary to establish a performance assessment plan that meets the expectations of the parties and the Commission as articulated in the *Final Order*.

B. The CLEC Coalition Has No Economic Incentive to Resolve Critical Issues through the Periodic Review Process.

In support of its *Motion to Dismiss*, the CLEC Coalition asserts that the periodic review process is the more appropriate forum to address the serious problems with the Current Plan that were identified and discussed in BellSouth's Petition. The CLEC Coalition states that the six-

⁶ *Id.* at 336.

⁷ *Id.* at 338.

⁸ *In re: Request by Seacoast Utilities for order to correct legal description in Order 17158 issued 2/5/87 to amend certificates 29-W and 29-S in Palm Beach County*, PSC Docket No.

month review process “presents a useful framework for resolving issues, so long as the parties are motivated to use it for that purpose.”⁹ In addition to implying that BellSouth is to blame for the problems with the periodic review process, the CLEC Coalition claims that BellSouth’s “own behavior has been an impediment to the [success of the periodic review] process”¹⁰ and that BellSouth “has caused delay by repeatedly rejecting Staff’s attempts to offer compromise proposals [for implementing a severity mechanism into the SEEM plan].”¹¹

Contrary to the CLEC Coalition’s contentions, BellSouth has actively participated in good faith in the periodic review process. It is true that BellSouth has been unable to accept every aspect of the Commission Staff’s formal recommendations relating to the severity aspect of SEEM. However, it is as equally true that BellSouth has thoroughly considered all of the features of the Commission Staff proposals, and has offered several counterproposals for many of the objectionable aspects of the Staff proposals, all of which have been rejected by the CLEC Coalition. Regardless of how one may characterize the motives behind a party’s actions, the fact remains that the six-month periodic review process has become akin to an adversarial setting (rather than a collaborative workshop environment), and therefore is not working in the way the Commission envisioned.

880675-WS, Order No. 19845, issued August 22, 1988. at p.3 (“There is no time limit which applies against correction of administrative orders.”) (copy attached as Exhibit A)

⁹ *Motion to Dismiss*, at p.5 (emphasis added)

¹⁰ *Id.*

¹¹ *Motion to Dismiss*, at p.6

From a practical perspective, and as mentioned in BellSouth's Petition, the CLEC Coalition has no economic incentive to agree to any change in the Current Plan that may reduce the excessive and irrational penalties that the Current Plan generates. As such, the CLEC Coalition's suggestion that the issues raised in BellSouth's Petition are better dealt with in the periodic review process will only delay any meaningful plan revisions while maintaining the *status quo*. Indeed, and regrettably, the ongoing severity debate, which started in September 2002, demonstrates that reaching agreement on a narrowly focused SEEM matter cannot be accomplished in a collaborative and timely manner.

C. The Commission Should Disregard the CLEC Coalition's Unsubstantiated and Misleading Arguments for Dismissing BellSouth's Petition.

In its *Motion to Dismiss*, the CLEC Coalition noticeably fails to comment on substantive problems that were identified and discussed in BellSouth's Petition, such as the excessive and irrational penalties generated by the Current Plan's measurement-based remedy calculation methodology or the low percentage of current measurements that experience a statistically significant level of activity on a monthly basis. Instead, the CLEC Coalition makes generalized, misleading assertions about the Petition such as "BellSouth wants to throw out the Commission's work that it publicly supported and instead have the Commission rubber stamp a plan independently designed by BellSouth to satisfy its own objectives."¹² To the contrary, BellSouth is proposing for the Commission to use the performance measurement data that has been

¹² *Motion to Dismiss*, at p.8

compiled over the past two years to develop a more efficient and rational transaction-based performance assessment plan.

D. The Exorbitant Level of SEEM Payments, in the Absence of Performance Backsliding, Demonstrates that the Current Plan is Inefficient and Generates Excessive, Irrational Penalties.

Finally, the CLEC Coalition contends that the increasing level of SEEM payments from May 2002 through June 2003 indicates “that BellSouth has indeed ‘back-slid’ since it received 271 approval.”¹³ Again, BellSouth is not backsliding in Florida. The CLEC Coalition suggests that BellSouth should focus on reducing SEEM payments by improving performance.¹⁴ As demonstrated by the SEEM payment examples included in BellSouth’s Petition (a matter not addressed by the CLEC Coalition), improved performance will not solve the irrational payments generated by the Current Plan. These examples are not illustrations of poor performance. Rather, such examples show why the Current Plan needs a thorough review. In short, the increased SEEM payments are a direct result of increased CLEC activity in Florida coupled with a fundamentally flawed measurement-based plan that contains an excessive and unnecessary level of disaggregation.


¹³ *Id.* at p.10.

¹⁴ *Id.* at p.9.

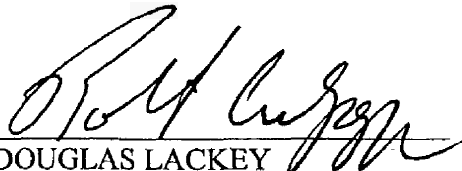
III. CONCLUSION

The Current Plan is unduly complex and generates excessive and irrational penalties. As such, it should come as no surprise that the CLEC Coalition opposes revising the Current Plan. Instead of addressing the specific problems raised and discussed in BellSouth's Petition, the CLEC Coalition either mischaracterizes BellSouth's Petition or suggests that all such problems should be addressed in the periodic review process. Again, and despite the best efforts of the Commission Staff, the periodic review process has proved to be an unsuitable forum for correcting fundamental flaws in the Current Plan. With the benefit of the data associated with operating under the Current Plan for the past two years, the goals of the Plan, as originally envisioned by this Commission, can be accomplished by establishing a new performance assessment plan for BellSouth in Florida.

WHEREFORE, for the reasons set forth herein, the Commission should deny the Motion to Dismiss, and should proceed with establishing a new performance assessment plan for BellSouth in Florida consistent with BellSouth's Petition filed on May 12, 2004.



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540106

Exhibit A

1 of 100 DOCUMENTS

In re: Request by SEACOAST UTILITIES for order to correct legal description in Order
17158 issued 2/5/87 to amend certificates 29-W and 29-S in Palm Beach County

DOCKET NO. 880675-WS; ORDER NO. 19845

Florida Public Service Commission

1988 Fla. PUC LEXIS 1255

88-8 FPSC 223

August 22, 1988

PANEL: [*1]

The following Commissioners participated in the disposition of this matter: KATIE NICHOLS, Chairman; THOMAS M. BEARD; GERALD L. GUNTER; JOHN T. HERNDON; MICHAEL McK. WILSON

OPINION: ORDER CORRECTING ORDER NO. 17158

BY THE COMMISSION:

This matter comes before us on a request by Seacoast Utilities (Seacoast) for a corrective amendment of its service area, which was stated in Order No. 17158, issued February 5, 1987. That order was the culmination of a proceeding which began in late August, 1985, when Seacoast published notice of its intention to apply to the Commission to expand its service area.

Several parties filed objections with the Commission. In response, Seacoast agreed to eliminate certain territory from its proposed expansion. Seacoast therefore revised the legal description of its proposed new service area. That revised legal description was incorporated into Seacoast's application. All but one of the objections was thereby resolved.

Seacoast's application for expansion of its service area went to formal administrative hearing before the Commission on the remaining objection by Palm Beach County. That objection was denied by the Commission in Order No. 17158, which [*2] granted Seacoast's application on all points. That order was appealed and affirmed. Palm Beach County v. Florida Public Service Commission, Case No. BS-203 (Fla. 1st DCA November 20, 1987) rehearing denied, December 28, 1987.

Despite that hearing and appeal, it was not until recently that it was realized, by Seacoast, as it was, that the legal description in the Commission's final order contained an apparent error. Seacoast requests here that the Commission amend that final order to properly state the service area which Seacoast had noticed and applied for and which, except for the changes made due to the objections, it believed until recently had been granted.

Comparison of the pertinent documents illustrates the difference. The legal description in the public notice and the legal description in the amended application itself are the same, as they should be. The legal description in our final order should have been the same as well, except for the changes made in response to the objections.

However, the legal description contained in Order No. 17158 differs more than it should from that which was in the notice and application. Aside from correctly lacking those [*3] changes made in response to the objections, the legal description in that order also lacks the words "E 1/2 of Section 27, that part of the east half." That line of the legal description was in both the notice and application and should have been granted in the final order as it was not one of

the deletions made in response to the objections. The omission of that line of legal description was a clerical error that apparently originated during the transcription of the application's legal description into a form suitable for our final order.

As an administrative body with quasi-judicial powers, this Commission has inherent authority to correct clerical errors in our orders. There is no time limit which applies against correction of administrative orders. It is largely a matter of discretion, restrained by due regard for the principle of administrative finality.

Seacoast does not seek modification of the Commission's underlying decision, only a correction of the Commission's final order so that it properly manifests that decision. Amending the final order's legal description as Seacoast requests would make it conform to what it should have been and was assumed to be all along. [*4] Correction as requested would support administrative finality because it would preserve settled expectations against the disruption that would attend giving effect to a previously unrecognized error in the Commission's order.

We therefore find it appropriate to correct Order No. 17158 to include the inadvertently omitted portion of the legal description of Seacoast's service area. For the sake of clarity, we will restate, in Attachment A to this Order, Seacoast's service area, rather than refer only to the portion being added.

In view of the foregoing, it is

ORDERED by the Florida Public Service Commission that the request by Seacoast Utilities for a corrective amendment of its service area is granted. It is further

ORDERED that the legal description of Seacoast's service area as stated in Order No. 17158 is hereby corrected as stated in Attachment A to this Order, which by reference is incorporated herein. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission, this 22nd day of AUGUST, 1988.

[Material Omitted in Original Source]

ATTACHMENT A

All of Sections 29, 30, 31, 32, Township 41 South, Range 42 East; [*5]

All of Sections 23, 24, 25, 26, 36, the East half (E 1/2) of Section 27, that part of the East half (E 1/2) of Section 34 lying Northeasterly of the Beeline Highway, and that part of Section 35 lying Northeasterly of the Beeline Highway; all in Township 41 South, Range 41 East;

All of Sections 1, 2, 11, 12, 24, 25, 26, and that part of the East half (E 1/2) of Sections 13 lying North of West Lake Park Road, the East half (E 1/2) of the West half of (W 1/2) of Section 13; all in Township 42 South, Range 41 East;

All of Sections 5, 6, that part of Sections 7, 8, 17, lying Northeasterly of the Beeline Highway all in Township 42 South, Range 42 East.