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DOCKET # 7892
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Docket No. 7892-U

In Re: Performance Measures for Telecommunications Interconnection,
Unbundling and Resale

ORDER DENYING BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO
MODIFY SELF-EFFECTUATING ENFORCEMENT MECHANISM PLAN

BY THE COMMISSION:

I. INTRODUCTION

The Georgia Public Service Commission ("Commission") first held hearings in the above-styled docket in November, 1997. Since that time, the Commission has continued to take input from interested parties and guidance from the Federal Communications Commission ("FCC") in the development of a performance plan for BellSouth Telecommunications, Inc. ("BellSouth"). The Commission has identified the three main components of a comprehensive performance plan: an appropriate set of performance measurements; an appropriate set of benchmarks and retail analogs to apply to those measurements; and, a remedy plan to ensure compliance with the performance goals. (Docket No. 7892-U, Commission Order, p. 2; January 16, 2001). BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism ("SEEM") Plan ("Motion") addresses the last of these components by seeking to eliminate the penalties associated with line sharing. The term "line sharing" describes when a competitive local exchange company ("CLEC") uses the high frequency portion of the loop ("HFPL") to provide xDSL service, and the incumbent local exchange company ("ILEC") uses the low frequency portion of the same loop to provide voice service.

II. POSITIONS OF THE PARTIES

A. BellSouth's Motion

On October 22, 2003, BellSouth filed with the Commission a Motion to eliminate the penalties associated with line sharing. BellSouth bases its Motion in large part on the Triennial

Review Order¹ issued by the Federal Communications Commission ("FCC"). The FCC concluded that CLECs are no longer impaired without unbundled access to the HFPL. (Triennial Review Order, ¶ 258). The standard for designating unbundled network elements ("UNEs") pursuant to Section 251 of the Telecommunications Act of 1996 ("Federal Act") consists of a finding that CLECs would be impaired without unbundled access. 47 U.S.C. 251(d)(2)(B). BellSouth argues that because line sharing is no longer a UNE the SEEM should be modified to eliminate associated penalties. (BellSouth Motion, p. 1). BellSouth supports this position by arguing that every state in its region has limited the application of automatic payments to Section 251 obligations. *Id.* at 2. BellSouth's Motion includes a request that the Commission act immediately to change the SEEM requirements, as opposed to waiting for the next review process. BellSouth argues that this is appropriate because this requested modification results from a change in applicable law, rather than routine information gathering. *Id.* at 6.

B. Joint CLEC Response

On November 7, 2003, AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications and MCI WorldCom ("Joint CLECs") filed with the Commission a Response to BellSouth's Motion to Modify SEEM Plan ("Response"). In their Response, the Joint CLECs argued that the Motion should be denied for three reasons. First, the Joint CLECs stated that "the Commission has jurisdiction over the SEEM Plan to protect Georgia citizens from anti-competitive behavior, including enforcement of BellSouth's Section 271 obligations." (Response, p. 1). The Response cites to Georgia law, specifically O.C.G.A. § 46-5-168(d)(2), to support the position that the Commission retains jurisdiction over the SEEM plan. *Id.* at 2. The Joint CLECs argue that BellSouth still must provide line sharing under the Federal Act, and that therefore, discontinuing the SEEM penalties for line sharing would violate the Section 271 of the Federal Act. *Id.* at 3. Second, the Joint CLECs argue that both the Triennial Review Order and Section 271 require BellSouth to provide non-discriminatory access to line sharing. *Id.* Finally, the Joint CLECs argue that granting the relief BellSouth seeks in its Motion would be contrary to public interest. *Id.* at 6.

3. BellSouth's Reply

On December 4, 2003, BellSouth filed with the Commission a Reply in Support of its Motion ("Reply"). In its Reply, BellSouth emphasized that there is no explicit requirement under Georgia law that a performance assessment plan be developed. (Reply, p. 2). BellSouth claims that it does not have an obligation to continue to provide line sharing under Section 271. BellSouth reasons that it would be illogical for the FCC to have expressly stated that line sharing is not required under Section 251, but remains a requirement under Section 271. *Id.* at 7.

III. DISCUSSION

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003)

The Triennial Review Order states that CLECs are no longer impaired without unbundled access to line sharing. (Triennial Review Order, ¶ 258). In making this determination the FCC recognized that some CLECs have made commitments, such as the building of internal systems to order HFPL from ILECs, based on the existence of line sharing. *Id.* at ¶ 264. To prevent disruption of service and harm to consumers, the FCC ordered a three-year transition period for new line sharing arrangements. *Id.* While the FCC concluded that line sharing should no longer be a UNE, it maintained that CLECs and their consumers would be placed at risk if CLECs were not given an adequate time to adjust to the new rules. BellSouth's Motion to immediately eliminate penalties associated with line sharing is inconsistent with the implementation of a transitional period. BellSouth's Motion, at the very least, is premature.

In addition, the Triennial Review Order makes clear that bell operating companies ("BOCs") have an independent and ongoing access obligation under Section 271. ("Triennial Review Order, ¶ 654). Section 271 checklist items 4, 5, 6, and 10 impose access requirements without reference to Section 251, while checklist item 2 on non-discriminatory access to network elements includes the language "in accordance with the requirements of sections 251(c)(3) and 252(d)(1). 47 U.S.C.271(c)(2)(B). The FCC notes that concluding all of the checklist items are subject to Section 251 would make checklist items 4, 5, 6, and 10 duplicative of item 2. (Triennial Review Order, ¶ 654). The FCC also concluded that because Section 251 applies to all ILECs, whereas Section 271 applies only to BOCs, it is logical to interpret the two sections as operating independently. *Id.* at 655.

Even though line sharing is no longer a UNE, BellSouth still must provide it pursuant to the transitional mechanism ordered by the FCC and Section 271 checklist item 4. The Commission determines that at this time it is not sound policy to eliminate the penalties associated with line sharing. BellSouth's Motion is therefore denied.

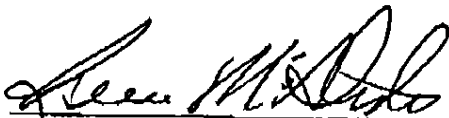
WHEREFORE IT IS ORDERED, that BellSouth's Motion to Modify Self-Effectuating Enforcement Mechanism Plan is hereby denied.

ORDERED FURTHER, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

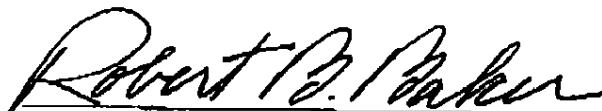
ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 16th day of December, 2003.



Reece McAlister
Executive Secretary

1-14-04
Date



Robert B. Baker, Jr.
Chairman

Jan. 14, 2004
Date