

Docket No. 18948-U

In Re: CompSouth's Petition for a Ruling Regarding the Need for Public Review and Approval by the Commission of the Telecommunications Service Agreements Between BellSouth Telecommunications, Inc. and Dialogica Communications, Inc., CI2, and ABC Telecom

**ORDER DENYING BELLSOUTH'S MOTIONS
FOR STAY AND RECONSIDERATION**

I. Introduction

On October 25, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") a Motion to Reconsider and a Motion to Stay the October 15, 2004 Order in this docket.

II. Background

On May 25, 2004, the Competitive Carriers of the Southeast, Inc. ("CompSouth") filed with the Commission a Petition for Expedited Ruling Regarding the Filing of BellSouth's Wholesale Local Phone Service Agreements. The petition alleged that BellSouth had entered into "commercial agreements" with a number of competitive local exchange carriers. The term "commercial agreement" as used in the petition referred to "the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreements (hereinafter collectively referred to as "the BellSouth Agreements"); and any other such agreements concerning resale, interconnection or UNE." (Petition, fn 1). The Petition requested that the Commission direct BellSouth to file these commercial agreements with the Commission. BellSouth filed a response to the petition on June 3, 2004, and CompSouth replied to BellSouth's response on June 23, 2004.

The Staff recommended in the September 2, 2004, Communications Committee that the Commission hold this matter in abeyance until the FCC issues its permanent rules. The Staff reasoned that the FCC would likely decide this issue before the end of the year because (1) the FCC is currently seeking comment on whether commercial agreements must be filed with state commissions, and (2) the FCC has indicated through the statements of individual commissioners that it intends to have permanent rules in place by the end of the year. In its Administrative Session on September 7, 2004, the Commission declined to accept the Staff's recommendation, and instead held the matter until the next Administrative Session, with direction for the Staff to

return to the Commission with a recommendation on how the filing should be done. The Staff's recommended procedures for the filing of the commercial agreements were adopted at the September 16, 2004 Administrative Session.

III. BellSouth's Motions

A. Motion to Stay

In its Motion to Stay, BellSouth requests that the Commission should stay the effectiveness of its October 14, 2004 Order pending either further consideration of the issue in the Commission's generic unbundled network element ("UNE") docket, or the FCC's decision on this issue in the Triennial Review Docket. (Motion to Stay, p. 1). BellSouth argues that its motion meets the four-prong test that BellSouth has a substantial likelihood of success on the merits, that it faces a substantial threat of irreparable injury to BellSouth if the preliminary injunction is not granted, that this irreparable injury outweighs the harm the preliminary injunction will cause the Commission, and the preliminary injunction will not disserve the public interest. *Id.* at 1-2.

B. Motion for Reconsideration

In its Motion for Reconsideration, BellSouth first takes issue with the Commission's interpretation of state and federal law. In doing so, BellSouth raises many of the same arguments that it raised when CompSouth's Petition was before the Commission. BellSouth states that the Commission's analysis was flawed because it failed to consider that absent a request pursuant to Section 251 of the Federal Telecommunications Act of 1996, the agreement is not a negotiated agreement subject to Commission jurisdiction. (Motion for Reconsideration, p. 4). BellSouth argues that the language in Section 252(a)(1) stating that carriers may negotiate agreements "without regard to the standards set forth in subsections (b) and (c)" does not mean that an agreement that does not contain items that must be offered under Section 251(b) and (c) and was not entered into pursuant to a request under Section 251(a) is a negotiated agreement subject to Commission jurisdiction. *Id.* BellSouth concludes that to give the entirety of Section 251(a)(1) meaning, it must be determined that the latter type of agreement described does not need to be filed with the Commission. *Id.* at 5.

BellSouth disagrees with the Commission's interpretation of the FCC's decision in *Qwest NAL*.¹ BellSouth states that this decision favors its position because the filing requirement was applied only to agreements that contain Section 251 obligations. *Id.* at 6. BellSouth also disagrees with the Commission's construction of Section 252(c)(1). BellSouth argues that the Commission's interpretation would negate the "pursuant to Section 251" language in Section 252(a)(1). *Id.* at 7. BellSouth also challenges the Commission's conclusion that state law supports the filing of the agreements. BellSouth contends that there is no evidence to support

¹ *Qwest Corp. Apparent Liability for Forfeiture*, File No. EB-03-0IH-0263, ¶ 11 (rel. March 12, 2004) (FCC 04-57) ("*Qwest NAL*").

that the commercial agreements are “interconnection agreements,” which are the type of agreements that state law requires be filed. *Id.* at 8.

BellSouth also charges that the Commission’s decision is arbitrary and capricious because the record does not contain evidence to support that the commercial agreements contain ongoing obligations pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. *Id.* at 9. Finally, BellSouth argues that the Commission order does not reflect its vote. *Id.* at 10. BellSouth asserts that the Commission only voted on the process for filing the agreements, not whether the agreements should be filed. *Id.* at 10-11.

IV. Discussion

A. Motion for Stay

The Commission denies BellSouth’s Motion to Stay. This is an extraordinary form of relief. BellSouth has not demonstrated that it meets the elements of the four prong test discussed in its Motion for Stay. BellSouth has not demonstrated a substantial likelihood of success on the merits. That the Commission’s decision is consistent with the decisions reached by other state commissions undermines BellSouth’s position that it has a substantial likelihood on the merits. In fact, BellSouth’s argument that it has a substantial likelihood on the merits consists of nothing more than a bald statement that its position on the law is correct.

BellSouth’s claims of irreparable harm are similarly unpersuasive. The irreparable harm must neither be remote nor speculative, but must be actual and imminent. Siegel v. LePore, 234 F. 3d 1134 (2000). BellSouth claims that the Commission ruling will adversely impact BellSouth and the competitive local exchange carrier industry because it will “chill the incentive to execute commercial agreements.” (Motion For Stay, p. 2). Even assuming that such a result would constitute a harm, it is, at best, speculative. BellSouth’s failure to meet these criteria, by itself, warrants denial of its Motion For Stay. It cannot be said that the speculative alleged injury outweighs the claimed harm from the Commission decision.

In addition, BellSouth has not demonstrated that granting its Motion for Stay would serve the public interest. To the contrary, the public interest would be better served by robust competition. The likelihood of robust competition is increased if the commercial agreements at issue are subject to the same scrutiny that all negotiated interconnection agreements must undergo. One of the grounds pursuant to which a state commission may reject a negotiated interconnection agreement is that the agreement is not consistent with the public interest. 47 U.S.C. § 252(e)(2)(A)(ii). It is difficult to understand how removing the Commission’s authority to reject an agreement that is counter to the public interest would serve the public interest.

The Commission concludes that BellSouth’s Motion for Stay should be denied.

B. Motion for Reconsideration

BellSouth's arguments in its Motion for Reconsideration can be broken down into three categories: (1) statutory interpretation, (2) evidentiary and (3) procedural. Its statutory interpretation arguments are similar to those that it raised during consideration of CompSouth's Petition. The point BellSouth wishes to make with its statutory argument is that the commercial agreements do not fit the description of negotiated agreements under the Federal Act; and that therefore they do not need to be filed with and approved by the Commission. In order to make this point, BellSouth must define the negotiated agreements as narrowly as possible. Towards this end, BellSouth tries to limit the description of the negotiated agreements to agreements that pertain to specific obligations set forth in the Federal Act. For the reasons set forth in its October 15, 2004 Order, the Commission does not agree with BellSouth's statutory arguments.

First, BellSouth still does not provide an adequate basis for its interpretation of the Federal Act's provision that negotiated agreements may be negotiated "without regard to the standards set forth in subsections 251(b) and (c)." 47 U.S.C. § 252(a)(1). Its explanation of the limited meaning of the word "standards" as opposed to "what must be offered under Section 251(b) or (c)" disregards the distinctions expressly set forth in Section 252(e)(2) between the permissible grounds for a state commission's rejection of a negotiated agreement versus the permissible grounds for a state commission's rejection of an arbitrated agreement. Section 252(e)(2)(A)(ii) authorizes a state commission to reject an arbitrated agreement if it finds "that the agreement does not meet the requirements of section 251 . . ." (emphasis added). No such authorization can be found in Section 252(e)(2)(A)(i) for the authorized grounds for rejecting a negotiated agreement. That a state commission cannot reject a negotiated agreement that does not meet the requirements of Section 251 undermines the distinction BellSouth attempts to make between the "standards" set forth in this section and "what must be offered under" this section.

Despite this shortcoming, BellSouth continues to maintain that the manner in which Section 252(a)(1) links the ability to negotiate an agreement "without regard to the standards set forth in subsections (b) and (c)" to a request pursuant to Section 251 means that the commercial agreements are not what was contemplated by the Federal Act. BellSouth's reliance on Section 252(a)(1) to support its position that negotiations for these commercial agreements were not prompted by a request pursuant to 251, and that therefore, the filing requirements do not apply in these instances, is based on an impermissibly narrow construction of the duty to negotiate pursuant to Section 251(c)(1). As discussed in the Commission's October 15 Order, the duty to negotiate is not limited to services or unbundled network elements, related solely to an incumbent local exchange carrier's legal obligations set forth in Section 251. A broader construction is consistent with the FCC's decision in its *Qwest ICA Order*.² In that order, the FCC stated that, "[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected . . . we decline to establish an exhaustive, all-encompassing

² *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("*Qwest ICA Order*").

‘interconnection agreement’ standard.” (Qwest ICA Order, ¶ 10) (footnote omitted). The FCC has granted state commissions great deference to reach the kind of determination that was reached in the October 15, 2004 Order.

The Commission also stands by its reliance upon the requirement in Section 252(a)(1) that interconnection agreements negotiated prior to the Federal Act must be filed with state commissions. As the Commission stated in its October 15, 2004 Order, it is illogical to conclude on the one hand that the filing requirement pertains to only those negotiated agreements for the resale, UNEs or interconnection to be offered under Section 251, while on the other hand acknowledging that interconnection agreements entered into prior to the existence of that code section must also be filed.

BellSouth’s arguments that the Commission’s decision is flawed due to a lack of evidentiary support about what is contained in the agreements are ironic given BellSouth’s refusal to file the agreements in question. Given this refusal, the Commission based its conclusion on the pleadings describing the contents of the agreements. It is inconsistent for BellSouth to resist disclosure of the terms and conditions of the agreements, and then attack a Commission order for the failure to consider all of the relevant terms and conditions of the agreements.

The Commission also disagrees with BellSouth’s argument that the October 15, 2004 Order does not reflect the Commission vote on this matter. The Staff recommendation to the Commission was conditioned on the language that “to the extent that the Commission has found that BellSouth’s commercial agreements are subject to filing, approval under the Telecommunications Act of 1996 and/or state law.” The Commission approval of the Staff’s recommendation clarified the Commission intent for BellSouth to file the agreements. The clear intent in adopting the Staff’s recommendation at the September 21, 2004 Administrative Sessions was for BellSouth to file these agreements. This conclusion is based on the plain language of the Staff’s recommendation and a common sense construction of the Commission vote. It would have been meaningless to vote on the procedures for the filing of agreements that were not to be filed.

For the reasons discussed herein, the Commission denies BellSouth’s Motion for Reconsideration.

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WHEREFORE IT IS,

ORDERED, that BellSouth’s Motion for Stay is denied.

ORDERED FURTHER, that BellSouth’s Motion for Reconsideration is denied.

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 18th day of November, 2004.

Reece McAlister
Executive Secretary

H. Doug Everett
Chairman

Date

Date