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July 22, 2002

**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
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Re: Docket No.: 020578-TP

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ FCCA's Response in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss Complaint

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Joseph A. McGlothlin

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of the Florida Competitive  
Carriers Association for Expedited Review and  
Cancellation of BellSouth Telecommunications  
Inc.'s Key Customer Promotional Tariffs

Docket No. 020578-TP

Filed: July 22, 2002

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**THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S RESPONSE IN  
OPPOSITION TO BELLSOUTH TELECOMMUNICATIONS, INC.'S  
MOTION TO DISMISS COMPLAINT**

The Florida Competitive Carriers Association (FCCA), pursuant to rule 28-106.204, Florida Administrative Code, files its response to BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Dismiss FCCA's Petition for Expedited Review and Cancellation of BellSouth's Key Customer Promotional Tariffs. The motion should be denied and the FCCA's Petition should be processed on an expedited basis.

**I.**

**Introduction**

On June 25, 2002, FCCA filed a Petition asking this Commission to immediately review and cancel, or alternatively, suspend or postpone, BellSouth's 2002 Key Customer tariff. On July 15, 2002, BellSouth filed a motion to dismiss FCCA's petition, or alternatively, a response. The grounds upon which BellSouth predicates its motion to dismiss are without merit and the motion should be denied for the reasons set forth below.

**II.**

**Standard for Ruling on a Motion to Dismiss**

Before responding to BellSouth's argument, a review of the standard to be applied to a motion to dismiss is necessary. As many courts have held:

[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action . . . [T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side . . . Significantly, all material factual allegations of the complaint must be taken as true.<sup>1</sup>

Thus, as this Commission is well aware, **all** of the allegations in the FCCA petition must be taken as true when the Commission considers the motion to dismiss. In its petition, FCCA alleged, among other things, that BellSouth has made no showing that the discounted rates of the subject promotion would be above its incremental costs; that BellSouth has chosen a configuration that makes it difficult to even relate the discounts to incremental costs; that BellSouth does not market and promote the Key Customer programs to all eligible business customers, but only those who have taken some action to initiate a change of carrier to an ALEC; that BellSouth's strategy is not to compete, but to implement a seamless succession of predatory discounts that effectively remove certain customers from the reach of competition; that the long duration of Key Customer contracts, coupled with the harsh penalties associated with breaking the contract, produces a chilling effect on a subscriber's ability to choose competitors. For purposes of ruling on the motion to dismiss, the Commission *must assume that all of these allegations are true*. The application of the well-established standard to BellSouth's motion can lead only to a denial of that motion.

### III.

#### **BellSouth's Key Customer Tariff Should Be Cancelled, Suspended or Postponed**

BellSouth spends the majority of its motion to dismiss on an attempt to persuade the Commission that Order No. PSC-02-0875-PAA-TP, entered in Docket No. 020119-TP, is somehow dispositive of the allegations raised by FCCA. BellSouth states, for example, that in

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<sup>1</sup> *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (citations omitted).

the order the Commission determined that the rates of the prior Key Customer tariff exceeded incremental costs (page 10); that the Commission determined in the order that the tariff is not made unduly discriminatory by BellSouth's selective application of the discounts (page 11); that the Commission rejected the challenge of Florida Digital Network to the termination charges of the prior tariff (page 13); that FCCA asks the Commission to "effectively reverse" the order (page 8); and that there is no need to "replow the same ground that it (the Commission) plowed less than a month ago" (page 15). However, as BellSouth acknowledged in its pleading, Order No. PSC-02-0875-PAA-TP is an Order on Proposed Agency Action. On its face, the order states that its findings are preliminary and subject to protest. In its petition of June 25, 2002, FCCA indicated its intent to protest the PAA and request a hearing on the proposed findings in the order. *FCCA filed its protest and request for hearing on July 19, 2002.* As the Commission is well aware, the effect of the protest is to render the protested portion of the PAA a nullity and initiate a proceeding *de novo* to address the disputed matters. *See Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778, 785 (Fla. 1st DCA 1981) (a petition for a formal 120.57 hearing commences a *de nova* proceeding: *In re: Petition for approval of a special contract with IMC Phosphates Company for provision of interruptible electric service by Tampa Electric Company*, Docket 001287-EI; Order No. PSC-01-1001-PCO-EI (Apr. 2001) (protest of a PAA Order renders the protested portions of the order a nullity). BellSouth's reliance on the PAA, which constitutes far and away the bulk of its motion to dismiss, is entirely misplaced.

In its pleading, BellSouth refers to the "inactivity" of ALECs regarding the subject tariff. BellSouth refers to the fact that on June 18th the Commission to deny Staff's recommendation to preclude the processing of similar tariffs pending the ultimate disposition of the dispute over the

Key Customer tariff then before it. The vote to deny that portion of the Staff's recommendation took place on June 18, 2002; FCCA filed its petition on June 25, 2002. There is simply no basis to support BellSouth's claim that ALECs were slow to respond to its latest iteration of the Key Customer ongoing discount program. Nor can BellSouth rely on the June 18 vote as "dispositive" of FCCA's petition. A decision by the Commission to decline to anticipate matters not before it at the time is no precedent for a decision on a pending request by an affected party.

In its pleading, BellSouth contends that its competitors in Florida are growing; that its prices are "not predatory"; and that it denies many of the allegations contained in FCCA's petition. The effect of these portions of BellSouth's pleading is simply to demonstrate the existence of disputed factual matters that require an evidentiary process to resolve. FCCA has pleaded allegations that, if true, would constitute grounds for relief—and for expedited consideration. (*BellSouth* made this case when it pointed out that the tariff is already in effect.) The Commission must deny BellSouth's motion to dismiss. So that a delay does not effectively prevent the possibility of meaningful relief, it should also grant the request for expedited treatment.

  
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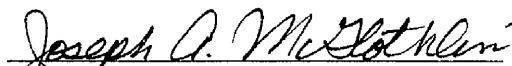
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of The Florida Competitive Carriers Association, Inc.'s Response in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss was on this 22nd day of July 2002 sent (\*) via Hand Deliver and U.S. Mail to the following names and addresses.

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