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October 3, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

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COMMISSION
CLERK

Re: Docket Nos.: 020119-TP and 020578-TP

Dear Ms. Bayo:

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

- ▶ Florida Competitive Carriers Association and Mpower Communication Corp.'s Motion for Reconsideration of a Portion of Order No. PSC-02-1295-PCO-TP.

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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Enclosure

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Digital Network,
Inc., for Expedited Review and Cancellation
of BellSouth Telecommunication Inc.'s
Key Customer Promotional Tariffs
and for an Investigation of BellSouth
Telecommunication Inc.'s Promotional
Pricing and Marketing Practices.

Docket No.: 020119-TP

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

Docket No.: 020578-TP

Filed: October 3, 2002

**FLORIDA COMPETITIVE CARRIERS ASSOCIATION AND
MPOWER COMMUNICATIONS CORP.'S MOTION FOR RECONSIDERATION OF A
PORTION OF ORDER NO. PSC-02-1295-PCO-TP**

Pursuant to Rule 25-22.0376, Florida Administrative Code, the Florida Competitive Carriers Association (FCCA) and Mpower Communications Corp. (Mpower) (collectively, Movants) seek Reconsideration of that portion of Order No. PSC-02-1295-PCO-TP which excludes Issue 3F from consideration in this case. Movants respectfully request that Prehearing Officer Baez reconsider his decision to exclude Issue 3F. In support of this motion, Movants state:

INTRODUCTION

1. On August 29, 2002, Staff held an issue identification meeting in this docket. At the meeting, Movants proposed Issue 3F:

What additional filing requirements, if any, should be established for BellSouth promotional tariffs?

2. BellSouth objected to Issue 3F. The Prehearing Officer directed the parties to prepare briefs in support of their positions. Briefs were filed on September 6, 2002.

3. On September 23, 2002, Commissioner Baez, sitting as Prehearing Officer, issued the Order Establishing Procedure, Order No. PSC-02-1295-PCO-TP. In the Order, Prehearing Officer Baez excluded Issue 3F from the issues to be considered in this case. Movants respectfully suggest that Commissioner Baez erred in excluding this issue for the reasons set forth below.

ARGUMENT

4. To prevail on a motion for reconsideration, the moving party must demonstrate a point of fact or law that was overlooked or which was not considered. *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). In this instance, Movants respectfully suggest that Commissioner Baez has overlooked or misapprehended the meaning of the statutory language in § 364.051(5)(a), Florida Statutes, upon which he relied to exclude Issue 3F.

5. Central to the issues the Commission will consider in this case is whether or not BellSouth's Key Customer promotional offerings are anticompetitive. Movants contend that part of the anticompetitive nature of such filings is related to the fact that BellSouth continually "renews" such filings. Thus, while each filing is limited in time, the fact that such filings are continually "rolled over" via subsequent filings results in the filings essentially "evading review" prior to going into effect. That is, by the time the parties and the Commission have considered a specific promotional filing (via discovery requests, testimony and ultimately, a hearing), the specific promotional offering has expired and a new promotional offering (which is not the subject of the hearing) is in effect.

6. Commissioner Baez erroneously concluded that requiring BellSouth to file information supporting a tariff at the same time it files the promotional tariff itself would somehow "modify or alter the law." Commissioner Baez reaches that erroneous conclusion due

to a misapprehension of the meaning of § 364.051(5). This section provides that tariff filings are "presumptively valid." However, Issue 3F does not speak to, much less alter the standard of the presumptive validity of a tariff. It simply seeks to explore whether, in order to mitigate the "evading review" aspect of BellSouth's promotional filings, BellSouth should be required to file supporting information at the same time the promotional filing is made. Requiring the filing of such information would **in no way** change the statutory standard of "presumptive validity" of the tariff filing; it would only permit appropriate review of promotional tariffs at the outset of their filing rather than **after** they have gone into effect.¹

7. Because Issue 3F, even if decided in Movants' favor, would in no way change the law regarding the presumptive validity of tariff filings, it was improperly excluded. Further, *Diamond Cab Owners Ass'n v. Florida R.R. & Pub. Comm'n*, 66 So.2d 593 (Fla. 1953), on which Commissioner Baez relies, is simply inapplicable. In that case, a rule that had been challenged was found to be in **direct conflict** with a statute. In the case of Issue 3F, no change in law is effected by the inclusion of the issue. The statute Commissioner Baez relies upon does not address what must be included in a tariff filing. The requirement that information accompany the promotional tariff filing does not alter the presumptive effect of a tariff filing.

8. Further, in its Brief, BellSouth did not contend that the statutory standard of "presumptive validity" precludes the Commission from evaluating the validity of the tariff *after* it is filed. If a party or the Commission can require a company to provide information or data for the purpose of evaluating the tariff after it has been filed without disturbing the presumption of validity, then a party or the Commission can require a company to provide information or data for the purpose of evaluating the tariff commencing at the same time the tariff is filed without disturbing the presumption. Again, Issue 3F would only allow a party or the Commission to

¹ It is important to recognize that while such tariffs are in effect they "lock in" customers for several years.

obtain information about the promotional tariff at an earlier point in time. It **would not** alter, amend, or change the “presumption of validity” pursuant to § 364.051(5).

9. It is also important to note that the Commission's statutory duties require it to encourage and promote competition² as well as to prevent predatory pricing and anticompetitive behavior.³ The requirement of the filing of information in order to fulfill that obligation provides another basis for inclusion of the issue.

CONCLUSION

10. The Prehearing Officer should respectfully reconsider his decision and include Issue 3F among the issues to be considered by the Commission in these dockets. Issue 3F deals only with the *procedural* point of *timing*. It does not conflict with § 364.051(5) and would in no way alter, amend, or change the “presumption of validity” for given tariffs pursuant to that section. If the Commission can require information regarding the validity of the tariffs to be filed after the tariff has been filed without impinging on the presumption it has the authority to order that the same information be filed sooner. Finally, the filing requirement embodied in Issue 3F is consistent with the Commission’s statutory duties to encourage and promote competition, to prevent predatory pricing and to prevent anticompetitive behavior.

WHEREFORE the FCCA and Mpower request Prehearing Officer Baez reconsider his decision and include Issue 3F among the issues to be considered by the Commission in these dockets.

² §364.01(4), Florida Statutes.

³ § 364.3381, Florida Statutes.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Competitive Carriers Association and Mpower Communications Corp.'s Motion for Reconsideration of A Portion of Order No. PSC- 02-1295-PCO-TP has been furnished by (*) hand delivery or U. S. Mail this 3rd day of October 2002 to the following:

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