

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s Key Customer tariff filed 12/16/02, by Florida Digital Network, Inc.

DOCKET NO. 021252-TP

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.

DOCKET NO. 020119-TP

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association.

DOCKET NO. 020578-TP  
ORDER NO. PSC-03-0148-PAA-TP  
ISSUED: January 28, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman  
J. TERRY DEASON  
BRAULIO L. BAEZ  
RUDOLPH "RUDY" BRADLEY  
CHARLES M. DAVIDSON

ORDER CONSOLIDATING DOCKETS AND NOTICE OF PROPOSED AGENCY ACTION  
ORDER DENYING FDN'S COMPLAINT, IN PART

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action regarding notification of BellSouth's 2003 Key Customer Tariff filing discussed herein in Section II of this Order is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition

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for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

### I. CASE BACKGROUND

On December 20, 2002, Florida Digital Network, Inc. (FDN) filed a Petition for Expedited Review and Cancellation or Suspension of BellSouth Telecommunications, Inc.'s Key Customer Tariff Filing of December 16, 2002 (FDN's Complaint). On January 3, 2003, BellSouth Telecommunications, Inc. filed a Response to FDN's Petition (BellSouth Response). BellSouth's Key Customer Tariff filing of December 16, 2002 (BellSouth's 2003 Key Customer tariff) is a continuation of its second 2002 Key Customer Tariff, which is currently scheduled for hearing on February 19-20, 2003, in consolidated Docket Nos. 020119-TP and 020578-TP. Our records indicate that BellSouth's 2003 Key Customer Tariff is identified as Tariff No. T-021241.

This Order addresses FDN's Complaint and BellSouth's Response.

We are vested with jurisdiction in this matter pursuant to Sections 364.01, 364.051, 364.08, and 364.285, Florida Statutes.

### II. TARIFF FILING

The issue regarding BellSouth's 2003 Key Customer Tariff filing developed as a result of allegations made by FDN regarding BellSouth's obligation to provide specific notification of upcoming tariffs in accordance with the companies' interconnection agreement. The allegations were raised in FDN's Complaint.

#### Arguments

In its Complaint, FDN requests in part that we immediately review and cancel or, alternatively, suspend or postpone, the Key Customer tariff reported as filed by BellSouth Telecommunications Inc. on December 16, 2002. FDN asserts that BellSouth filed this tariff without having provided FDN and other ALECs proper notice. For this reason, FDN believes the tariff should not be permitted. As additional support for its Complaint, FDN incorporates by reference the pleadings, testimony, and exhibits in Docket Nos.

020119-TP and 020578-TP, which address previous BellSouth Key Customer Tariff filings.

FDN asserts that recent action in the above-referenced dockets impacts the instant case. At the Prehearing Conference on December 16, 2002, in Docket Nos. 020119-TP and 020578-TP, a continuance was granted at the request of several ALECs. FDN acquiesced in the continuance for the following reasons: (1) FDN believed that there should be opportunity for meaningful negotiations between the parties, and (2) FDN reasonably believed FDN would not be further harmed by the Key Customer promotions during a 45-day continuance, since no tariff notification had been posted on BellSouth's website, and the current Key Customer tariff would expire December 31, 2002. In not opposing the 45-day continuance in the proceedings in Docket Nos. 020119-TP and 020578-TP, FDN believes it acted reasonably by relying on BellSouth's practice of providing an advance posting of upcoming tariff changes. FDN states that it had been checking the tariff notification portion of BellSouth's website daily, and that a new Key Customer filing was not posted on the website.

The MCImetro - BellSouth Florida Interconnection Agreement, which FDN and a number of other ALECs have adopted, contains the 45-day notice obligation, according to FDN. FDN states correctly that Section 1.2.1.1 of this agreement obligates BellSouth to

notify [ALEC] of any proposed changes in terms and conditions under which BellSouth offers Telecommunications Services to subscribers who are not Telecommunications Service providers or carriers, including but not limited to the introduction or discontinuance of any features, functions, services, promotions or changes in retail rates at least forty-five (45) days prior to the effective date of such change, or concurrent with BellSouth's internal notification process for such change.

FDN contends that BellSouth "simply filed the tariff" instead of posting the proper notice 45 days in advance as specified in its interconnection agreement. FDN asserts that BellSouth's failure to fulfill its notice obligation for this tariff justifies the relief it seeks. FDN states:

No other remedy will put ALECs like FDN in the position they would have been in had BellSouth fulfilled its obligation to post notice of tariff changes 45 days in advance. Now that FDN has monitored the BellSouth website for tariff notifications, and BellSouth did not follow the notification process for the 2003 Key Customer tariff, the notification process would, ironically, appear to be of less consequence to BellSouth. BellSouth must be held to the notice obligation to which it agreed, has acknowledged, and has followed previously. (footnotes omitted)

FDN concludes its argument by stating, "[t]here must be adequate and reasonable consequence to BellSouth's violation of its acknowledged duty, and FDN maintains that the proper remedy is to bar BellSouth from implementing the 2003 Key Customer tariff as proposed."

On January 3, 2003, BellSouth filed its Response to FDN's Complaint. Therein, BellSouth asserts that we should summarily deny all claims for relief set forth in FDN's pleading.

BellSouth acknowledges that on December 13, 2002<sup>1</sup>, the company filed a tariff extending the (then) current Key Customer tariff. Our records indicate that this tariff is identified as Tariff No. T-021241. BellSouth asserts that the tariff notification was timely posted, but as a result of an unknown "technical problem," it could not be viewed by ALECs in Florida. BellSouth states "[w]hile there was an unfortunate mishap in the posting of the notice on BellSouth's website, there is no requirement that the notice be given to ALECs in a specific manner." BellSouth contends that FDN, as well as all of the ALECs, received actual notice of the extension when BellSouth filed this tariff. In acknowledging the mishap, BellSouth has proposed a specific implementation plan<sup>2</sup> for this tariff:

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<sup>1</sup> While the official filing date is December 13, 2002, inconsistent dates appear in the filings made in this docket.

<sup>2</sup>On December 23, 2002, Nancy H. Sims, Director-Regulatory Relations for BellSouth-Florida, Inc., sent a letter to Walter D'Haeseleer, Director of the Competitive Markets and Enforcement Division of the Florida Public Service Commission, detailing the proposed implementation for this tariff.

- 1) BellSouth will not provide service to its retail customers under this tariff until January 30, 2003. The date of January 30, 2003 was selected because it is a full 45 days from the date BellSouth provided notice of this tariff.
- 2) The tariff will remain on file and be allowed to go into effect on December 31, 2002.
- 3) BellSouth understands that allowing the tariff to remain on file will allow the ALECs to begin reselling this tariff service on January 1, 2003, which is 30 days in advance of when BellSouth can provide service under the tariff to its retail customers.

BellSouth states that at the August 20, 2002 Agenda conference for Docket Nos. 020119-TP and 020578-TP, there was discussion about an eventual, subsequent filing. BellSouth asserts that it committed at that time that "any new Key Customer Tariff filings made would be similar to those filed before and not contain dissimilar requirements or discounts." BellSouth maintains that the filing at issue in the instant proceeding is a "continuation" of the (then) current tariff, which expired on December 31, 2002. No new terms or conditions are present.

BellSouth respectfully requests that we deny all relief requested in FDN's Complaint.

#### Analysis

We believe that FDN's concerns surrounding the noticing of Tariff No. T-021241 are mitigated when viewed along with the points raised in BellSouth's Response. FDN's argument concentrates on the fact that an advance notification was not posted, although BellSouth asserts that the actual filing of the tariff constitutes a "notice." While we acknowledge that a 45-day notification period is a requirement contained in the operative interconnection agreement between BellSouth and FDN, we emphasize that the cited language of that agreement does not specify *how* the notice is to be provided. BellSouth readily acknowledges that efforts were made, though unsuccessful, to correctly post the anticipated filing on its website. However, absent the advance notice, we concur with BellSouth that the filing itself can be construed as a "notice." Rather than delay the effective date of the tariff until January 30, 2003, BellSouth proposes to withhold the offering of this tariff to its own retail customers until that date.

In proposing this implementation plan, we believe BellSouth has substantially complied with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement. Though not conventional, we believe that BellSouth's proposed implementation, in effect, provides the ALECs with a 30 day period to resell this offering before BellSouth will offer it to its own retail customers. We note that the typical corrective action would have been to delay the effective date of the tariff to January 30, 2003, which would have precluded ALEC resale before that date.

On a practical basis, we are concerned that BellSouth deviated in this instance from its customary practice of providing advance notice of forthcoming tariff changes on BellSouth's website. On a going forward basis, we encourage BellSouth to follow its customary noticing practice since this practice affords ALECs a consistent means of monitoring future tariff filings.

### Conclusion

Based on the foregoing, we find that BellSouth has substantially complied with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement and, therefore, Tariff No. T-021241 shall remain in effect. As such, this narrow aspect of FDN's Complaint regarding tariff notification obligation, is denied. In the event the Proposed Agency Action portion of this Order regarding the notification of BellSouth's 2003 Key Customer Tariff filing is protested, the tariff notification aspect of the instant docket shall not be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing because the matter of contract interpretation at issue is substantially different than the issues to be addressed in the consolidated proceeding.

### III. CONSOLIDATION

As stated previously, FDN's Complaint requests that BellSouth's December 16, 2002, Tariff Filing (BellSouth's 2003 Key Customer Tariff) be canceled or, alternatively, suspended or postponed. FDN maintains that this tariff filing should be cancelled for the same reasons FDN has asserted for the prior Key Customer tariffs (T-020035 and T-020595) at issue in Docket Nos. 020119-TP and 020578-TP (consolidated tariff dockets). Further, FDN incorporates by reference and requests that FDN's pleadings, prefiled testimony and exhibits filed in Docket Nos. 020119-TP and 020578-TP, be considered by us in this docket. FDN reasons that

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the 2003 Key Customer tariff should be cancelled for the reasons FDN has set forth in the consolidated tariff dockets.

BellSouth responds that we should summarily deny FDN's requests and claims asserted in its Complaint. BellSouth asserts that the 2003 Key Customer Tariff is merely a continuation of the second 2002 Key Customer Tariff.

We note that the 2002 Key Customer tariffs addressed in the consolidated tariff dockets are currently scheduled for hearing on February 19-20, 2003. Because BellSouth's 2003 Key Customer Tariff is a continuation of its second 2002 Key Customer tariff, the issues regarding BellSouth's 2003 Key Customer Tariff are effectively the same. Further, we note that FDN and BellSouth are also parties in the consolidated tariff dockets.

Accordingly, with the exception of the tariff notification concern addressed in Section II of this Order, Docket No. 021252-TP shall be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing because the matters at issue are substantially similar and consolidation will promote administrative efficiency.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Complaint is denied, in part, as set forth in the body of this Order. It is further

ORDERED that with the exception of the notification aspect of BellSouth Telecommunications, Inc.'s 2003 Key Customer Tariff filing, Docket No. 021252-TP is consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing. It is further

ORDERED that the provisions of this Order denying Florida Digital Network, Inc.'s Complaint as it relates to notification of BellSouth's Telecommunications, Inc.'s 2003 Key Customer Tariff filing, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

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ORDERED that if a timely protest of the Proposed Agency Action portion of this Order is filed, the protested issue shall be set for a separate hearing. It is further

ORDERED that in the event the Proposed Agency Action portion of this Order becomes final, this docket shall remain open pending the outcome of further proceedings.

By ORDER of the Florida Public Service Commission this 28th day of January, 2003.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action regarding notification of BellSouth's Telecommunications, Inc.'s 2003 Key Customer Tariff filing is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this



order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 18, 2003. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.