

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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
ORDER NO. PSC-03-0223-PCO-TP
ISSUED: February 14, 2003

ORDER GRANTING IN PART, AND DENYING IN PART,
FLORIDA DIGITAL NETWORK'S SECOND MOTION TO COMPEL

On February 14, 2002, Florida Digital Network, Inc. (FDN) filed a Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s (BellSouth) Key Customer Promotional Tariffs and For An Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices (January tariff filing). On March 5, 2002, BellSouth filed its Response and Answer to FDN's Petition.

On June 25, 2002, the Florida Competitive Carriers Association (FCCA) filed a Petition for Expedited Review and Cancellation Of BellSouth's Key Customer Promotional Tariffs (June tariff filing) in Docket No. 020578-TP.

On July 15, 2002, BellSouth filed a Motion to Dismiss or, in the alternative, Response to the "Petition of the Florida Competitive Carriers Association (FCCA) for Expedited Review and

DOCUMENT NUMBER-DATE

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Cancellation Of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs."

FDN and the FCCA filed separate protests of Order No. PSC-02-0875-PAA-TP on July 19, 2002, each requesting an administrative hearing be convened in Docket No. 020119-TP. On July 22, 2002, the FCCA filed a Response to BellSouth's Motion to Dismiss. By Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, BellSouth's Motion to Dismiss FCCA's complaint was denied and Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing. By Order No. PSC-02-1295-PCO-TP, issued September 23, 2002, the procedural and hearing dates were set for these dockets.

On December 20, 2002, FDN filed a Petition for Expedited Review and Cancellation or Suspension of BellSouth Telecommunications, Inc.'s Key Customer Tariff Filing of December 16, 2002. Docket No. 021252-TP was opened to address FDN's complaint regarding BellSouth's December 16, 2002 filing. On January 3, 2003, BellSouth filed a Response to FDN's Petition. Order No. PSC-03-0148-PAA-TP was issued on January 28, 2003, consolidating Docket No. 021252-TP with Docket Nos. 020119-TP and 20578-TP, for the purposes of hearing because the matters at issue are substantially similar and consolidation will promote administrative efficiency.

On February 12, 2003, FDN filed its Second Motion to Compel and on the same date, BellSouth filed its response. This order addresses the Motion.

ARGUMENTS

FDN's Motion to Compel

In its Motion to Compel, FDN seeks to: (a) compel BellSouth to answer FDN Interrogatory No. 34 by no later than February 17, and (b) permit FDN to identify at hearing those portions of BellSouth's testimony pertaining to the information sought which should be stricken as a remedy if BellSouth fails to comply with a Commission order compelling an answer by February 17.

FDN states that on December 8, 2002, FDN served by email and U.S. Mail, FDN's Second Set of Interrogatories (Interrogatory Nos.

33 - 50) on BellSouth. By Order No. PSC-02-1602-PCO-TP, issued November 19, 2002, the Prehearing Officer granted an extension of time for filing rebuttal testimony and ruled that objections to discovery were due within 5 days of service. By Order No. PSC-03-0065-PHO-TP, issued January 8, 2003, discovery obligations were suspended during a continuance, and discovery responses were ruled due by February 5, 2003, if the parties could not reach a settlement during the continuance. No settlement was reached by the parties during the continuance. As a result, objections to FDN's discovery were due December 13, 2002, and responses were due February 5, 2003.

On December 13, 2002, BellSouth served general objections and made specific objections to FDN's interrogatory Nos. 34 - 37, 40, 42, 46, 47, 49 and 50. BellSouth served discovery responses, despite and subject to certain objections, to all but Interrogatory No. 34. Interrogatory No. 34 states:

Referring to the exhibit attached to Mr. Gallagher's prefiled rebuttal testimony and marked for identification as MPG-5, state by year the total amount of revenue collected by BellSouth as a result of each of the rate changes that took place on or after January 2001 as shown in the exhibit.

FDN argues that Mr. Gallagher's proffered rebuttal exhibit MPG-5, which itemizes BellSouth's rate increases to single and multi-line business customers since 2000, is relevant to support FDN's claim that BellSouth's promotional discounts are unduly discriminatory and anticompetitive because the discounts are not given to all BellSouth customers within a class. FDN claims that BellSouth has created a class within a class by increasing rates for some business customers while decreasing rates for others.

FDN further claims that BellSouth has incorrectly invoked the "competitive necessity doctrine" in defense of its practice of increasing rates for some customers while decreasing rates for other. However, FDN asserts that the competitive necessity doctrine stipulates that customers who are discriminated against do not receive rate increases at all. FDN further states that BellSouth has indicated that it may not be economical for BellSouth to apply a discount to all customers. If so, FDN maintains that it

is necessary to evaluate the magnitude of the rate increases in the context of other factors, such as the magnitude of discounts and how discounts are offered, to test BellSouth's assertions.

FDN contends that the answer to Interrogatory No. 34 is relevant: (a) to show how BellSouth is financing its rate decreases through rate increases, and the magnitude with which it is doing so, (b) to show the inapplicability of the competitive necessity doctrine that BellSouth invoked, and (c) to test the uneconomical aspects, if any, of offering across-the-board decreases.

BellSouth's Response

BellSouth first states that since the promotional tariffs at issue relate to offerings that began in 2002, FDN's request is irrelevant because it asks for information "on or after January 2001."

Further, BellSouth contends that the promotional tariffs bear no relationship to FDN's exhibit MPG-5. The exhibit indicates that BellSouth has changed prices six times over two years with an average increase every four months, which BellSouth maintains, is not the case. In compliance with the price regulation statute, Section 364.051, Florida Statutes, which delineates two business line products, single-line and multi-line 1FBs, single-line prices have changed by inflation minus 1 percent, twice in 24 months and multi-line has changed three times in 36 months. This amounts to once a year for each product, BellSouth states.

BellSouth states that neither the FCC's pronouncements nor Mr. Ruscilli's testimony demonstrate that the information FDN seeks relating to rate increases authorized by Florida law have any relevance to the promotional tariffs at issue.

Additionally, contrary to FDN's assertion that BellSouth invoked the competitive necessity doctrine to defend "its practice of increasing rates for some customers while discounting rates to others," BellSouth claims that while customers that participate in BellSouth's Key customer offering receive a discount, that discount is calculated based on applicable tariff rates. BellSouth asserts that the competitive necessity doctrine has no relation to rate increases. Further, BellSouth adds, both the FCC and Section

364.051(5), Florida Statutes, allow companies to price services to meet competitive threats. BellSouth, therefore, requests that FDN's Motion to Compel be denied.

DECISION

After reviewing the parties' pleadings, as well as the interrogatory in question, FDN's Motion to Compel shall be granted in part and denied in part.

Rule 1.280(b) states that:

It is not ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

The central issue in this case is whether BellSouth's Key Customer tariffs are anticompetitive and therefore violate Florida Statutes. BellSouth claims that the information sought by FDN is not relevant to any issue in this docket. FDN argues that the information it seeks is relevant to issues in the case and its defenses.

The discovery rule permits discovery of some of the information that FDN is seeking. The central issue in this case revolves around whether BellSouth's Key Customer tariffs are anticompetitive. In consideration of this issue, FDN attempts to discover information which itemizes BellSouth's rate increases to single and multi-line business customers, which may be related and helpful to preparing its case. It has been established that information sought that is reasonably calculated to lead to the discovery of admissible evidence is discoverable. The only exceptions apply when that information is protected by a privilege or when the information sought is overly broad or unduly burdensome. However, FDN has requested information "on or after 2001." Since the Key Customer tariffs at issue began in the year 2002, it is beyond the scope of this proceeding to consider years prior to 2002. Therefore, I find it appropriate to limit FDN's request for information to the year 2002. Hence, FDN's Motion to Compel is granted in part and denied in part.

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In view both of the short time remaining before the hearing, and the breadth of the discovery being compelled, BellSouth is directed to respond to FDN Interrogatory No. 34 by January 18, 2003. The responses shall be provided to FDN with a copy to staff, by hand delivery or facsimile, to be received no later than 3:00 p.m. on that date.

I also note that FDN has requested that certain portions of BellSouth's testimony pertaining to information sought should be stricken from the record as a remedy for BellSouth's failure to comply with this Order. I believe that this request is not ripe for consideration at this time.

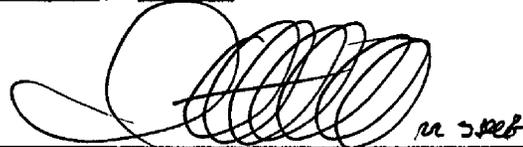
Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Florida Digital Network Inc.'s Motion to Compel is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc. shall respond to the discovery requests set forth in the body of this Order within the time limits and in the manner described in the body of this Order. It is further

ORDERED that these Dockets shall remain open pending the resolution of the matters to be addressed at hearing.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 14th Day of February, 2003.

A handwritten signature in black ink, appearing to read 'Braulio L. Baez', is written over a horizontal line. The signature is stylized and somewhat cursive.

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

LHD

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.

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.

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; or (2) 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.