



Public Service Commission
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DATE: NOVEMBER 7, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE SERVICES (SIMMONS)
DIVISION OF LEGAL SERVICES (CHRISTENSEN)

RE: DOCKET NO. 000733-TL - INVESTIGATION TO DETERMINE WHETHER
BELLSOUTH TELECOMMUNICATIONS, INC.'S TARIFF FILING TO
RESTRUCTURE ITS LATE PAYMENT CHARGE IS IN VIOLATION OF
SECTION 364.051, F.S.

AGENDA: 11/19/01 - REGULAR AGENDA - MOTION FOR STAY PENDING
JUDICIAL REVIEW - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\000733.RCM

CASE BACKGROUND

On July 9, 1999, BellSouth Telecommunications, Inc. (BellSouth or Company) filed a tariff with the Commission to restructure its Late Payment Charge (LPC) in Section A2 of its General Services Tariff (GST). Under this tariff filing, BellSouth applies a Late Payment Charge of \$1.50 for residential customers and \$9.00 for business customers plus an interest charge of 1.50% on unpaid balances in excess of \$6.00. Prior to this filing, BellSouth applied a Late Payment Charge of 1.50% to any unpaid balance greater than \$1.00.

Pursuant to Section 364.051(5)(a), Florida Statutes, since BellSouth is a price-regulated Local Exchange Company, BellSouth's tariff filings are presumptively valid and may go into effect fifteen (15) days after the filing. BellSouth's filing became effective July 24, 1999, in accordance with Section 364.051(5)(a),

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Florida Statutes. The tariff provisions became effective August 28, 1999.

In August 1999, staff first expressed concerns to BellSouth about possible statutory violations regarding its Late Payment Charge tariff filing. Staff was made aware of ongoing discussions between BellSouth and the Office of Public Counsel (OPC) on this same filing. In view of the ongoing discussions between BellSouth and OPC, BellSouth requested that the Commission allow the negotiations to continue in an effort to resolve the matter. BellSouth furnished to the Commission a letter stating that BellSouth would provide refunds to affected customers if the Late Payment Charge was ultimately found to be unlawful.

On June 19, 2000, this docket was established to investigate whether BellSouth's tariff filing to restructure its late payment charge was in violation of Section 364.051, Florida Statutes. By Order No. PSC-00-1357-PAA-TL, issued July 27, 2000, the Commission found BellSouth's July 9, 1999, tariff filing in violation of Section 364.051(5)(a), Florida Statutes. Pursuant to Order No. PSC-00-1357-PAA-TL, the tariffs were to remain in effect if a timely protest were filed, pending the outcome of a hearing with any revenues resulting from the tariff held subject to refund.

On August 17, 2000, BellSouth timely petitioned for a formal hearing. By Order No. PSC-00-2458-PSC-TL, issued December 20, 2000, OPC's Notice of Intervention was acknowledged. By Order No. PSC-00-2279-PCO-TL, a hearing was scheduled for April 18, 2001.

On December 11, 2000, BellSouth and OPC filed a Joint Motion to Amend Procedural Schedule. By Order No. PSC-01-0228-PCO-TL, issued January 23, 2001, the parties' motion was granted, the hearing was cancelled and the parties were directed to file their post hearing briefs. At the August 14, 2001, Agenda Conference, the Commission considered staff's recommendation on the parties' posthearing briefs on BellSouth's Late Payment Charge tariff.

By Order No. PSC-01-1769-FOF-TP, issued August 30, 2001, the Commission found BellSouth's Late Payment Charge in violation of Section 364.051(5)(a), Florida Statutes. Pursuant to Order No. PSC-01-1769-FOF-TP, BellSouth was directed to refund all amounts collected through the restructured interest charge of 1.50% on all unpaid balances in excess of \$6.00, with interest, to all affected customers within 120 days of the issuance of the Order.

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On September 14, 2001, BellSouth filed its Motion for Stay of Order Pending Judicial Review. On September 27, 2001, BellSouth filed its Notice of Administrative Appeal. The Supreme Court of Florida issued its Acknowledgment of New Case on October 17, 2001. This recommendation addresses BellSouth's Motion for Stay of Order Pending Judicial Review.

The Commission is vested with jurisdiction pursuant to Section 364.051(5)(a), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's Motion for Stay of Order Pending Judicial Review?

RECOMMENDATION: Yes, BellSouth's Motion for Stay of Order Pending Judicial Review should be granted conditioned upon BellSouth posting a corporate undertaking for moneys subject to the refund addressed by Order No. PSC-00-1357-PAA-TL. (CHRISTENSEN)

STAFF ANALYSIS: As stated in the Case Background, on July 9, 1999, BellSouth filed its tariff to restructure its Late Payment Charge. By Order No. PSC-00-1357-PAA-TL, by proposed agency action, the Commission found that BellSouth's Late Payment Charge tariff apparently violated Section 364.051, Florida Statutes. BellSouth filed a request for hearing and by Order No. PSC-00-2279-PCO-TL the matter was scheduled for an administrative hearing. The parties subsequently filed a Joint Motion to Amend Procedural Schedule whereby the parties would stipulate to the facts and file post hearing briefs in lieu of a hearing. By Order No. PSC-01-0228-PCO-TL, issued January 23, 2001, the parties' motion was granted.

At the August 14, 2001, Agenda Conference, the Commission considered staff's recommendation on the parties' post hearing briefs on BellSouth's Late Payment Charge. By Order No. PSC-01-1769-FOF-TP, issued August 30, 2001, the Commission found BellSouth's Late Payment Charge in violation of Section 364.051(5)(a), Florida Statutes. BellSouth was ordered to issue a refund to customers.

On September 14, 2001, BellSouth filed its Motion for Stay of Order Pending Judicial Review (Motion). On September 27, 2001, BellSouth filed its Notice of Administrative Appeal. The Supreme Court of Florida issued its Acknowledgment of New Case on October 17, 2001.

BellSouth's Motion

In support of its Motion, BellSouth states that on July 9, 1999, it filed a tariff with the Commission revising its advanced payments tariff to change the Late Payment Charge from a percentage to a flat rate and to add a new interest charge on unpaid balances. BellSouth asserts that after a stipulation of exhibits and briefs,

the Commission issued Order No. PSC-01-1769-FOF-TP, which held that the interest charge imposed by BellSouth violated Section 364.051 (5)(a), Florida Statutes. BellSouth states that the Commission further found that it should discontinue assessing the interest charge and refund all amounts collected through the interest charge, with interest, to all affected customers within 120 days.

BellSouth alleges that it would be filing a Notice of Appeal of the Order to the Florida Supreme Court and therefore is seeking a stay of the Order pending the appeal. BellSouth filed its Notice of Appeal on September 27, 2001, and the Florida Supreme Court acknowledged the new case on October 17, 2001.

BellSouth states that it is seeking a stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, which requires a stay be granted pending judicial review of an Order which involves a refund or a decrease in rates. BellSouth contends that under these circumstances BellSouth does not have to show that it is likely to prevail on the merits, that it has suffered irreparable harm or that a stay is not contrary to the public interest. BellSouth alleges that there is no controversy that the Order decreases the rates presently charged by BellSouth to its end user customers and orders a refund of moneys. BellSouth argues that the Order mandates a decrease in BellSouth's charge to its customers for unpaid balances over \$6.00. Prior to the Order, these customer were charged interest of 1.50%. However, the Order requires that BellSouth no longer impose this charge and, thus, the interest charge has decreased from 1.50% to zero for unpaid balances over \$6.00.

BellSouth states that, in the alternative, should the Commission determine that the Order is not a refund or decrease in rates, BellSouth seeks a stay pending judicial review pursuant to Rule 25-22.061(2), Florida Administrative Code. BellSouth states that in determining whether to grant a stay, the Commission may consider whether BellSouth is likely to prevail on appeal; whether BellSouth has shown it will suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest.

BellSouth contends that it believes that it will prevail on appeal because the interest charge is not a telecommunications service or part of a telecommunications service. BellSouth argues that the interest charge is not a fee for service regulated by

Section 364.051(5)(a), Florida Statutes, and therefore BellSouth is properly charging customers for the loss of use of money. BellSouth further argues that if a stay is not granted it will suffer irreparable harm. BellSouth asserts that the Commission's Order essentially mandates that BellSouth forego that ability to recover the loss of the use of money. BellSouth contends that it will not be able to recover its losses if the Order is eventually overturned on appeal. BellSouth states that in contrast to the harm to it if the stay is not granted, the harm to the public if a stay is entered will be inconsequential. BellSouth states that it will continue to collect the interest charge subject to providing refunds with interest to affected customers if the interest charge is ultimately found to be unlawful.

BellSouth states that it seeks to preserve the status quo pending appeal. BellSouth contends that if the stay is not granted and BellSouth prevails on appeal, it will not be allowed to retroactively bill the customers involved even if the customers can be located. BellSouth argues that there will be no harm caused to the customers involved or to the general public if a stay is granted.

BellSouth states that Rule 25-22.061(1)(a) and Rule 25-22.061(2), Florida Administrative Code, permit the Commission to require BellSouth to post a bond or issue some other corporate undertaking as a condition of the stay. BellSouth recommends that the bond be set at zero. BellSouth argues that no bond is necessary because granting a stay will not prejudice the general public. BellSouth states that it will collect the tariffed charges involved from customers in Florida subject to refund pending the outcome of the judicial review. BellSouth contends that upon the ultimate determination of this matter, BellSouth can make the appropriate disposition of these funds. BellSouth asserts that the public will not be harmed or prejudiced by the lack of a bond.

Analysis

Staff notes that no response has been filed to the Motion for Stay of Order Pending Judicial Review. Rule 25-22.061(1)(a), Florida Administrative Code, states

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the

utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

By Order No. PSC-01-1769-FOF-TP, issued August 30, 2001, the Commission found BellSouth's Late Payment Charge in violation of Section 364.051(5)(a), Florida Statutes, and ordered BellSouth to refund all amounts collected through the restructured interest charge of 1.50% on all unpaid balances in excess of \$6.00, with interest, to all affected customers within 120 days of the issuance of the Order. Staff believes that it is clear that the Order requires BellSouth to refund moneys to customers. In accordance with Rule 25-22.061(1)(a), Florida Administrative Code, the Commission must grant a stay pending judicial review if the Order involves a refund of moneys. BellSouth filed its Notice of Administrative Appeal on September 27, 2001. Further, the Supreme Court of Florida acknowledged receipt of this case on October 17, 2001. Therefore, staff recommends that the Commission grant a stay of Order No. PSC-01-1769-FOF-TP pending judicial review.

BellSouth asks that the Commission set a zero bond in this matter because the public will not be harmed should the stay be granted. However, Rule 25-22.061(1)(a), Florida Administrative Code, requires that a good and sufficient bond or corporate undertaking be posted as a condition of granting a stay. Staff believes that a corporate undertaking is appropriate.

Staff believes that it is clear that the Order involves a refund of moneys which meets the criteria for granting a stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code. Since staff believes that it is appropriate to grant a stay based on Rule 25-22.061(1)(a), Florida Administrative Code, no discussion of the merits of BellSouth's arguments based on Rule 25-22.061(2), Florida Administrative Code, is necessary. Staff believes that it is clear that the Order involves a refund of moneys.

For the foregoing reasons, staff recommends that the Commission should grant BellSouth's Motion for Stay of Order Pending Judicial Review conditioned upon BellSouth posting a corporate undertaking for moneys subject to the refund addressed by Order No. PSC-00-1357-PAA-TL.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending judicial review. (CHRISTENSEN)

STAFF ANALYSIS: BellSouth has filed a Notice of Administrative Appeal. The Supreme Court of Florida issued its Acknowledgment of New Case on October 17, 2001. Therefore, this docket should remain open pending judicial review.