

ORIGINAL

Legal Department

James Meza III  
Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

September 6, 2002

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Mrs. Blanca S. Bayó  
Director, Division of the Commission  
Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: **Docket No. 020119-TP**  
**Petition of Florida Digital Network, Inc. for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices**

**Docket No.: 020578-TP**  
**Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc's Key Customer Promotional Tariffs**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief on Proposed Issue 3(F), which we ask that you file in the caption dockets.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return a copy to me. Copies have been served to the parties shown on the attached certificate of service.

Sincerely,

*James Meza III*  
James Meza III (CM)

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- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM 5
- CTR \_\_\_\_\_
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- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- SEC 1
- OTH \_\_\_\_\_

Enclosures

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

*Teach  
dkt*

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*RJM*  
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**CERTIFICATE OF SERVICE  
DOCKET NO. 020119-TP and 020578-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 6th day of September, 2002 to the following:

Felicia Banks  
Linda Dodson  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
Tel. No. (850) 413-6216  
[fbanks@psc.state.fl.us](mailto:fbanks@psc.state.fl.us)  
[ldodson@psc.state.fl.us](mailto:ldodson@psc.state.fl.us)

Matthew Feil  
Florida Digital Network  
390 North Orange Avenue  
Suite 2000  
Orlando, FL 32801  
Tel. No. (407) 835-0460  
Fax. No. (407) 835-0309  
[mfeil@floridadigital.net](mailto:mfeil@floridadigital.net)

Kenneth A. Hoffman, Esq.  
Martin P. McDonnell, Esq.  
Marsha Rule  
Rutledge, Ecenia, Purnell & Hoffman  
215 S. Monroe St., Suite 420 (32301)  
P.O. Box 551  
Tallahassee, FL 32302-0551  
Tel. No. (850) 681-6788  
Fax. No. (850) 681-6515  
Atty. for US LEC  
[Ken@Reuphlaw.com](mailto:Ken@Reuphlaw.com)

Dana Shaffer  
105 Molly Street, Suite 300  
Nashville, TN 37201  
Tel. No. (615) 777-7700  
Fax. No. (615) 345-1564  
Atty. for XO  
[dana.shaffer@xo.com](mailto:dana.shaffer@xo.com)

Karen Camechis, Esq.  
Pennington Law Firm  
P.O. Box 10095  
215 S. Monroe  
Tallahassee, FL 32302-2095  
Tel. No. (850) 222-3533  
Fax. No. (850) 222-2126  
Atty. for Time Warner  
[Karen@penningtonlawfirm.com](mailto:Karen@penningtonlawfirm.com)

Carolyn Marek  
Time Warner  
233 Bramerton Court  
Franklin, TN 37069  
Tel. No. (615) 376-6404  
Fax. No. (615) 376-6405  
[Carolyn.Marek@twtelecom.com](mailto:Carolyn.Marek@twtelecom.com)

Joseph A. McGlothlin  
Vicki Gordon Kaufman  
Timothy J. Perry  
McWhirter, Reeves, McGlothlin,  
Davidson, Decker, Kaufman, Arnold  
& Steen, PA  
117 South Gadsden Street  
Tallahassee, FL 32301  
Tel. No. (850) 222-2525  
Fax. No. (850) 222-5606  
[jmclglothlin@mac-law.com](mailto:jmclglothlin@mac-law.com)  
[vkaufman@mac-law.com](mailto:vkaufman@mac-law.com)  
Attys. for Access  
Attys. for FCCA  
Attys. for Mpower

D. Mark Baxter  
Stone & Baxter, LLP  
577 Mulberry Street, Suite 1111  
Macon, Georgia 31201-8256  
Tel. No. (478) 750-9898  
Fax. No. (478) 750-9899  
Atty. for Access

Rodney Page  
Access Integrated Networks, Inc.  
4885 Riverside Drive, Suite 101  
Macon, Georgia 31210

Nanette Edwards  
ITC DeltaCom  
4092 South Memorial Parkway  
Huntsville, AL 35802  
Tel. No. (256) 382-3900  
Fax. No. (256) 382-3801  
[nedwards@itcdeltacom.com](mailto:nedwards@itcdeltacom.com)

Rick Heatter, Vice President  
Mpower Communications Corp.  
175 Sully's Trail, Suite 300  
Pittsford, New York 14534  
Tel. No. (585) 218-6556  
Fax. No. (585) 218-0635

  
James Meza III (LH)

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for expedited review and ) Cancellation of BellSouth Telecommunications,) Docket No. 020119-TP Inc.'s Key Customer promotional tariffs and for ) Investigation of BellSouth's promotional pricing ) and marketing practices, by Florida Digital ) Network, Inc. ) _____ )	
In Re: Petition of the Florida Competitive ) Carriers Association for Expedited Review and ) Docket No. 020578-TP Cancellation of BellSouth Telecommunications ) Inc.'s Key Customer Promotional Tariffs ) _____ )	Dated: September 6, 2002

**BELLSOUTH'S BRIEF ON PROPOSED ISSUE 3(F)**

Pursuant to the Florida Public Service Commission Staff's ("Staff") memorandum issued on August 29, 2002, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Brief regarding the propriety of including proposed issue 3(F) in the above-captioned proceeding. As will be established below, the Prehearing Officer should reject this issue because consideration of the issue conflicts with Florida law.

**BACKGROUND**

On August 29, 2002, several parties and Staff conducted an issue identification meeting, wherein the parties identified a number of issues to be addressed in this proceeding. However, the parties could not agree on Florida Digital Network, Inc. and the Florida Competitive Carriers Association's (collectively referred to herein as "ALECs") proposed issue 3(F) ("Issue"), which provided:

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

Because there was no agreement as to this proposed Issue, Staff notified the parties that the Prehearing Officer will rule on the propriety of including the Issue in the proceeding and asked the parties to submit briefs regarding the Issue. BellSouth submits this Brief in response to Staff's request.

### LAW AND ANALYSIS

#### **I. The Commission Cannot Consider the Issue Because It Would Require the Commission to Change or Amend the Law.**

It is well settled that the Florida Public Service Commission ("Commission") is a creature of statute. City of Cape Coral v. GAC Util., Inc., 281 So. 2d 493 (Fla. 1973). "As such the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof." Id. at 493 (cit. omitted).

Further, the Commission does not have the authority to amend or change the law by requiring any additional considerations or requirements than what is required under the law. See Diamond Cab Owners Ass'n v. Florida R.R. & Pub. Util. Comm'n, 66 So. 2d 593, 596 (Fla. 1953); Atlantic Coast Line R. Co. v. Mack, 57 So. 2d 447, 452 (Fla. 1952). Consequently, while the "Commission may make rules and regulations within the yardstick prescribed by the Legislature, . . . it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules or regulations." Diamond Cab, 66 So. 2d at 596. Pursuant to these principles, the Supreme Court has routinely held that the Commission cannot add

any additional requirements or restrictions to the award of a certificate of public convenience and necessity beyond those specifically set forth in the law. See Atlantic Coast Line R. Co., 57 So. 2d at 452; Diamond Cab, 66 So. 2d at 596.

In the instant matter, the ALECs' proposed Issue violates these well-established tenants because the Issue asks the Commission to establish additional filing requirements for BellSouth's promotional tariffs. Under the price cap statute, Section 364.051(5), Florida Statutes, BellSouth's tariffs are presumptively valid after 15 days notice.<sup>1</sup> Section 364.051(5)(a); see also, In re: BellSouth Telecommunications, Inc., Order No. PSC-01-1769-FOF-TL (Aug. 30, 2001) ("As a price-regulated Local Exchange Company, BellSouth's [tariff] filings are presumptively valid, pursuant to Section 364.051(5)(a), Florida Statutes, and may go into effect fifteen (15) days after the filing.").

Accordingly, the Legislature has determined that BellSouth's tariffs are presumptively valid and that BellSouth need not comply with any specific filing requirements in order to receive this presumption of validity. Like the previous improper attempts to impose additional limitations and restrictions on the award of certificates of public necessity and convenience discussed in Atlantic Coast Line R. Co. and Diamond Cab, supra, the ALECs' proposed Issue would require the Commission to consider imposing additional filing requirements on BellSouth – requirements that do not currently exist.

Therefore, the Commission should not consider this Issue because it would require the Commission to modify or alter the law, which the Supreme

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<sup>1</sup> For basic service, BellSouth can adjust its prices after 30 days notice. See Section 364.051(3), Florida Statutes.

Court has determined is impermissible. For this reason alone, the Prehearing Officer should reject the ALECs' attempt to include the Issue in this proceeding.

**II. Inclusion of the Issue Is Prohibited Because It Would Constitute the Adoption of an Invalid Rule.**

Assuming arguendo that the Commission had the authority to modify BellSouth's tariff filing obligations established by the Legislature, which is denied, consideration of the proposed Issue would be improper because it could result in the promulgation of an invalid Commission rule. The Administrative Procedure Act ("APA") sets forth the rulemaking procedure to be followed by agencies, including the Commission. The APA provides that rule making is not a matter of agency discretion; rather, each agency statement must be adopted by the rule-making procedure set forth in the APA. Section 120.54(1)(a), Florida Statutes.

A "rule" is defined by the APA as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency . . . ." Section 120.52(15), Florida statutes. A proposed or existing rule is an invalid exercise of delegated legislative authority if the agency failed to follow the applicable rulemaking procedures or requirements set forth in the APA in adopting the rule. Section 120.52(8)(a), Florida Statutes: See Section 120.52(8)(a),(16); Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991) (Department of Natural Resources' letter imposing new requirements and procedures was an invalid rule not adopted in manner required by law).

Consideration of the proposed Issue may result in the development of a new rule for tariff promotions filed by price-regulated LECs. Because this new

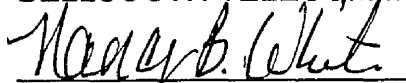
rule would not be promulgated pursuant to a rule-making procedure, it would be invalid and of no force and effect.<sup>2</sup> Accordingly, the Prehearing Officer should reject the ALEC's proposed issue for this additional reason.

**CONCLUSION**

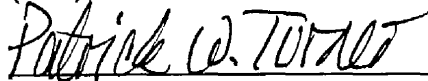
For the foregoing reasons, BellSouth respectfully requests that the Prehearing Officer strike proposed Issue 3(F) from consideration in the instant proceeding.

Respectfully submitted this 6th day of September, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



Nancy B. White (CA)  
James Meza III  
150 South Monroe Street  
Suite 400  
Tallahassee, Florida 32301  
(305) 347-5558



R. Douglas Lackey (CA)  
Patrick W. Turner  
675 West Peachtree Street, Suite 4300  
Atlanta, Georgia  
(404) 335-0747

461352

<sup>2</sup> Any argument that the ALECs may make that consideration of the issue may not result in a new rule or in modification of the law because the Commission could decide not to adopt any new filing requirements should be given little credence. It is illogical and contrary to the concepts of judicial economy to consider an issue that, if approved, would result in a decision that violates the law. The better decision is to simply not consider the issue at all.