



Public Service Commission
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DATE: AUGUST 21, 2003
TO: DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)
FROM: OFFICE OF THE GENERAL COUNSEL (BANKS) *FRB AK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BARRETT)
OFFICE OF MARKET MONITORING & STRATEGIC ANALYSIS (DICKENS) *meB*
RE: DOCKET NO. 020119-TP - 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. 020578-TP - PETITION FOR EXPEDITED REVIEW AND CANCELLATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S KEY CUSTOMER PROMOTIONAL TARIFFS BY FLORIDA COMPETITIVE CARRIERS ASSOCIATION.

DOCKET NO. 021252-TP - 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.

AGENDA: 09/02/03 - REGULAR AGENDA - MOTION FOR RECONSIDERATION OF FINAL DECISION - ORAL ARGUMENT NOT REQUESTED; HOWEVER, ORAL ARGUMENT MAY BE ENTERTAINED AT THE COMMISSION'S DISCRETION PURSUANT TO RULE 25-22.060(1)(f), FLORIDA ADMINISTRATIVE CODE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020119R3.RCM

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CASE BACKGROUND

On January 15, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed its 2002 Key Customer promotional tariff, Tariff No. T-020035, which became effective on January 31, 2002, and expired on June 25, 2002. On February 14, 2002, Florida Digital Network, Inc. (FDN) filed a Petition 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. FDN's Petition triggered the establishment of Docket No. 020119-TP.

A subsequent "Key Customer" promotional tariff offering from BellSouth led to the establishment of Docket No. 020578-TP, and by Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing. A third "Key Customer" promotional tariff filing from BellSouth triggered Docket No. 021252-TP, and this docket was consolidated as well. Collectively, all three of the "Key Customer" tariffs were evaluated in the administrative hearing held on February 19-20, 2003.

Staff's post-hearing recommendation addressing the allegations raised by FDN was presented at the May 20, 2003, Agenda Conference. By Order No. PSC-03-0726-FOF-TP (Key Customer Order), issued on June 19, 2003, all of the Commission's decisions for these consolidated dockets were set forth.

On July 7, 2003, FDN filed a Motion for Reconsideration (Motion) of Order No. PSC-03-0726-FOF-TP, Final Order on BellSouth's Key Customer Tariffs (Key Customer Order). On July 14, 2003, BellSouth filed a Response in Opposition to Florida Digital Networks, Inc.'s Motion for Reconsideration/Clarification (Response). This recommendation addresses the Motion and Response.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion for Reconsideration filed by FDN be granted?

RECOMMENDATION: No. FDN has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision. Therefore, FDN's Motion for Reconsideration should be denied. (BANKS, BARRETT, DICKENS)

STAFF ANALYSIS:

FDN's Motion for Reconsideration

As stated previously, on July 7, 2003, FDN filed a Motion for Reconsideration, and or Clarification of Order No. PSC-03-0726-FOF-TP, Key Customer Order. In its Motion, FDN asserts that the Key Customer Order must be reconsidered, if not rescinded entirely, or at least clarified, because the Key Customer Order relies on certain factual errors and reaches erroneous legal conclusions. (Motion at 2) FDN states that the Commission erred in its decision in this case by completely ignoring evidence in the record that showed the unfair and anticompetitive market impacts of BellSouth's Key Customer program. FDN contends that the Commission erroneously interpreted Chapter 364, Florida Statutes, in the respect that the Commission's decision effectively renders Section 364.051, Florida Statutes, a nullity.

Specifically, FDN asserts that the Commission overlooked market evidence that was entered as Hearing Exhibit No. 17. FDN asserts that Exhibit No. 17 contained an accumulation of BellSouth's reported ALEC line totals segregated by facilities-based, UNE-P, and resale, with data points from February 2001 to September 2002. However, FDN contends that neither the staff recommendation nor the Key Customer Order make any reference to or any analysis of Exhibit No. 17, which contained market information that was both current and critically focused. (Footnote omitted) (Motion at 5).

An overarching argument proffered by FDN is that BellSouth possesses enormous "market power," and many of FDN's arguments are grounded in this core assertion. FDN believes that collectively, BellSouth's market power has enabled the company to effectively "lock up" portions of the business market. FDN believes

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BellSouth's "Key Customer" promotions are unfair and anticompetitive, and the Commission did not properly define what an "anticompetitive act or practice" was. As such, FDN contends the Commission may have overlooked an applicable statutory threshold. FDN explains that BellSouth's market power enables it to offer "Key Customer" programs selectively in areas where competitors operate, and not all subscribers in the business class can avail themselves of the discounts. FDN believes that by doing so, the Commission may not be promoting the interests of all consumers. FDN opines that the Key Customer programs have had a negative impact on competition in the market - specifically on facilities-based competitors. FDN asserts that a hearing exhibit it entered on market evidence was ignored. Specifically, FDN asserts that the Commission relied upon a single hearing exhibit (Exhibit 8, the 2002 Comp Report¹) that was developed from potentially unreliable data, to the exclusion of another hearing exhibit (Exhibit 17, Florida ALEC Business Access Lines: BellSouth Territory), which was developed based on data from a single source. (Motion at 2-12). Based on the foregoing, FDN requests that the Commission grant its Motion for Reconsideration, and or Clarification.

BellSouth's Response

As stated previously, on July 14, 2003, BellSouth filed its Response to FDN's Motion for Reconsideration, and or Clarification. In its Response, BellSouth contends that FDN's Motion is devoid of a single point of fact or law that would justify reconsideration and states that the Commission should summarily reject it. (Response at 1) BellSouth opines that instead of providing facts that the Commission overlooked, or law, FDN merely regurgitates its theory of the case. BellSouth states that this Commission addressed each and every argument raised by FDN in this case, and appropriately concluded, based on the record evidence, that BellSouth's Key Customer tariff filings comply with Florida statutes. (Response at 2). According to BellSouth, FDN's Motion is deficient because FDN's conclusion that failure to directly cite to a particular hearing exhibit in the Final Order does not constitute overlooked or ignored evidence. Furthermore, failure to provide a definition that states what "anticompetitive conduct is . . ." does not mean that the Commission failed to evaluate the tariffs for

¹Titled "Telecommunications Markets in Florida, Annual Report on Competition as of June 30, 2002," the publication is prepared annually by the FPSC to satisfy the statutory requirements set forth in Sections 364.386 and 364.161(4), Florida Statutes.

compliance with the Florida Statutes. BellSouth contends that FDN's assertions about market power and the impacts on the competitive marketplace do not yield new facts or evidence that was overlooked or not considered by this Commission. (Response at 2-4).

In summary, BellSouth believes the Commission's Final Order demonstrates that the Commission reviewed each and every issue and practice complained of by FDN, and considered the record in its entirety. (Response at 4). Therefore, BellSouth requests that the Commission deny FDN's Motion for Reconsideration, and or Clarification.

Analysis

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff believes that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, staff believes that FDN's Motion for Reconsideration, and or Clarification, should be denied.

In its Motion, FDN complains that the Commission did not define what an "anticompetitive act or practice" is. Although staff acknowledges that this text appears to be extracted directly from Section 364.051(5)(a), Florida Statutes, staff does not believe it was the Commission's intent to establish such definitions in its consideration of this case. However, in its Order, the Commission indicates that because the words "unfair, anticompetitive, or discriminatory" are rooted in the Florida

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Statutes, the true evaluation of the issue[s] focuses on compliance with the Florida Statutes." Order at 24.

The Commission explains that if a determination revealed that the rates were "non-compensatory," such a finding would sway it to conclude that the tariff offerings are unfair, anticompetitive, or discriminatory. Order at 22. Therefore, staff believes that FDN's argument that the Commission was required, and failed, to define "anticompetitive practice" should be dispatched, and is not a valid basis to pursue a motion for clarification. The Commission clearly outlined what it viewed to be an anticompetitive practice or conduct in the context of the matters at issue in this proceeding.

In its Motion, FDN cites to an exchange between a Commissioner and a staff analyst wherein the Commissioner asked about staff's "general conclusions" of the market impact of BellSouth's "Key Customer" offerings. (Motion at 6) The analyst responded by referencing a single hearing exhibit, Exhibit 8, though staff indicated that this exhibit was only ". . . one of the key pieces of evidence . . ." considered by the staff. (Emphasis added) Staff makes no assertion that this exhibit was the sole basis of its consideration to the exclusion of any (or all) other exhibits, and believes FDN is misguided in alleging that staff overlooked the record evidence contained in Exhibit 17.

Regarding Exhibit 17, staff notes that total line growth is reflected therein, including line growth for facilities-based competitors. Staff believes Exhibit 17 shows very succinctly that overall competitive line growth has occurred, though certain shifts have occurred in the relative percentages of competitive lines provisioned by various methods. Among the readily discernable conclusions are the following:

- Facilities-based listings grew dramatically between February 2001 and April 2002, and then leveled off;
- UNE-P listings grew through the same time period referenced above, and continue to grow;
- Resale listings have fallen from roughly 20% of the total competitive market to less than 1% through the same time period.

(Attachment A of FDN Motion, a/k/a EXH 17)

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Staff acknowledges FDN's assertion that line growth for UNE-P has outpaced the growth for facilities-based providers, though both show a positive trend. This positive trend is entirely consistent with the conclusions that are referred to by the staff analyst in citing the 2002 Comp Report (Exhibit 8) as a key piece of evidence in this matter. Because staff placed the emphasis of its analysis on the "overall" market activity, as opposed to a "segment" (such as facilities-based providers), staff believes that either Exhibit 8 or 17 could have been relied upon to demonstrate that overall competitive line growth had occurred during the time that the subject "Key Customer" promotional tariffs were in effect. This fact was presented in staff's recommendation and was affirmed in the Commission's Final Order. Therefore, FDN's contention that neither staff or the Commission considered (or cited) Exhibit 17 is simply not true. Staff believes the exhibit was properly considered, and FDN's Motion on grounds that Exhibit 17 was overlooked is not warranted.

FDN's secondary argument is that BellSouth's Key Customer programs have (had) a negative impact on competition in the market - specifically on facilities-based competitors. However, staff believes that a decrease in facilities-based competition is not a prima facie showing that BellSouth has market power. FDN witness Gallagher addresses this issue in his direct testimony by pointing to BellSouth's share, stating that this Commission cannot ignore the fact that BellSouth still enjoys monopoly status in the incumbent market territory. Order at 9. It is clear that the Commission did consider BellSouth's market power. Hence, FDN's contention that the Commission overlooked BellSouth's market power in making its decision is mere reargument and not appropriate for a motion for reconsideration.

Conclusion

Because FDN failed to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision, staff recommends that FDN's Motion for Reconsideration, and or Clarification should not be granted.

DOCKET NOS. 020119-TP, 020578-TP, 021252-TP
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ISSUE 2: Should these dockets be closed?

RECOMMENDATION: Yes. If staff's recommendation in Issue 1 is approved, these dockets should be closed. (**BANKS**)

STAFF ANALYSIS: If staff's recommendation in Issue 1 is approved, these dockets should be closed.