

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of Rule 25-4.073(1)(f), F.A.C., which prohibits the placement of promotional or merchandising material in automated answering systems, by BellSouth Telecommunications, Inc.

DOCKET NO. 020421-TL
ORDER NO. PSC-02-0953-PAA-TL
ISSUED: July 15, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING WAIVER OF
RULE 25-4.073(1)(f) FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

CASE BACKGROUND

On May 14, 2002, pursuant to Section 120.542, Florida Statutes, and Rule No. 28-104.002, Florida Administrative Code, BellSouth Telecommunications, Inc. (BellSouth), filed a Petition for Waiver of Rule 25-4.073(1)(f), Florida Administrative Code (Petition).

BellSouth requests a waiver of Rule 25-4.073(1)(f), Florida Administrative Code, prohibiting the placement of promotional or merchandising material on BellSouth's automated answering system. The automated answering system is on BellSouth's business line and its customers would listen to the messages while on hold.

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BellSouth states that allowing the rule waiver will ensure BellSouth customers are given as much information as possible regarding services available to them, such as current specials.

Further, BellSouth explains that its waiver request meets the standards of Section 120.542, Florida Statutes. Further, BellSouth explains that the purpose of the underlying statutes, Sections 364.01(4), 364.025, 364.03, 364.386 and 364.171, Florida Statutes, will not be undermined by the request for waiver.

Pursuant to Section 120.542(6), Florida Statutes, the notice of BellSouth's Petition was submitted to the Secretary of State for publication in the June 7, 2002, Florida Administrative Weekly. No comments concerning the Petition were filed within the 14-day comment period provided by Rule 28-104.003, Florida Administrative Code.

We have authority over these matters pursuant to Sections 120.542, 364.01(4), 364.025, 364.03, 364.386 and 364.171, Florida Statutes.

DISCUSSION

Section 120.542(2), Florida Statutes, states in part:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.

The underlying statutes of Rule 25-4.073, Florida Administrative Code, are Sections 364.01 (4), 364.025, 364.03, 364.386 and 365.171, Florida Statutes. The purposes of these statutes are: (1) to protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices; (2) to encourage and promote competition in order to ensure the widest possible range of consumer choice in the provision of telecommunications services; (3) to ensure that all providers of telecommunications services are treated fairly by preventing

anticompetitive behavior and eliminating unnecessary regulatory restraint; (4) to provide for universal service objectives; (5) to provide minimum mandatory service standards and maintenance of telecommunications facilities; and (6) to provide for "911" availability.

In whole, Rule 25-4.073, Florida Administrative Code, was initially adopted to ensure that customers would be provided timely service without unnecessary exposure to marketing scripts from a monopolistic service provider. In its Petition, BellSouth states that granting a waiver of Rule 25-4.073(1)(f) would not increase the time that a customer spends on hold and that BellSouth would continue to be responsible for meeting the answer time requirements contained in the remainder of Rule 25-4.073, Florida Administrative Code. Other purposes of the underlying statutes are, in part, to promote competition in order to ensure the widest possible range of consumer choice in the provision of telecommunications services and to ensure that all providers of telecommunications services are treated fairly by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint. BellSouth's Petition addresses and fulfills all the requirements of the underlying statutes.

Section 120.542(2), Florida Statutes, requires that the petitioner also show that application of the rule would create a substantial hardship or would violate principles of fairness. In 1968, when Rule 25-4.073, Florida Administrative Code, became effective, competition did not exist and a prohibition on advertising by a monopoly provider while a customer was on hold for customer service was appropriate. However, in the current competitive environment and with rapidly evolving technology making new services available, allowing advertising during customer hold times is an effective way to inform customers of the choices they have in meeting their telecommunications needs. BellSouth notes in its petition that neither IXCs nor ALECs are prohibited from putting advertising on their automated answering systems. Preventing BellSouth from doing the same would violate principles of fairness by denying it parity with its competitors in this instance. Therefore, we approve BellSouth's Petition for Waiver of Rule 25-4.073(1)(f), Florida Administrative Code.

Based on the foregoing, it is

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ORDERED by the Florida Public Service Commission that the requirements Rule 25-4.073(1)(f), Florida Administrative Code, prohibiting the placement of promotional or merchandising material on BellSouth Telecommunications, Inc.'s automated answering system be waived in this instance. It is further

ORDERED that the provisions of this Order, 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 or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed upon the issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 15th day of July, 2002.

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

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

(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 that is available under Section 120.57, 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 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.

The action proposed herein 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 5, 2002.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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