

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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
ORDER NO. PSC-02-1237-FOF-TP
ISSUED: September 9, 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

ORDER DENYING BELLSOUTH'S MOTION TO DISMISS AND
CONSOLIDATING DOCKET NOS. 020119-TP AND 020578-TP

BY THE COMMISSION:

I. CASE BACKGROUND

On June 11, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed a promotional tariff, Tariff No. T-020595, which became effective on June 26, 2002. On June 14, 2002, our staff and BellSouth representatives met via teleconference to discuss this filing; a follow-up conference was held on June 17, 2002.

The promotional tariff, which BellSouth identifies as the "2002 Key Customer Program," is currently effective and terminates on December 31, 2002. We note, however, that this promotion replaces an expired program of the same name (see Tariff No. T-020035, which expired on June 25, 2002). The earlier tariff filing was addressed by us in Docket No. 020119-TP.

On June 28, 2002, we issued Order No. PSC-02-0875-PAA-TP in Docket No. 020119-TP.

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For the purposes of this Order and to avoid confusion between the two filings, we will refer to the filing in Tariff No. T-020035 as the "2002 Key Customer Program/January filing" (January filing), and the filing in Tariff No. T-020595 as the "2002 Key Customer Program/June filing." (June filing) Based upon a history of BellSouth's past promotional tariff filings, it is not uncommon for BellSouth to begin a new promotion upon, or near, the termination date of any given program.

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.

On July 15, 2002, BellSouth filed a Motion to Dismiss or, in the alternative, Response to the "Petition of the Florida Competitive Carriers Association for Expedited Review and Cancellation Of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs."

On July 19, 2002, Florida Digital Network, Inc. (FDN) and the FCCA filed separate protests of Order No. PSC-02-0875-PAA-TP, 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.

This Order addresses BellSouth's June filing, the FCCA's Petition, BellSouth's Motion to Dismiss, and the FCCA's Response to BellSouth's Motion to Dismiss.

We are vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

II. BELLSOUTH'S MOTION TO DISMISS

As stated above, on June 25, 2002, the FCCA filed a Petition for Expedited Review and Cancellation of BellSouth's Key Customer Promotional Tariffs. On July 15, 2002, BellSouth filed a timely Motion to Dismiss, or in the Alternative, Response to Petition of FCCA for Expedited Review and Cancellation of BellSouth's Key Customer Promotional Tariffs. Subsequently, on July 22, 2002, the FCCA timely filed a Response in Opposition to BellSouth's Motion to Dismiss Complaint.

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

FCCA claims that Sections 364.08(2), 364.051(5)(b) and (5)(c), Florida Statutes, require a telecommunications company to offer services to customers at rates above its incremental costs. FCCA argues that BellSouth has not made such a showing. FCCA asserts that BellSouth's marketing of its Key Customer tariff only in those wire centers where ALEC competitors have shown some interest in the market is anti-competitive and hence, violates Florida Statutes and Commission rules.

We believe that the FCCA has stated a cause of action upon which we could grant relief. Although BellSouth makes an attempt to demonstrate that prices are not predatory and that its rates are compensatory and in compliance with the Commission rules and statutes, BellSouth neglects to show that the FCCA has not stated a cause of action upon which we could grant relief. We agree with FCCA that the decision in Docket No. 020119-TP is not dispositive

of the instant case, although they may be factually similar. If the FCCA's allegations are viewed under the Varnes standard, the FCCA has stated a cause of action upon which we could grant relief.

Taking FCCA's allegations of BellSouth's anti-competitive behavior, predatory pricing and non-compensatory rates as true, and viewing them in the light most favorable to the FCCA, we believe that FCCA's Petition states a cause of action upon which the Commission could grant relief. Therefore, we find that BellSouth's Motion to Dismiss shall be denied.

III. BELLSOUTH'S KEY CUSTOMER TARIFF (JUNE 2002 FILING)

The issue to be addressed is whether BellSouth's 2002 Key Customer Program/June filing should be suspended and the matter set for hearing.

As stated above, on June 25, 2002, FCCA filed a petition requesting us "to immediately review and cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff and any like tariffs filed by BellSouth Telecommunications, Inc." The FCCA contends "the substantial interests [of its members] are affected significantly by BellSouth's anticompetitive behavior."

The FCCA asserts that statutory requirements mandate that telecommunications companies offer services at rates above incremental costs, and as of the filing date of its Petition, contends that BellSouth has made no showing that demonstrates that its discounted rates will cover the incremental costs:

[B]y applying the [tariffed] discounts to total revenues and incorporating the hunting feature at discounts as much as 100%, BellSouth has made it difficult for affected parties or the Commission to even relate the discounts to incremental costs; the impacts will vary depending upon individual customers' usage patterns.

Additionally, the FCCA's petition states that BellSouth's promotional pricing programs are offered exclusively to current and potential ALEC business customers, rather than to all eligible business customers. In doing so, the petitioner believes that BellSouth uses its "dominant market status to selectively eliminate

its business market competitors." FCCA's Petition also alleges that BellSouth's promotional tariffs are continuous in nature.

In summary, the FCCA believes that "BellSouth's continuous program of discounts, its failure to demonstrate compensatory rates, and its selection of a pricing approach that obscures the impact of the discounts, constitute a prima facie indication of anticompetitive intent."

In BellSouth's response, it states that "there is no need for the Commission to re-plow the same ground that it plowed less than a month ago," an obvious reference to the Commission's recent action in Docket No. 020119-TP. BellSouth believes we should:

. . . dismiss the FCCA's Petition in its entirety. In the alternative, the Commission should summarily deny both the FCCA's request for expedited treatment of its Petition and the FCCA's request for cancellation, suspension, postponement, and/or other modification of any of BellSouth's tariffs, and it should deny all remaining claims for relief set forth in the FCCA's Petition.

BellSouth contends that the FCCA's Petition is "substantially similar" to the FDN Petition that was evaluated in Docket No. 020119-TP:

The Commission convened Docket No. 020119-TP to address FDN's Petition, and several parties, including the FCCA and some of its members, intervened in that docket . . . After investigating BellSouth's prior Key Customer tariff [January filing] for nearly four months, the Commission addressed FDN's Petition during its June 18, 2002 Agenda Conference. The Commission heard extensive comments, . . . [then] unanimously voted not to cancel, suspend, postpone, or otherwise modify the prior Key Customer tariff.

Regarding the FCCA's contention about rates, BellSouth denies this allegation on the basis that the rates offered under the June filing have a lower discount rate, and thus yield a higher rate, than the rates offered under the previous Key Customer promotion

[the January filing]. BellSouth asserts "the Commission has determined that the rates offered under the prior Key Customer tariff [January filing] exceed incremental cost."

In reference to the FCCA's competitive harm allegations, BellSouth cites to data gleaned from the Commission's December, 2001 report entitled "Competition in Telecommunications Markets in Florida."¹ BellSouth believes the 2001 Comp Report demonstrates that competitive line growth is occurring in Florida despite BellSouth's promotional endeavors. BellSouth contends the 2001 Comp Report presents facts which "flatly refute the FCCA's allegations that BellSouth's current Key Customer promotion will cause irreparable harm to competition in Florida."

We acknowledge the points raised in the FCCA's petition, and, as BellSouth does, we note the points therein are similar to those contained in the FDN petition filed on February 14, 2002, in Docket No. 020119-TP. As noted in the Case Background, we issued Order No. PSC-02-0875-PAA-TP in Docket No. 020119-TP, on June 28, 2002. The FCCA's Petition centered on three main points - targeting, pricing concerns, and the impact of repetitive promotions.

In Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TP, we found that nothing in Section 364.051(5)(a), Florida Statutes, prohibits or restricts a LEC from targeting specific geographic markets and offering volume and term discounts. BellSouth's Motion to Dismiss also cites to this text in responding to this segment of the FCCA's Petition.

The FCCA's Petition identified pricing concerns. We note that in Docket No. 020119-TP, FDN alleged that the post-discount rates were not compensatory. In Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TP, we also found that:

[B]ased on our analysis of BellSouth's responses to staff's discovery, we can determine that the percentage of contracts which are potentially non-compensatory is

¹The Commission prepares this report on an annual basis to satisfy the statutory requirements of Section 364.386, Florida Statutes, which requires the Commission to provide a report on the status of competition in the telecommunications industry to designated members of the Legislature.

very small. Hence, we find that the rates for services purchased under BellSouth's 2002 Key Customer Program [January filing] are compensatory.

Last, in Docket No. 020119-TP, we acknowledged that "it is not uncommon for BellSouth to begin a new promotion upon, or near, the termination date for a given program." BellSouth believes that the FCCA is presenting a similar assertion that we have previously evaluated. While we agree in general with BellSouth's assertions, we do, however, emphasize that the tariff at issue here does contain different terms and conditions from the January filing.

FCCA has requested that we "cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff. . ." We believe that we have authority to suspend a tariff. We rely upon the rationale previously accepted by us in Docket No. 990043-TP². Therein, we voted on January 19, 1999, to suspend a BellSouth tariff filing, but the tariff was subsequently withdrawn. As a result, no order from our vote was issued. Nevertheless, we believe that the rationale regarding our suspension authority advocated in that case is sound.

However, we believe that the issues addressed in this docket should be addressed in an evidentiary hearing. On that basis, we are not inclined to pursue suspension of the BellSouth's Key Customer Tariff (June Filing). Instead, we find that this matter shall be set for an expedited hearing. We note also that the issues are similar in Docket No. 020119-TP and this docket and believe that it is appropriate to consolidate these dockets for purpose of hearing. Therefore, we also find that for purposes of hearing Docket Nos. 020119-TP and 020578-TP shall be consolidated. This docket shall remain open pending the outcome of further proceedings.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Telecommunications, Inc.'s Motion to Dismiss shall be denied. It is further

²Petition to review and to cancel BellSouth Telecommunications, Inc.'s promotional tariff (T-98-1783) by Arrow Communications, Inc. (Arrow)

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ORDERED that Docket Nos. 020119-TP and 020578-TP are hereby consolidated as set forth herein. It is further

ORDERED that this docket shall remain opening pending the outcome of further proceedings.

By ORDER of the Florida Public Service Commission this 9th day of September, 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)

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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.

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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.