

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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. 020119-TP

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

In re: 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.

DOCKET NO. 021252-TP  
ORDER NO. PSC-03-1057-FOF-TP  
ISSUED: September 23, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman  
J. TERRY DEASON  
BRAULIO L. BAEZ  
RUDOLPH "RUDY" BRADLEY  
CHARLES M. DAVIDSON

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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

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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.

Commission 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 our 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 Order addresses the Motion and Response.

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

#### 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. FDN states that we erred in our 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.

Specifically, FDN asserts that we 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 Commission 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.

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 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 we 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, we 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 Report<sup>1</sup>) 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. Based on the foregoing, FDN requests that the Commission grant its Motion for Reconsideration, and or Clarification.

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<sup>1</sup>Titled "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.

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 we should summarily reject it. BellSouth opines that instead of providing facts that we overlooked, or law, FDN merely regurgitates its theory of the case. BellSouth states that we 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. 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 we failed to evaluate the tariffs for 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 us.

In summary, BellSouth believes our Final Order demonstrates that we reviewed each and every issue and practice complained of by FDN, and considered the record in its entirety. Therefore, BellSouth requests that we 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. 1<sup>st</sup> 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. 3<sup>rd</sup> DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> 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).

In its Motion, FDN complains that the Commission did not define what an "anticompetitive act or practice" is. Although we acknowledge that this text appears to be extracted directly from Section 364.051(5)(a), Florida Statutes, it was not our intent to establish such definitions in our consideration of this case. However, in our Order, we indicate that because the words "unfair, anticompetitive, or discriminatory" are rooted in the Florida Statutes, the true evaluation of the issue[s] focuses on compliance with the Florida Statutes." Order at 24.

We explain that if a determination revealed that the rates were "non-compensatory," such a finding would sway us to conclude that the tariff offerings are unfair, anticompetitive, or discriminatory. Order at 22. Therefore, FDN's argument that the we were required, and failed, to define "anticompetitive practice" should be dispatched, and is not a valid basis to pursue a motion for clarification. We clearly outlined what we 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 Commission staff analyst wherein the Commissioner asked about staff's "general conclusions" of the market impact of BellSouth's "Key Customer" offerings. The analyst responded by referencing a single hearing exhibit, Exhibit 8, though Commission staff indicated that this exhibit was only ". . . **one** of the key pieces of evidence . . ." considered by the staff. We make no assertion that this exhibit was the sole basis of our consideration to the exclusion of any (or all) other exhibits, and FDN is misguided in alleging that we overlooked the record evidence contained in Exhibit 17.

Regarding Exhibit 17, we note that *total* line growth is reflected therein, including line growth for facilities-based competitors. Exhibit 17 demonstrates 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:

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

We acknowledge 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 as a key piece of evidence in this matter. Because we placed the emphasis of our analysis on the "overall" market activity, as opposed to a "segment" (such as facilities-based providers), 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 Commission staff's recommendation and was affirmed in our Final Order. Therefore, FDN's contention that neither we or Commission staff considered (or cited) Exhibit 17 is simply not true. 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, 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 we cannot ignore the fact that BellSouth still enjoys monopoly status in the incumbent market territory. Order at 9. It is clear that we did consider BellSouth's market power. Hence, FDN's contention that we overlooked BellSouth's market power in making our decision is mere reargument and not appropriate for a motion for reconsideration.

Conclusion

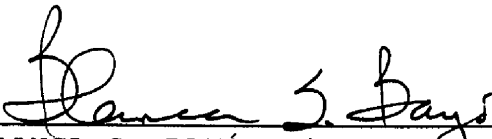
Because FDN failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our decision, FDN's Motion for Reconsideration, and or Clarification is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 23rd Day of September, 2003.

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

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.