

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc. | DOCKET NO. 050119-TP

In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC. | DOCKET NO. 050125-TP
ORDER NO. PSC-05-0517-PAA-TP
ISSUED: May 11, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

NOTICE OF PROPOSED AGENCY ACTION
ORDER CONSOLIDATING DOCKETS AND DENYING SUSPENSION OF TARIFF

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.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Case Background

On February 11, 2005, TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc., d/b/a GT Com; Smart City Telecom; ITS Telecommunications Systems Inc.; and Frontier Communications of the South, LLC (Joint Petitioners) filed a joint petition that objects to and requests suspension and cancellation of BellSouth Telecommunication Inc.'s (BellSouth) General Subscriber Services Tariff A16.1, Transit Traffic Service. Docket No. 050119-TP was established in response to the petition filed by the Joint Petitioners. On February 17, 2005, AT&T Communications of the Southern States, LLC, (AT&T) also filed a petition and complaint for suspension and cancellation of Transit Traffic Tariff No. FL 2004-284 filed by BellSouth. Docket No. 050125-TP was subsequently established in response to AT&T's petition.

BellSouth filed an answer to the Joint Petitioners in Docket No. 050119-TP, on March 3, 2005, and on March 4, 2005, filed an answer and motion in Docket No. 050125-TP to consolidate Docket No. 050119-TP with Docket No. 050125-TP. This order addresses the BellSouth motion to consolidate the two dockets and the requests for suspension of the Transit Traffic Tariff.¹

These dockets involve a dispute over transit traffic, which is traffic that originates on the network of one carrier, transits over BellSouth's network, then terminates on the network of a third carrier. BellSouth has filed a new tariff, General Subscriber Services Tariff § A.16.1, Transit Traffic Service, which sets forth certain rates, terms and conditions that apply when carriers receive transit service from BellSouth but have not entered into an agreement with BellSouth setting forth rates, terms and conditions for the provision of transit services. BellSouth's transit tariff does not apply to a party with whom BellSouth has an existing contractual relationship because the tariff, by its terms, applies as a default, only in the absence of an existing contractual agreement.

We are vested with jurisdiction over this matter pursuant to provisions of Chapter 364.01(4), and 364.051(5), Florida Statutes.

Findings and Analysis

Consolidation

We find it appropriate to consolidate Docket Nos. 050119-TP and 050125-TP. We find that both petitions have been recently filed, and no party would be harmed or prejudiced by consolidating any objections to BellSouth's Tariff A16.1, Transit Traffic Service, into a single proceeding, per BellSouth's Motion in Docket No. 050125-TP. Furthermore, consolidation would allow for greater administrative efficiency by streamlining the disputes regarding the tariff into a single proceeding.

¹ Transit Traffic Tariff No. FL 2004-284 is also known as BellSouth's General Subscriber Tariff A16.1, Transit Traffic Tariff.

Suspension of Tariff

Parties Arguments

The Joint Petitioners argue that they are “originating Telecommunications Service Providers of Transit Traffic” as defined by the tariff. The Joint Petitioners state that they are not parties to separate written agreements with BellSouth specifically addressing the rates, terms and conditions for BellSouth’s provision of Transit Traffic Service. The Joint Petitioners further claim that they have historically engaged in a consistent course of conduct with BellSouth whereby Transit Traffic Service, as defined by the Proposed Tariff, has been provided by BellSouth without charge to the Joint Petitioners.

AT&T argues that pursuant to Sections 251(a)(1) and 251(c)(2) of the Telecommunications Act of 1996 (the “Act”), BellSouth is obligated to provide for direct or indirect interconnection for the transmission and routing of telephone exchange or exchange access service. Transit traffic clearly falls within the confines of these obligations. Moreover, the transport of transit traffic must be offered at TELRIC rates pursuant to Section 252(d)(1) of the Act.

BellSouth argues that when it provides transit service, it operates as a conduit between other carriers that may not have direct interconnection agreements in place. BellSouth states that in most instances, it has established contractual arrangements that address the terms and conditions for the provision of transit service, as well as the compensation that is owed to BellSouth – generally from the originating carrier – for transiting such traffic. BellSouth claims that its Transit Traffic Tariff does not apply to carriers who have negotiated such contracts. BellSouth further states that the petitioners, despite having no arrangement in place with BellSouth for the provision of transit service, send transit traffic to BellSouth for termination to other carriers with whom the petitioners have no direct interconnection. In the absence of an existing contractual agreement, BellSouth intends for the Transit Traffic Tariff to apply as a default.

Findings

In deciding whether or not to suspend a tariff this Commission considers whether a petition demonstrates that the alleged anticompetitive or discriminatory effect of the tariff will cause significant harm that cannot be adequately redressed if the tariff is ultimately determined to be invalid. Such irreparable harm includes financial or economic harm to telecommunications providers, significant harm to market image or goodwill, or significant discrimination against similarly situated customers.²

Section 364.051, Florida Statutes, governs BellSouth’s tariff filings, providing that non-basic service tariffs become effective and presumptively valid 15 days after filing. Thus, we find

² Similar language was approved in Docket No. 990043-TP. Staff’s recommendation incorporating this language was approved at the January 26, 1999 Agenda Conference; however, an order was never issued as the underlying petition was withdrawn shortly thereafter. See also, Order No. PSC-02-1237-FOF-TP in Docket No. 020578-TP

that this Commission should only suspend the effectiveness of a tariff upon a prima facie demonstration that the tariff is anticompetitive or discriminatory, and the actions contemplated by the tariff in question may cause irreparable harm. Irreparable harm is serious harm that cannot be undone; an injury that cannot be adequately compensated in damages, or measured by pecuniary standards. Cloughton v. Donner, 771 F.Supp. 1200 (S.D. Fla. 1991). The American Heritage Dictionary (Second College Edition) defines irreparable as: "incapable of being repaired, rectified, or amended." In Black's Law Dictionary (Fifth Edition) irreparable injury is defined as follows:

This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included. The remedy for such is commonly in the nature of injunctive relief. "Irreparable injury" justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.

We find that the petitioners have failed to make a conclusive showing that (1) the tariff is anticompetitive or discriminatory in nature, and (2) the actions contemplated by the tariff in question may cause irreparable harm. Thus, denial of the petitions to suspend BellSouth's Transit Traffic Tariff are appropriate in that no irreparable harm would be suffered by the petitioners. We do, however, find it appropriate that revenues from the tariff be held by BellSouth subject to refund pending the outcome of this proceeding. Furthermore, at the end of the proceeding, if the tariff is found to be invalid, a refund would be appropriate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Docket Nos. 050119-TP and 050125-TP are hereby consolidated. It is further

ORDERED that BellSouth Telecommunication Inc.'s General Subscriber Services Tariff A16.1, Transit Traffic Service shall remain in effect pending the outcome of this proceeding.

ORDERED that that revenues from BellSouth Telecommunication Inc.'s General Subscriber Services Tariff A16.1, Transit Traffic Service be held by BellSouth subject to refund pending the outcome of this proceeding. 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

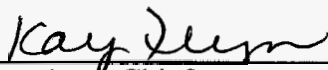
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Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall remain open.

By ORDER of the Florida Public Service Commission this 11th day of May, 2005.

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

By: 
Kay Flynn, Chief
Bureau of Records

(S E A L)

JPR

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 June 1, 2005.

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.