

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL  
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In re: Comprehensive Review of the ) Docket No. 920260-TL  
Revenue Requirements and Rate )  
Stabilization Plan of Southern Bell ) Filed: 2-24-97  
Telephone and Telegraph Company )

**PALM BEACH NEWSPAPERS, INC.'S  
MOTION FOR RECONSIDERATION  
OR IN THE ALTERNATIVE,  
PETITION FOR RELIEF FROM UNJUST RATES AND INADEQUATE SERVICE**

Palm Beach Newspapers, Inc. (PBNI) hereby files this its Motion for Reconsideration of Order No. PSC-97-0128-FOF-TL, or in the alternative, Petition for Relief from Unjust Rates and Inadequate Service.

**INTRODUCTION**

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v King, 146 So. 2d 889 (Fla. 1962). This standard is easily met as it applies to the Commission's decision denying PBNI relief from exorbitant N11 rates. The Commission's order did not discuss, note, mention, recognize, or otherwise

ACK \_\_\_\_\_  
AFA 1 acknowledge the arguments PBNI advanced in its confidential post-  
APP \_\_\_\_\_ hearing brief ("Confidential Brief").

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LEG 1  
LIN 5 overlooking and failing to consider PBNI's brief is an particularly egregious violation of PBNI's right to due process in this case because no live testimony was taken at hearing. Thus, the Commission has no foundation upon which to base its decision other than the written testimony of witnesses, exhibits, and the

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post hearing briefs of the parties. Where there is no live testimony, the briefs often become the chief instrument by which a party makes its case to the Commission.

For PBNI, its Confidential Brief was critically important. The testimony of PBNI witness James Freeman was prepared before discovery was completed. Only PBNI's Confidential Brief presents to the Commission information critical to judging PBNI's case. The Commission was obligated to consider PBNI's case in rendering its decision, and this oversight and failure is reversible error.

#### **PBNI'S PROPOSAL**

In this proceeding, PBNI has proposed to change the N11 tariff of BellSouth Telephone (BST) so that the N11 customer pays a flat rate of \$0.01 per minute or the current monthly minimum, whichever is greater. Although PBNI's Confidential Brief is comprehensive and detailed, PBNI's case for the requested relief can be concisely stated in one sentence: The Commission should accept PBNI's proposal because it will (1) have **zero revenue effect** on BST, (2) **lessen exorbitant rates** over time, and (3) **serve the public interest** by promoting the development of N11 services and products. Each of these three elements are explained briefly below.

##### Zero Revenue Effect on BST

PBNI demonstrated in Confidential Brief that because the monthly minimum charge would remain in place, its proposal would have a **zero revenue effect** on BST, or at worse (using BST's flawed, overstated estimate), an effect **no greater than a rounding error** (i.e. a projected revenue reduction of less than \$99,500 per year).

This is because the monthly minimum remains in place and N11 providers typically do not pay more than the minimum.

Lessen Exorbitant BST Rates

PBNI also demonstrated in its brief that the ratio of the N11 price to BST's cost of providing the service is exorbitant. PBNI may not make any disclosure here that would compromise confidential cost information about BST. The cost to the N11 customer may be disclosed, however. The N11 customer pays between \$0.23 and \$0.32 a message, which is many times greater than the costs BST incurs in providing the service. For a complete description and evaluation of these data, please see PBNI's Confidential Brief.

PBNI's Proposal in the Public Interest

PBNI also demonstrated in its brief and through the testimony of Mr. Freeman that N11 service continues to be in the public interest and that moving toward cost based rates will promote expanded and varied N11 and other abbreviated dialing services. These expanded services can occur in two broad ways. First, existing N11 providers will be able to create and deliver products that do not exist today; next, as N11 service becomes more affordable and tested, it can expand into new territories. Neither new products nor expansion into new territories is guaranteed; the double-edged genius of competition is that it encourages many to take risks but rewards few. But what can be guaranteed is that if the Commission does not move N11 rates toward cost, it is consigning N11 service to its current state and foreclosing the development of other abbreviated dialing services.

## THE COMMISSION'S RATIONALE FOR REJECTING PBNI'S PROPOSAL

The decision to reject PBNI's proposal is fatally flawed for both reasons of both omission and commission. As already noted, the decision simply overlooked and failed to consider PBNI's case as presented in its Confidential Brief. For this reason alone, the Commission must reconsider its decision and address PBNI's case for relief.

### Misapprehension about expansion into smaller markets

There are also flaws in decision's stated rationale that require consideration. For example, the order suggests that PBNI's primary justification for reducing rates would be to introduce N11 services into new territories. Although this is certainly an aspect of the justification, it misses the gravamen of the case for relief from exorbitant rates. Tersely stated, the public interest case for rate relief is as follows:

**Unless N11 rates are brought into alignment with costs, there is no chance that N11 customers will be able to develop new products that are appealing to the public and/or for N11 service (or other abbreviated dialing services) to move into smaller markets. The cost per message now is simply too high to allow for the growth of this service, whatever its potential.**

### Vanity number confusion

The Order apparently concludes that N11 service would not grow at any price because there are less costly seven digit alternatives to N11 Service, and if growth were to be had, the industry would have seen it:

Witness Freeman suggests that price reductions for N11 Service usage might be stimulate those presumably non-major markets where they are not already saturated. If there were truly a

recognizable or potential demand, current Florida tariffs provide opportunities to offer information service with seven digit numbers such as vanity numbers. This would be less expensive than even the rates that witness Freeman proposes, in that there could be no usage charges at all. (Order at 27-28)

This rationale confuses allocation of available N11 numbers with saturation of N11 products for the public. There is no evidence of any product saturation. Indeed, under today's pricing the development of products is repressed.

No competent substantial evidence

Also, there is no competent substantial evidence in the record to suggest that seven digit numbers are a functional substitute for N11. In fact, this observation ignores the reason N11 service developed in the first place: there were no pay per call alternatives to information providers other than 976 service which was available in only one city per NPA.

It may be that the Commission finds support for its "vanity number" analysis in the deposition of BST witness Varner. At deposition, staff counsel asked Mr. Varner if vanity numbers could be a substitute for N11 codes.

Q. Do you believe that vanity numbers could be considered a reasonable less expensive alternative to N11 codes?

A. In some cases, yes. It depends on what the marketing plan is and what they feel the attractiveness is. But it certainly does give them substantial form, is what they are trying to get with an N11 number. [Varner Deposition at p. 43]

Mr. Varner, of course, was not proffered by BST as an expert on the marketing of information service and, in fact, is not

qualified to offer expert opinion testimony on that subject. Nevertheless, even in his lay opinion whether there are substitutes for N11 codes obviously depends on the business plan of the information provider. Curiously, this question was not asked of either PBNI which has real expertise in what an information provider needs from the LEC in order to provide products the public wants. Had PBNI been asked, the record would contain competent evidence upon which the Commission could render some conclusion about whether vanity numbers are substitutes for N11 codes.

In its final paragraph addressing PBNI's proposal, the Commission suggests that relief may come to PBNI through competition, presumably through resale. This suggestion also overlooks PBNI's Confidential Brief. When one is paying rates that are many, many times the cost of service, the promise of a 20% discount sometime in the future is of little solace.

#### **CONCLUSION**

For the reasons stated above, the Commission should reconsider its decision not to accept PBNI's modest proposal to reduce its N11 costs. The Commission should carefully consider the arguments made in PBNI's Confidential Brief and then order BST to change its N11 tariff so that the N11 customer pays a flat rate of \$0.01 per minute or the current monthly minimum, whichever is greater.

#### **ALTERNATIVE PETITION FOR RELIEF FROM UNJUST RATES**

If the Commission declines to reconsider its decision with respect to PBNI's proposal in this docket, PBNI in the alternative

petitions the Commission for relief from unjust rates and inadequate service pursuant to Section 364.051, Florida Statutes.

In contemplation of the dispute the consideration of this new petition for relief, PBNI requests that a new docket be established for this matter, and that Exhibits 22 (Confidential) and 23 the Confidential Brief from Docket No. 920260 be made part of the record of the new docket. Although much of the data produced by BST is flawed, the data contained in the exhibits establish the outer limits of the cost of providing N11 service. PBNI's Confidential Brief establishes the economic justification for revising rates for N11 Service. PBNI intends to rely on these documents in a subsequent motion for expedited relief.

#### **GROUNDS FOR RELIEF**

Although Section 364.051, Florida Statutes establishes flexible price regulation for certain LECs such as BST, it does not create a system of regulation in which the customer of a non-basic monopoly service is abandoned to the whim of the LEC in defining the price and quality of monopoly services. For example, in Section 364.051(6)(a), the statute sets certain ground rules as to pricing while ensuring the LEC ample flexibility to wheel and deal in the market. Nevertheless, at the end of Section 364.051(6)(a), the statute states an overriding legislative benchmark:

However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

Similarly, in the following subsection the statute establishes continuing regulatory jurisdiction to protect against the monopoly

abuses by the LEC, including the unfair treatment of an information provider such as PBNI. Specifically, Section 364.051(6)(b) provides in pertinent part as follows:

(b) The commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market. . . .

Although this section clearly contemplates active regulatory oversight to prevent cross-subsidization of non-basic services by basic services, the scope of the Commission's authority includes two other areas of inquiry. The Commission is directed to resolve service complaints and to ensure that providers of telecommunication or information services be treated fairly in the market. PBNI's petition for relief is grounded in these two provisions as well.

Additionally, as demonstrated in the Confidential Brief, PBNI is a captive end-user of a BST monopoly non-basic service and the rates of this monopoly non-basic service are being used to subsidize other offerings of BST, some of which may ultimately compete against PBNI's own information services. Although PBNI's unique position as a customer of monopoly non-basic service does not trigger the Commission's "regulatory oversight to prevent cross-subsidization of non-basic services by basic services," the policy concerns are the same. Thus, PBNI's request for relief is specifically contemplated under two provisions of Section 364.051(6)(b), and consistent with the third.

### STANDARD FOR RELIEF

PBNI submits that to state a claim for relief under Section 364.051(6), a petitioner must allege the following elements:

1. The violation of one of the following statutory standards by the LEC:
  - (a) it is being subjected to an anticompetitive act or practice; or
  - (b) it is being subject to unreasonable discrimination in comparison to similarly situated customers; or
  - (c) it is being subject to inadequate service; or
  - (d) as a provider, it is being treated unfairly in the telecommunications market.
2. The granting of the requested relief is in the public interest.

### PBNI'S CLAIM FOR RELIEF

#### Violation of Statutory Standards

BST's pricing and provision of N11 service violates not just one, but each of the standards of Section 364.051(6) (a) and (b).

**Anticompetitive.** The Commission implicitly found in Order No. PSC-97-0128-FOF-TL that vanity and other seven-digit numbers were competitive alternatives to N11 codes, and BST witness agreed at deposition that in some cases this was true. Although PBNI believes that N11 Service is unique, if the Commission does not reconsider its order then PBNI is being subject to exorbitant rates that put it at a competitive disadvantage from providers who rates are "less expensive than even the rates that (PBNI) proposes. . . ." (Order at 27-28) BST's rates must be redesigned to eliminate this anticompetitive effect.

**Unreasonable discrimination.** PBNI remains convinced that the

service it takes is unique and that there are no similarly situated customers. If the Commission maintains its position that vanity numbers are substitutes for N11 codes, then vanity number customers are similarly situated to N11 customers from a competitive perspective. There is no reasonable basis upon which to discriminate between the N11 customer and the vanity number customer as is the case now. If the Commission agrees with PBNI that N11 services are unique and there are no similarly situated customers, then a surrogate must be established to determine whether unreasonable discrimination exists. Ultimately the Commission's inquiry will arrive at an inevitable conclusion: the price-cost ratio of N11 Service rates are exorbitant and unfairly discriminate against the N11 customer.

**Inadequate service.** N11 customers pay a premium rate for what is essentially a central office remote speed dialing service with billing and collection. The functionalities offered by BST for this premium rate are inadequate for the price paid. For example, BST is unable to turn off N11 billing for selected days. Thus, if PBNI wished to provide its 511 access for free for various purposes it cannot. In any event, BST must either improve its service or lower its rates.

**Unfair treatment.** PBNI is a provider of information services being treated unfairly in the market because it is being forced to pay exorbitant rates for a monopoly service which is key to its entire information service business plan.

### Rate Revision for N11 Service in the Public Interest

Seven years ago PBNI began a futile effort to obtain a seven-digit vanity number with billing and collection. BST took the position that only 976 service could provide the bundle of features sought by PBNI and that only customers who resided in Miami, Orlando, and Jacksonville could subscribe to that service. According to BST, the North America Numbering Plan allowed only one NXX per NPA, and West Palm Beach had been preempted by Orlando, which at the time shared the same area code with West Palm Beach.

PBNI, BST and staff worked on this problem for about two years without success. Then PBNI hit on an ingenious solution to the dilemma: idle N11 codes could be used to provide the needed platform for a pay-per-call audiotext information service. BST ultimately agreed that this approach would work and would be in the public interest. In bold and industry shaking move, BST filed a tariff proposing N11 service. Because of BST's leadership, Florida was the first place in the world that N11 abbreviated dialing was made available for information services.

BST's tariff was protested and the matter went to hearing. Every party to that hearing stipulated that in general freeing up N11 codes for commercial and other use was in the public interest. There was, however, some dispute as to how the limited codes should be allocated and as to whether some codes should be reserved for purportedly public interest use.

The Commission decided to take public interest testimony before approving the stipulation. The record in that proceeding,

including the testimony of BST's witness, supports the development of N11 service as being in the public interest because it creates the opportunity for local based information services to develop. The decision of the Commission approving N11 service may be found in Order No. PSC-93-1620-FOF-TL, Docket No. 920913-TL (issued November 4, 1993).

N11 service remains a good idea today for the same reason the BST proposed it and the Commission embraced it in 1993: it takes network facilities that would be otherwise used -- the five N11 numbers available in each local calling area throughout the state - - and allows information service providers to put them to work attempting to satisfy consumer demand for information services. Moreover, N11 service has produced and will continue to produce above the line revenues, which have and will directly benefit the general body of ratepayers.

In the four years since being allocated 511 in its territory, PBNI has delivered on part of the promise of its information services. Today in the South Florida area, PBNI provides through 511 some 800 to 1000 information "products" to the public, many of which are accessible in both English and Spanish. And with respect to its bilingual products, PBNI believes that it has the largest Spanish language audiotext information service in the world.

But as suggested above, PBNI has delivered on only part of the promise of its local information services. The current prices it must pay for N11 service limits its ability to take the service to the next level. PBNI recognizes that when pricing was originally

set for N11 service it made sense to ensure that BST would not lose money. Thus, high non-recurring charges, high monthly minimums, and high usage charges were appropriate at the beginning. But as demonstrated in PBNI's Confidential Brief, BST has been more than compensated for its start-up costs. Four years have passed since the need for high start-up rates, and it is time to get the rates right so N11 service can fulfill its promise.

In sum PBNI believes that granting it relief from exorbitant rates will serve the public interest. Under appropriate rates, N11 Service will continue to:

- o help meet the consumer demand for convenient access to information services;
- o promote the development of information services;
- o increase the availability of information services;
- o make it easier for consumers to reach and use information services without worrying about presubscription or having to establish relationships with information services providers;
- o spur competition in information services; and
- o generate above the line revenues which will benefit the general body of ratepayers.

#### CONCLUSION

If the Commission declines to reconsider Order No. PSC-96- - FOF-TL and to grant PBNI's proposal in Docket No. 920260-TL, PBNI request the following alternative relief:

- (1) Accept this pleading as Petition for Relief from
- (2) Open a new docket on the subject matter of this Petition;

(3) Move into the new docket from Docket No. 920260-TL Exhibits 22 (Confidential) and 23;

(4) Move into the new docket from Docket No. 920260-TL PBNI's Confidential Brief;

(5) Grant PBNI relief from the current rates for its N11 Service.

Respectfully submitted this 24th day of February 1997.



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**CERTIFICATE OF SERVICE**

**Docket No. 920260-TL**

I HEREBY CERTIFY that a copy of the foregoing Palm Beach Newspapers, Inc.'s Motion for Reconsideration or in the Alternative, Petition for Relief from Unjust Rates and Inadequate Service has been furnished by U.S. Mail this 24th day of February, 1997, to:

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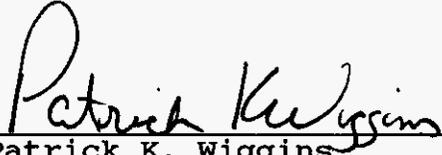
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