

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation to determine whether BellSouth Telecommunications, Inc.'s tariff filing to restructure its late payment charge is in violation of Section 364.051, F.S.

DOCKET NO. 000733-TL  
ORDER NO. PSC-01-2348-PCO-TL  
ISSUED: December 6, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman  
J. TERRY DEASON  
LILA A. JABER  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI

ORDER GRANTING BELL SOUTH'S MOTION FOR  
STAY OF ORDER PENDING JUDICIAL REVIEW

BY THE COMMISSION:

BACKGROUND

On July 9, 1999, BellSouth Telecommunications, Inc. (BellSouth) filed a tariff with this Commission to restructure its Late Payment Charge (LPC) in Section A2 of its General Services Tariff (GST). Under this tariff filing, BellSouth applies a Late Payment Charge of \$1.50 for residential customers and \$9.00 for business customers plus an interest charge of 1.50% on unpaid balances in excess of \$6.00. Prior to this filing, BellSouth applied a Late Payment Charge of 1.50% to any unpaid balance greater than \$1.00.

Pursuant to Section 364.051(5)(a), Florida Statutes, since BellSouth is a price-regulated Local Exchange Company, BellSouth's tariff filings are presumptively valid and may go into effect fifteen (15) days after the filing. BellSouth's filing became effective July 24, 1999, in accordance with Section 364.051(5)(a),

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Florida Statutes. The tariff provisions became effective August 28, 1999.

In August 1999, we first expressed concerns to BellSouth about possible statutory violations regarding its Late Payment Charge tariff filing. We were made aware of ongoing discussions between BellSouth and the Office of Public Counsel (OPC) on this same filing. In view of the ongoing discussions between BellSouth and OPC, BellSouth requested that we allow the negotiations to continue in an effort to resolve the matter. BellSouth furnished to us a letter stating that BellSouth would provide refunds to affected customers if the Late Payment Charge was ultimately found to be unlawful.

On June 19, 2000, this docket was established to investigate whether BellSouth's tariff filing to restructure its late payment charge was in violation of Section 364.051, Florida Statutes. By Order No. PSC-00-1357-PAA-TL, issued July 27, 2000, we found BellSouth's July 9, 1999, tariff filing in violation of Section 364.051(5)(a), Florida Statutes. Pursuant to Order No. PSC-00-1357-PAA-TL, the tariffs were to remain in effect if a timely protest were filed, pending the outcome of a hearing with any revenues resulting from the tariff held subject to refund.

On August 17, 2000, BellSouth timely petitioned for a formal hearing. By Order No. PSC-00-2458-PSC-TL, issued December 20, 2000, OPC's Notice of Intervention was acknowledged. By Order No. PSC-00-2279-PCO-TL, a hearing was scheduled for April 18, 2001.

On December 11, 2000, BellSouth and OPC filed a Joint Motion to Amend Procedural Schedule. By Order No. PSC-01-0228-PCO-TL, issued January 23, 2001, the parties' motion was granted, the hearing was cancelled and the parties were directed to file their legal briefs. At the August 14, 2001, Agenda Conference, we considered our staff's recommendation on the parties' briefs on BellSouth's Late Payment Charge tariff.

By Order No. PSC-01-1769-FOF-TP, issued August 30, 2001, we found BellSouth's Late Payment Charge in violation of Section 364.051(5)(a), Florida Statutes. Pursuant to Order No. PSC-01-1769-FOF-TP, BellSouth was directed to refund all amounts collected through the restructured interest charge of 1.50% on all unpaid

balances in excess of \$6.00, with interest, to all affected customers within 120 days of the issuance of the Order.

On September 14, 2001, BellSouth filed its Motion for Stay of Order Pending Judicial Review. On September 27, 2001, BellSouth filed its Notice of Administrative Appeal. The Supreme Court of Florida issued its Acknowledgment of New Case on October 17, 2001. No response to BellSouth's Motion has been filed.

We are vested with jurisdiction pursuant to Section 364.051(5)(a), Florida Statutes.

MOTION FOR STAY OF ORDER PENDING JUDICIAL REVIEW

BellSouth's Motion

In support of its Motion, BellSouth states that on July 9, 1999, it filed a tariff with this Commission revising its advanced payments tariff to change the Late Payment Charge from a percentage to a flat rate and to add a new interest charge on unpaid balances. BellSouth asserts that after a stipulation of exhibits and briefs, we issued Order No. PSC-01-1769-FOF-TP, which held that the interest charge imposed by BellSouth violated Section 364.051(5)(a), Florida Statutes. BellSouth states that we further found that it should discontinue assessing the interest charge and refund all amounts collected through the interest charge, with interest, to all affected customers within 120 days.

BellSouth alleges that it would be filing a Notice of Appeal of the Order to the Florida Supreme Court and therefore is seeking a stay of the Order pending the appeal. BellSouth filed its Notice of Appeal on September 27, 2001, and the Florida Supreme Court acknowledged the new case on October 17, 2001.

BellSouth states that it is seeking a stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, which requires a stay be granted pending judicial review of an Order which involves a refund or a decrease in rates. BellSouth contends that under these circumstances BellSouth does not have to show that it is likely to prevail on the merits, that it has suffered irreparable harm or that a stay is not contrary to the public interest. BellSouth alleges that there is no controversy that the Order decreases the

rates presently charged by BellSouth to its end user customers and orders a refund of moneys. BellSouth argues that the Order mandates a decrease in BellSouth's charge to its customers for unpaid balances over \$6.00. Prior to the Order, these customer were charged interest of 1.50%. However, the Order requires that BellSouth no longer impose this charge and, thus, the interest charge has decreased from 1.50% to zero for unpaid balances over \$6.00.

BellSouth states that, in the alternative, should we determine that the Order is not a refund or decrease in rates, BellSouth seeks a stay pending judicial review pursuant to Rule 25-22.061(2), Florida Administrative Code. BellSouth states that in determining whether to grant a stay, we may consider whether BellSouth is likely to prevail on appeal; whether BellSouth has shown it will suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest.

BellSouth contends that it believes that it will prevail on appeal because the interest charge is not a telecommunications service or part of a telecommunications service. BellSouth argues that the interest charge is not a fee for service regulated by Section 364.051(5)(a), Florida Statutes, and therefore BellSouth is properly charging customers for the loss of use of money. BellSouth further argues that if a stay is not granted it will suffer irreparable harm. BellSouth asserts that our Order essentially mandates that BellSouth forego the ability to recover the loss of the use of money. BellSouth contends that it will not be able to recover its losses if the Order is eventually overturned on appeal. BellSouth states that in contrast to the harm to it if the stay is not granted, the harm to the public if a stay is entered will be inconsequential. BellSouth states that it will continue to collect the interest charge subject to providing refunds with interest to affected customers if the interest charge is ultimately found to be unlawful.

BellSouth states that it seeks to preserve the status quo pending appeal. BellSouth contends that if the stay is not granted and BellSouth prevails on appeal, it will not be allowed to retroactively bill the customers involved even if the customers can be located. BellSouth argues that there will be no harm caused to

the customers involved or to the general public if a stay is granted.

BellSouth states that Rule 25-22.061(1)(a) and Rule 25-22.061(2), Florida Administrative Code, permit us to require BellSouth to post a bond or issue some other corporate undertaking as a condition of the stay. BellSouth recommends that the bond be set at zero. BellSouth argues that no bond is necessary because granting a stay will not prejudice the general public. BellSouth states that it will collect the tariffed charges involved from customers in Florida subject to refund pending the outcome of the judicial review. BellSouth contends that upon the ultimate determination of this matter, BellSouth can make the appropriate disposition of these funds. BellSouth asserts that the public will not be harmed or prejudiced by the lack of a bond.

#### Analysis

We note that no response has been filed to the Motion for Stay of Order Pending Judicial Review. Rule 25-22.061(1)(a), Florida Administrative Code, states

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

By Order No. PSC-01-1769-FOF-TP, issued August 30, 2001, we found BellSouth's Late Payment Charge in violation of Section 364.051(5)(a), Florida Statutes, and ordered BellSouth to refund all amounts collected through the restructured interest charge of 1.50% on all unpaid balances in excess of \$6.00, with interest, to all affected customers within 120 days of the issuance of the Order. We believe that it is clear that the Order requires BellSouth to refund moneys to customers. In accordance with Rule 25-22.061(1)(a), Florida Administrative Code, we must grant a stay pending judicial review if the Order involves a refund of moneys. BellSouth filed its Notice of Administrative Appeal on September

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27, 2001. Further, the Supreme Court of Florida acknowledged receipt of this case on October 17, 2001. Therefore, we find it appropriate to grant a stay of Order No. PSC-01-1769-FOF-TP pending judicial review.

BellSouth asks that we set a zero bond in this matter because the public will not be harmed should the stay be granted. However, Rule 25-22.061(1)(a), Florida Administrative Code, requires that a good and sufficient bond or corporate undertaking be posted as a condition of granting a stay. We find that a corporate undertaking is appropriate.

We believe that it is clear that the Order involves a refund of moneys which meets the criteria for granting a stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code. Since we find that it is appropriate to grant a stay based on Rule 25-22.061(1)(a), Florida Administrative Code, no discussion of the merits of BellSouth's arguments based on Rule 25-22.061(2), Florida Administrative Code, is necessary. We believe that it is clear that the Order involves a refund of moneys.

For the foregoing reasons, we grant BellSouth's Motion for Stay of Order Pending Judicial Review conditioned upon BellSouth posting a corporate undertaking for moneys subject to the refund addressed by Order No. PSC-00-1357-PAA-TL.

Based on the foregoing, it is

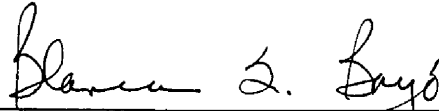
ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Stay of Order Pending Judicial Review is hereby granted. It is further

ORDERED that BellSouth Telecommunications, Inc. shall post a corporate undertaking for moneys subject to the refund addressed by Order No. PSC-00-1357-PAA-TL. It is further

ORDERED that this docket shall remain open pending judicial review.

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By ORDER of the Florida Public Service Commission this 6th day  
of December, 2001.



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

( S E A L )

PAC

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.

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2)

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reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.