



Public Service Commission  
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**-M-E-M-O-R-A-N-D-U-M-**

020119-TP  
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**DATE:** OCTOBER 24, 2002  
**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)  
**FROM:** OFFICE OF THE GENERAL COUNSEL (BANKS, DODSON) *PKB* DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (BARRETT) *mc*

**RE:** DOCKET NO. 020119-TP - 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. 020578-TP - PETITION FOR EXPEDITED REVIEW AND CANCELLATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S KEY CUSTOMER PROMOTIONAL TARIFFS BY FLORIDA COMPETITIVE CARRIERS ASSOCIATION.

**AGENDA:** 11/5/2002 - REGULAR AGENDA - MOTION FOR RECONSIDERATION-ORAL ARGUMENT HAS NOT BEEN REQUESTED; HOWEVER, PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION PURSUANT TO RULE 25-22.0376, F.A.C.

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\020119R2.RCM

CASE BACKGROUND

On February 14, 2002, Florida Digital 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 (January tariff filing). On March 5, 2002, BellSouth filed its Response and Answer to FDN's Petition.

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DOCKET NOS. 020119-TP, 020578-TP  
DATE: OCTOBER 24, 2002

On March 13, 2002, the Commission issued Order No. PSC-02-0331-PCO-TP, to initiate an expedited discovery procedure. On June 28, 2002, the Commission issued PAA Order No. PSC-02-0875-PAA-TP in Docket No. 020119-TP.

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 (June tariff filing) in Docket No. 020578-TP.

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

On July 19, 2002, 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. By Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, BellSouth's Motion to Dismiss FCCA's complaint was denied and Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing. On August 29, 2002, an issue identification meeting was held for these dockets. All of the issues were agreed upon by the parties, with the exception of FCCA's Proposed Issue 3F. The Prehearing Officer directed parties to file briefs on whether Proposed Issue 3F should be included as an issue by September 6, 2002. By Order No. PSC-02-1295-PCO-TP, issued September 23, 2002, the procedural and hearing dates were set for these dockets. Further, the prehearing officer determined that Proposed Issue 3F would be excluded from issues to be considered for hearing.

On October 14, 2002, FCCA filed an unopposed Motion for Extension of time to file direct testimony. By Order No. PSC-02-1415-PCO-TP, issued October 15, 2002, FCCA's Motion for Extension of time was granted.

On October 3, 2002, FCCA and Mpower Communication, Corp. filed a Motion for Reconsideration of a portion of the Order Establishing Procedure, Order No. PSC-02-1295-PCO-TP, issued September 23, 2002. On October 15, 2002, BellSouth filed Opposition to FCCA's and Mpower's Motion for Reconsideration. Staff notes that on October 22, 2002, Mpower filed a Notice of Withdrawal as a party

DOCKET NOS. 020119-TP, 020578-TP  
DATE: OCTOBER 24, 2002

to these dockets. This recommendation addresses the Motion for Reconsideration and the Opposition thereto.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Motion for Reconsideration filed by FCCA and Mpower be granted?

**RECOMMENDATION:** No. FCCA and Mpower have not identified a point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering his decision. Therefore, the Motion for Reconsideration should be denied. (BANKS, DODSON)

**STAFF ANALYSIS:**

**FCCA's and Mpower's Motion for Reconsideration**

As stated in the Case Background, in Order No. PSC-02-1295-PCO-TP, Order Establishing Procedure, issued September 23, 2002, the prehearing officer excluded Proposed Issue 3F from the issues to be considered in this case. On October 3, 2002, FCCA and Mpower (collectively "Movants") filed a Motion for Reconsideration of the portion of the Order Establishing Procedure which excludes Proposed Issue 3F. Movants' Proposed Issue 3F is:

What additional filing requirements, if any, should be established for BellSouth promotional tariffs?

Movants state that to prevail on a motion for reconsideration, the moving party must demonstrate a point of law or fact that was overlooked or which was not considered. Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). Movants contend that central to the issues the Commission will consider in this case is whether or not BellSouth's Key Customer promotional offerings are anticompetitive. Movants assert that part of the anticompetitive nature of such filings is related to the fact that BellSouth continually "renews" such filings. Thus, movants explain that while each filing is limited in time, the fact that such filings are continually "rolled over" via subsequent filings results in the filings essentially "evading review" prior to going into effect. Movants assert that the prehearing officer erroneously concluded that to require BellSouth to file information supporting a tariff at the same time it files its promotional tariff itself would somehow "modify or alter the law." Movants state that Section 364.051(5), Florida Statutes, provides that tariff filings are "presumptively valid."

However, movants contend that the Proposed Issue 3F simply seeks to explore whether, in order to mitigate the "evading review" aspect of BellSouth's promotional filings, BellSouth should be required to file supporting information at the same time the promotional filing is made. Movants state that requiring such information would in no way change the statutory standard of presumptive validity of the tariff filing; it would permit review of promotional tariffs at the outset of their filing rather than after they have gone into effect. Further, movants state that Diamond Cab Owners Ass'n vs. Florida R.R. & Pub Cmm'n, 66 So 2d 593 (Fla. 1953), on which the Prehearing Officer relies, is inapplicable because there a rule that had been challenged was found to be in direct conflict with a statute. Movants assert that Section 364.051(5) does not address what must be included in a tariff filing. Therefore, movants request that the Commission reconsider the prehearing officer's decision excluding Proposed Issue 3F from the issues to be considered at hearing.

#### BellSouth's Response

BellSouth states that 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 decision. See Diamond Cab Co. v. King. BellSouth contends that it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96,97 (Fla. 3<sup>rd</sup> DCA 1959) (citing State ex. Rel. Jayatex Realty Co. Green, 10 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958)). Moreover, BellSouth asserts that a motion for reconsideration should not be based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review. Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). BellSouth contends that it is well settled that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at 3 ("It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."); In re: Southern States Utilities, Inc. Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996, 1996 WL 116438 at 3 ("Reconsideration is not an opportunity to raise new arguments.")

BellSouth states that Movants argue that reconsideration is proper because the prehearing officer misconstrued Section

364.051(5)(a), Florida Statutes. BellSouth contends that in their motion, the Movants attempt to reargue the same points raised in their brief. Despite the movants' position, BellSouth believes that Diamond Cab Owner's Ass'n is directly on point and that Proposed Issue 3F would require that the Commission implement "a change in the law," which is prohibited under Florida Supreme Court precedent. BellSouth explains that the prehearing officer rejected the movants' arguments finding that "although, FCCA asserts that to not require an additional filing requirement would be an injustice to parties, Section 364.051(5), Florida Statutes, clearly provides that after 15 days notice, tariffs are presumptively valid." Order at 8-9. Moreover, BellSouth opines that Movants' new arguments raised are not appropriate for a motion for reconsideration. Therefore, BellSouth contends that the Movant's motion for reconsideration should be denied.

#### Staff Analysis

It appears that the parties agree that the standard 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 Diamond Cab Co. v. King. Staff agrees. In their motion, the Movants assert that the prehearing officer erroneously concluded that to require BellSouth to file information supporting a tariff at the same time it files a promotional tariff itself would somehow "modify or alter the law." BellSouth responds by stating that to require additional information to be filed at the time of filing its tariff, would in effect, be amending Section 364.051(5), Florida Statutes. As stated in the prehearing officer's decision, Section 364.051(5), Florida Statutes, clearly provides that tariff filings are presumptively valid after 15 days notice. Order at 8-9. Further, the prehearing officer found that the imposition of an additional filing requirement would necessitate a change in law. Order at 8.

However, movants assert that requiring BellSouth to file additional information with its tariff filing would mitigate the "evading review" aspect of BellSouth's promotional tariffs. This argument was, however, presented in movants' brief, and staff views it as an attempt to reargue the same points already raised, which is inappropriate for a motion for reconsideration. See Sherwood v. State. Movants contend that Section 364.051(5), Florida Statutes, does not address what must be included in a tariff filing. BellSouth responds that Section 364.051(5), Florida Statutes,

DOCKET NOS. 020119-TP, 020578-TP  
DATE: OCTOBER 24, 2002

provides that after 15 days notice, tariffs are presumptively valid. In addition, Movants explain that Diamond Cab Owner's Ass'n v. Florida R.R. & Pub Cmm'n is inapplicable to the instant case. In its motion, Movants assert that the rule challenged in that case was found to be in direct conflict with a statute. BellSouth responds that this is a new argument and that it is inappropriate to raise new arguments in a motion for reconsideration. See In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC-96-1024-FOF-TP, issued August 7, 1996. Staff agrees.

The prehearing officer's Order clearly demonstrates that the prehearing officer considered the arguments raised by the Movants. Hence, Movants have failed to identify a point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering his decision. Therefore, staff recommends that the motion for reconsideration filed by FCCA and Mpower should be denied.

DOCKET NOS. 020119-TP, 020578-TP  
DATE: OCTOBER 24, 2002

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending further proceedings.

**STAFF ANALYSIS:** This docket should remain open pending further proceedings.