

State of Florida



Public Service Commission  
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DATE: JANUARY 9, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION  
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BANKS, DODSON) *PPB*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BARRETT) *meB*

RE: DOCKET NO. 021252-TP - 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. 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: 01/21/03 - ISSUE 1- REGULAR AGENDA - PROPOSED AGENCY  
ACTION - INTERESTED PERSONS MAY PARTICIPATE; ISSUE 2-  
PROCEDURAL - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021252.RCM

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**CASE BACKGROUND**

On December 20, 2002, Florida Digital Network, Inc. (FDN) filed a Petition for Expedited Review and Cancellation or Suspension of BellSouth Telecommunications, Inc.'s Key Customer Tariff Filing of December 16, 2002 (FDN Petition). On January 3, 2003, BellSouth Telecommunications, Inc. filed an Answer to FDN's Petition (BellSouth Answer). BellSouth's Key Customer Tariff filing of December 16, 2002 (BellSouth's 2003 Key Customer tariff) is a continuation of its second 2002 Key Customer Tariff, which is currently scheduled for hearing on February 19-20, 2003, in consolidated Docket Nos. 020119-TP and 020578-TP. Commission records indicate that BellSouth's 2003 Key Customer Tariff is identified as T-021241.

This recommendation addresses FDN's Petition and BellSouth's Response.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01, 364.051, 364.08, and 364.285, Florida Statutes.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Did BellSouth comply with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement? If not, should Tariff No. T-021241 remain in effect?

**RECOMMENDATION:** BellSouth substantially complied with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement and, therefore, Tariff No. T-021241 should remain in effect. In the event the Proposed Agency Action resulting from this recommendation is protested, the tariff notification aspect of the instant docket should not be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing. (BARRETT, BANKS, DODSON)

**STAFF ANALYSIS:** This issue developed as a result of allegations made by FDN regarding BellSouth's obligation to provide specific notification of upcoming tariffs in accordance with the companies'

interconnection agreement. The allegations were raised in FDN's Petition. Staff notes that this issue is limited in scope to the tariff notification claims, and that subsequent issues in this recommendation address other points.

### Arguments

In its Petition, FDN requests in part that "the Florida Public Service Commission . . . immediately review and cancel or, alternatively, suspend or postpone, the Key Customer tariff reported as filed by BellSouth Telecommunications Inc. on December 16, 2002 . . . ." FDN asserts that BellSouth filed this tariff without having provided FDN and other ALECs proper notice. (FDN Petition at p. 3) For this reason, FDN believes the tariff should not be permitted. As additional support for its Petition, FDN incorporates by reference the pleadings, testimony, and exhibits in Docket Nos. 020119-TP and 020578-TP, which address previous BellSouth Key Customer Tariff filings. (FDN Petition at pp. 3-4)

FDN asserts that recent action in the above-referenced dockets impacts the instant case. At the Prehearing Conference on December 16, 2002, in Docket Nos. 020119-TP and 020578-TP, a continuance was granted at the request of several ALECs. FDN acquiesced in the continuance for the following reasons: (1) FDN believed that there should be opportunity for meaningful negotiations between the parties, and (2) FDN reasonably believed FDN would not be further harmed by the Key Customer promotions during a 45-day continuance, since no tariff notification had been posted on BellSouth's website, and the current Key Customer tariff would expire December 31, 2002. In not opposing the 45-day continuance in the proceedings in Docket Nos. 020119-TP and 020578-TP, FDN believes it acted reasonably by relying on BellSouth's practice of providing an advance posting of upcoming tariff changes. FDN states that it had been checking the tariff notification portion of BellSouth's website daily, and that a new Key Customer filing was not posted on the website. (FDN Petition at p. 6)

The MCImetro - BellSouth Florida Interconnection Agreement, which FDN and a number of other ALECs have adopted, contains the 45-day notice obligation, according to FDN. (FDN Petition at p. 4) FDN states correctly that Section 1.2.1.1 of this agreement obligates BellSouth to

notify [ALEC] of **any proposed changes** in terms and conditions under which BellSouth offers Telecommunications Services to subscribers who are not Telecommunications Service providers or carriers, including but not limited to the introduction or discontinuance of any features, functions, services, promotions or changes in retail rates **at least** forty-five (45) days prior to the effective date of such change, or concurrent with BellSouth's internal notification process for such change.

(FDN Petition at p. 4) (emphasis added in Petition)

FDN contends that BellSouth "simply filed the tariff" instead of posting the proper notice 45 days in advance as specified in its interconnection agreement. FDN asserts that BellSouth's failure to fulfill its notice obligation for this tariff justifies the relief it seeks. FDN states:

No other remedy will put ALECs like FDN in the position they would have been in had BellSouth fulfilled its obligation to post notice of tariff changes 45 days in advance. Now that FDN has monitored the BellSouth website for tariff notifications, and BellSouth did not follow the notification process for the 2003 Key Customer tariff, the notification process would, ironically, appear to be of less consequence to BellSouth. BellSouth must be held to the notice obligation to which it agreed, has acknowledged, and has followed previously. (footnotes omitted)

FDN concludes its argument by stating, "[t]here must be adequate and reasonable consequence to BellSouth's violation of its acknowledged duty, and FDN maintains that the proper remedy is to bar BellSouth from implementing the 2003 Key Customer tariff as proposed." (FDN Petition at p. 7)

On January 3, 2003, BellSouth filed its Answer to Petition of Florida Digital Network, Inc. for Expedited Review and Cancellation/Suspension of BellSouth Telecommunications Inc.'s Key Customer Tariff. Therein, BellSouth asserts that the Commission

should summarily deny all claims for relief set forth in FDN's pleading.

BellSouth acknowledges that on December 13, 2002<sup>1</sup>, the company filed a tariff extending the (then) current Key Customer tariff. Commission records indicate that this tariff is identified as Tariff No. T-021241. BellSouth asserts that the tariff notification was timely posted, but as a result of an unknown "technical problem," it could not be viewed by ALECs in Florida. (BellSouth Answer at p. 3) BellSouth states "[w]hile there was an unfortunate mishap in the posting of the notice on BellSouth's website, there is no requirement that the notice be given to ALECs in a specific manner." (BellSouth Answer at p. 5) BellSouth contends that FDN, as well as all of the ALECs, received actual notice of the extension when BellSouth filed this tariff. In acknowledging the mishap, BellSouth has proposed a specific implementation plan<sup>2</sup> for this tariff:

- 1) BellSouth will not provide service to its retail customers under this tariff until January 30, 2003. The date of January 30, 2003 was selected because it is a full 45 days from the date BellSouth provided notice of this tariff.
- 2) The tariff will remain on file and be allowed to go into effect on December 31, 2002.
- 3) BellSouth understands that allowing the tariff to remain on file will allow the ALECs to begin reselling this tariff service on January 1, 2003, which is 30 days in advance of when BellSouth can provide service under the tariff to its retail customers.

BellSouth states that at the August 20, 2002 Agenda conference for Docket Nos. 020119-TP and 020578-TP, there was discussion about an eventual, subsequent filing. BellSouth asserts that it committed at that time that "any new Key Customer Tariff filings

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<sup>1</sup> While the official filing date is December 13, 2002, inconsistent dates appear in the filings made in this docket.

<sup>2</sup> On December 23, 2002, Nancy H. Sims, Director-Regulatory Relations for BellSouth-Florida, sent a letter to Walter D'Haeseleer, Director of the Competitive Markets and Enforcement Division of the Florida Public Service Commission, detailing the proposed implementation for this tariff.

made would be similar to those filed before and not contain dissimilar requirements or discounts." (BellSouth Answer at p. 4) BellSouth maintains that the filing at issue in the instant proceeding is a "continuation" of the (then) current tariff, which expired on December 31, 2002. No new terms or conditions are present.

BellSouth respectfully requests that the Commission deny all relief requested in FDN's Petition. (BellSouth Answer at p. 6)

### Analysis

Staff again notes that its recommendation in this issue is limited in scope to the tariff notification claims, and that subsequent issues in this recommendation address other points.

Staff believes FDN's concerns surrounding the noticing of Tariff No. T-021241 are mitigated when viewed along with the points raised in BellSouth's Answer. Staff believes FDN's argument concentrates on the fact that an advance notification was not posted, although BellSouth asserts that the actual filing of the tariff constitutes a "notice." While staff acknowledges that a 45-day notification period is a requirement contained in the operative interconnection agreement between BellSouth and FDN, staff emphasizes that the cited language of that agreement does not specify how the notice is to be provided. BellSouth readily acknowledges that efforts were made, though unsuccessful, to correctly post the anticipated filing on its website. However, absent the advance notice, staff concurs with BellSouth that the filing itself can be construed as a "notice." Rather than delay the effective date of the tariff until January 30, 2003, BellSouth proposes to withhold the offering of this tariff to its own retail customers until that date.

In proposing this implementation plan, staff believes BellSouth has substantially complied with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement. Though not conventional, staff believes that BellSouth's proposed implementation, in effect, provides the ALECs with a 30 day period to resell this offering before BellSouth will offer it to its own retail customers. Staff notes that the typical corrective action would have been to delay the effective date of the tariff to January 30, 2003, which would have precluded ALEC resale before that date.

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On a practical basis, staff is concerned that BellSouth deviated in this instance from its customary practice of providing advance notice of forthcoming tariff changes on BellSouth's website. On a going forward basis, staff would encourage BellSouth to follow its customary noticing practice since this practice affords ALECs a consistent means of monitoring future tariff filings.

Staff believes this tariff notification issue is effectively a question of contract interpretation. Accordingly, staff would note that in the event the Proposed Agency Action resulting from this recommendation is protested, the tariff notification aspect of the instant docket should not be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing because the matter at issue is substantially different than the issues to be addressed in the consolidated proceeding.

#### Conclusion

Staff believes that BellSouth has substantially complied with the tariff notification obligation contained in the BellSouth-FDN interconnection agreement and, therefore, Tariff No. T-021241 should remain in effect.

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**ISSUE 2:** Should this docket be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing on the substantive tariff issues?

**RECOMMENDATION:** Yes. With the exception of the tariff notification concern addressed in Issue 1, staff recommends that this docket be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing. (BANKS, DODSON)

**STAFF ANALYSIS:** As stated previously, the FDN Petition requests that BellSouth's December 16, 2002, Tariff Filing (BellSouth's 2003 Key Customer Tariff) be canceled or, alternatively, suspended or postponed. FDN maintains that this tariff filing should be cancelled for the same reasons FDN has asserted for the prior Key Customer tariffs (T-020035 and T-020595) at issue in Docket Nos. 020119-TP and 020578-TP (consolidated tariff dockets). (FDN Petition at p. 3) Further, FDN incorporates by reference and requests that FDN's pleadings, prefiled testimony and exhibits filed in Docket Nos. 020119-TP and 020578-TP, be considered by the Commission in this docket. FDN reasons that the 2003 Key Customer tariff should be cancelled for the reasons FDN has set forth in the consolidated tariff dockets.

BellSouth responds that the Commission should summarily deny FDN's requests and claims asserted in its Petition. (BellSouth Answer at p. 1) BellSouth asserts that the 2003 Key Customer Tariff is merely a continuation of the second 2002 Key Customer Tariff. (BellSouth Answer at p. 3)

Staff notes that the 2002 Key Customer tariffs addressed in the consolidated tariff dockets are currently scheduled for hearing on February 19-20, 2003. Because BellSouth's 2003 Key Customer Tariff is a continuation of its second 2002 Key Customer tariff, the issues regarding BellSouth's 2003 Key Customer Tariff are effectively the same. Further, staff notes that FDN and BellSouth are also parties in the consolidated tariff dockets.

As a result, staff believes that this Docket should be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing, because the matters at issue are substantially similar and consolidation will promote administrative efficiency. Based on the foregoing, staff recommends that this Docket, with the exception of the tariff notification concern addressed in Issue 1,



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be consolidated with Docket Nos. 020119-TP and 020578-TP for purposes of hearing.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. If no person whose substantial interests are affected protests the Commission's PAA decision on Issue 1 within 21 days of the issuance of the Order from this recommendation, the decision will become final upon issuance of a Consummating Order. If, however, a timely protest of the PAA portion of the Order is filed, the protested issue should be set for a separate hearing.

Whether staff's procedural recommendation in Issue 2 is approved or rejected, the resulting decision will be final agency action. However, in either case, this docket should remain open to address the issues raised by FDN regarding BellSouth's 2003 Key Customer Tariff. (BANKS, DODSON)

**STAFF ANALYSIS:** No. If no person whose substantial interests are affected protests the Commission's PAA decision on Issue 1 within 21 days of the issuance of the Order from this recommendation, the decision will become final upon issuance of a Consummating Order. If, however, a timely protest of the PAA portion of the Order is filed, the protested issue should be set for a separate hearing.

Whether staff's procedural recommendation in Issue 2 is approved or rejected, the resulting decision will be final agency action. However, in either case, this docket should remain open to address the issues raised by FDN regarding BellSouth's 2003 Key Customer Tariff.