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September 12, 2003

Mr. Blanco S. Bayo  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

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Re: Docket No. 021249-TP

Dear Ms. Bayo:

This letter is in response to BellSouth's Letter of Supplemental Authority dated September 11, 2003. In that Letter, BellSouth asks this Commission to take official recognition of Entergy Louisiana, Inc. v. Louisiana Public Service Commission, No. 02-299, 2003 U.S. LEXIS 4278 (June 2, 2003). This case is cited for the proposition that the filed rate doctrine preempts this Commission's jurisdiction.

The Entergy case BellSouth seeks "official recognition" of is inapplicable to this proceeding for several reasons: (1) the Entergy case is quite clear that the scope of the filed rate doctrine is limited to the "cost allocation context;" (2) the Florida Public Service Commission's ("Commission") previous Order No. PSC-02-0878-FOF-TP involved only the Commission's authority to promote competition in the local voice market by preventing anti-competitive practices that interfere with a consumer's right to choice; (3) the Commission's previous Order No. PSC-02-0878-FOF-TP did not seek to regulate the end-user price at which BellSouth seeks to offer its "retail" Fast Access internet service, and (4) BellSouth's federally filed "wholesale" tariff does not address in any manner BellSouth's "retail" Fast Access service or the price at which BellSouth seeks to offer this retail service. As such, there is no possible way that the filed rate doctrine could ever apply – even if the Entergy case was broadly interpreted to include "terms" having nothing to do with rates or cost allocation. For these reasons, BellSouth's federally filed "wholesale" tariff and supplemental authority are inapplicable to the facts in this case.

The United States Supreme Court was clear that the scope of the filed rate doctrine was limited to the "cost allocation context." See pg. 18. The "terms" at issue in the Entergy case that were included in the tariff filed, by Entergy, with the FERC set out a formula dictating "how and by whom that classification [or ERS units] should be made." While the "term" was not itself a specific rate, the formula was designed to allocate a specific cost. "Applying Natahala and MP&L to the facts of this case, we conclude that the LPSC's order impermissibly 'traps' costs that have been allocated in a FERC tariff." See pg. 19, Part B. Docket No. 021249-TP presently before this Commission does

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not in any way involve ratemaking or cost allocation. Accordingly, the Entergy case has no controlling or persuasive effect on the specific matters pending in the proceeding.

Docket No. 021249-TP is simply a request for this Commission to enforce its previously issued Order No. PSC-02-0878-FOF-TP. This order is presently on appeal. BellSouth did not seek a stay of this Order. The decision the Commission reached in Order No. PSC-02-0878-FOF-TP relates solely to the Commission's power and duty to promote competition in the local voice market by preventing anti-competitive practices. The Commission ordered BellSouth to cease its anti-competitive practice of interfering with a consumer's right to choose his or her local voice provider. The facts demonstrated that BellSouth routinely disconnected its retail Fast Access internet service when a customer changed his or her voice provider, over the same line, to a UNE-P competitor. See Order No. 02-0413-FOF-TP, pg. 140 issued March 26, 2002. BellSouth acknowledged then, and admits today, that it does not disconnect a customer's Fast Access service, so long as the competitor purchases the line as a Resale line – as opposed to UNE-P.

Nowhere in the Commission's previous order did it seek to regulate the end-user price at which BellSouth may offer its "retail" Fast Access service. Under the Commission's previous order, BellSouth is free to raise and lower its Fast Access end-user price at any time. BellSouth can charge different retail prices in differing counties to cover different expenses (e.g. Miami-Dade County versus Alachua County). The Commission's order does not seek to regulate prices in any fashion. As already noted, the Entergy case involves rate setting or "terms" that directly impact upon cost allocation. Neither of these matters is involved in the Commission's previous order. The Entergy case is therefore inapplicable.

Assuming arguendo that Entergy was relevant to this proceeding, the fundamental problem with BellSouth's argument is that its federally filed tariff involves only its "wholesale" DSL transport service and does not address in any manner either BellSouth's "retail" Fast Access service. BellSouth's "wholesale" tariff cannot act to pre-empt its "retail" product – citing Entergy as authority. For this reason alone, the Entergy case is neither controlling nor persuasive to the facts or circumstances of the issues pending in this proceeding.

As noted, BellSouth's federally filed tariff involves its "wholesale" xDSL transport service. BellSouth's "wholesale" tariff dictates to whom resellers of BellSouth's wholesale xDSL service may sell the product to: (i.e. resellers cannot sell xDSL to end users that do not have a BellSouth voice service).

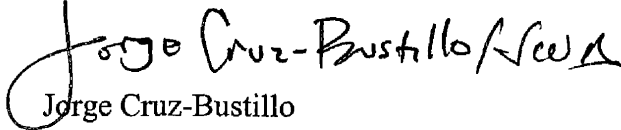
The Entergy opinion limited the pre-emption effect of "terms" to those "terms" that involved "cost allocation." The terms that BellSouth has included in its wholesale tariff do not in any way involve cost allocation that might impact upon state regulation of state retail regulated rates. There is a legitimate question regarding whether these non-cost BellSouth terms can, in fact, act to pre-empt state Commission's if these non-cost terms are used to hinder competition in the local voice market. With this important qualification, BellSouth's "wholesale" tariff is legally irrelevant to this proceeding for the simple reason that the Commission's previous Order No. PSC-02-0878-FOF-TP has absolutely nothing to do with BellSouth's wholesale DSL transport service.

It is irrelevant to this proceeding because the Commission's previous Order No. PSC-02-0878-FOF-TP was limited to the Commission's authority to promote competition in the local voice market by preventing anti-competitive practices that interfere with a consumer's right to choice. The *means* BellSouth employed, which was found to interfere with a consumer's right to choice, was the linking of its "retail" FastAccess service – not its "wholesale" DSL service - to its local voice service. As already noted, BellSouth's federally filed tariff involves only its "wholesale" DSL service. As such, there is no possible way that the filed rate doctrine could ever apply – even if the Entergy case was broadly interpreted to include "terms" having nothing to do with rates or cost allocation. For all of the above reasons, BellSouth's "wholesale" tariff and supplemental authority are neither controlling nor persuasive to the facts and circumstances of the issues pending in this proceeding.

Supra respectfully requests that the Commission deny BellSouth's request to grant official recognition of the Entergy case, or in the alternative find that the Entergy is substantively distinguishable and, as such, legally inapplicable to the pending proceeding.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me. Copies of this letter have been served on the parties shown on the attached Certificate of Service.

Sincerely,

  
Jorge Cruz-Bustillo  
Assistant General Counsel

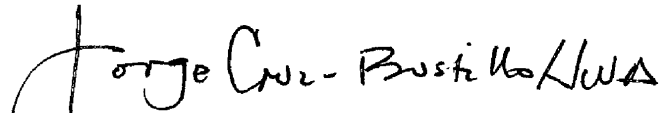
**CERTIFICATE OF SERVICE**  
**Docket No. 021249-TP**

I HEREBY CERTIFY that a true and correct copy of the following was served via Hand Delivery, Facsimile, U.S. Mail, and/or Federal Express this 12<sup>th</sup> day of September 2003 to the following:

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By: Jorge Cruz-Bustillo