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DATE: April 7, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Rojas) *AK for JPR vk*
Division of Competitive Markets & Enforcement (King, Vickery) *vk for PV*

RE: Docket No. 050119-TP - Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC, concerning BellSouth Telecommunications, Inc.'s Transit Service Tariff

Docket No. 050125-TP - Petition and Complaint of AT&T Communication of the Southern States, LLC for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc.

AGENDA: 04/19/05 – Regular Agenda – 1) Motion to Consolidate; 2) Petition to Suspend Tariff Filing – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: I:\PSC\GCL\GCO\WP\050119.RCM.DOC

Case Background

On February 11, 2005, TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc., d/b/a GT Com; Smart City Telecom; ITS Telecommunications Systems Inc.; and Frontier Communications of the South, LLC (Joint Petitioners) filed a joint petition that objects to and requests suspension and cancellation of BellSouth Telecommunication Inc.'s (BellSouth) General Subscriber Services Tariff A16.1, Transit Traffic Service. Docket No. 050119-TP was established in

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Docket Nos. 050119-TP; 050125-TP

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response to the petition filed by the Joint Petitioners. On February 17, 2005, AT&T Communications of the Southern States, LLC, (AT&T) also filed a petition and complaint for suspension and cancellation of Transit Traffic Tariff No. FL 2004-284 filed by BellSouth. Docket No. 050125-TP was subsequently established in response to AT&T's petition.

BellSouth filed an answer to the Joint Petitioners in Docket No. 050119-TP, on March 3, 2005, and on March 4, 2005, filed an answer and motion in Docket No. 050125-TP to consolidate Docket No. 050119-TP with Docket No. 050125-TP. This recommendation addresses the BellSouth motion to consolidate the two dockets and the requests for suspension of the Transit Traffic Tariff.¹

These dockets involve a dispute over transit traffic, which is traffic that originates on the network of one carrier, transits over BellSouth's network, then terminates on the network of a third carrier. BellSouth has filed a new tariff, General Subscriber Services Tariff § A.16.1, Transit Traffic Service, which sets forth certain rates, terms and conditions that apply when carriers receive transit service from BellSouth but have not entered into an agreement with BellSouth setting forth rates, terms and conditions for the provision of transit services. BellSouth's transit tariff does not apply to a party with whom BellSouth has an existing contractual relationship because the tariff, by its terms, applies as a default, only in the absence of an existing contractual agreement.

The Commission is vested with jurisdiction over this matter pursuant to provisions of Chapter 364.01(4), and 364.051(5), Florida Statutes.

¹ Transit Traffic Tariff No. FL 2004-284 is also known as BellSouth's General Subscriber Tariff A16.1, Transit Traffic Tariff.

Discussion of Issues

Issue 1: Should the Commission grant BellSouth's Motion to Consolidate Docket Nos. 050119-TP and 050125-TP?

Recommendation: Yes. (Rojas)

Staff Analysis: BellSouth puts forth that there is no value in duplicating the Commission's effort by addressing the same issue in different proceedings. BellSouth further argues, both petitions have been recently filed, and no party would be harmed or prejudiced by consolidating any objections to BellSouth's Transit Traffic Tariff.

Staff recommends consolidating Docket Nos. 050119-TP and 050125-TP. Staff agrees that both petitions have been recently filed, and no party would be harmed or prejudiced by consolidating any objections to BellSouth's Tariff A16.1, Transit Traffic Service, into a single proceeding, per BellSouth's Motion in Docket No. 050125-TP. Staff has communicated with counsel from AT&T, and counsel has indicated that AT&T would not be opposed to consolidation of the dockets. Furthermore, consolidation would allow for greater administrative efficiency by streamlining the disputes regarding the tariff into a single proceeding.

Issue 2: Should BellSouth's Transit Traffic Tariff be suspended pending the resolution of the petitions filed by the Joint Petitioners and AT&T?

Recommendation: No. BellSouth's General Subscriber Services Tariff A16.1, Transit Traffic Service should not be suspended. Staff does, however, recommend that revenues from the tariff be held subject to refund pending the outcome of this proceeding. **(Rojas)**

Staff Analysis:

Position of the Parties

Joint Petitioners

The Joint Petitioners argue that they are "originating Telecommunications Service Providers of Transit Traffic" as defined by the tariff. The Joint Petitioners state that they are not parties to separate written agreements with BellSouth specifically addressing the rates, terms and conditions for BellSouth's provision of Transit Traffic Service. The Joint Petitioners further claim that they have historically engaged in a consistent course of conduct with BellSouth whereby Transit Traffic Service, as defined by the Proposed Tariff, has been provided by BellSouth without charge to the Joint Petitioners.

AT&T

AT&T argues that pursuant to Sections 251(a)(1) and 251(c)(2) of the Telecommunications Act of 1996 (the "Act"), BellSouth is obligated to provide for direct or indirect interconnection for the transmission and routing of telephone exchange or exchange access service. Transit traffic clearly falls within the confines of these obligations. Moreover, the transport of transit traffic must be offered at TELRIC rates pursuant to Section 252(d)(1) of the Act.

AT&T further argues that the Transit Traffic Tariff provisions will allow BellSouth to arbitrarily increase the amounts that CLECs must pay for any traffic that transits BellSouth's network to terminate on a third party's network or serve as the basis to impose the increased transit traffic rate at a "market rate" in CLEC's interconnection agreements. Allowing BellSouth's proposed tariff filing to go into effect without opportunity for hearing as to the appropriate rate level for this service sets a precedent without an evidentiary record as to the Commission's policy on appropriate rates for transit traffic.

AT&T asserts that BellSouth's new tariffed rate for transit traffic service of \$0.003 represents more than a five hundred percent (500%) increase in the rate that AT&T can expect to currently pay. AT&T contends that, on its face, an increase in the transit traffic rate of the magnitude found in the transit traffic tariff is not consistent with the TELRIC pricing principles. Without any showing that such a price increase is warranted pursuant to a TELRIC cost study, the tariffed rate is clearly unfair and anticompetitive in violation of Sections 364.01(4)(c), 364.01(4)(g), 364.01(4)(i) and 364.051(5)(b) as well as Section 252(d) of the Act.

BellSouth

BellSouth argues that when it provides transit service, it operates as a conduit between other carriers that may not have direct interconnection agreements in place. BellSouth states that in most instances, it has established contractual arrangements that address the terms and conditions for the provision of transit service, as well as the compensation that is owed to BellSouth – generally from the originating carrier – for transiting such traffic. BellSouth claims that its Transit Traffic Tariff does not apply to carriers who have negotiated such contracts. BellSouth further states that the petitioners, despite having no arrangement in place with BellSouth for the provision of transit service, send transit traffic to BellSouth for termination to other carriers with whom the petitioners have no direct interconnection. In the absence of an existing contractual agreement, BellSouth intends for the Transit Traffic Tariff to apply as a default.

BellSouth argues that it is neither the originating nor terminating carrier of transit traffic, and BellSouth has no duty under Section 251(c)(2) of the Act to provide the service at TELRIC rates. BellSouth states that it provides rates, terms and conditions for the provision of transit service to many carriers pursuant to agreement and is entitled to compensation for providing this service.

BellSouth denies that its transit tariff and its transit tariff rate violates Florida law. Furthermore, as an affirmative defense BellSouth asserts that the petitions of AT&T and the Joint Petitioners fail to state a claim for which relief can be granted. Additionally, BellSouth asserts the further affirmative defenses that (1) the Joint Petitioners have failed to comply with Rules 25-22.036 and 28-106.201, Florida Administrative Code, which require a petitioning party to identify a specific rule or statute that is in dispute and (2) to the extent that the Joint Petitioners have not paid BellSouth for services provided, BellSouth claims unjust enrichment. The Joint Petitioners have received transit services from BellSouth and have accepted such services under circumstances that would make it inequitable for them to retain such services without payment. If the Commission grants any relief to the Joint Petitioners, BellSouth is entitled to compensation in the amount the Joint Petitioners have been unjustly enriched.

Analysis and Conclusion

The Commission should consider whether a petition to suspend the tariff demonstrates that the alleged anticompetitive or discriminatory effect of the tariff will cause significant harm that cannot be adequately redressed if the tariff is ultimately determined to be invalid. Such irreparable harm includes financial or economic harm to telecommunications providers, significant harm to market image or goodwill, or significant discrimination against similarly situated customers.²

² Similar language was approved in Docket No. 990043-TP. Staff's recommendation incorporating this language was approved at the January 26, 1999 Agenda Conference; however, an order was never issued as the underlying petition was withdrawn shortly thereafter. See also, Order No. PSC-02-1237-FOF-TP in Docket No. 020578-TP

Section 364.051, Florida Statutes, governs BellSouth's tariff filings, providing that non-basic service tariffs become effective and presumptively valid 15 days after filing. Under that statute, the Commission does not have express authority to delay the effectiveness of tariff filings pending resolution of any challenge to the tariff's substantive provisions.

Staff believes that the Commission should only suspend the effectiveness of a tariff upon a prima facie demonstration that the tariff is anticompetitive or discriminatory, and the actions contemplated by the tariff in question may cause irreparable harm. Irreparable harm is serious harm that cannot be undone; an injury that cannot be adequately compensated in damages, or measured by pecuniary standards. Cloughton v. Donner, 771 F.Supp. 1200 (S.D. Fla. 1991). The American Heritage Dictionary (Second College Edition) defines irreparable as: "incapable of being repaired, rectified, or amended." In Black's Law Dictionary (Fifth Edition) irreparable injury is defined as follows:

This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included. The remedy for such is commonly in the nature of injunctive relief. "Irreparable injury" justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.

Staff believes that the petitioners have failed to make a conclusive showing that (1) the tariff is anticompetitive or discriminatory in nature, and (2) the actions contemplated by the tariff in question may cause irreparable harm. Thus, denial of the petitions to suspend BellSouth's Transit Traffic Tariff is appropriate in that no irreparable harm would be suffered by the petitioners. Staff does, however, recommend that revenues from the tariff be held subject to refund pending the outcome of this proceeding. Furthermore, at the end of the proceeding, if the tariff is found to be invalid, a refund would be appropriate.

In summary, staff recommends that the Commission should consider whether a petition to suspend the tariff demonstrates that the alleged anticompetitive or discriminatory effect of the tariff will cause significant harm that cannot be adequately redressed if the tariff is ultimately determined to be invalid. Such irreparable harm includes financial or economic harm to telecommunications providers, significant harm to market image or goodwill, or significant discrimination against similarly situated customers. Staff believes that petitioners have failed to make a showing of irreparable harm and recommends denying the petition to suspend BellSouth's Transit Traffic Tariff.

Docket Nos. 050119-TP; 050125-TP

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ISSUE 3: Should these dockets be closed?

RECOMMENDATION: No, if staff's recommendations are approved, these dockets should be consolidated and remain open pending the resolution of these petitions. **(Rojas)**

STAFF ANALYSIS: Staff believes that these dockets should remain open, pending the resolution of these petitions.