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COMMISSION
CLERK

DATE: March 23, 2006

TO: Kay B. Flynn, Chief of Records, Division of the Commission Clerk & Administrative Services

FROM: Laura V. King, Public Utilities Supervisor, Division of Competitive Markets & Enforcement *LJK*

RE: Documents to be filed in Docket Nos. 050119-TP and 050125-TP

The attached documents were sent to staff counsel via electronic mail and were not filed with your office. I am asking that these documents be included in the docket files for Docket Nos. 050119-TP and 050125-TP. If you have any questions, please call me at 413-6588.

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02637 MAR 23 08

FPSC-COMMISSION CLERK

Laura King

From: Ken Hoffman
Sent: Wednesday, March 15, 2006 4:39 PM
To: James.White@alltel.com; stephen.b.rowell@alltel.com; Tracy Hatch; jwahlen@ausley.com; john.tyler@bellsouth.com; manuel.gurdian@bellsouth.com; meredith.mays@bellsouth.com; Nancy Sims; Nancy White; robert.culpepper@bellsouth.com; bhd@bloostonlaw.com; AMcCall@czn.com; mellmer@fairpoint.com; Michael Gross; cgerkin@fh2.com; mbarrett@flapsc.com; maryannh@itstelecom.net; Fself@lawfla.com; Vicki Gordon Kaufman; sberlin@nuvox.com; Felicia Banks; Kira Scott; Laura King; Paul Vickery; lbhall@smartcity.com; bill.atkinson@sprint.com; michele.thomas@t-mobile.com; Tom Mccabe; dnobles@townes.net; charles.palmer@troutmansanders.com; elaine.critides@verizonwireless.com
Subject: Docket Nos. 050119-TP and 050125-TP
Attachments: Banks Correspondence 03 15 06.pdf



Banks
Correspondence 03 1

Please see attached correspondence.

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MANUEL A. GURDIAN
Attorney
BellSouth Telecommunications, Inc.
150 South Monroe Street
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(305) 347-5561

March 22, 2006

Via Electronic Mail

Ms. Felicia Banks
Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 050119-TP: Joint 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 ("Joint Petitioner") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc.

Docket No. 050125-TP: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL 2004-284 filed by BellSouth Telecommunications, Inc. by AT&T Communications of the Southern States, LLC

Dear Ms. Banks:

BellSouth Telecommunications, Inc. ("BellSouth") is in receipt of Mr. Kenneth Hoffman's, counsel for the Small LECs, March 15, 2006 letter. Mr. Hoffman asserts that BellSouth has the burden of proof in this proceeding. As previously noted, BellSouth respectfully disagrees with the Small LECs' assertion.

In establishing this consolidated docket, the Commission recognized that BellSouth's Transit Traffic Service Tariff ("Tariff") was presumptively valid and that the various parties challenging the Tariff had "failed to make a conclusive showing" (i.e. failed to prove) that the Tariff should be suspended. Order No. PSC-05-0517-PAA-TP, issued May 11, 2005, at pp. 3-4. Following the submission of proposed issues list by the various parties, the Commission identified 17 tentative issues to be decided in this docket – burden of proof was not one of the 17 issues identified by the Commission. See Order No. PSC-05-1206-PCO-TP, issued December 6, 2005, Attachment "A". ***Indeed, which party bears the burden of proof was not one of the 16 issues proposed by the Small LECs.*** (Small LECs' proposed issues list is attached hereto as

Exhibit 1). As explained below, the Small LECs attempt to shift the burden of proof to BellSouth on the eve of hearing is inappropriate; contrary to Florida law; and at odds with Commission precedent.

Florida Statutes § 364.051(5)(a) states that "Each company subject to this section shall maintain tariffs with the Commission containing the terms, conditions, and rates for each of its nonbasic services, and may set or change, on 15 days' notice, the rate for each of its nonbasic services . . . and the rate shall be presumptively valid."

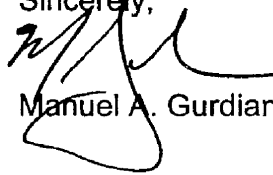
In addition to the above-referenced Order, the Commission has consistently held that tariffs are "presumptively valid." Docket No. 000733-TL, Order No. PSC-01-2348-PCO-TL (Issued December 6, 2001) ("Pursuant to Section 364.051(5)(a), Florida Statutes, since BellSouth is a price-regulated Local Exchange Company, BellSouth's tariff filings are presumptively valid and may go into effect fifteen (15) days after the filing."); Docket No. 020119-TP, Order No. PSC-02-1295-PCO-TP (Issued September 23, 2002) ("Section 365.051(5), Florida Statutes, clearly provides that after 15 days notice, tariffs are presumptively valid."); Docket No. 040130-TP, Order No. PSC-05-0975-FOF-TP (Issued October 11, 2005) ("[T]here exists no requirement that an incumbent provide supportive evidence for its tariffed rates; tariffs are presumptively valid."); Docket No. 010795-TP, Order No. PSC-03-0048-FOF-TP (Issued January 7, 2003) ("Pursuant to Section 364.051, Florida Statutes, tariff revisions made by price regulated ILECS are "presumptively valid" and applicable to those carriers that must purchase from the tariff.").

Contrary to the Small LECs' assertions, BellSouth is not seeking affirmative approval of its Transit Traffic Tariff. Again, based upon the plain terms of F.S. § 364.051(5)(a), BellSouth's Tariff is "presumptively valid" and thus BellSouth does not need to seek approval of the Tariff prior to it going into effect. Rather, it is the Small LECs who are seeking affirmative relief in this proceeding not BellSouth.

More importantly, the Commission has stated numerous times that **the burden of showing why a proposed tariff should be suspended or rejected is on the objecting party.** Docket No. 860031-TI, Order No. 15869 (Issued March 21, 1986); Docket No. 860848-TI, Order No. 16831 (Issued November 10, 1986); Docket No. 850586, Order No. 15492; Docket No. 850461-TI, Order No. 15474 (Issued December 20, 1985); Docket No. 830434-TP, Order No. 13015 (Issued February 20, 1984); Docket No. 830457, Order No. 12912 (Issued January 20, 1984); and Docket No. 820450, Order No. 12292 (Issued July 25, 1983) ("The tariff shall be presumptively valid. Under the concept of presumptive validity, the burden of showing why a proposed tariff should be suspended or rejected rests with the objecting party.")(emphasis added).

Accordingly, based upon the foregoing, as the "objecting party" to the Tariff, it is clear that the Small LECs (and other parties challenging the Tariff) have the burden of proof in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Gurdian', written over the word 'Sincerely,'.

Manuel A. Gurdian

Enclosures

cc: All Parties of Record
Jerry Hendrix
R. Douglas Lackey
Nancy B. White
Robert Culpepper
John T. Tyler
James Meza III

626842v2

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint 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 Tele-)
communications Systems, Inc. and Frontier)
Communications of the South, LLC,)
("Joint Petitioner") objecting to and)
requesting suspension of Proposed Transit)
Traffic Service Tariff filed by BellSouth)
Telecommunications, Inc.)

Docket Nos. 050119-TP and 050125-TP
Filed: November 3, 2005

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SMALL LOCAL EXCHANGE TELECOMMUNICATIONS COMPANIES' PROPOSED ISSUES LIST
TALLAHASSEE, FL
DIRECTOR-REG. RELATIONS

TDS Telecom, d/b/a TDS Telecom/Quincy Telephone, Northeast Florida Telephone Company, d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Communications, LLC d/b/a Smart City Telecom and Frontier Communications of the South, LLC hereby file the following Proposed List of Issues for consideration at the Issue Identification Meeting to be held November 8, 2005 in the above-referenced dockets:

General Issues:

1. Is BellSouth's Transit Service Tariff an appropriate mechanism to address transit service provided by BellSouth?
2. Which carrier should be responsible for providing compensation to BellSouth for the provision of the transit transport and switching services?
3. If an originating carrier utilizes the services of a tandem provider to switch and transport traffic to a third party network that is not affiliated with the tandem provider, what are the responsibilities of the originating carrier?

HAND DELIVER

DATE 11/3

TIME 2pm

Trunking and Routing:

4. What is BellSouth's network arrangement for transit traffic and how is it typically routed from an originating party to a terminating third party?
5. At what threshold of traffic volume should CLECs and CMRS providers be required to establish actual direct interconnection with a Small LEC?
6. How should transit traffic be delivered to the Small LECs' networks?
7. What are the terms, conditions, rights and obligations that BellSouth should be required to establish with the Small LECs for BellSouth's provision of transit services to third party CLECs and CMRS providers?
8. If a CLEC or CMRS provider uses the services of a tandem provider such as BellSouth under which the tandem provider delivers traffic to a Small LEC network, what terms and conditions should the CLEC or CMRS provider be required to establish with the third party Small LEC?
9. What effect does transit service have on ISP bound traffic?

Rates, Compensation and Cost Recovery:

10. How should charges for transit service be determined?
 - a. What is the appropriate rate for transit service?
 - b. To what types of traffic do the rates identified in "a" apply?
11. If a Small LEC were to incur new expenses in the form of payment of charges to BellSouth for transit services, how should the Small LEC recover these costs?

Administrative Issues:

12. Should BellSouth issue an invoice for transit service and if so, in what detail?
13. Should BellSouth provide to the terminating carrier sufficiently detailed call records to accurately bill the originating carrier for call termination? If so, what information should be provided by BellSouth?
14. How should billing disputes concerning transit services be addressed?

Laura King

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Wednesday, March 22, 2006 5:06 PM
To: Felicia Banks
Cc: Michael Barrett; Laura King; stephen.b.rowell@alltel.com; bhd@bloostonlaw.com; Ken Hoffman; marty@reuphlaw.com; marsha@reuphlaw.com; Tracy Hatch; James.white@alltel.com; jwahlen@ausley.com; amccall@czn.com; mellmer@fairpoint.com; maryannh@itstelecom.net; dnobles@townes.net; lbhall@smartcity.com; rgavillet@neutraltandem.com; sberlin@nuvox.com; Vicki Gordon Kaufman; cgerkin@fh2.com; Tom McCabe; michele.thomas@t-mobile.com; Floyd Self; charles.palmer@troutmansanders.com.; elaine.critides@verizonwireless.com; Michael Gross
Subject: FW: Ltr. to Banks
Importance: High
Attachments: Ltr._to_.pdf



Ltr._to_.pdf
(214 KB)

This letter is being sent to you on behalf of Manny Gurdian.

-----Original Message-----

From: Fatool, Vicki
Sent: Wednesday, March 22, 2006 11:20 AM
To: Fatool, Vicki
Subject: Ltr. to Banks

Please open the attached document.
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Sent by: <vicki.fatool@bellsouth.com>
Number of pages: 6
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March 15, 2006

VIA ELECTRONIC MAIL AND HAND DELIVERY

Felicia R. Banks, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket Nos. 050119-TP and 050125-TP

Dear Ms. Banks:

As you are aware, our firm represents the Small Local Exchange Companies (Small LECs) in the above-referenced dockets.

This letter follows up on the discussion at this morning's prehearing conference in the above-referenced dockets concerning the order of witnesses. Specifically, the prehearing officer expressed interest in the issue of which party has the burden of proof as such may affect the order of witnesses. BellSouth expressed an opinion at the prehearing conference that it does not have the burden of proof with respect to its proposed tariff. The Small LECs respectfully disagree.

As I stated at this morning's prehearing conference, the most orderly and logical presentation of the evidence in this proceeding would have BellSouth present and explain their tariff first rather than have the petitioners and intervenors present testimony on various objections to the tariff before the tariff is presented to the Commission through the BellSouth testimony.

With regard to burden of proof, BellSouth predicated their position on the argument that the proposed Transit Traffic Tariff is presumptively valid under Chapter 364, Florida Statutes. BellSouth presumably takes this position on the basis that the Transit Traffic Tariff is a non-basic service. The issue of whether BellSouth's proposed tariff is presumptively valid has not been raised in this proceeding and the prehearing officer need not resolve that issue to properly determine that BellSouth has the burden of proof.

Felicia R. Banks, Esquire
March 15, 2006
Page 2

It is BellSouth's proposed tariff and the new rates proposed therein that are at issue in this proceeding. BellSouth is seeking affirmative approval of its proposed Transit Traffic Tariff in this proceeding and, consequently, under the well-established rule of law in Florida, it bears the burden of proving that it is entitled to the affirmative relief it seeks. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

The challenges filed by the petitioners and intervenors protesting and requesting the cancellation of BellSouth's tariff is not unlike a petition challenging a proposed agency action order. Every facet of BellSouth's proposed Transit Traffic Tariff is now at issue in this proceeding. Like a utility that presents a series of proposed tariffs in the form of a proposed rate increase, BellSouth bears the burden of proof in connection with its proposed new transit traffic charges. See, South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Florida 1988). A utility that seeks approval of a new rate or charge or an increase in a rate or charge has the burden of proof even in a situation where the party challenging the proposed tariff or rate increase is the petitioner. For example, under section 367.081(8), Florida Statutes, a water utility that files for a rate increase under the proposed agency action procedure bears the burden of proof where an intervenor petitions and protests the Commission's proposed agency action preliminarily approving an increase.

To allow BellSouth to avoid the burden of proof would be unprecedented under Florida jurisprudence. A parallel can be drawn from the certificate of need ("CON") process in Florida. Under that process, which like Commission proceedings is subject to Chapter 120, Florida Statutes, a hospital that receives a preliminary approval from the Agency for Health Care Administration for a CON has the burden to prove by a preponderance of the evidence that its CON application should be approved if the preliminary approval is timely challenged by a substantially affected party at the Division of Administrative Hearings. See, e.g., Wellington Regional Medical Center, Inc., d/b/a Wellington Regional Medical Center v. Agency for Health Care Administration, et al, 27 FALR 1446, 1496 (Final Order entered on March 7, 2005).

Thank you for your consideration of these comments.

Sincerely,



Kenneth A. Hoffman

KAH/bdv

cc: All Parties of Record, via electronic mail

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