



Public Service Commission

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DATE: JANUARY 28, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYD)

FROM: DIVISION OF COMMUNICATIONS (BARRETT, SIMMONS) *SAS for MCB SAS*
DIVISION OF LEGAL SERVICES (M. BROWN) *MCB*

RE: DOCKET NO. 990043-TP - PETITION TO REVIEW AND TO CANCEL BELL SOUTH TELECOMMUNICATIONS, INC.'S PROMOTIONAL TARIFF (T-98-1783) BY ARROW COMMUNICATIONS, INC.

AGENDA: FEBRUARY 2, 1999 - REGULAR AGENDA - PROTEST OF TARIFF FILING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: IMMEDIATE ACTION REQUESTED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990043.RCM

CASE BACKGROUND

On December 31, 1998, BellSouth Telecommunications, Incorporated (BellSouth or the Company) filed a tariff to offer a promotion called "Three Free." Attachment A contains the tariff filing (T-98-1783). The "Three Free" program is a ninety-day promotion targeted at small business customers in its service areas who are currently receiving telecommunication services from alternative local exchange companies (ALECs). The "Three Free" promotion offers the incentive of three (3) months of no-cost telecommunications services in exchange for a contractual commitment to leave an ALEC, return to BellSouth, and remain with BellSouth for eighteen (18) months. The "Three Free" promotional period initially began January 14, 1999, and was scheduled to end April 9, 1999.

On January 13, 1999, Arrow Communications, Incorporated (Arrow), a certificated ALEC, filed a petition with the Commission to review and cancel BellSouth's promotional tariff. The petition

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is attached as Attachment B. In its petition, Arrow alleged that BellSouth's tariff is discriminatory and anti-competitive, in violation of Sections 364.01(g), 364.09, and 364.10, Florida Statutes. Arrow claimed that free service for three (3) months would provide a sixteen (16%) percent reduction in the price of BellSouth's business service over the eighteen (18) month period, an amount that closely parallels the wholesale discount at which ALECs may purchase service from BellSouth for resale. According to Arrow, the promotion - because it is targeted specifically at ALEC customers who have left BellSouth - impermissibly undercuts the price at which ALECs may provide service, and will have serious anticompetitive economic effects on ALECs. The petition alleges that the promotion also unduly discriminates against other similarly situated business customers.

The Division of Communications received this petition on January 14, 1999, the date the proposed tariff became effective.

When Arrow's petition was received, staff reviewed the tariff in light of the petitioner's allegations. Staff determined that if the tariff remained effective while the Commission decided the merits of the petition, anticompetitive harm could occur during the pendency of the proceeding that could not be adequately redressed at the conclusion of the case. For that reason, staff filed an emergency recommendation to "suspend," or postpone the effective date of the tariff, pending substantive review of the allegations in Arrow's petition.

The matter was addressed at the January 19, 1999 Agenda Conference. BellSouth and Sprint objected to staff's recommendation, and several parties, including AT&T and MCI supported the recommendation because of their concern over the alleged discriminatory and anticompetitive nature of the tariff filing. There was considerable discussion of the Commission's authority to take any interim action to stay the effectiveness of the tariff pending the resolution of Arrow's petition.

In response to questions from the Commission concerning the duration and scope of a decision to "suspend" BellSouth's tariff, staff explained that its recommendation was to delay the tariff's effectiveness only pending full review of Arrow's petition, and only because the petition demonstrated on its face that without delay the tariff would do irreparable anticompetitive harm to ALECs that could not be undone at the conclusion of the proceeding.

Because the issues addressed in staff's original recommendation at the January 19, 1999, Agenda Conference are

significant and controversial, and because they were addressed very quickly, staff offers this recommendation to supplement the analysis initially provided, and to invite additional discussion on the scope and criteria to use in limited circumstances where the Commission should "suspend" a tariff under the current statutory scheme.

DISCUSSION OF ISSUES

ISSUE 1: What criteria should the Commission apply to determine that a tariff filed pursuant to the provisions of Section 364.051, Florida Statutes, will cause irreparable harm if implemented prior to completion of a proceeding to determine its validity?

RECOMMENDATION: The Commission should consider whether a petition to invalidate 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.
(BARRETT, SIMMONS, BROWN)

STAFF ANALYSIS: At the January 19, 1999, Agenda Conference, BellSouth and Sprint objected to staff's proposal to suspend the operation of BellSouth's "Three Free" tariff on the grounds that the 1995 revisions to Chapter 364, Florida Statutes, exempted price regulated local exchange companies from Section 364.05, Florida Statutes, the Commission's traditional "file and suspend" statute. According to the companies, Section 364.051, Florida Statutes, governs their tariff filings, providing that 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. BellSouth argued that if the Commission believed that a tariff was unlawful, Section 364.015, Florida Statutes, provides that the Commission can seek injunctive relief from the courts to prevent implementation of the tariff. The companies also criticized the proposal to suspend the

tariff on the grounds that it was vague, and did not provide a definite time limitation or criteria for suspension.

Arrow, AT&T and MCI responded in support of staff's recommendation, contending that the 1995 legislative revisions to Chapter 364 gave the Commission the responsibility to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Section 364.01(g), Florida Statutes. Although they agreed that the Commission's traditional "file and suspend" authority found in Section 366.05, Florida Statutes, does not apply to price regulated companies, they stated that the specific provision in Chapter 364 relating to the presumptive validity and effective date of price regulated companies' tariffs, Section 364.051(6)(a), Florida Statutes, provides that ". . . the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers." In light of that specific provision, and the general directive to the Commission to prevent anticompetitive behavior in section 364.01, they argued that the Commission does have the authority to delay implementation of a tariff where circumstances indicated that anticompetitive harm or unreasonable discrimination would occur if the tariff went into effect.

It is clear that price regulated LECs are not subject to Section 364.05(5), Florida Statutes, which relates to rate base, rate-of-return regulation, and rate cases in particular. Today, under the presumption of validity, tariff filings of price-regulated LECs go into effect after the appropriate notice period. For example, under Section 364.051(6)(a), Florida Statutes, price-regulated LECs may:

...set or change, on 15 days' notice, the rate for each of its non-basic services, except that a price increase for any non-basic service category may not exceed ...percent within a 12-month period, and the rate shall be presumptively valid.

The phrase "presumptively valid" is used in the context of rate increases. If one infers that the "presumptively valid" language extends to price decreases, the terminology suggests that filings are presumed valid until some action is taken to the contrary. In this case, Arrow has filed a petition alleging that the tariff is discriminatory and anticompetitive.

Staff would also point out that a careful reading of Section 364.05(5), Florida Statutes, reveals that the provisions refer to rate increases and are silent on rate decreases. The issue in this case is a rate decrease. The following passages from Section 364.05(5) illustrate this point:

Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the telecommunications company requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent . . . The new rates or any portion not consented to may, at the option of the company, go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order require such telecommunications company to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amount were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such telecommunications company to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. (emphasis added)

In a competitive environment, a price increase by one competitor does not adversely affect other competitors. The same cannot be said of price decreases, which may indicate either healthy, rivalrous competition or predatory behavior. There are numerous statutory references which point to the Commission's obligation to prevent discriminatory and anticompetitive behavior. These references include Sections 364.01(4)(g) (preventing anticompetitive behavior), 364.08(2) (no free or reduced service), 364.09 (prohibition on giving rebate or special rate), 364.10 (prohibition on providing undue advantage to a person or locality), and 364.3381(3) (continuing oversight over cross-subsidization, predatory pricing, or similar anticompetitive behavior). In addition, as mentioned before, section 364.051(6)(a), which is applicable only to price-regulated LECs, includes the passage that LECs "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers."

At the January 19, 1999, Agenda Conference, the Commission determined that BellSouth's tariff should be suspended pending its decision on the merits of Arrow's petition. The Commission did not attempt to reestablish its traditional file and suspend authority. Rather, in response to the petition before it, it postponed the effective date of the "Three Free" Tariff because it believed that irreparable anticompetitive harm to ALECs could occur if the tariff remained in effect and then was ultimately shown to be discriminatory or anticompetitive. The Commission also expressed interest in further development of criteria to use to decide when a tariff should be suspended pending a determination on the merits of a petition protesting the tariff.

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 beyond no certain pecuniary standard exist 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.

To the extent that a harmful effect cannot be overcome, it then is considered "irreparable."

Staff considered the scope of irreparable harm in the emerging, evolving business climate of telecommunications. Harmful business practices violate the spirit (and letter) of Chapter 364, Florida Statutes. In addition, the Telecommunications Act of 1996 specifically provides for entry into local telecommunications markets through one of three ways: 1) as a facilities-based enterprise; 2) as a reseller of telecommunications; and, 3) through unbundled network elements. Staff believes that any restriction or barrier to the use of one of these avenues would constitute harm, perhaps irreparable harm. Staff categorizes this range of possibilities for harm in two primary ways:

- 1) Financial/economic harm
- 2) Harm to image or goodwill

Financial or economic harm takes many forms and is, by and large, quantifiable. This harm could be in terms of the firm's customer base, revenue, or cost, and may in many cases be redressed. Where, however, the financial or economic harm impairs the firm's ability to compete to the point of jeopardizing the firm's viability, the harm would be considered irreparable and should be prevented at the outset, since no action can be taken subsequently that would appropriately compensate for the wrongs of the past.

In the instant case, staff recognizes the distinct probability that financial harm could occur for Arrow Communications and other ALECs, if the BellSouth "Three Free" tariff were in effect. Staff believes that Arrow's ability to compete could be substantially affected. Presently, Arrow is able to compete with BellSouth as a reseller of service on the basis of price. Through contractual agreements, Arrow is able to purchase telecommunication services from BellSouth (or other facility-based providers) at a discount. That difference between the "bought and sold" prices for these services represents the margin by which Arrow (or other ALECs) can operate and prosper. This margin is critically important to the interests of the non-facilities based enterprises such as Arrow. If the value of the "Three Free" benefit is averaged over the life of the contract, the resultant price is over sixteen (16) percent lower than the regularly tariffed rate, which approximates the discounted rate available to ALEC resellers, such as Arrow. The "Three Free" tariff by BellSouth essentially neutralizes this operating margin for Arrow (and others), and irreparable harm could result. BellSouth appears to be impeding resellers by offering a retail price which approximates the wholesale price, thereby creating a possible price squeeze.

On the other hand, staying the effectiveness of the "Three Free" tariff should not create irreparable financial or economic harm for BellSouth. If the Commission ultimately determines that the tariff is not discriminatory and anticompetitive, the only apparent harm to BellSouth is delay, which staff does not view as irreparable.

Harm to image or goodwill, though less quantifiable, also influences a company's viability. While it is nearly impossible to measure "perceived" goodwill, character, or reputation, these soft characteristics are vital for a company to prosper. Any harm - or perception of harm - can also rise to the level of catastrophic harm, wherein the financial viability of the firm is threatened. A presumably tarnished product or service may be an obstacle which cannot be overcome, resulting in irreparable harm.

In summary, staff recommends that the Commission should consider whether a petition to invalidate 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.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open, pending the resolution of this petition. **(BROWN)**

STAFF ANALYSIS: Staff, therefore, concludes that this docket should remain open, pending the resolution of this petition.

ISSUED: December 30, 1998
BY: Joseph P. Lacher, President -FL
Miami, Florida

EFFECTIVE: January 14, 1999

Attachment A
Docket No. 990043-TP

A2. GENERAL REGULATIONS

A2.10 Special Promotions (Cont'd)

A2.10.2 Descriptions (Cont'd)

A. The following promotions are approved by the Commission: (Cont'd)

Area of Promotion	Service	Charges Waived	Period	Authority
BellSouth's Service Territory ¹ -From Central Offices where Designer Listings are available.	Designer Listings (residence)	Nonrecurring Charges	03/14/98 to 02/28/99	
BellSouth's Service Territory ¹ -From Central Offices where Message Waiting is available.	Message Waiting Indication (residence)	Nonrecurring Charges	03/14/98 to 02/28/99	
BellSouth's Service Territory ¹ -From Central Offices where Rotary Line Service is available.	Rotary Line Service (residence)	Nonrecurring Charges	03/14/98 to 02/28/99	
(DELETED)				(D)
BellSouth's Service Territory ¹	All Business Services excluding: taxes, late payment charges, charges billed pursuant to Federal or State Access Service Tariffs, charges collected on behalf of municipalities (including, but not limited to surcharges for 911 service and dual party relay service), and charges for services provided by other companies, billed charges on any account that provides any service rated according to customer-specific negotiations, contracts or service arrangements (including, but not limited to Contract Service Arrangements (CSAs and MSAs) and Special Service Arrangements).	Line Connection Charges and three months' recurring charges for returning business customers that previously had BellSouth service and left BellSouth before October 1, 1998 and that currently have local service with a CLEC (facilities based or reseller). These customers must sign a contract agreeing to remain a BellSouth customer for 18 months. Customers leaving BellSouth prior to the end of the 18 month agreement will reimburse BellSouth for nonrecurring and recurring charges waived.	01/14/99 to 04/09/99	(N)

Note 1: Customer may elect to participate only once during each promotion.

David B. Erwin
Attorney-at-Law

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Crawfordville, Florida 32327

Phone 850.926.9331
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derwin@lewisweb.net

January 13, 1999

990043-TP

Blanca Bayo
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

In re: Petition to Review and to Cancel Promotional
Tariff of BellSouth Telecommunications

Dear Ms. Bayo:

Please find enclosed an original and ten copies of the Petition to Review and to Cancel Promotional Tariff of BellSouth Telecommunications, by Arrow Communications, Inc.

Please call me if you have any questions.

Sincerely,



David B. Erwin

DBE:jm
Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Review)
and to Cancel Promotional Tariff)
of BellSouth Telecommunications)

Docket No.
Filed: January 13, 1999

PETITION TO REVIEW AND TO
CANCEL PROMOTIONAL TARIFF

Arrow Communications, Inc., d/b/a ACI, through its undersigned attorney petitions the Commission to Review the Promotional Tariff of BellSouth Telecommunications, Inc. (hereinafter BellSouth), filed December 30, 1998, to become effective January 14, 1999, (T-98-1783) and to cancel said tariff forthwith.

In support of its petition, ACI states as follows:

1. ACI is a certificated ALEC, with Certificate No. 4468, issued by the Commission, and as such, ACI is a substantially affected competitor of BellSouth, and, as such, has standing to protest the objectionable tariff filing of BellSouth.

The petitioner's name, address and telephone number is:

Arrow Communications, Inc. d/b/a ACI
16001 S. W. Market Street
Indiantown, Florida 34956
Telephone: 561.597.3113
Fax: 561.597.2115
President: Robert M. Post, Jr.

The petitioner's representative's name, address and telephone number is:

David B. Erwin
127 Riversink Road
Crawfordville, Florida 32327
Telephone: 850.926.9331
Fax: 850.926.8448

2. The tariff filing of BellSouth is objectionable on various factual and legal grounds, as hereinafter set forth, because of the inducements offered by the promotion, the circumstances under which the inducements are offered and the persons to whom they are made available. BellSouth intends to lure BellSouth's competitors' small business customers away from those competitors and back to BellSouth by giving those small business customers free service for three months in return for an 18 month commitment to be a customer of BellSouth once again.

a. The promotional scheme of BellSouth embodied in its proposed tariff is objectionable because it violates Section 364.08(1), Florida Statutes. The tariff extends lower rates to one segment of small business customers that are indistinguishable from all other small business customers during the effective period of the lower rates. The only distinguishing factor between the two groups of small business customers is the carrier with which each customer was doing business before the effectiveness of the lower rate. Section 364.08(1), F. S., prohibits extending to any person any contractual advantage not regularly extended to all persons under like circumstances for the same or substantially similar service, and BellSouth is extending such an advantage to selected small business customers.

b. The promotional scheme of BellSouth embodied in its proposed tariff is objectionable because it violates Section 364.08(2), F. S., by giving free or reduced service. The service is free for three months to returning selected small business customers, or, if the free service is averaged with the cost of service for the 18 month term of commitment, the service is at a reduced rate (at least 16.6% of the regularly tariffed rate).

c. The promotional scheme of BellSouth embodied in its proposed tariff is objectionable because it violates Sections 364.09, F. S., in the same manner described in the two previous paragraphs, by charging special rates to one group of small business customers when that group is indistinguishable from any other group of small business customers. All such customers receive the same or substantially similar service, but one group, over an eighteen month period will receive service at a rate that is at least 16.6% lower.

d. The fact that BellSouth can charge rates to one group of small business customers that are 16.6% lower than its regular retail rates calls into question the sufficiency of the avoidable costs that BellSouth has alleged as the basis for reducing its retail rates by 16.81% to resellers. If BellSouth can make do with revenue from a number of small business customers that is reduced by at least 16.6%, then perhaps BellSouth needs less revenue from its small business customers and/or BellSouth's wholesale rate to resellers should have a greater percentage reduction than the 16.81% currently approved by the Commission.

e. The promotional scheme of BellSouth embodied in its proposed tariff is objectionable because it is anticompetitive. Under the current resale environment, resellers can compete with BellSouth on the basis of price. Resellers of business service can obtain service from BellSouth at a 16.81% discount and then offer service to customers at a rate that is less than BellSouth's retail rate. Under BellSouth's promotional scheme, however, the reseller's ability to compete will evaporate. Under that scheme BellSouth can offer the competitor's customer rates for 18 months that are virtually the same as the competitor's rates, and may well be lower, since the competitor can not pass on the entire BellSouth discount and cover costs and provide a profit margin.

WHEREFORE and in consideration of the above, Arrow Communications, Inc. d/b/a ACI, respectfully requests the Commission to review the promotional tariff filing of BellSouth Telecommunications, Inc., referenced herein, and cancel said tariff, if the allegations herein are determined to be meritorious.

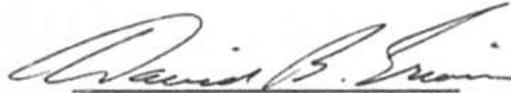
Respectfully submitted,



David B. Erwin

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Arrow Communications, Inc. was hand delivered to the party indicated below, this 13th day of January, 1999.



David B. Erwin

Nancy White, c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301