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Florida Digital Network

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March 31, 2003

Ms. Blanca Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

via Overnight Mail

Re: Docket No. 020119 – Petition for Expedited Review and Cancellation Of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation Of BellSouth's Promotional Pricing And Marketing Practices by Florida Digital Network, Inc.

Re: Docket No. 020578 – Petition of the Florida Competitive Carriers Association for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs.

Re: Docket No. 020578-TP Petition of the Florida Competitive Carriers Association for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs.

Dear Ms. Bayó,

Please find enclosed for filing in the above dockets an original and seven (7) copies of the Post-Hearing Brief and Post-Hearing Statement of Issues and Positions of Florida Digital Network, Inc.

If you have any questions regarding this letter or the one attached, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: 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. 021252-TP
In Re: Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation of BellSouth's Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices.	Docket No. 020119-TP
In re: Petition of the Florida Competitive Carriers Association for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs.	Docket No. 020578-TP

POST-HEARING BRIEF AND POST-HEARING STATEMENT OF ISSUES AND POSITIONS OF FLORIDA DIGITAL NETWORK, INC.

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INTRODUCTION AND SUMMARY OF ARGUMENT

BellSouth Telecommunications, Inc., ("BellSouth") has failed to justify its Key Customer programs under the standards BellSouth itself urges this Commission apply, let alone the criteria that the Commission should apply. For instance, BellSouth invokes the "competitive necessity doctrine" as a free pass to discriminate and to increase prices to some customers in a class while decreasing prices to others in the same class. BellSouth acknowledges that one of the prerequisites of the competitive necessity doctrine is:

> That the discrimination benefits the users of the carrier's services who are discriminated against, i.e., **charges to other users are lower** because of the discriminatory rate than they would be without such rates.[1]

Yet, with remarkable insouciance, BellSouth has produced **not one single shred of evidence** in this case that customers who received rate increases are paying less than they would if the discounts to other customers were not offered – just what the competitive necessity doctrine demands. Instead, the evidence in the record supports a finding that BellSouth is using the revenue produced from rate increases to fund the revenue decreases suffered through its discount programs. This is clearly to the detriment of the customers discriminated against and inconsistent with the competitive necessity doctrine BellSouth itself has advanced.

BellSouth witness Pitofsky testified that there is nothing nefarious about powerful companies increasing prices in some markets while decreasing prices in others. But witness Pitofsky admitted he had not considered BellSouth's profitability as a factor in this case, even though he has criticized courts in the past for not taking into consideration the profitability of a firm charged with monopolistic conduct. If the BellSouth discounted rates are, according to BellSouth's argument, still above cost when discounted

[1] Composite Exhibit No. 1, page 311 (BellSouth Response to Staff Interrogatory No. 52) (emphasis added).

by 40%, it stands to reason the rates must have been super profitable prior to the substantial discount, if not when increased by roughly 30% (as BellSouth's rates have since 2000). BellSouth's discounting above cost (allegedly) is a suspect exercise of market power per witness Pitofsky's own criticisms. Further, the Telex case witness Pitofsky cites as support for his views on competition is completely off base since, in the instant proceeding, the two relevant markets to consider (hot wire centers and non-hot wire centers) are not both competitive markets as in Telex. Instead, BellSouth is leveraging its monopoly power in the non-hot wire center markets to help finance its anticompetitive practices in the hot wire center markets. BellSouth asks the Commission to turn a blind eye to the customers in those markets. Through no fault of their own, those customers are not only left without competitive choices as a vehicle to escape BellSouth's rate increases, but they are made to finance the benefits of customers elsewhere who may have competitive choices.

BellSouth maintains its discounted rates comply with Section 364.051(5)(a) of the Florida Statutes insofar as BellSouth alleges it is "meeting offerings by any competitive provider of . . . nonbasic services in a specific geographic market . . . ." BellSouth witness Pitofsky testified that his opinions in this case rely on the factual premise that BellSouth's discounted rates were **never** below ALEC prices. However, not one of BellSouth's witnesses could testify which competitors were present in which specific markets or what offers what competitors were making in which markets. Consequently, not one BellSouth witness could testify conclusively that BellSouth's discounted prices are above or are "meeting" competitor offerings.[2] Rather, the evidence in the record all

[2] At best, the record shows a largely undefined competitor presence in certain markets, but this is a far cry from the showing BellSouth must make under the statute, i.e., that it is meeting competitor offerings in

points to the fact that BellSouth is significantly undercutting the prices of facilities-based competitors like FDN. Hence, rather than being the well-defined, competitively focused approach BellSouth urges the Commission to accept as comporting with the statute, BellSouth's Key Customer program is about as restricted in scope (and as devastating to facilities-based competition) as a shotgun blast. BellSouth's statutory claims simply cannot be validated from the record, and witness Pitofsky's reliance on the notion that BellSouth's discounted prices are always above competitor prices is wholly without foundation.

BellSouth's claim that it is permitted by statute to discount rates in specific geographic markets hits another road block when it comes time to justifying the Key Customer programs in the SLA, CLUB and move environments. There, BellSouth changes course to in a misguided attempt to avoid the statute's requirements. BellSouth claims that its discounted offerings are just plain "customer friendly," and, in the case of CLUB billing, that its billing systems prevent it from restricting eligibility based on geography. If the Legislature had intended yet one more supposed limitation of BellSouth's billing system or BellSouth's perception of what is or is not customer friendly to trump Section 364.051(5)(a), the Legislature would have passed a law saying so, but it did not. At best, BellSouth is only permitted to meet specific competitor offerings in specific geographic markets; no other discounting is sanctioned by the law. As BellSouth's discounting in the SLA, CLUB and move environments is made with utter disregard to the statutory criteria for meeting competitor offerings in specific markets, these practices are illegal.

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specific geographic markets. Further, as explained below, in the case of discounts offered in the SLA, CLUB and move environments, BellSouth is discounting prices notwithstanding competitor offerings in specific geographic markets, and this, the statute does not sanction.

To ignore these crucial and undisputable fallacies in BellSouth's case would be reversible error for the Commission. Moreover, just as BellSouth cannot escape these flaws inherent in the positions BellSouth has advanced, this Commission cannot evade its own responsibilities under the law and the stance it must take to encourage facilities-based competition.[3]

The Commission's duty under Chapter 364 is to protect the interests of all telecommunications consumers in the State of Florida over the long-haul, not to protect just some consumers for a brief period at the expense of other consumers. BellSouth produced not one jot of proof that consumers who had their rates increased benefit in any way, shape or form from BellSouth's promotional discounts to other consumers. Absent that proof, the Commission cannot say it has complied with its solemn statutory obligations, and turn around and approve BellSouth's promotions.

Additionally, the Commission itself has acknowledged that sustained facilities-based competition is what is in the long-term best interests of Florida's consumers. But the bold-faced results of BellSouth's discount programs cannot be reconciled with promotion of facilities-based competition. The record in this proceeding clearly shows that the combination of BellSouth's discounts and onerous termination liability contracts has triggered a virtual stand-still in the growth of facilities-based competition.[4] Indeed, in 2002, line growth for facilities-based competitors in BellSouth territory slowed to a trickle (some 1,900 line per month for all facilities-based carriers), while the monthly rate at which BellSouth locked customers under Key Customer contracts exceeded total

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[3] Throughout this brief, FDN refers to "facilities-based competition." UNE-L providers such as FDN are in that group, but UNE-P providers are not. (TR. 242.)

[4] See, e.g., Exhibit No. 17.

facilities-based line growth by more than six-and-a-half times, and BellSouth locked up nearly 20% of the addressable market in less than 9 months. While all facilities-based carriers in Florida are asked to survive on a meager ration of 1,900 lines a month – a ration that might not sustain just one facilities-based carrier never mind all of them -- ALECs using the UNE-P vehicle (that BellSouth itself has characterized as detrimental to competition and that does not bear the geographic limitation and cost burdens of facilities-based competition) appear not to be as adversely affected by BellSouth's discount programs. For this Commission to sacrifice Florida's facilities-based carriers to BellSouth in favor of UNE-P providers is completely at odds with the acknowledgement that sustained facilities-based competition is in the best interest of Florida's consuming public. If the Commission does not act now to curb BellSouth's discount programs, to at least cap the early termination liability on BellSouth's discount contracts so facilities-based carriers have a chance to compete for the ever-shrinking base of addressable customers, facilities-based competition in this state may never reach sustainability.

POST HEARING ISSUES, POSITIONS AND ARGUMENT

ISSUE A: What is the Commission's jurisdiction in this matter?

FDN: *The Commission has jurisdiction to determine whether BellSouth's promotions and discounts comport with Chapter 364, Florida Statutes. *

This issue does not appear to be in dispute. Refer to FDN's post-hearing position above.

ISSUE 1: How should Section 364.01, Florida Statutes, be interpreted in evaluating a BellSouth promotional tariff for compliance with Chapter 364, Florida Statutes?

FDN: *Section 364.01 should be interpreted as an expression of the Legislature's overriding intent to promote and preserve sustainable competition for the benefit of all telecommunications customers over the long term, not just to benefit some over the short

term to the detriment of the larger goal. *

On cross-examination, BellSouth witness Pitofsky accepted key elements of FDN's position on this issue, i.e. the Commission's statutory duty is to protect the interests of all customers, not just some customers, over the long-term, not the short-term. (TR. 427.) BellSouth has also acknowledged that facilities-based competition is in the best interest of consumers. (TR 427.) While there may be little difference between FDN's and BellSouth's position on those points, the parties are most decidedly at odds on how the Commission is to carry out its duty in this case.

Section 364.01 exhibits the Legislature's intent for interpreting and enforcing the provisions of Chapter 364. That expression of intent cannot be divorced from the facts of this or any case, for a proposed interpretation of a specific section of Chapter 364 cannot be used to justify results offensive to the overriding intent of the Legislature. For instance, no one could logically argue from reading Section 364.01 that the Legislature meant to sanction conduct that resulted in competition forestalled, a monopoly's dominance preserved, and customers being treated unfairly. Yet, the Commission will assuredly hear BellSouth argue that individual provisions of Chapter 364, taken in isolation, permit it to do just what it has done notwithstanding the results.

The totality of the facts in this case point out that BellSouth's conduct is antithetical to the Legislature's purpose. The very facilities-based carriers that both BellSouth and the Commission say must persist, the facilities-based carriers that require real and steady growth to reach sustainability, have stalled as a result of BellSouth's conduct. Without viable competitors, there simply will be no competition for the benefit of anyone. The Commission must have noted that **not one** BellSouth witness adequately

or directly the future of competition in the State and the fate of customers in the non-hot wire centers, i.e. the big picture. That is because, contrary to the Legislature's intent, BellSouth wants this Commission's attention focused solely on the temporary benefit some customers obtain from BellSouth in the here and now. But even focused on the here and now, BellSouth could not disguise the fact that it has unreasonably discriminated against customers the Commission is charged with protecting, since the host of BellSouth customers not receiving discounts, through no fault of their own, pay the freight for customers who are receiving discounts.

The Commission's evaluation of this case must be tempered with Section 364.01 in mind, and no part of Section 364.01 favors stagnating competitors, a monopoly's dominance restored, or customers suffering due to discrimination.

ISSUE 2:What criteria, if any, should be established to determine whether the pricing of a BellSouth promotional tariff offering is unfair, anticompetitive, or discriminatory?

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, and the impacts on customers, competition and competitors over time. *

As a preliminary matter, the Commission must acknowledge two over-arching aspects to its review of this case. The first is that BellSouth must have the ultimate burden of proving that its tariffs are proper and lawful. Though FDN petitioned the Commission and therefore may at least be said to have a burden of coming forward with a case in opposition, the law recognizes that BellSouth initiated the matter by filing tariffs with the Commission and by requesting Commission approval thereof, even though initial approval may have come through a presumption of validity. Before the Commission, the company filing a tariff always has always had, and must always have,

the ultimate burden of proving the propriety and legality of its tariffs, since a contrary rule, by force of logic, would improperly place the burden of proof on the Commission itself when the Commission suspends or cancel a suspect tariff.[5] Second, to justify Commission action in this case, Chapter 364 does not require that the Commission find BellSouth's conduct to violate antitrust laws or standards. Had the Legislature intended to incorporate antitrust rules, it would have said so, but it did not. Therefore, the Commission must simply adjudge whether, in its view, the BellSouth conduct at issue, taken as a whole, is more "unfair" than fair, more "anticompetitive" than procompetitive.

From the record, there is little question BellSouth has engaged in unreasonable, undue and unlawful discrimination.[6] BellSouth has offered Key Customer discounts of 40% to some customers[7] while increasing rates by 30% to other customers in the same class.[8] Invoking the "competitive necessity doctrine" as its justification for offering reduced prices to certain customers (TR. 156-157), BellSouth itself acknowledges that one condition of the competitive necessity doctrine is:

> That the discrimination benefits the users of the carrier's services who are discriminated against, i.e., **charges to other users are lower** because of the discriminatory rate than they would be without such rates.[9]

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[5] If a company fails to meet its burden of proof for any reason, the company cannot be rewarded for that failure by permitting continued effectiveness of the tariff. The Commission must cancel the tariff.

[6] BellSouth admits offering discounts to some customers but not others is discriminatory, but takes issue with whether the discrimination is permissible. (TR. 234-235.)

[7] It is factually inaccurate to portray the maximum 2002 Key Customer discounts as 20% or 25%, because of the free hunting service also offered. (TR. 40, 62; Exhibit No. 5, page 25.)

[8] See Exhibit No. 7.

[9] Composite Exhibit No. 1, page 311 (BellSouth Response to Staff Interrogatory No. 52) (emphasis added). The cases on competitive necessity cited in Mr. Ruscilli's testimony support the proviso quoted above. See, e.g. *TELPAK,* Memorandum Opinion and Order, Docket No. 181828 (rel. Sep. 23, 1976).

The record, however, is utterly devoid of evidence that customers who received rate increases are paying rates lower than if the discounts to other customers were not offered, never mind having rates that remain the same or a rate decrease. Instead, the record supports a finding that BellSouth is using the revenue produced from rate increases to fund the revenue decreases suffered through its discount programs. (See Exhibits Nos. 14 and 15.) Thus, instead of being benefited, or at least being held harmless, the customers discriminated against in this case are actively being harmed by the discrimination. Even without invoking application of the competitive necessity doctrine BellSouth brought into the case, the Commission must recognize the "no harm" proviso of the doctrine as intrinsically required by Chapter 364 if the Commission is to protect the interests of all customers.[10] The Ohio PSC, to illustrate, recently ruled it would permit an ILEC to offer discounted prices to customers with competitive choices, but only if ineligible customers did not get a rate increase. See Complaint of CoreComm Newco, Inc. v. Ameritech Ohio, Case No. 02-579-TP-CSS, Opinion and Order, November 26, 2002, at 31. If the customers are not all treated fairly and equally by the requiring BellSouth discounts to apply to all customers in a class as Mr. Gallagher recommends (TR. 62, 69), then at least the customers discriminated against must have some benefit from the discrimination or be held harmless.

BellSouth witness Pitofsky testified that there is nothing nefarious about powerful companies increasing prices in some markets while decreasing prices in others. However, witness Pitofsky admitted he had not considered BellSouth's profitability as a factor in this case, even though he has criticized courts in the past for not taking into

[10] See, e.g., Sections 364.01(3), 364.05(5)(a)2, 364.08, Florida Statutes.

consideration the profitability of a firm charged with monopolistic conduct.[11] (TR 430-432.) Basically, that criticism ("the Cellophane fallacy") is that a dominant firm may lower prices, remain profitable and still make a healthy profit because of the above-normal profits gained prior to price reduction. (TR. 432.)[12] According to BellSouth's argument, its rates are above cost when discounted by a whopping 40%. With BellSouth's business rates having been set above traditional rate-of-return cost to subsidize residential rates, the pre-discount rates were set at above normally profitable levels to start with, if they did not become so afterwards when increased by roughly 30% since 2000.[13] Thus, the inference is supported that BellSouth has improperly exercised market power in the very manner identified in witness Pitofsky's criticism of the courts.[14] BellSouth offered no proof to the contrary.[15]

The Telex[16] case witness Pitofsky cites as support for his views on competition misses the mark in several respects. First and foremost, the two relevant markets in this case, hot wire centers v. non-hot wire centers, are not both subject to competition. In Telex, IBM did not have monopoly power in the CPU market where it was raising prices,

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[11] Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 7 (1990).

[12] Id.

[13] See Exhibit No. 7.

[14] The courts recognize that a firm can price above cost but still be found liable for monopolization if the totality of the circumstances and exclusionary conduct of the firm so warrant. See. e.g. LePage's, Inc. v. Minnesota Mining and Manufacturing Co., 2003 WL 1480498 (3rd Cir.)

[15] Mr. Pitofsky also said he did not consider the profitability of ALECs or their service methods (UNE-L, UNE-P, etc. However, he acknowledged that the Commission should consider the quality as well as quantity of competitors. (TR. 425.)

[16] Telex Corporation v. International Business Machines Corporation, 510 F2d 894 (10th Cir. 1975).

justified by cost reasons.[17] BellSouth has a monopoly in the non hot wire center markets[18] and is leveraging that power (on the backs of its customers) to finance its anticompetitive practices in the hot wire center markets. BellSouth asks the Commission to turn a blind eye to customers in those non-hot wire center markets. Through no fault of their own, those customers are not only left without competitive choices as a vehicle to escape BellSouth's rate increases, but they are made to finance the benefits of customers elsewhere who may have competitive choices. (TR. 69.) Further, in Telex, the plaintiff was profitable after IBM's price reductions, the plaintiff could and did have a price response to IBM's price reductions, the plaintiff made "remarkable" gains after the price reductions, and the plaintiff did not rely on IBM for essential facilities and actually negotiated a 28% reduction in prices from its suppliers.[19] Whereas, in this case, FDN has not even started turning a profit, FDN has not and cannot issue a price response to BellSouth's discounts, FDN's gains in access lines since the advent of the 2002 Key Customer tariffs are far from "remarkable," and FDN is reliant on BellSouth as its chief supplier and competitor for essential facilities and gets no volume or term discounts or any price concessions of any kind from BellSouth.[20] In short, Telex is not even remotely analogous to the instant case. BellSouth is improperly exercising market power to force

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[17] See id. at 899, 907.

[18] See Exhibit No. 8, pp. 67-77; TR. 429.

[19] See Telex at 902-904, 905, and 923.

[20] TR. 123-124, 131, 134, 428.

competitors (facilities-based competitors in particular) out of the market as Mr. Gallagher testified.[21]

Exhibit No. 17, the chart of competitive activity in BellSouth territory, speaks more than volumes about this case. Prior to 2002, facilities-based carriers made steady progress in gaining market share.[22] However, with the advent of BellSouth's 2002 Key Customer programs, that steady progress halted and growth stagnated to 1,877 lines per month for all facilities-based carriers. In the meantime, the monthly rate at which BellSouth locked customers under Key Customer contracts exceeded total facilities-based line growth by more than six-and-a-half times, and BellSouth locked up nearly 20% of the addressable market in less than 9 months. (Exhibit No. 17; TR. 404-405.)[23] ALECs using the UNE-P vehicle were not as adversely affected as facilities-based carriers. The explanation for these results is simple. Despite UNE rates having been lowered by the Commission for 2002 in Docket No. 990649A, UNE rates have not been lowered to the extent that UNE-L providers can compete with BellSouth's 2002 Key Customer prices.[24]

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[21] Mr. Pitofsky relied on the testimony of other BellSouth witnesses that BellSouth's discount prices were never below those of its competitors. (TR. 425-426.) As illustrated later in this brief, BellSouth could offer no proof supporting this notion.

[22] Even a cursory review of the BellSouth discounts tariffed before 2002 confirms that those filings were markedly different from the 2002 Key Customer tariffs. The total billed revenue discounts were less, no free hunting was available, and there were no early termination provisions. See Exhibit No. 11.

[23] BellSouth cannot downplay its market power and the influence of the 2002 Key Customer tariffs. Remarkably, in the first nine months of 2002 in Florida, BellSouth regained, in raw numbers, nearly every single line it had lost to competitors. (See Exhibit No. 27.)

[24] The Commission's examination of margins in its Competition Report (Exhibit 8, pp. 29 – 34) provides recognition that the UNE-to-retail rate comparison is a valid evaluation criterion when looking at market results and behavior. As Mr. Gallagher testified, ALECs like FDN compete with BellSouth largely on the basis of price, and FDN would have to price below BellSouth's 2002 Key Customer rates to compete. (TR 38, 42-46.) Mr. Gallagher further testified that FDN would not be able to price below those BellSouth rates and have sufficient margin to sustain its business. (TR 42-46, 78, 123-124; Exhibit 6 (MPG-1).) Mr. Ruscilli's margin analysis is seriously flawed because he compared only recurring UNE rates with retail rates plus subscriber line charges ("SLC"). (Exhibit 13, JAR-7.) Mr. Ruscilli should have accounted for an

For if the UNE-L providers could have competed on price, they surely would have considering their anemic growth. UNE-P providers have not suffered as much (if at all) because they do not have the same capital burdens, "scale" issues, and geographic limitations as facilities-based providers.[25] BellSouth's 2002 Key Customer tariffs prey upon these characteristics of the facilities-based providers, while BellSouth decries the evils of UNE-P and endeavors to have it eliminated. (TR. 38, 45, 62-65, 241-242; Exhibit No. 5, p 27-28.) Indeed, BellSouth, the Commission and the FCC are all in agreement that promoting facilities-based competition is desirable and in the best interest of the consume public; yet, in Florida, facilities-based competition is being sacrificed in favor of UNE-P. (TR. 55-57, 135-136; Exhibit No.; 17.)

In closing, the criteria FDN advocates the Commission apply in this case are as in Mr. Gallagher's testimony. And as he pointed out, the Commission must consider that, aside from the harm done and yet to be done to consumers by BellSouth's discount programs, carriers like FDN have much more to lose in this case than BellSouth. When BellSouth loses a customer to an ALEC, BellSouth supplants the lost retail revenue with wholesale revenue. ALECs are merely left with accumulating unrecovered costs when they lose customers. And to rub the ALEC's nose in the loss, BellSouth charges the

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amortized portion of the significant nonrecurring costs UNE-L providers must pay BellSouth to initiate service. Unlike BellSouth's retail connection charges under the 2002 Key Customer program, the UNE-L provider's connection charges are not waived. (See also, Exhibit No. 24, where Mr. Shell recognized an amortized portion of the nonrecurring connection charges in his cost evaluation.) Further, Mr. Ruscilli should have either eliminated SLC from the retail side of the equation or added it to the wholesale side for a better apples-to-apples comparison. The SLC represents recovery of a real cost from end user for ILEC and ALEC alike, and both are permitted to assess it to end users. In fact, numerous pages included in Mr. Garcia's prefiled exhibit CG-3 (Exhibit No. 20) verify that ALECs do indeed assess the SLC.

[25] The Commission's Competition Report states, "ALECs appear to have converted a substantial number of resold lines to UNE-P, probably due the better UNE-P margins." Exhibit 8, page 35.

ALEC a disconnect fee while it waives connection charges on the retail side. (TR. 40-43.)[26] The inequities of this are patently obvious, and must be rectified.

i) Pursuant to the cost standard identified in Sections 364.051(5) and 364.3381, Florida Statutes.

FDN: * Neither Section 364.051(5) nor 364.3381 should be interpreted so as to sanction discounts of the nature that BellSouth has offered.*

One principle point warrants Commission review on this subissue: interpretation of Section 364.051.[27] Section 364.051(5)(c) provides:

> The price charged to a consumer for a nonbasic service shall cover the **direct costs** of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

(Emphasis supplied.) When parsed, the section's starting point is that the retail price for a "nonbasic service"[28] must cover "direct cost." Though "direct cost" is not defined, in its ordinary sense, "direct cost" is certainly not incremental cost, not TSLRIC, or some

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[26] Included in the relief the Commission grants in this case, the Commission should decree that BellSouth may not assess disconnect fees on ALEC UNEs where BellSouth wins the customer back, particularly with a promotion discount. As FDN has explained, BellSouth's assessing this fee is patently unfair, and no Commission order or interconnection agreement suggests the Commission should not so order. (Exhibit No. 5, p. 27.)

[27] In this brief, FDN focuses on the interpretation of Section 364.05. However, FDN notes BellSouth has provided no support for its claim that Section 364.3381, Florida Statutes, does not apply to price-cap LECs. There is no express language in Chapter 364 containing such an exemption, and no rule of statutory construction can be manipulated so as to create an exemption the Legislature chose not to create expressly. BellSouth must therefore show that it has complied with all provisions of Section 364.3381.

[28] "Nonbasic service" is defined in Section 364.02(8) and "basic local telecommunications service" is defined in Section 364.02(2). "Service" is not defined in Chapter 364. However, "service" is referred to in "basic service" and "nonbasic service" and in their respective definitions. As used in "basic service," "service" refers to a combination of discrete, severable, identifiable uses. In other words, several uses or services are part of the single "basic service." Unlike the definition of "basic service," the Legislature did not specifically state a "nonbasic service" includes any combination of discrete, severable and identifiable uses, but rather, that a "nonbasic service" was "any telecommunications service provided by a[n ILEC] other than" basic service.

variation thereof. Had the Legislature meant some form of "incremental cost" to apply in this test instead of "direct cost," the Legislature would have said so, as it did in Section 364.3381. The plain and ordinary meaning of "direct cost" includes the actual, booked network cost for providing the service. Since BellSouth's cost study in this case is built on a foundation of incremental costs, it cannot be known from the record whether BellSouth's discounted prices comport with Section 364.051(5)(c).[29] The statute then provides an imputed cost add-on that must be recovered in the price of the non-basic service "to the extent **a cost** is not included in the direct cost."[30]

The meaning of Section 364.051(5)(c) is plain and unambiguous on its face. BellSouth cannot assail Section 364.051(5)(c) by trying to cast ambiguities upon it or by suggesting the Commission rewrite it to look more like Section 364.3381.[31] Insofar as BellSouth may argue that the "nothing-in-this section" language of Section 364.051(5)(a)[32] conflicts with or overrides Section 364.051(5)(c), FDN counters that

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[29] As to whether BellSouth's cost study complies with Section 364.3381, FDN notes that BellSouth witness Shell admits he did not account in the study for (1) zone-specific UNE rates, (2) BellSouth's $100 discount program fee and (3) other discounts that may be offered in combination. Though Mr. Shell claims he did not think any one of these items were significant, he did not state he examined the **aggregate** effect of these, nor did he provide documentation of his analysis of any. (TR. 373-376.) Therefore, the Commission has sufficient cause to question the adequacy of BellSouth's study.

[30] As observed in Docket No. 000075-TP, ILECs have interpreted the broad reference to "a cost" to mean "a cost charged to a competitor for a monopoly component." In other words, the price of a nonbasic service would have to include direct cost plus monopoly component cost if that monopoly component cost is not included in direct cost. ILECs have long relied and acted on this interpretation when competing with ALECs for intraLATA toll services, by imputing access cost to direct cost. There has been no showing in this case that BellSouth's cost study recovers even direct cost. Notably, the Legislature did not provide that the ILEC price floor for a nonbasic service was just the monopoly component cost in lieu of direct cost. Rather, the price floor, according to the statute, is direct cost plus, when appropriate, the monopoly component cost.

[31] Section 364.3381(1) and (2), Florida Statutes, establish a distinct and separate test for cross-subsidies for an entirely separate purpose.

[32] BellSouth may emphasize, "Nothing in this section shall prevent the [ILEC] from meeting offerings by a competitive provider of . . . nonbasic services . . . ." See Section 364.051(5)(a)2, Florida Statutes.

accepting such an argument would completely confound Legislative purpose. The rules of statutory construction require reading any apparently conflicting or inconsistent provisions together to achieve a harmonious interpretation, which does not render any one provision meaningless. The interpretation BellSouth would proffer of Section 364.051(5)(a) would render 364.051(5)(c) a nullity. Section 364.051(5)(c) is specifically designed to level the competitive playing field when an ILEC and ALECs compete head to head. The language of Section 364.051(5)(a) pertains when an ILEC and ALEC compete head to head. If (5)(a) overrides (5)(c), when ILECs and ALECs compete, the very purpose of (5)(c) is eviscerated and its words are written out of the statute. This is contrary to the rules of statutory construction and cannot be an accepted interpretation. The more suitable meaning for the "nothing-in-this-section language" of (5)(a) will depend on the context of a specific case, but it certainly must be read less broadly than BellSouth may advocate in this case. Even under a more flexible view, no one could say the (5)(c) direct cost price floor would "prevent" BellSouth from meeting competitor offerings because BellSouth did not provide its direct cost, nor did BellSouth prove (as discussed in Issue 3D below) what competitor offerings it was meeting in what markets anyway.

In conclusion, since BellSouth's cost study does not account for all of BellSouth's direct costs for providing the nonbasic services at issue in this proceeding, BellSouth has not met its burden of proof, and the Commission must strike down BellSouth's 2002 Key Customer tariffs for that failing.

ii) Pursuant to any other provisions of Chapter 364, Florida Statutes.

FDN: *See FDN's position on the above and subsequent issues, including Issue No. 3D. BellSouth's geographic targeting of customers for discounts is discriminatory, as well as unfair and anticompetitive, since all BellSouth customers do not receive or even benefit from BellSouth's discounts. *

Refer to FDN's position statement above.

iii) How should the appropriate criteria identified in Issues 2(i) and 2(ii) be applied to a tariff under which varying customer configurations are possible?

FDN: *See FDN's position to 2(i) and 2(ii). *

Refer to FDN's position statement above.

iv) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to Issues 2(i), 2(ii) and 2(iii)?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

Refer to FDN's position statement above.

v) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to Issues 2(i), 2(ii) and 2 (iii)?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

Refer to FDN's position statement above.

ISSUE 3A:What criteria, if any, should be established to determine whether the termination liability terms and conditions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the

termination liability, and the impacts on customers, competition and competitors over time. *

As Mr. Gallagher testified, depending on the Commission's treatment of the market share, price/cost and class eligibility criteria he proposed, more lenient criteria could be applied to evaluating termination liability. (TR 48.) However, with BellSouth's current dominant market status and the nature, degree and discrimination of the 2002 discount programs, the BellSouth termination liability provisions in effect now are clearly anticompetitive. (TR 48-51; 74.)

Aside from the taking into account the criteria discussed at length in the issues above, the Commission must take special note of certain undisputed facts when evaluating termination liability. BellSouth has locked up nearly 20% of the addressable market with 2002 Key Customer contracts in just nine months, when over a hundred ALECs took years to come close to a 20% share. (Exhibit No. 8; TR. 74.)[33] BellSouth's early termination charges are substantial, the charges pose a significant disincentive to customer migration and very few customers have left Key Customer contracts early. (Exhibit No. 27; TR 48-51, 740.)[34] The pre-2002 iterations of BellSouth's discount programs did not have penalties for early termination (see Exhibit No. 11), and there is no evidence that ALEC market share stalled pre-2002 as it has since. In 2002, facilities-based carrier growth in Florida came to a near standstill, and BellSouth's rate of Key Customer signings over nine months far exceeded the growth rate of all ALECs

[33] BellSouth provided the 19% share figure as representing just those signed up for the 2002 Key Customer programs from January 2002 through September 2002. BellSouth refused to provide discovery responses regarding pre-2002 discount programs, but it is certainly safe inference from the record that the overall percentage of the addressable market under contract to BellSouth is higher than 20%.

[34] Under the January 2002 Key Customer tariff, BellSouth is incented to increase rates and the customers have more to lose since the customer's early termination liability under that tariff increases as rates increase. (TR 50.) Further, termination liability under the June 2002 Key Customer tariff imposes a fee completely disproportionate to that of the January 2002 tariff. Both cannot be right.

combined. (Exhibit No. 17.) ALEC customers, FDN's included, freely migrated to BellSouth and its discounted service notwithstanding, and heedless of, whatever ALEC tariffs may provide regarding termination liability; for if this was not so, BellSouth could not have regained nearly every line it lost to competitors in 2002. (TR 70, 83, 96; Exhibit No. 27). Thus, the reality of the market place is that ALEC customers are not migration-deterred by ALEC termination liability provisions, but are decidedly migration-deterred by BellSouth's contract termination liability. (TR, 74, 84, 124-125.) In summary, BellSouth's market dominance is aided by the onerous termination liability of its discount contracts.

Neither the record nor reason support the notion that the impact in the marketplace is the same when the entire legion of diminutive ALECs and BellSouth have similar termination liability provisions, let alone if the ALECs' termination liability is more stringent. (TR 70.) The above-cited facts support exactly the opposite finding. Indeed, all of BellSouth's assertions that the Commission must equate ALEC and BellSouth termination liability are unsupportable on a number of levels. BellSouth witness Ruscilli would have the Commission believe that FDN and other ALECs could charge up to $90,000 a customer in termination liability charges.[35] (TR 171-175.) The absurdity of this claim is obvious on its face.[36] Worse still, all of Mr. Ruscilli's calculations are wrong anyway since he did not account for any avoided cost (see TR 172, line 19-20).

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[35] In this portion of his testimony, Mr. Ruscilli refers to provision in FDN's tariff since replaced. (Exhibit No. 5, p. 25)

[36] The more reasonable view is that ALECs temper their termination liability with market considerations. An ALEC could not sell its services if potential customers knew they would be subjected to onerous termination liability. (Exhibit No.5, p. 25-26; TR 124-5.)

The pivotal consideration of this case really should be market power not market player. That said, however, Section 364.01(4)(d), Florida Statutes, does recognizes that ALECs and ILECs are not on equal footing in the market and cannot be regulated in the same way. BellSouth's ability to quickly lock up substantial market share with its discount programs, to have very few customers leave it discount contracts, to regain nearly every line it has lost to competitors, and to put a halt to facilities-based carrier growth – this is all the illustration the Commission needs to see there remains no equal footing for ALEC competitors six years after passage of the Telecommunications Act.

The Commission must similarly reject Mr. Ruscilli's assertion that the Division of Administrative Hearings (DOAH) already found it improper in the "Fresh Look" case to place more restrictions on an ILEC promotion than an ALEC promotion. (See TR 170-1.) The DOAH decision turned on a factual deficiency that does not exist here. In the Fresh Look case,[37] DOAH ruled no facts were presented in the record demonstrating ILEC contracts presented a greater obstacle to ALEC sales than ALEC contracts presented to ILEC sales.[38] In stark contrast, the above-cited facts in this case lay bare that BellSouth's termination liability poses a serious obstacle to ALEC sales while the converse could certainly not be true.

The Fresh Look case is distinguishable, and notable, for other reasons as well. In Fresh Look, the issue was whether the Commission could or should declare an omnibus, one-time termination right for all customers under ILEC contracts for certain services. The issue here is not one of granting an "out" to all customers under existing BellSouth

[37] See Docket No. 980253-TX.

[38] The DOAH order stated, "there was no demonstration that the ILECs' long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC's long-term contract." (TR 171.)(Emphasis added.)

discount contracts, but rather, capping termination liability charges to a level that will not impede competition on a going-forward basis. In other words, the Commission is not being asked at this stage to undertake the drastic remedy of re-writing existing contracts as in the Fresh Look case (although it would be justified based on the impact the discounts have had on facilities-based competition). The Commission is instead asked to consider a cap on BellSouth's termination liability provisions for prospective contracts, with a clear justification therefor. Significantly, the Commission reasoned in the Fresh Look case:

> Although there is certainly a deleterious effect on the number of contracts that would be available for fresh look, some **customers will still be locked up into long term contracts with the LECs, and unable to take advantage of the development of competition** without a fresh look.

Order No. PSC-00-0253-PCO-TX, issued February 7, 2000, in Docket No. 980353-TX. (Emphasis added.) Thus, just two years ago the Commission pronounced that it is harmful to competition for customers to be locked into long-term contracts with dominant providers. In this case, with the Fresh Look case's proof problem solved, as stated above, the Commission must once again recognize the principle it recognized in its prior decision, and then tailor a suitable remedy that promotes competition, as recommended by FDN.

The effects of BellSouth's discount programs and contracts are patently obvious from the record: facilities-based competition in Florida has stalled. (TR. 74, 124-125; Exhibit No. 17.) If permitted to continue on their present course, BellSouth's discount programs and contracts will very soon have devastating effect on facilities-based competition, and it will be too late for the Commission to undertake any type of corrective action unless it acts now. (TR 62-68.) Therefore, if the Commission takes no

other action in this case, the Commission must at least limit the termination liability charges as FDN has recommended, to BellSouth's retail line installation charges. (TR. 51.)

Had BellSouth placed reasonable limits on termination liability, FDN may not have pursued a hearing and decision in this proceeding. (TR. 83.) Because of the importance of the termination liability issue, even if the Commission will not accept FDN's primary proposal above, FDN proposes an alternative solution. If the Commission were to deem reciprocal treatment necessary, FDN is agreeable to limiting its termination liability for voice service term contracts to retail line installation charges as well.(TR. 83.)[39] In making this alternative proposal, FDN does not concede the principle that there is need or justification for reciprocal regulation for ALECs and ILECs. There clearly is not. Rather, FDN believes, as this Commission must, that it is an absolute necessity that facilities-based competitors in Florida like FDN survive the next several years to reach scale and sustainability. That, in FDN's view, takes precedence over principle in this case. The Commission's capping the termination liability of BellSouth's discount contracts provides at least a fair opportunity for facilities-based competitors like FDN to survive (an opportunity they will not otherwise have), and FDN understands this is more important than its stake in its own termination liability rights. Accordingly, if the Commission does not accept FDN's primary proposal on termination liability, it should accept FDN's alternative proposal as a fair and reasonable compromise supported in by evidence in the record.

[39] One of BellSouth's chief counter-arguments in the record to FDN's termination liability complaint was that BellSouth is doing no differently than what the ALECs are doing on termination liability.

FDN recognizes that it is the only ALEC left standing in this case, the only ALEC seeking relief against BellSouth and willing to make concession if required to obtain that relief. So, if the Commission decides to accept FDN's alternative proposal, the Commission may reach the question of what to do about other ALECs. The answer is that the Commission has a few choices at its discretion, but the choice selected should be based on sound judgment and the record. Certainly, the Commission may suggest guidelines for other ALEC situations or may rule ALECs who did not participate in this proceeding may choose to shoulder the burden of proving their own case and pursuing their own remedies with the Commission.

Finally, brief words should be devoted to two other baseless arguments BellSouth makes: the first concerning split service and the second concerning liquidated damages. As to the former, there can be no debate that BellSouth's Key Customer contracts do not inform the customer in clear terms that the customer may migrate to another carrier without penalty as long as some service remains with BellSouth. (See Exhibit No.20, CG-1.) This aside, BellSouth's own witnesses conceded that BellSouth fought for the benefits of one-stop customer shopping in Docket No. 960786-TP (BellSouth's 271 proceeding) and that splitting services between carriers is not perceived by customers as desirable. (TR 348-349.)[40] Therefore, BellSouth's argument that split service is a means for termination liability avoidance and a cure for the anticompetitive effects that result from the discount programs does not even approach persuasiveness and must be rejected.

[40] BellSouth failed miserably in its over-reaching efforts to display one measly case where a customer did have split services with BellSouth and FDN because in that case, the issue was not voice lines split among carriers, but voice service and the ADSL service that the Commission ruled BellSouth was unlawfully tying to its voice service in Docket No. 010098-TP. (TR 137.)

As for liquidated damages, the Commission has no jurisdiction to say a Florida carrier's contract does or does not have a valid liquidated damages provision under Florida contract law. The Commission's jurisdiction in the instant field of inquiry is limited to what is or is not permissible under the statutory provisions of Chapter 364, and a determination of what is unfair or anticompetitive.[41] To determine what is or is not anticompetitive, the Commission must look to the effect of the subject conduct in the context of the competitive marketplace, not cede its authority to contract rules established by the courts. And as FDN has proven here, the market place effect of BellSouth's termination liability is detrimental to facilities-based competitors and consumers.

i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. BellSouth's early termination liability should not exceed BellSouth's retail line installation rates. Alternatively, the Commission may order the parties to have reciprocal termination liability not to exceed retail line installation rates. *

See discussion above and FDN's position statement.

ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. BellSouth's early termination liability should not exceed BellSouth's retail line installation rates. Alternatively, the Commission may order the parties to have reciprocal termination liability not to exceed retail line installation rates. *

See discussion above and FDN's position statement.

ISSUE 3B:What criteria, if any, should be established to determine whether the duration (term of individual contracts, length and succession of promotions) of a BellSouth promotional tariff offering is unfair, anticompetitive, or discriminatory?

[41] Any argument that BellSouth's discount contracts contain valid liquidated damages provisions and are therefore not unfair or not anticompetitive is a not-so-subtle attempt at rewriting the statute.

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. *

As established in Issue No. 2 above, BellSouth's improper use of market power to regain retail market share has caused facilities-based competition in Florida to stall before sustainability is attained and has harmed the customers BellSouth has discriminated against. With discount programs like the 2002 Key Customer tariffs in place for six months at a time, programs rolled over again and again, it will not be very long before facilities-based competition has even slower or no growth and the gap between customers discriminated for and discriminated against widens into a gulf. (TR 50-52.)

Even if the Commission accepts BellSouth's discounts for the here and now, the Commission must be weary of the cumulative, detrimental impacts that loom on the horizon. As Mr. Gallagher argues:

> The damage . . . [includes] the cumulative effect of those [customer] losses and the future harm resulting from the dominant firm's locking up customers for the long term, during the infancy of the competitors, and deterring those customers from migrating in the future. Further, there is the damage done to the dominant firm's customers who do not share in the benefits of competition because they do not receive rate decreases, as they should.
>
> If the Commission is not going to outright stop BellSouth from offering promotional prices in limited geographic areas, the Commission surely must recognize the potential for these BellSouth promotions to stifle competition over time and the need for the Commission to reserve the power or have mechanisms in place to "put on the brakes" and stop negative competitive impacts before it is too late to reverse those impacts. This is precisely why the Commission must place a meaningful limit on the duration of any tariffed promotions and on any agreement or eligibility terms, as well as addressing termination liability. If the Commission realizes at an annual review that total ALEC growth is limping along at 5%, it may be too late to stop the cumulative effect of prior promotions, or even stop BellSouth's 8th Key Customer tariff, so as to do anything to alter the course that the dominant BellSouth has set for the market. Too many customers will

already be locked up with BellSouth, and Commission action to release those customers already signed up with BellSouth from termination liability provisions may prove too difficult. (TR 66-68.)

In its Competition Report, the Commission itself admits it does not have as good a handle on competitive activity and cause-and-effect market issues as it would like, and that is why the Commission is seeking ways to improve its reporting. (See Exhibit No.8, page 17-18.) Moreover, judging from the stagnating growth of facilities-based carriers displayed in Exhibit No. 17, what Mr. Gallagher was concerned with is already coming to pass. (TR. 74.) Because of BellSouth's undeniable dominance and the prospect for irreversible damage to facilities-based competitors, the Commission must leave itself a means to address undesirable market results before it is too late, rather than delegating plenary control of the market to BellSouth. Further, in light of BellSouth's faithful commitment to rate increases for customers it has discriminated against, the Commission should not leave itself open to a perpetually worsening disparity between haves and have-nots.[42] Accordingly, if it permits BellSouth's discounts to stand, the Commission must at least address the market safety net and caste system issues by imposing meaningful duration limitations on BellSouth discount programs, such as those recommended by FDN.

i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. The Commission must limit the duration of promotional tariffs; eligibility and contracts to protect against reversing competitive trends and to ameliorate the gap between customers discriminated for and against. FDN recommends a maximum of 120-day tariff duration, and a maximum of one-year discount eligibility, with at least a one year off discount period per customer. *

See discussion above and FDN's position statement.

[42] See Exhibit No.7, MPG-5; TR 68.

ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. The Commission must limit the duration of promotional tariffs; eligibility and contracts to protect against reversing competitive trends and to ameliorate the gap between customers discriminated for and against. FDN recommends a maximum of 120-day tariff duration, and a maximum of one-year discount eligibility, with at least a one year off discount period per customer. *

See discussion above and FDN's position statement.

ISSUE 3C:What criteria, if any, should be established to determine whether the billing conditions or restrictions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. *

To the extent this issue may have been designed to address termination liability or eligibility for BellSouth promotions in the SLA, CLUB and move environments, FDN addresses those specific matters in Issues Nos. 3A and 3D. Otherwise, refer to FDN position statement.

i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

Refer to FDN position statement.

ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

Refer to FDN position statement.

ISSUE 3D: What criteria, if any, should be established to determine whether geographic targeting in a BellSouth promotional tariff is unfair, anticompetitive or discriminatory?

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. *

In its argument on Issue 2 above and elsewhere, FDN discusses the competitive and discrimination criteria mentioned in its position statement on this issue and the special consideration required due to the geographic limitations of facilities-based carriers.

i) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "meeting offerings by any competitive provider" be interpreted?

FDN: *Any permitted discounts should be narrowly tailored to meet specific competitor offerings. BellSouth has the ultimate burden of proof on this question, and BellSouth has failed to meet that burden relative to its discounts generally or to SLA, Club and moves specifically. *

Section 364.051(5)(a) 2 states, in part:

> Nothing contained in this section shall prevent the [price cap ILEC] from **meeting** offerings by any competitive provider of **the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by**

> deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, **using volume discounts and term discounts, and offering individual contracts**. However, the [ILEC] shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

(Emphasis added.) From this language, the Commission must make several observations.[43] First, the ILECs permission is limited to "meeting" competitor offerings for the same or equivalent nonbasic service. The statute does not say that the ILEC is permitted to "beat" competitor offerings, but to "meet" them, which, in the ordinary sense would mean to "match" those offerings. The competitor offerings the ILEC meets must be for the same or equivalent nonbasic service; hence, if a competitor could not provide a service in a market or to a customer, there is no offering the ILEC is permitted to meet. Next, the ILEC offerings are permitted to meet the offering of any competitive provider in a specific geographic market or to a specific customer. So, if a competitor makes an offering in one specific market or to one specific customer but not in or to another, the ILEC is permitted only to meet the offering in the market or to the customer, which the competitor does.

BellSouth has not met its burden of proving its 2002 Key Customer programs comply with Section 364.051(5)(a) on a number of levels. None of BellSouth's witness could state which competitors were present in which hot wire centers and what offerings those competitors made or did not make. When asked on cross examination which competitors made what offerings in which wire centers, neither Mr. Ruscilli nor Mr. Garcia could answer. (TR. 254, 344-346.) BellSouth cannot comply with the statute by tossing some vague yellow page ads and a hodge-podge of other documents into the

[43] FDN discusses elsewhere in this brief the prefatory phrase at the beginning of the quoted language and the last sentence of the quoted language.

record when its own sponsoring witnesses cannot tell the Commission what exactly in those documents constitutes "the same or functionally equivalent nonbasic services" offered by competitors in "specific geographic areas" or to "specific customers" which BellSouth is "meeting" with its discount programs.[44] Certainly, the record does show that competitors like FDN have won customers from BellSouth in the past and that a largely nameless competitor presence exists in certain BellSouth wire centers.[45] However, the record most decidedly does not show that BellSouth's 2002 Key Customer tariffs meet competitor offerings in specific geographic markets or to specific customers. Just looking at FDN alone, the record shows BellSouth's 40% off Key Customer prices significantly undercut FDN's existing voice service prices. (Exhibit No.6, MPG-1.) That BellSouth is indiscriminately undercutting ALEC prices is also corroborated by the number of lines BellSouth signed to Key Customer contracts compared to the much smaller number of lines gained by the entire ALEC community for the same period. (See Exhibit No. 17.)

BellSouth offers the 2002 Key Customer discounts in the SLA, CLUB and move situations without regard to whether or what competitor offerings are available to the

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[44] Prefiled Exhibits JAR-2 and CG-3, which BellSouth offered as proof of the ALEC offerings it was supposedly meeting, contain sparse little real information. Anyone closely scrutinizing those pages would be hard-pressed to confirm any specific ALEC offering information from them. For example, counsel for BellSouth pointed out an FDN yellow page included in Mr. Garcia's materials. That ad makes reference to prices 20% to 40% lower than BellSouth's, but it does not specify what price level applies to what service or where. (See one of the unnumbered pages of CG-3.) Such specificity would be necessary for a correct apples-to-apples comparison of offerings, since the tariffed Key Customer discounts pertain to regulated voice services and the FDN ad, as well as many others included in prefiled CG-3, reference Internet services.

[45] Virtually all of the BellSouth wire centers where FDN has collocated have been classified as hot wire centers by BellSouth. As stated later, BellSouth is significantly undercutting FDN prices and, as explained throughout this brief, BellSouth is otherwise acting in an unfair, anticompetitive and discriminatory manner.

customer. (Exhibit No.20, CG01; TR 255.)[46] Here, BellSouth sidesteps the statute and instead argues that it is just being "customer friendly," and, in the case of CLUB billing, that its billing systems prevent it from restricting eligibility based on geography.[47] The Legislature did not provide in the statute that yet one more limitation of BellSouth's billing system or BellSouth's subjective notions of what is customer friendly excuses compliance with Section 364.051(5)(a). Accordingly, BellSouth's indiscriminately offering discounts to customers in SLA, CLUB or move situations, without regard to competitor offerings of the same or equivalent service to the same geography or to the same customer, is not permitted by statute.

ii) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "specific geographic market" be interpreted?

FDN: *The Commission should not permit BellSouth to apply discounts to different locations of the same business entity or to customers who have moved to a new location unless BellSouth can show that it is meeting a competitor's offering for those locations.*

See discussion above and FDN position statement. FDN does not take issue with the definition of "specific market" BellSouth suggested in its Prehearing Statement, only with how BellSouth has erroneously and unlawfully applied that definition.

iii) Pursuant to Section 364.051(5)(a), and 364.08, Florida Statutes, how should "similarly situated" or "substantially similar" be interpreted?

[46] With CLUB billing, for instance, BellSouth offers the Key Customer discount to all locations of a business as long as one location is in a hot wire center. The test of Section 364.051(5)(a) is whether BellSouth is meeting a competitor offering in the specific geographies where the business operates or a competitor offering made to a specific customer. BellSouth's discounting in the CLUB billing environment pays no heed that there may not be any competitor offering for every location of the business, let alone that no one competitor may be able to serve all locations with the same or equivalent offering. Similarly, if a customer moves from a hot wire center to a non hot wire center, the customer is still eligible for a discount despite the absence of any proof that there is'a competitor offering in the non hot wire center.

[47] In its Prehearing Statement, BellSouth stated that "specific geographic market" should depend on what the competition is doing. That position, like the statue itself, apparently only applies when convenient to BellSouth's cause.

FDN: *Undue discrimination has historically hinged on cost differences inherent in serving customers -- cost differences not present here. BellSouth's position must be rejected since BellSouth has not shown that customers not receiving discounts are not harmed by the discount offerings. *

The question of undue or unreasonable discrimination has historically hinged on cost differences inherent in serving customers in the same class or different classes. When BellSouth retail rates were set prior to the advent of price cap regulation, the Commission established rate structure and rate classifications/groupings based on cost differences so as to avoid discrimination among similarly situated customers. Here, BellSouth has not alleged that any cost differences among customers arise by virtue of a competitor's presence in a hot wire center. Rather, in reliance on "the competitive necessity doctrine," BellSouth alleges that discriminatory pricing to meet competitor offerings is reasonable and permissible in certain circumstances. However, as FDN has argued in Issue No. 2 above, BellSouth has not fulfilled all of the criteria of the competitive necessity doctrine because BellSouth has not shown that the customers discriminated against have benefited from the discrimination through rates lower than what the would have been otherwise.

iv) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

See discussion above and FDN's position statement.

v) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

See discussion above and FDN's position statement.

ISSUE 3E:What criteria, if any, should be established to determine whether any other terms or conditions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

FDN: *The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. *

With the competitive landscape constantly changing, the Commission must be ever mindful of the interplay of other matters with its decision in cases like this, and the Commission must be able to react quickly. For instance, in Docket No. 010098, the Commission barred BellSouth from discontinuing DSL service to ALEC voice customers and directed that BellSouth not impose any other obstacles to voice service competition. Recently, BellSouth began offering 12 months of free DSL service to customers in Florida. This is yet another improper exercise of monopoly power. Further, the situation presented by the free DSL is worsened if that offering is tied to BellSouth voice service offerings. The Commission must be able to promptly adjudicate such offerings to be anticompetitive if the Commission is to preserve a free and fair marketplace.

i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

See discussion above and FDN position statement.

ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

FDN: *Yes. Any BellSouth discounts should be offered to all BellSouth customers. At a minimum, BellSouth customers discriminated against must not be harmed by the discrimination. The record in this case establishes that customers discriminated against have been harmed. *

See discussion above and FDN position statement.

ISSUE 4A:Under what terms and conditions should BellSouth promotional tariff offerings be made available for ALEC resale?

FDN: *Resale terms and conditions must be fair and reasonable. BellSouth's are not because it bills ALECs without automatically applying the discounts and because ALECs should not be responsible for the full termination liability in the event the customer departs ALEC service, particularly when the customer ports back to BellSouth. *

Resale terms and conditions should be fair and reasonable. BellSouth proposes to bill ALEC customers for the resale of promotions without automatically applying both the wholesale and promotion discounts, but instead requiring a credit request procedure. (TR 54; Exhibit No. 1, p. 314.) Additionally, BellSouth proposes to make ALECs responsible for the customer's full termination liability in the event the customer departs ALEC service, even if the customer goes back to BellSouth. (TR 54.) Neither proposal is fair and reasonable. (TR 54.) An ALEC cannot fairly be held responsible for a customer's termination liability where, if the customer were BellSouth's direct customer,

BellSouth would not pursue termination liability from that customer. Moreover, making the ALEC responsible to BellSouth for termination liability when the resold ALEC customer departs pre-term only to return to BellSouth would be an inappropriate windfall for BellSouth.

i) Does the BellSouth Key Customer tariff filing (Tariff Number T-020035) meet the resale terms and conditions established pursuant to this issue?

FDN: *No. *

See discussion above and FDN's position statement.

ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) meet the resale terms and conditions established pursuant to this issue?

FDN: *No. *

See discussion above and FDN's position statement.

ISSUE 4B:What is the competitive impact, if any, of the resale of BellSouth promotional tariff offerings?

FDN: *The resale of BellSouth's promotional discounts is completely at odds with this Commission's and the FCC's announced goals of promoting facilities-based competition. Resale of promotions leads to the erosion/abandonment of facilities-based infrastructure. Resale is an unfinanciable, non-viable business option. *

FDN refers the Commission to the unrebutted testimony of Mr. Gallagher and highlights that since inception of this proceeding, BellSouth has not conjured a remotely logical response to this FDN argument. (TR 54-58; Exhibit No. 5, page 13.) That FDN may have experimented with a handful of resale lines means nothing, and any inference BellSouth may attempt to draw from that experiment is ridiculously unfounded. The underlying premise of BellSouth's position is that facilities-based carriers like FDN

should substantially abandon their investment and their business model in favor of resale in order to compete. This FDN has not done and cannot do. Resale is dead for a reason. To the extent Exhibit No. 17 did not make resale's demise crystal clear, Mr. Gallagher's testimony should have. (See TR 54-58, 124; Exhibit No. 5, page 13.)

ISSUE 5A: In the context of marketing promotional tariffs, what waiting period or other restrictions, if any, should be applicable to BellSouth?

FDN: *BellSouth should not be permitted to market promotions for 30 days after a customer leaves ALEC service. Marketing discounts should be by effective similar means, materials and methods for all eligible customers. Marketing should also be restricted in the wake of an ALEC market exit. *

In order for the ALEC and its customer to have sufficient time to adjust to the transition to ALEC service, the Commission should bar BellSouth from initiating winback contacts with the customer for 30 days after the customer leaves BellSouth service. (TR. 116-117.) Any shorter period would be insufficient for the ALEC and the customer to settle into service after curing any problems encountered during the complex provisioning process and to make any necessary adjustments. (TR 116-117.)

BellSouth should also be required to properly inform eligible customers of discounts.[48] If BellSouth's discount programs were structured such that only ALEC customers were eligible, those programs would not pass muster.[49] BellSouth should not be permitted to do indirectly what it cannot do directly, and therefore, BellSouth should

[48] Section 364.08(1), Florida Statutes, requires a service to be "regularly and uniformly extended" to all persons in like circumstances.

[49] Section 364.051(5)(a), Florida Statutes, permits ILEC discounted pricing to "a specific geographic market or to a specific customer." Thus, an ILEC may focus on an individual market or to an individual customer. The statute does not say an ILEC may discriminate on the basis of a customer's carrier. Further, in the Arrow Communications case, the Commission voted to suspend a BellSouth promotional tariff that limited discount eligibility only to ALEC customers. See attachment to FDN's Petition in Docket No. 020119-TP.

offer discounts to all eligible customers using effectively similar means, materials and methods.

BellSouth does not market its discounts to all eligible customers in the same way. (TR. 46-47, 58-60, 346-348.) BellSouth claims it that it tries to reach every eligible customer with marketing material; however, those claims are less than sincere since BellSouth does not even routinely inform every eligible inbound caller of the discounts. (TR. 346-348.) Ironically, BellSouth argued it was trying to be "customer friendly" by improperly expanding customer eligibility, as discussed in Issue 3D, yet BellSouth apparently does not think it should be **too** customer friendly by letting those eligible for the discount know about the discounts when they call. (TR. 346-348 .) BellSouth's excuses are, simply put, a poor disguise. The reality is that BellSouth discriminates indirectly, focusing on ALEC customers through its sales force and marketing arms, while paying little or no attention to its own eligible customers through customer care personnel standing at the ready. (TR58-60, 346-348 .)

When an ALEC exits the market, BellSouth should not be able to take advantage of ensuing panic through direct and immediate marketing of its discount programs before the customers have a meaningful opportunity to consider other carrier offers. (TR 59-60, 118.)

ISSUE 5B:In the context of marketing promotional tariffs, what restrictions, if any, should be placed on the sharing of information between BellSouth's wholesale and retail divisions?

FDN: *No BellSouth retail employee or agent with access to wholesale information should engage in retention or winback efforts. No retention or winback effort should

occur during retail customer contact initiated for account activity predicate to a change in carrier, such as moving or removing xDSL, lifting a freeze, etc.*

BellSouth witness Ruscilli testified that BellSouth retail call center personnel have access to certain wholesale information, such as LSRs, to facilitate execution of their duties. (TR 264-70.) Mr. Ruscilli conceded that BellSouth does not and may not attempt to retain a customer when the customer calls BellSouth to lift a local service freeze. (TR 264-70.) Lifting a local service freeze is clearly an act predicate to a carrier change. However, lifting a freeze is not the only customer act predicate to a carrier change. (TR 264-70.) As the Commission noted in its recent decision in Docket No. 010098-TP, BellSouth ties BellSouth DSL service to BellSouth voice service. When attempting to port to ALEC voice service, certain account activities are necessary and predicate for the customer's suitably retaining, one way or another, BellSouth DSL service. Moving ADSL from the main BTN to another WTN is one such activity. (TR 59.) And only the customer is permitted to carry out this predicate retail account activity; the ALEC cannot do it for the customer. (TR. 59.)

To ensure competitive fairness and have the advantages of a bright-line rule, the Commission should bar BellSouth retail personnel with access to wholesale information from engaging in retention efforts. The possibility of improper access and conduct is too great otherwise.[50] Further, notwithstanding whether the retail employee has access to wholesale information, BellSouth retail personnel should not be permitted to engage in

[50] A direct link between access to wholesale information and marketing efforts would constitute a violation of Section 222(b) of the Act.

retention efforts during customer contact initiated for account activity predicate to a carrier change, such as lifting a freeze and moving or removing DSL service [51] (TR 59.)

ISSUE 6: If the Commission determines that a BellSouth promotional tariff is unlawful, what effect, if any, should this decision have on customers who have already contracted for service under the promotional tariff?

FDN: *If the promotional tariffs in this case are deemed unlawful, FDN does not at this time object to a Commission determination prospective in effect. *

See FDN's position statement.

RESPECTFULLY SUBMITTED, this 1st day of April, 2003.

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[51] Since BellSouth does not routinely offer discounts to inbound callers anyway and since BellSouth already does not engage in retention efforts during one type of service call (i.e. freeze lift requests), a rule of this type should not be problematic for BellSouth to follow even if DSL changes are not necessarily, in every single case, predicate to a carrier change. Having a bright line rule is critical to fair treatment of the ALECs as long as BellSouth imposes obligations that ALECs cannot perform for the customer but which must be performed for the customer to change voice carriers.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 1st day of April, 2003.

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