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January 20, 2004

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Mrs. Blanca S. Bayó  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No.: 031132-TP  
Petition of Florida Digital Network, Inc. d/b/a FDN Communications  
for Suspension of or For a Stay of the Effective Date of BellSouth  
Telecommunications, Inc.'s 2004 Key Customer Promotional Tariff  
Filing December 17, 2003**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer to Petition of Florida Digital Network, Inc. d/b/a FDN Communications for Suspension of or For a Stay of the Effective Date of BellSouth's 2004 Key Customer Promotional Tariff, which we ask that you file in the captioned docket.

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

RECEIVED & FILED

Sincerely,

*dh*  
FPSC-BUREAU OF RECORDS

*Nancy B White*  
Nancy B. White *RW*

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Enclosures

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey

DOCUMENT NUMBER DATE

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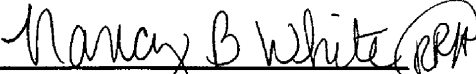
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**CERTIFICATE OF SERVICE  
Docket No. 031132-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
Electronic Mail and Federal Express this 20th day of January, 2004 to the following:

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Linda Dodson  
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\_\_\_\_\_  
Nancy B. White

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Florida Digital Network, Inc. d/b/a ) Docket No. 031132-TP  
FDN Communications for Suspension of or For a Stay)  
of the Effective Date of BellSouth )  
Telecommunications, Inc.'s 2004 Key Customer )  
Promotional Tariff Filing of December 17, 2003 ) Filed: January 20, 2004  
\_\_\_\_\_)

**BellSouth Telecommunications, Inc.'s Answer to Petition of Florida Digital Network, Inc. d/b/a FDN Communications for Suspension of or For a Stay of the Effective Date of BellSouth's 2004 Key Customer Promotional Tariff**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Answer to the Petition of Florida Digital Network, Inc. d/b/a FDN Communications ("FDN") for Suspension of or for a Stay of the Effective Date of BellSouth's 2004 Key Customer Promotional Tariff. As explained below, the Florida Public Service Commission ("Commission") should summarily deny FDN's request for suspension or a stay of any of BellSouth's tariffs. The Commission also should deny all remaining claims for relief set forth in FDN's Petition.

**I. Response to Request for Expedited Review and For a Stay of the Effective Date of the 2004 Key Customer Tariff**

**A. Introduction**

The Commission should dismiss or, in the alternative, summarily deny FDN's request for expedited review and its request for suspension or stay of the effective date of BellSouth's 2004 Key Customer tariff for the following reasons:

BellSouth and FDN have been down this road before. FDN has challenged three prior Key Customer tariffs and lost. The Commission in Order No. PSC-03-0726-FOF-TP, issued on June 19, 2003 found that BellSouth's prior Key Customer tariffs were in compliance with Florida law and were not unfair, anticompetitive, or discriminatory.

Moreover, the Commission did not find the terms and conditions of the tariff to be oppressive.

**B. Far from being anticompetitive as the Petition erroneously alleges, BellSouth's 2004 Key Customer tariff represents the very essence of competition**

The allegations in FDN's Petition turn the meaning of "anticompetitive" on its head. BellSouth's offering lower prices to compete with the competitive offerings of FDN is competition, and the Courts have held that "*[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.*"<sup>1</sup> Moreover, because the prices BellSouth offers under the Key Customer tariff are not predatory, any harm that FDN purportedly suffers because of BellSouth's lower prices is simply the natural effect of competition. As the United States Supreme Court has held "*cutting prices in order to increase business often is the very essence of competition. The antitrust laws were enacted for the protection of competition, not competitors.*"<sup>2</sup>

The United States Supreme Court has also held that

Low prices benefit customers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. We have adhered to this principle regardless of the type of antitrust claim involved.

\* \* \*

To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. *The antitrust laws require no such perverse result.*<sup>3</sup>

In its Petition, FDN is simply attempting to insulate itself from competition by BellSouth at the cost of depriving Florida customers of one of the intended benefits of the vibrant

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<sup>1</sup> *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F. 2d 1050, 1057 (6<sup>th</sup> Cir.), cert. denied 469 U.S. 1036 (1984) (emphasis added).

<sup>2</sup> *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (emphasis added).

competition that exists in the local exchange market in Florida – lower prices. The Commission should reject FDN's attempt to stifle competition and should allow the current Key Customer tariff to remain in effect.

**C. FDN has not – and cannot – allege any facts that support its conslutory allegations of substantial and irreparable harm.**

FDN alleged that the 2004 Key Customer tariff causes substantial and irreparable harm to Florida's ALECs. FDN has failed to allege any facts that, if proven, demonstrate any such harm.

The reason that FDN has alleged no facts in support of these allegations is clear – there are no facts that would support any claim of irreparable harm. In June 2003, this Commission submitted a report entitled "Competition in Telecommunications Markets in Florida" ("the Report") to the legislature.<sup>4</sup> This Report shows that Florida has seen *continued increases* in competitive entry in the business sector since the Commission's prior report in December 2002. In fact, as of June 30, 2003, 432 CLECs were certificated in Florida serving 1,119,208 business access lines. Report at 4 and 8. Furthermore, BellSouth's business market share has decreased since submission of the Report.

The number of business access lines being served by CLECs in Florida is steadily increasing. These increases occurred while various BellSouth promotions were in effect, some of which were strikingly similar to the 2004 Key Customer tariff. These facts of public record flatly refute FDN's allegations that BellSouth's current Key

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<sup>3</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (emphasis added).

<sup>4</sup> The Commission prepared this Report to satisfy the statutory requirements of Section 364.386, Florida Statutes, which requires the Commission to provide designated members of the Legislature an annual

Customer promotion will cause irreparable harm to competition in Florida. Lastly, FDN asserts or raises a number of falsehoods or inaccuracies as the basis of its complaint.

**D. The inaction of FDN shows that expedited consideration of the Petition is neither necessary nor appropriate.**

The inaction of FDN further demonstrates that expedited consideration of FDN's Petition is neither necessary nor appropriate. FDN is a party to an interconnection agreement with BellSouth, and that agreement provides that BellSouth will provide notice of the introduction of retail promotions at least forty-five days prior to the effective date of such promotions. BellSouth notifies CLECs of such promotions by way of a web-page to which all CLECs have access. Accordingly, on November 16, 2003 BellSouth posted a Notice on its web page that describes the currently effective Key Customer Program in detail. This Notice stated that BellSouth anticipated filing the program tariff with the Commission on December 17, 2003 with an effective date of January 2, 2003, and BellSouth did, in fact, file the program tariff with the Commission on December 17, 2003 with a proposed effective date of January 2, 2003. If expedited consideration of FDN's Petition really was appropriate, why did FDN not file its Petition immediately upon the filing of the tariff (and after 45 days prior notice) rather than waiting until three days before the tariff went into effect with a holiday within those three days? As in past complaints or interventions with Key, one can easily conclude that FDN is merely attempting to halt or delay competition by BellSouth.

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report on the status of competition in the telecommunications industry. (See Report at 3; Florida Statutes §364.386).

**E. The tariff modifications complained of by FDN are reasonable and appropriate.**

FDN complains of two modifications made to BellSouth's 2004 Key Customer tariff that make that tariff differ from the earlier Key Customer tariffs. First, FDN asserts that the termination liability of the 2004 Key Customer tariff is unfair and anticompetitive. The termination liability provision of BellSouth's Key Customer Tariff consists of \$30 per month for the months remaining on the term agreement plus any "special promotional awards revised". The flat fee per month portion of the termination liability provision is similar to those of the earlier tariffs and has already been adjudicated by this Commission. Rather than having two separate flat fees based upon different levels of monthly charges, BellSouth developed one blended rate for purposes of simplicity.

In addition, FDN's interpretation of "special promotional rewards received" is simply incorrect. Special promotional rewards are to cover *special* rewards as the description provides and do not include rewards credited for regulated total billed revenue or for hunting service. Indeed, it is intended solely to apply to nonrecurring one-time rewards provided for signing up for the 2004 Key Customer tariff.

Second, FDN asserts the automatic renewal language included in the 2004 Key Customer tariff will have the effect of locking-up customers for several years, and is therefore, anticompetitive. FDN's assertions are disingenuous as this provision is a *renewal* provision in which the customer may choose to renew or not to renew for another term – it is the customers choice as many customers prefer not to withstand the inconvenience of exchanging documents or interruption of monthly rewards and opt to renew for another term. Moreover, as it has done for the last several years, BellSouth will continue to proactively contact the customer on multiple occasions prior to the

expiration of the term agreement via use of written and oral communications. These contacts will remind the customer that the term agreement is nearing expiration and will give the customer ample opportunity and time to make a decision to renew the contract or seek service from one of BellSouth's competitors. With the 2004 Key Customer tariff, the first reminder to the customer will take place 180 days in advance of the expiration of the contract.

These modifications are reasonable and appropriate. FDN has either misunderstood or misinterpreted these modifications.

## **II. Response to the Allegations Set Forth in the Petition**

1. BellSouth admits that FDN is a CLEC certificated by the Commission. BellSouth admits that FDN purchases certain services from BellSouth in the State of Florida. BellSouth denies the remaining allegations contained in Paragraph 1 of the Petition.

2. The allegations of Paragraph 2 of the Petition do not require a response from BellSouth.

3. The allegations of Paragraph 3 of the Petition do not require a response from BellSouth.

4. BellSouth admits the allegations contained in Paragraph 4 of the Petition.

5. BellSouth submits that the Commission's Annual Report on Competition for Telecommunications Markets in Florida dated June 30, 2003 speaks for itself. BellSouth denies the remaining allegations contained in Paragraph 5 of the Petition.

6. BellSouth admits that, in response to the vibrant competition for business customers in the Florida local exchange market, BellSouth has filed various promotional



tariffs that offer reduced rates for various business services. BellSouth submits that the terms and conditions of these tariffs speak for themselves. BellSouth denies the remaining allegations contained in Paragraph 6 of the Petition. Furthermore, FDN's allegations are false.

7. BellSouth denies the allegations contained in Paragraph 7 of the Petition.

8. BellSouth admits that FDN has filed previous complaints with the Commission concerning BellSouth's Key Customer tariffs. BellSouth also admits that the Commission issued Order No. PSC-03-0726-FOF-TP ("Order") concluding that BellSouth's promotional tariffs complied with Florida Statutes and were not unfair, anticompetitive, or discriminatory. BellSouth further admits that FDN has appealed the Commission's Order.

9. BellSouth denies the allegations contained in Paragraph 9 of the Petition.

10. BellSouth denies the allegations contained in Paragraph 10 of the Petition. Moreover, BellSouth submits that the "special promotional rewards received" referred to in the tariff does not include rewards credited for regulated total billed revenue and hunting service.

11. BellSouth denies the allegations contained in Paragraph 11 of the Petition. Indeed, FDN's allegations are specious, nonsensical and not based on fact. Moreover, BellSouth submits that it provides substantial and ample notice in advance of the contract termination date in both written and oral form and on multiple occasions. Such actions will assist customers to make a choice as to whether to renew the Key Customer Contract.

12. The terms and conditions of BellSouth's promotional tariffs speak for themselves and BellSouth denies the remaining allegations contained in Paragraph 12 of the Complaint.

13. BellSouth denies the allegations contained in Paragraph 13 of the Petition and avers that termination liability for the 2004 Key Customer tariff consists of \$30 per month for the months remaining on the contract plus any nonrecurring / one-time rewards for signing up for the 2004 Key Customer tariff.

14. BellSouth denies the allegations contained in Paragraph 14 of the Petition and incorporates its answers to Paragraph 11 herein by reference.

15. BellSouth denies the allegations contained in Paragraph 15 of the Petition.

16. BellSouth denies the allegations contained in Paragraph 16 of the Petition. Granting the relief requested by FDN would be prejudicial not only to BellSouth, but also to BellSouth's customers who have signed up for services under such tariffs; to allow FDN to succeed would allow FDN to stop such tariffs in their tracks weeks and months after they have gone into effect. It would also deny to Florida businesses the benefits of competition that cannot be recaptured. Such a result also would prejudice the customers of FDN and other CLECs, because without the pressure of competitive responses from BellSouth, competitors will feel far less compelled to compete vigorously, offer more variety of services, or lower their prices.

17. BellSouth denies the allegations contained in Paragraph 17 of the Petition.

18. BellSouth denies the allegations contained in Paragraph 18 of the Petition.

19. BellSouth denies the allegations contained in Paragraph 19 of the Petition.

20. BellSouth denies the allegations contained in Paragraph 20 of the Petition.

21. BellSouth denies the allegations contained in Paragraph 21 of the Petition.
22. BellSouth denies the allegations contained in Paragraph 22 of the Petition.
23. BellSouth denies the allegations contained in Paragraph 23 of the Petition.

FDN has mischaracterized BellSouth's Key Customer tariff and this Commission's Order. There is no such thing as a "one-line – behind rule." The only requirement is that some level of service remain with BellSouth to avoid early termination liability. Moreover, BellSouth has not required customers to maintain the main billing telephone number with BellSouth in order to avoid early termination liability.

24. BellSouth denies the allegations contained in Paragraph 24 of the Petition.
25. BellSouth denies the allegations contained in Paragraph 25 of the Petition.
26. BellSouth denies the allegations contained in Paragraph 26 of the Petition.
27. BellSouth denies the allegations contained in Paragraph 27 of the Petition.
28. BellSouth denies the allegations contained in Paragraph 28 of the Petition.
29. BellSouth denies the allegations contained in Paragraph 29 of the Petition.
30. BellSouth denies the allegations contained in Paragraph 30 of the Petition.
31. BellSouth denies the allegations contained in Paragraph 31 of the Petition.

Respectfully submitted this 20th day of January, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

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