ORIGINAL

Florida **Digital** Network

February 13, 2002

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-TP – Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation Of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation Of BellSouth Telecommunications, Inc.'s Promotional Pricing And Marketing Practices

Dear Ms. Bayó,

Please find enclosed for filing in a **new docket** an original and seven (7) copies of the following: Florida Digital Network, Inc.'s Petition for Expedited Review and Cancellation Of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation Of BellSouth Telecommunications, Inc.'s Promotional Pricing And Marketing Practices

Also enclosed is a diskette containing a Microsoft Word for Windows 2000 file of the foregoing document.

If you have any questions regarding the enclosed, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

L O C A L   L O N G   D I S T A N C E   I N T E R N E T

DOCUMENT NUMBER-DATE
01727 FEB 14 02
FPSC-COMMISSION CLERK

390 N. Orange Avenue Suite 2000 & 200 Orlando, Florida 32801
407.835.0300 Fax 407. 835.0309 www.floridadigital.net

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation Of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation Of BellSouth Telecommunications, Inc.'s Promotional Pricing And Marketing Practices	Docket No. 020119 Filed: February 14, 2002

PETITION OF FLORIDA DIGITAL NETWORK, INC., FOR EXPEDITED REVIEW AND CANCELLATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S KEY CUSTOMER PROMOTIONAL TARIFFS

AND

FOR AN INVESTIGATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S PROMOTIONAL PRICING AND MARKETING PRACTICES

Florida Digital Network, Inc., ("FDN" or "Florida Digital") hereby petitions the Florida Public Service Commission ("FPSC" or "Commission") pursuant to Sections 364.3381(3), 364.01(4)(a), (c) and (g), Florida Statutes, to enforce Sections 364.01(4)(a), (c), and (g), 364.051(6), 364.08, 364.09, 364.10, and 364.3381(3), Florida Statutes, and, specifically, to immediately review and cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff and any like tariffs filed by BellSouth Telecommunications, Inc. ("BellSouth") and to launch a comprehensive investigation of BellSouth's promotional pricing and marketing practices. In support of its petition, FDN states as follows:

DOCUMENT NUMBER-DATE

01727 FEB 14 02

FPSC-COMMISSION CLERK

BACKGROUND

1. FDN is an alternative local exchange carrier ("ALEC") certificated by the FPSC. Therefore, FDN is a substantially affected competitor of BellSouth and, as such, has standing to file this proceeding. In addition, FDN is a retail business class customer of BellSouth.[1]

2. The Petitioner's name, address and telephone number is:

Florida Digital Network, Inc.
390 North Orange Ave.
Suite 2000
Orlando, FL 32801
407-835-0300

3. The Petitioner's representative's name, address and telephone number is:

Matthew Feil
Florida Digital Network, Inc
390 North Orange Ave.
Suite 2000
Orlando, FL 32801
407-835-0460

4. BellSouth is a corporation organized and formed under the laws of the State of Georgia, having an office at 675 West Peachtree Street, Atlanta, Georgia, 30375. BellSouth provides local exchange and other services within its legacy franchised areas in Florida. BellSouth is a "Bell Operating Company" and an "incumbent local exchange carrier" ("ILEC") under the terms of the Federal Telecommunications Act ("the Act") and is certificated as a Florida ILEC.

5. According to ALEC-sponsored evidence presented in Docket No. 960786-TL (BellSouth's 271 Case), BellSouth's overall voice market share in Florida is over 90% -- still a monopoly for all practical purposes. Even by conservative estimates of business customer market share, BellSouth is by far the single dominant provider in its ILEC territory in Florida.

[1] Some of FDN's regional offices receive BellSouth retail service.

6. Through promotional pricing programs offered exclusively to ALEC business customers and potential ALEC business customers, BellSouth has used, and intends to continue to use, its dominant market status to selectively eliminate its business market competitors, causing substantial and irreparable harm to Florida's ALECs and to Florida's consumers. Meanwhile, BellSouth proposes to increase rates to its captive residential customers -- who are yet to have a real competitive choice in the state -- and to its own business customers.

7. Over the last year, BellSouth has filed with the Commission various promotional tariffs of temporary duration that offer price reductions to eligible subscribers. The two principle promotional programs BellSouth has tariffed in Florida for business class subscribers are known as the Full Circle program and the Key Customer program. The promotional discounts in these programs are **not** offered to **all** BellSouth business class subscribers. Rather, the Full Circle program had offered discounts up to 20% off billed revenue (lines and features) only to "former BellSouth business customers who have changed to another local service provider in the previous two years." The 2001 Key Customer program offers discounts of up to 18% off total billed revenue (lines and features), as well as a discount of up to 75% off the line hunting service and a waiver of line connection charges, to "business customers served from wire centers in competitive situations." Thus, only subscribers who are or could be served by a competitor could receive these promotional discounts.

8. On or about January 14, 2002, BellSouth filed a new promotional tariff, the 2002 Key Customer Program. The 2002 Key Customer program offers discounts of up to **25%** off total billed revenue (lines and features), as well as the line hunting service for free, and no connection charges to "businesses customers served from wire centers in competitive situations." BellSouth

proposed that this tariff become effective January 31, 2002, and remain effective through June 25, 2002. A copy of the pertinent tariff pages, printed from BellSouth's website, is attached hereto and marked "Exhibit A."

9. At some time after January 14, BellSouth revised the 2002 Key Customer Tariff. A copy of the revised tariff pages, printed from BellSouth's website, is attached hereto and marked "Exhibit B." These pages altered the eligibility language from "For business customers served from wire centers in competitive situations" to "For business customers served from hot wire centers" and added a page which lists the so-called "hot wire centers." The January 31, 2002, effective date proposed by the original filing and the discounts were not changed with the revised filing.[2] There are over 120 "hot wire centers," which apparently are those wire centers where competing carriers have a presence.

10. The Key Customer tariffs are designed to apply only to existing ALEC customers and potential ALEC customers.[3] The programs' substantial discounts for basic and non-basic services are not offered to BellSouth residential customers and not to BellSouth business customers who do not have a competitive choice.

11. Upon information and belief, BellSouth does not generally market and promote the Key Customer programs to all eligible business customers. Rather, BellSouth target markets and promotes the Key Customer program only to business customers who have taken some action initiate a change of carrier from BellSouth to an ALEC.

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[2] The revised pages bear the same tariff sheet revision level as the original pages, so they were apparently meant as substitute pages. However, as of this date, the Commission's Tariff Filing Summary Report lists only one Key Customer tariff filing, that on January 14.

[3] The eligibility criteria for the Key Customer programs make no distinction between business customers who are or could be served by the various ALEC service strategies: facilities-based, UNE, UNE-P or reseller.

12. Nearly simultaneous to its filing the 2002 Key Customer discounts, BellSouth has filed tariffs to increase rates to its retail residential and business customers. BellSouth proposes to increase flat rate residential and business services, multi-line business services and various other services. The attached "Exhibit C" and "Exhibit D" are copies, printed from BellSouth's website, of Tariff Distribution summaries for the rate increases effective January 19 and February 16, respectively. The attached "Exhibit E" is a schedule prepared by FDN summarizing the business class customer rate increases BellSouth has filed.

13. To take advantage of BellSouth's promotional pricing, subscribers must accept a "poison pill" condition that makes it extremely costly for them to later change carriers. Subscribers that sign up to receive promotional discounts, but leave BellSouth service before expiration of the contract term must reimburse BellSouth for **all** discounts received **and** pay any applicable termination charges.

14. The Commission has not heretofore undertaken examination of the cost and price bases for BellSouth's promotions, either in isolation, or in conjunction with the residential and business retail price increases BellSouth has just recently filed. Nor has the Commission heretofore undertaken an examination of BellSouth's marketing practices for these promotional programs.

15. Last year, after a flurry of ALEC complaints that BellSouth disparaged ALECs to customers when marketing these promotional programs, the PSC staff made an informal inquiry of BellSouth's marketing tactics. The matter was not docketed and the results of staff's review were not published in a recommendation. In media reports, BellSouth had announced it had temporarily suspended certain "winback" activities. The particular winback activities suspended

were not identified. However, BellSouth's anticompetitive promotional price tariffing and associated activities continue.

16. In Docket No. 960786-TP (BellSouth's 271 Case), BellSouth witness Cox identified how BellSouth identifies **former** BellSouth customers to target market: BellSouth compiles a list from disconnect reports. However, BellSouth also target markets customers that **intend** to leave BellSouth. BellSouth has not explained how it identifies these soon-to-be-former customers. The ALECs have experienced instances where BellSouth contacts customers about promotions when the customer has initiated account activity with BellSouth necessary to initiate a carrier change (e.g. changing or correcting a customer service record (CSR)), as well as at times suspiciously coincident to the CLEC's submitting a CSR request or local service request (LSR) to BellSouth.

IRREPARABLE HARM & NEED FOR EXPEDITED TARIFF REVIEW

17. BellSouth's 2002 Key Customer Program purportedly went into effect on January 31, 2002. FDN requests that the Commission immediately act to either cancel or at least temporarily suspend/postpone the BellSouth Key Customer promotional tariffs pending investigation.

18. FDN and other ALECs have suffered and will continue to suffer irreparable competitive harm if BellSouth's promotional tariffs remain in effect. The Key Customer tariffs are also unduly discriminatory on their face. Expedited Commission action is required to prevent the irreparable harm that will result from these tariffs.

19. BellSouth's promotional tariffs are unlawful and anticompetitive on various factual and legal grounds, including the inducements offered by the promotions, the intent and effect of the promotions, the circumstances under which the promotions are offered and the limited group

of customers to whom they are made available. This much is clear: BellSouth, the dominant carrier in its Florida territory, has embarked on a course to selectively eliminate Florida's competing carriers through discriminatory offers and anticompetitive practices designed to lure away the competitors' current and potential customers.

20. To support a finding of anticompetitive conduct under Chapter 364, the Commission need not find that the conduct amounts to a violation of state or federal antitrust laws. Indeed, there is no indication anywhere in Chapter 364 that for a carrier's behavior to be deemed anticompetitive, it must amount to an attempt to monopolize or a restraint of trade under the Sherman or Clayton Acts or the Florida Antitrust Act of 1980.[4] Had the Legislature intended application of traditional antitrust standards to a Chapter 364 determination of anticompetitive conduct, it would have required such, but it did not. Rather, it is sufficient that the conduct in question is anticompetitive in effect or nature. Based on the plain meaning of the statute, the test is simply whether the conduct is more anticompetitive than pro-competitive. As explained below, that BellSouth's Key Customer tariffs are anticompetitive is beyond question.

21. The Commission has ample authority to cancel or to suspend/postpone anticompetitive, discriminatory, or otherwise unlawful tariffs, and to order a halt to anticompetitive, discriminatory or unlawful conduct, pursuant to Sections 364.01(4)(a), (c) and (g), 364.051(6), 364.08, 364.09, 364.10 and 364.3381(3), Florida Statutes.[5] This authority pertains even if a tariff is "presumptively valid" under Section 367.051(6), Florida Statutes.[6]

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[4] Section 364.01(3), Florida Statutes, states that the regulatory oversight in chapter 364 does not limit the availability of antitrust remedies, thus acknowledging but not adopting antitrust standards while recognizing a possible overlap of jurisdiction in certain cases.

[5] Were this not so, the Commission would be utterly powerless to halt the effect of such tariffs and related conduct by its own orders, despite the Commission's exclusive jurisdiction and legislative directives to promote competition, prevent anticompetitive behavior, eliminate discrimination, and protect the public health, safety and welfare.

22. In Docket No. 990043-TP (Petition to review and cancel BellSouth Telecommunication, Inc.'s promotional tariff (T-98-1783) by Arrow Communications), the Commission voted that it had the power to suspend or postpone the effective date of a price regulated tariff upon a prima facie showing that irreparable anticompetitive harm would result from that tariff. There, Arrow, a reseller, asked the Commission to cancel a BellSouth promotional tariff that offered discounts roughly equal to a reseller's wholesale discount to any customer who had switched from BellSouth to an ALEC as of a certain date. Specifically, BellSouth proposed a discount of free connection charges and three free months of service (the "Three Free" promotion) to ALEC customers who switched to BellSouth for an eighteen-month term of service.[7] This amounted to a 16.6% discount over 18 months, while the reseller's wholesale discount was 16.81%. The Commission voted to suspend the Three Free promotional tariff pending resolution of Arrow's petition, finding irreparable competitive harm would result otherwise. The staff recommendation from the <u>Arrow v. BellSouth</u> docket file is attached hereto as "Exhibit F" and the vote sheet as "Exhibit G."[8]

23. The promotional scheme embodied in BellSouth's Key Customer tariffs is anticompetitive and therefore violates sections 364.01(4)(a), (c) and (g), 364.051(6) and 364.3381(3), Florida Statutes. There is simply no other way to characterize the conduct of a dominant, monopolistic provider who equals or undercuts the prices of its competitors, and even

[6] Section 364.051(6), Florida Statues, addresses a company's ability to implement on 15 days' notice only tariffs for nonbasic services. The tariffs at issue in this case are not exclusively for nonbasic services. Moreover, section 364.051(6) also provides that ILECs "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers" and grants the Commission jurisdiction for preventing cross-subsidization of basic and nonbasic services and "ensuring that all providers are treated fairly in the telecommunications market." Thus, "presumptively valid," even if applicable to a given tariff, does not mean "irrefutably valid" as far as the Commission's powers are concerned.

[7] The Three Free tariff also provided that subscribers would have to reimburse BellSouth for all discounts if the subscriber migrated before the terms' end.

[8] According to the docket file, BellSouth withdrew the tariff seventeen days after, and Arrow withdrew its petition twenty-two days after, the Commission's vote. No order reflecting the vote was issued.

offers some services for free, through inducements made exclusively to its competitors' customers. The anticompetitive character of this conduct is accentuated when these inducements are accompanied by an increase in prices for those customers not subject to competition.

24. As recognized in Arrow v. BellSouth, ALECs compete with BellSouth largely on the basis of price. That finding is true whether the ALEC is a reseller, facilities-based, a UNE or UNE-P provider. As confirmed in the attached affidavit of FDN's Chief Operating Officer, Michael P. Gallagher, attached hereto as "Exhibit H," FDN competes with BellSouth largely on the basis of price, and BellSouth's Key Customer promotions equal or exceed the prices FDN may offer and still remain viable.

25. Under BellSouth's Key Customer promotion, the Florida ALECs' ability to compete will evaporate since BellSouth offers exclusively to the competitors' customers rates that are virtually the same as its competitors' rates, and lower than an ALEC reseller's wholesale cost.

26. The Key Customer prices are designed to, and have no purpose other than to, eliminate the competition. Though the promotions may initially create some losses or lower profits for BellSouth, they presage higher monopolistic prices and greater profits hereafter as competitors fail. The small market share BellSouth has lost to ALECs is insignificant when compared to BellSouth's over-all presence in the market.

27. If BellSouth's promotional prices were not designed to eliminate the competition, they would be offered to all BellSouth's customers, not just to ALEC and potential ALEC customers. Further, the promotions would not be coupled with a penalty for subsequent customer migration, nor be coincident to price increases for customers not subject to competition.

28. As stated above, the Commission has not reviewed the cost bases for the promotional discounts. The Commission is required to do so in support of a finding of anticompetitive behavior and irreparable harm, or to suspend/postpone a tariff. Pricing below profitability is not the applicable legal test. Rather, the Commission may act to halt (at least temporarily) any pricing/conduct that on its face is more anticompetitive than pro-competitive. In any case, one cannot say BellSouth's promotional prices are at a point above profitability or may be offered as a result of BellSouth's superior efficiency without questioning: (a) why BellSouth does not offer the promotional prices and free services to all of its customers, (b) how BellSouth can offer free and significantly discounted service without creating cross subsidies, (c) why BellSouth has increased rates to its other retail customers, and (d) why the tariff requires a subscriber to reimburse BellSouth if migrating before term's end.

29. The fact that BellSouth can charge rates to one group of small business customers that are **25%** lower than its regular retail rates also calls into question the sufficiency of the avoidable costs that BellSouth has alleged as the basis for reducing its retail rates to resellers. If BellSouth can make do with revenue from small business customers that is reduced by 25%, then perhaps BellSouth needs less revenue from its small business customers and/or BellSouth's wholesale rate to resellers should have a greater percentage reduction than the rate currently approved by the commission.

30. The promotional scheme BellSouth embodied in its proposed tariff is also objectionable because it violates the discrimination and discounted service prohibitions of Sections 364.08, 365.09 and 364.10, Florida Statutes. The tariff extends discounted rates to one segment of small business customers who are indistinguishable from all other small business customers during the effective period of the lower rates. The only difference between the two

groups of customers is an ALEC presence in a particular wire center, which cannot justify BellSouth's disparate pricing.[9] BellSouth small business customers served from wire centers with an ALEC presence are similarly situated and receive substantially the same service as BellSouth small business customers served from wire centers without such a presence, but the Key Customer promotion does not treat them equally. Therefore, the Key Customer tariffs unduly discriminate and improperly offer discounted service.

31. As verified in "Exhibit H" hereto, the affidavit of Mr. Gallagher, FDN has been and will continue to be irreparably harmed by BellSouth's Key Customer and other similar price promotions. BellSouth's Key Customer promotions approximate or undercut the prices FDN is able to offer and still remain viable, and FDN has and will continue to lose market share due to BellSouth's promotions. The harm that Florida Digital has suffered and will continue to suffer from BellSouth's promotions cannot be undone and cannot be adequately compensated by damages or readily measured by pecuniary standards. That harm has been constant, frequent and continuous in character.

32. BellSouth's promotions also harm Florida's consumers. As competitors are eliminated as a result of the BellSouth promotions, consumers will have fewer competitive choices and will be subject to higher prices.

33. BellSouth is not at all prejudiced by suspension/postponement of the 2002 Key Customer tariff and any like tariffs. In balancing the interests of BellSouth and FDN, the irreparable harm FDN will suffer clearly outweighs any possible disadvantage to BellSouth from delayed implementation of the tariff described above.[10]

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[9] In Arrow v. BellSouth, ALECs actually served customers to whom the disparate prices would be offered, and the Commission voted to suspend the underlying BellSouth tariff.

[10] See Arrow v. BellSouth.

34. Any opportunity ALECs have to resell at a discount BellSouth promotional prices of 90 days or greater duration is a palliative consolation that serves neither to avoid irreparable harm nor to remedy BellSouth's anticompetitive conduct. BellSouth itself has repeatedly announced that the Commission and the FCC should promote facilities-based competition and that resale is an "entry" strategy. The resale business has been for sometime now widely considered a non-viable, unfinanciable venture, and many ALECs like FDN do not generally resell services because of resale's margins. On a long-term basis, resale of ILEC promotional rates by ALECs will naturally promote erosion of facilities-based competition. As demand for resold promotional prices grows, demand for facilities-based services declines. Thus, while BellSouth in every forum parades the Telecommunication Act's core objective of promoting true facilities-based competition, BellSouth engages in anticompetitive conduct where the mitigation it offers merely alters the ALEC's mode of demise. Neither the law nor equity requires a party to change its business model to evade irreparable harm and anticompetitive conduct.[11]

35. BellSouth's previous implementation of promotional tariffs does not legally or practically excuse the anticompetitive conduct in which BellSouth currently engages or lessen the irreparable harm it now inflicts.

<u>NEED FOR INVESTIGATION</u>

36. The allegations in the paragraphs above warrant Commission investigation into BellSouth's promotional pricing and marketing of promotions.

37. A prompt and comprehensive review becomes even more critical if the Commission is to assure Florida's consumers that promotional prices BellSouth offers to some customers who

[11] Arrow Communications was not required to become facilities-based to avoid the irreparable harm and the anticompetitive impact of the Three Free tariff.

may have a competitive choice are not financed on the backs of those who have no competitive choice.

38. A review of BellSouth's marketing of promotions is likewise critical to assure Florida's ALECs and the public that BellSouth is competing fairly. While the Act and the FCC have addressed some competitive protections on ILEC marketing, not all the bases have been covered. Section 222(b) of the Telecommunications Act provides:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

The FCC added,

> We conclude that section 222 [of the Telecommunications Act] does not allow carriers to use CPNI to retain soon-to-be former customer where the carrier gained notice of a customer's imminent cancellation for service through the provision of carrier-to-carrier service.[12]

39. FDN maintains that it is improper and anticompetitive for an ILEC to market promotions to a soon-to-be-former customer who contacts the ILEC for account activity that only the ILEC can execute/address with the customer, such as lifting an account freeze, changing features/services on a line, or correcting information on a CSR. The manner and method BellSouth employs for customer "retention" significantly affects the ALECs' ability to compete, particularly when BellSouth offers promotional discounts available only to ALEC customers. Therefore, retention marketing must be subject to thorough scrutiny and any unfair, anticompetitive tactics must be discovered and rooted out.

40. BellSouth's promotions should be reviewed to determine if they are discriminatory in practice, as well as discriminatory in principle. In BellSouth's 271 Case, BellSouth placed a

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[12] Telecommunications Carriers' Use of Customer Proprietary Network information and Other Customer Information, CC Docket No. 96-149. FCC 99-223, ¶ 76 (rel. September 3, 1999.)

great deal of significance on its claim that ALECs are collocated in nearly all of its central offices. Therefore, the vast majority of business subscribers in BellSouth's territory should be eligible for Key Customer promotions. Yet, if BellSouth does not use the same marketing means and methods to target all eligible subscribers as it does soon-to-be-former customers, the promotions may be discriminatory in practice as well as in principle.

41. If BellSouth is granted 271 approval, the prospect of additional and possibly more harmful anticompetitive pricing and marketing practices loom. Therefore, the need for investigation now is further warranted.

CONCLUSION

42. FDN suggests administrative efficiency favors addressing the various issues involved in BellSouth's promotional activities on a comprehensive basis and suggests that the most efficient vehicle for the Commission to rule on these issues is in a show cause and/or investigation proceeding.[13] BellSouth's intentions to file tariffs for anticompetitive and/or discriminatory discounted prices in the future is clear by its having done so in the past. Thus, the Commission, BellSouth and ALECs would benefit from (1) an expedited Commission decision as to the pricing and marketing of promotional programs even if the subject promotional tariffs are withdrawn or expire by their own terms and (2) pronouncement of definitive guidelines governing unacceptable anticompetitive behaviors relative to ILEC discounted pricing.

43. Florida's ALEC community does not possess the resources to pursue remedies for BellSouth's conduct through protracted litigation. The Commission should lead the investigations of legitimate allegations of ILEC anticompetitive behavior on an expedited basis.

[13] FDN raised Bell's winback pricing and marketing in BellSouth's 271 Case, but the Commission excluded the issue from consideration, over FDN's objection. FDN also raised BellSouth's winback programs in Docket No. 011077-TP (Generic Investigation of Anticompetitive Behaviors), but so far no action has been taken in that docket. As alleged herein, the need for the Commission to address this issue is immediate.

44. If the Florida Commission is to say that it promotes competition in this state, it must act immediately and decisively on claims of ILEC anticompetitive behavior, such as that alleged here.

WHEREFORE and in consideration of the above, Florida Digital Network, Inc. respectfully requests the Commission to cancel or, in the alternative, suspend or postpone the effectiveness of, BellSouth's Key Customer tariff and to initiate an investigation of BellSouth's promotional pricing and marketing conduct and practices.

Respectfully submitted, this 13 day of February 2002.

Matthew Feil
Florida Digital Network, Inc
390 North Orange Ave.
Suite 2000
Orlando, FL 32801
407-835-0460
mfeil@floridadigital.net

000063

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by overnight mail to the persons listed below this 13 day of February, 2002.

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

Ms. Beth Keating
Ms. Beth Salak
Florida Public Service Commission
2540 Shumard Oak Blvd.
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Matthew Feil

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TARIFF DISTRIBUTION

FILE CODE: 680.3400	FILE PACKAGE NO.: FL2002-004
DATE:	January 14, 2002
STATE:	FLORIDA
EFFECTIVE DATE:	01/31/2002
TYPE OF DISTRIBUTION:	Pending

PURPOSE: New Key Customer Promo will replace 2001-063

TARIFF SECTION	PAGE NUMBER	PAGE REVISION
A002	34.0.2	13

A2. GENERAL REGULATIONS

A2.10 Special Promotions (Cont'd)

A2.10.2 Descriptions (Cont'd)

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

Area of Promotion	Service	Charges Waived	Period	Authority	
(DELETED)					(D)
(DELETED)					(D)
BellSouth's Service Territory[1]	2002 Key Customer Program -For business customers served from wire centers in competitive situations. -Customers with Analog Private Line service are not eligible for this promotion. -Customers with Volume and Term Contract Service Arrangements are not eligible to participate in this promotion.	-Eligible monthly revenue is discounted at percentages listed below based on monthly total billed revenue (TBR) and applied as a credit each month on the customer's bill: Monthly TBR - 18 months $75 - $3,000 10% Monthly TBR - 36 months $75 - $3,000 25% -50% discount will be given on Rotary Line service for a contract period of 18 months. -100% discount will be given on Rotary Line service for a contract period of 36 months. -Line Connection Charges will be waived during the promotion sign-up period.	01/31/02 to 06/25/02		(N)

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

TARIFF DISTRIBUTION

FILE CODE: 680.3400	FILE PACKAGE NO.: FL2002-004
DATE:	January 31, 2002
STATE:	FLORIDA
EFFECTIVE DATE:	01/31/2002
TYPE OF DISTRIBUTION:	Approved

PURPOSE: New Key Customer Promo will replace 2001-063

TARIFF SECTION	PAGE NUMBER	PAGE REVISION
A002	34.0.2	13
A002	34.0.2.1	00

A2. GENERAL REGULATIONS

A2.10 Special Promotions (Cont'd)

A2.10.2 Descriptions (Cont'd)

A. The following promotions are ***on file with*** the Commission: (Cont'd) (T)

Area of Promotion	Service	Charges Waived	Period Authority	
(DELETED)				(D)
(DELETED)				(D)
BellSouth's Service Territory[1]	2002 Key Customer Program -For business customers served from hot wire centers[2]. -Customers with Analog Private Line service are not eligible for this promotion. -Customers with Volume and Term Contract Service Arrangements are not eligible to participate in this promotion.	-Eligible monthly revenue is discounted at percentages listed below based on monthly total billed revenue (TBR) and applied as a credit each month on the customer's bill: Monthly TBR - 18 months $75 - $3,000 10% Monthly TBR - 36 months $75 - $3,000 25% -50% discount will be given on Rotary Service for a contract period of 18 months. -100% discount will be given on Rotary Service for a contract period of 36 months. -Line Connection Charges will be waived during the promotion sign-up period.	01/31/02 to 06/25/02	(N)

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

Note 2: The list of hot wire centers that are eligible for this promotion is listed on Page 34.0.2.1. (N)

Exhibit B
Pg 2 of 3

A2. GENERAL REGULATIONS

A2.10 Special Promotions (Cont'd)

A2.10.2 Descriptions (Cont'd)

A. The following promotions are ***on file with*** the Commission: (Cont'd) (T)

Eligible Hot Wire Centers	Key Customer 2002		
BCRT BOCA TEECA	HTCHNSON IS MAIN	MIAM W. DADE	(N)
BOCA RATON MAIN	JCBH-MAIN	MIAM W. MIAMI	(N)
BCRT SANDALFOOT	JCVL-ARLINGTON	MELBOURNE	(N)
BROOKSVILLE	JCVL-BEACHWOOD	MILTON RAVINE	(N)
BELLE GLADE MAIN	JCVL-FT CAROLINE	MNDR-LORETTO	(N)
BUNNEL	JCVL-LAKE FOREST	NDAD ARCH CREEK	(N)
BOYNTON BEACH MAIN	JCVL-INT'L AIRPORT	NDAD BRENTWOOD	(N)
COCOA BEACH	JCVL-NORMANDY	JCVL-CLAY STREET MGO	(N)
COCOA-MAIN	JCVL-OCEANWAY	NDAD GOLDEN GLADES	(N)
COCOA-MERRITT ISLAND	JCVL-RIVERSIDE	NDAD OLETA	(N)
DEBARY DELTONA	JCVL-SAN JOSE	NEW SMYRNA BCH	(N)
DEBARY MAIN	JCVL-SAN MARCO	ORLD-AZALEA PARK	(N)
DELAND	JCVL-SOUTHPOINT	ORLD-COLONIAL	(N)
DLBH KINGS POINT	JCVL-WESCONNETT	ORLD-MAGNOLIA	(N)
DELRAY BCH MAIN	JUPITER MAIN	ORLD-PINECASTLE	(N)
DEERFIELD BEACH MAIN	KEY WEST MAIN	ORLD-PINEHILLS	(N)
DYBH-MAIN	LAKE CITY	ORLD-SAND LAKE	(N)
DYBH-ORMND BCH	LAKE MARY	ORPK-MAIN	(N)
DYBH-PORT ORANGE	MIAM ALHAMBRA	ORPK-RIDGEWOOD	(N)
EGLL-INDN HBR BH	MIAM ALLAPATTAH	OVIEDO	(N)
EGLL-BOWE GDNS	MIAM AIRPORT	PERRINE MAIN	(N)
FT LAUD MAIN RELIEF	MIAM BAYSHORE	PANAMA CITY BEACH	(N)
FTLD CORAL RIDGE	MIAM BISCAYNE	PANAMA CITY MAIN	(N)
FTLD CYPRESS	MIAM BEACH	PMBH CORAL SPRINGS	(N)
FTLD JACARANDA	MIAM CANAL	PMBH FEDERAL	(N)
FTLD OAKLAND	MIAM DADELAND BLVD	PMBH MARGATE	(N)
FTLD PLANTATION	MIAM FLAGLER	PMBH TAMARAC	(N)
FTLD SAWGRASS	MIAM GRANDE	PNSC-BELMONT	(N)
FTLD SUNRISE	MIAM HIALEAH	PNSC-FERRY PASS	(N)
FTLD WESTON	MIAM INDIAN CREEK	PNSC WARRNGTON	(N)
FERNANDINA BCH	MIAM KEY BISCAYN	PONTE VEDRA BCH	(N)
FORT PIERCE MAIN	MIAM METRO	PALM COAST	(N)
GULF BREEZE	MIAM NORTH MIAMI	PALATKA	(N)
GSVL-MAIN	MIAM NORTHSIDE	PORT ST. LUCIE MAIN	(N)
GSVL-NORTHWEST	MIAM OPA LOCKA	PTSL SOUTH PTSL	(N)
HLWD HALLANDALE	MIAM PALMETTO	SANFORD-O-WS	(N)
HLWD PEMBROKE PINES	MIAM POINCIANA	STAG-MAIN	(N)
HLWD WEST HOLLYWOOD	MIAM RED ROAD	STUART MAIN	(N)
HOLLYWOOD MAIN	MIAM MIAMI SHORES	TITUSVILLE	(N)
HOMESTEAD MAIN	MIAM SILVER OAKS	VERO BEACH MAIN	(N)
		WPBH GARDENS	(N)
		WPBH GREENACRES	(N)
		WPBH HAVERHILL	(N)
		WPBH MAIN ANNEX	(N)
		WPBH LAKE WORTH	(N)
		WPBH RIVIERA BCH	(N)
		WPBH RYL PLM BCH	(N)
		WWSP-HIGHLAND	(N)
		WWSP-SPRING HILL	(N)

Exhibit B
Pg 3 of 3

000069

EXHIBIT C

TARIFF DISTRIBUTION

FILE CODE: 680.3400	FILE PACKAGE NO.: FL2002-006
DATE:	January 22, 2002
STATE:	FLORIDA
EFFECTIVE DATE:	01/19/2002
TYPE OF DISTRIBUTION:	Approved

PURPOSE: This tariff filing increases rates for Business Multi-Line Service, Customer Code Restriction, DID, Exchange Access Frame Relay Service and Exchange Access ATM Service

TARIFF SECTION	PAGE NUMBER	PAGE REVISION
A003	17	06
A003	18	04
A003	19	06
A003	20	07
A003	21	06
A003	22	08
A003	24	08
A003	43	07
A003	44	08
A003	106	05
A003	107	03
A003	108	04
A003	109	04
A003	120	06
A003	122	04
A003	123	02
A003	124	03
A012	3	05
A013	59	09
A013	60	07
A013	61	03
A103	1	05
A103	3	06
A103	6	05
A103	10	06
A103	14	03
A103	18	04
A103	18.1	01
A103	18.3	01

A103	18.6	01
A103	18.7	01
A103	18.8	01
A103	18.10	01
A103	19.1	01
A103	19.2	01
A103	19.3	02
A103	19.4	01
A103	19.5	01
A103	20.2	01
E021	5	05
E021	6	05
E021	17	01

TARIFF DISTRIBUTION

FILE CODE: 680.3400 FILE PACKAGE NO.: FL2001-180

DATE: January 14, 2002

STATE: FLORIDA

EFFECTIVE DATE: 02/16/2002

TYPE OF DISTRIBUTION: Pending

PURPOSE: This tariff filing increases rates for Flat Rate Residence and Business Services, Consumer ISDN Service and Consumer Service Charges

TARIFF SECTION	PAGE NUMBER	PAGE REVISION
A003	17	07
A003	18	05
A003	19	07
A003	20	08
A003	21	07
A003	22	09
A003	24	09
A003	43	08
A003	120	07
A004	6	02

	Rate Group	BELL CURRENT	BELL PROPOSED	INCREASE	EFFECTIVE
BellSouth Multi-Line Pricing					
Basic Flat Rate Business Line (Ft. Lauderdale/Miami)	RG12	34.33	36.95	7%	1/19/2002
Basic Flat Rate Business Line (Orlando)	RG11	33.74	36.95	9%	1/19/2002
Basic Flat Rate Business Line (Boca Raton/Jacksonville)	RG10	33.03	36.95	11%	1/19/2002
Basic Flat Rate Business Line (Jacksonville Beach/West Palm)	RG9	32.32	36.95	13%	1/19/2002
Basic Flat Rate Business Line (Delray Beach/Sanford)	RG8	31.38	34.95	10%	1/19/2002
Basic Flat Rate Business Line (Cocoa/Melbourne)	RG7	30.38	33.95	11%	1/19/2002
Basic Flat Rate Business Line (Daytona/Gainesville/Stuart)	RG6	29.38	32.95	11%	1/19/2002
Basic Flat Rate Business Line (Ft Pierce/Titusville/Vero Beach)	RG5	28.14	30.95	9%	1/19/2002
Basic Flat Rate Business Line (St. Augustine)	RG4	27.01	29.95	10%	1/19/2002
BellSouth Single Line Pricing					
Basic Flat Rate Business Line (Ft. Lauderdale/Miami)	RG12	29.55	30.07	2%	2/16/2002
Basic Flat Rate Business Line (Orlando)	RG11	29.04	29.55	2%	2/16/2002
Basic Flat Rate Business Line (Boca Raton/Jacksonville)	RG10	28.43	28.93	2%	2/16/2002
Basic Flat Rate Business Line (Jacksonville Beach/West Palm)	RG9	27.82	28.31	2%	2/16/2002
Basic Flat Rate Business Line (Delray Beach/Sanford)	RG8	27.01	27.49	2%	2/16/2002
Basic Flat Rate Business Line (Cocoa/Melbourne)	RG7	26.15	26.61	2%	2/16/2002
Basic Flat Rate Business Line (Daytona/Gainesville/Stuart)	RG6	25.29	25.73	2%	2/16/2002
Basic Flat Rate Business Line (Ft Pierce/Titusville/Vero Beach)	RG5	24.22	24.65	2%	2/16/2002
Basic Flat Rate Business Line (St. Augustine)	RG4	23.25	23.66	2%	2/16/2002
Call Restrictions					
Option #1a., each Business Line	ALL	5.00	5.50	9%	1/19/2002
Option #1b., each Business Line	ALL	5.00	5.50	9%	1/19/2002
Option #2a, each Business Line	ALL	5.00	5.50	9%	1/19/2002
Option #2b, each Business Line	ALL	5.00	5.50	9%	1/19/2002
Option #3a., each Business Line	ALL	5.00	5.50	9%	1/19/2002
Option #3b., each Business Line	ALL	5.00	5.50	9%	1/19/2002

EXHIBIT E

State of Florida

EXHIBIT F

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JANUARY 28, 1999

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

SIS AL MCB SHS

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

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

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

CRITICAL DATES: IMMEDIATE ACTION REQUESTED

SPECIAL INSTRUCTIONS: NONE

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

CASE BACKGROUND

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

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

DOCUMENT NUMBER-DATE
01124 JAN 2

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

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

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

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

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

Because the issues addressed in staff's original recommendation at the January 19, 1999, Agenda Conference are significant and controversial, and because they were addressed very quickly, staff offers this recommendation to supplement the analysis initially provided, and to invite additional discussion on the scope and criteria to use in limited circumstances where the Commission should "suspend" a tariff under the current statutory scheme.

DISCUSSION OF ISSUES

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

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

STAFF ANALYSIS: At the January 19, 1999, Agenda Conference, BellSouth and Sprint objected to staff's proposal to suspend the operation of BellSouth's "Three Free" tariff on the grounds that the 1995 revisions to Chapter 364, Florida Statutes, exempted price regulated local exchange companies from Section 364.05, Florida Statutes, the Commission's traditional "file and suspend" statute. According to the companies, Section 364.051, Florida Statutes, governs their tariff filings, providing that tariffs become effective and presumptively valid 15 days after filing. Under that statute the Commission does not have express authority to delay the effectiveness of tariff filings pending resolution of any challenge to the tariff's substantive provisions. BellSouth argued that if the Commission believed that a tariff was unlawful, Section 364.015, Florida Statutes, provides that the Commission can seek injunctive relief from the courts to prevent implementation of the tariff. The companies also criticized the proposal to suspend the

Exhibit F
Pg 3 of 19

000076

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE 2: Should this docket be closed?

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

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

Attachment A
Docket No. 990043-TP

A2. GENERAL REGULATIONS

A2.10 Special Promotions (Cont'd)

A2.10.2 Descriptions (Cont'd)

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

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

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

Exhibit F
Pg 9 of 19

000082

David B. Erwin
Attorney-at-Law

127 Riversink Road
Crawfordville, Florida 32327

Phone 850.926.9331
Fax 850.926.8448
derwin@lewisweb.net

January 13, 1999

990043-TP

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

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

Dear Ms. Bayo:

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

Please call me if you have any questions.

Sincerely,

David B. Erwin

DBE:jm
Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Review and to Cancel Promotional Tariff of BellSouth Telecommunications	))))	Docket No. Filed: January 13, 1999

PETITION TO REVIEW AND TO
CANCEL PROMOTIONAL TARIFF

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

In support of its petition, ACI states as follows:

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

David B. Erwin

CERTIFICATE OF SERVICE

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

David B. Erwin

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

Legal Department

NANCY B. WHITE
General Counsel-Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

February 1, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990043-TP

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer and Response to Arrow Communications, Inc., d/b/a ACI's Petition to Review and to Cancel Promotional Tariff, which we asked that you file in the captioned matter.

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
FPSC-BUREAU OF RECORDS

Sincerely,

Nancy B. White
Nancy B. White (BW)

ACK
AFA
APP — NBW:jn
CAF — Enclosure
CMU Barrett
CTR — cc: All parties of record
EAG — Marshall M. Criser III
LEG 1 — William J. Ellenberg II
LIN
OPC
RCH
SEC 1
WAS
OTH

DOCUMENT NUMBER-DATE
01251 FEB-1 99

Exhibit F
Pg 15 of 19

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Review and to Cancel Promotion Tariff of BellSouth Telecommunications	Docket No.: 990043-TP Filed: February 1, 1999

BELLSOUTH TELECOMMUNICATION, INC.'S ANSWER AND RESPONSE TO ARROW COMMUNICATIONS, INC., d/b/a ACI'S PETITION TO REVIEW AND TO CANCEL PROMOTIONAL TARIFF

BellSouth Telecommunications, Inc., ("BellSouth"), hereby files its Answer and Response, pursuant to Rule 1.110, Florida Rules of Civil Procedure and Rules 25-22.037 and 25-22.0375, Florida Administrative Code, to the Petition to Review and To Cancel Promotional Tariff filed by Arrow Communications, Inc., d/b/a ACI. Notwithstanding ACI's allegations to the contrary, BellSouth has not violated the Telecommunications Act of 1996 (the "Act"), and Florida Statute or the Rules of the Florida Public Service Commission ("Commission"). BellSouth respectfully submits that the Petition should be denied.

For answers to the specific allegations in the Petition, BellSouth states as follows:

1. With regard to the allegations of Paragraph 1 of the Petition, BellSouth is without information sufficient to formulate a response thereto and, therefore, BellSouth denies the allegations of Paragraph 1 of the Petition.

2. With regard to the allegations of Paragraph 2 of the Petition, BellSouth admits that it filed a tariff on December 31, 1998 offering a promotion

called "Three Free". The terms of the tariff offering speak for themselves. BellSouth denies the remaining allegations of Paragraph 2.

3. With regard to the allegations of Paragraph 2 (a) of the Petition, BellSouth denies the allegations contained therein. BellSouth further avers that its tariff offering is available to all customers that meet the criteria set forth therein and is not unreasonably discriminatory.

4. With regard to the allegations of Paragraph 2(b) of the Petition, BellSouth denies the allegations contained therein. BellSouth further avers that its tariff offering is no different from promotions traditionally offered by local exchange companies. The requirements of section 364.08 (2), Florida Statutes are satisfied by the filing of a tariff.

5. With regard to the allegations of Paragraph 2(c) of the Petition, BellSouth denies the allegations contained therein.

6. With regard to the allegations of Paragraph 2(d) of the Petition, BellSouth denies the allegations contained therein. BellSouth further avers that its promotional tariff is not relevant to the determination of the wholesale discount.

7. With regard to the allegations of Paragraph 2(e) of the Petition, BellSouth denies the allegations contained therein.

And now, further answering, BellSouth states:

8. BellSouth's promotional tariff is no different than promotions offered by other local exchange companies in Florida.

9. BellSouth's promotional tariff is available for resale.

10. BellSouth provided all ALECs in Florida with 60 days notice of the tariff filing. ALECs could have countered with their own promotion (of which BellSouth would have no notice), but chose not to do so.

11. BellSouth should not be foreclosed from competing for customers. Indeed, Section 364.051(6)(a)(2), Florida Statutes provides that the local exchange telecommunications company may meet offerings by any competitive provider.

WHEREFORE, having fully answered the allegations raised in the Petition, BellSouth respectfully requests that ACI's Petition be dismissed as ACI is not entitled to the relief sought.

Respectfully submitted this 1st day of February, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White

NANCY B. WHITE (BW)
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, Florida 32301
(305)347-5558

William J. Ellenberg II

WILLIAM J. ELLENBERG II (BW)
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404)335-0711

CERTIFICATE OF SERVICE
Docket No. 990043-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 1st day of February, 1999 to the following:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6199
(850) 413-6250

David B. Erwin, Esq.
127 Riversink Road
Crawfordville, FL 32327
Tel. No. (850) 926-9331
Fax No. (850) 926-8448
Attorney for ACI

Nancy B. White
Nancy B. White (BW)

EXHIBIT G

FLORIDA PUBLIC SERVICE COMMISSION

15

VOTE SHEET

FEBRUARY 2, 1999

RE: DOCKET NO. 990043-TP - Petition to review and to cancel BellSouth Telecommunications, Inc.'s promotional tariff (T-98-1783) by Arrow Communications, Inc.

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

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

~~Issue~~ 1: Should BellSouth's Three-free Tariff promotion be suspended pending resolution of the petition filed by Arrow Communications Inc.?

MODIFIED as stated above.

Commissioners Clark and Deason dissented.

COMMISSIONERS ASSIGNED: Full Commission

COMMISSIONERS' SIGNATURES

MAJORITY	DISSENTING
[signature]	J. Terry Deason
[signature]	Susan F. Clark
Joe Garcia	
[signature]	

REMARKS/DISSENTING COMMENTS:

DOCUMENT NUMBER

01490 FE

Exhibit G
Pg 1 of 2

000093

PSC/RAR33 (5/90)

VOTE SHEET
FEBRUARY 2, 1999
DOCKET NO. 990043-TP - Petition to review and to cancel BellSouth Telecommunications, Inc.'s promotional tariff (T-98-1783) by Arrow Communications, Inc.

(Continued from previous page)

Issue 2: Should this docket be closed?
Recommendation: No. This docket should remain open, pending resolution of this petition.

APPROVED

AFFIDAVIT OF MICHAEL P. GALLAGHER

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared Michael P. Gallagher, as Chief Operating Officer of Florida Digital Network, Inc., who after being duly sworn, did state under oath:

1. I am the Chief Operating Officer of Florida Digital Network, Inc. ("Florida Digital").

2. Florida Digital's business has been and will continue to be irreparably harmed by the promotional prices BellSouth Telecommunications, Inc. ("BellSouth") offers to business customers, including BellSouth's Key Customer programs.

3. Florida Digital competes with BellSouth largely on the basis of price. Florida Digital generally offers business service rates that are 20% less than BellSouth's.

4. BellSouth's Key Customer programs approximate or undercut the prices that Florida Digital is able to offer and still remain viable.

5. Florida Digital has and will continue to lose customers and potential customers to BellSouth due to BellSouth's Key Customer promotions.

6. BellSouth's Key Customer promotions impair Florida Digital's ability to compete, to the point of jeopardizing Florida Digital's viability as an on-going business concern.

7. The harm that Florida Digital has suffered and will continue to suffer as a result of BellSouth's Key Customer promotions cannot be undone and cannot be adequately compensated by damages or readily measured by pecuniary standards.

8. The harm that Florida Digital has suffered and will continue to suffer as a result of BellSouth's Key Customer promotions has been constant, frequent and continuous in character.

FURTHER AFFIANT SAYETH NOT:

Michael P. Gallagher
CEO, Florida Digital Network, Inc.

Sworn to and subscribed before me this 13 day of February, 2002, by Michael P. Gallagher, as CEO of Florida Digital Network, Inc., and who is personally known to me.

Carol A Kelley
Notary's Signature

Notary's Stamp:

Carol A. Kelley
Notary's Name

Carol A Kelley
My Commission CC953890
Expires August 08, 2004

Exhibit H
Pg 2 of 2

000096