State of Florida

Public Service Commission

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DATE: AUGUST 8, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BARRETT, PLATT)
OFFICE OF THE GENERAL COUNSEL (BANKS, DODSON)

RE: DOCKET NO. 020578-TP - PETITION FOR EXPEDITED REVIEW AND CANCELLATION OF BELLSOUTH TELECOMMUNICATIONS, INC., KEY CUSTOMER PROMOTIONAL TARIFFS BY THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION.

AGENDA: 08/20/02 - REGULAR AGENDA 1) MOTION TO DISMISS - PARTIES MAY PARTICIPATE, 2) TARIFF FILING - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020578.RCM

CASE BACKGROUND

On June 11, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed a promotional tariff, Tariff No. T-020595, which became effective on June 26, 2002. On June 14, 2002, staff and BellSouth representatives met via teleconference to discuss this filing; a follow-up conference was held on June 17, 2002.

The promotional tariff, which BellSouth identifies as the "2002 Key Customer Program," is currently effective and terminates on December 31, 2002. Staff notes, however, that this promotion replaces an expired program of the same name (see Tariff No. T-020035, which expired on June 25, 2002). The earlier tariff filing was addressed by the Commission in Docket No. 020119-TP.

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On June 28, 2002, the Commission issued Order No. PSC-02-0875-PAA-TP in Docket No. 020119-TP.

For the purposes of this recommendation and to avoid confusion between the two filings, staff will refer to the filing in Tariff No. T-020035 as the "2002 Key Customer Program/January filing" (January filing), and the filing in Tariff No. T-020595 as the "2002 Key Customer Program/June filing." (June filing) Based upon a history of BellSouth's past promotional tariff filings, it is not uncommon for BellSouth to begin a new promotion upon, or near, the termination date of any given program.

On June 25, 2002, the Florida Competitive Carriers Association (FCCA) filed a Petition for Expedited Review and Cancellation Of BellSouth's Key Customer Promotional Tariffs. (FCCA's Petition)

On July 15, 2002, BellSouth filed a Motion to Dismiss or, in the alternative, Response to the "Petition of the Florida Competitive Carriers Association (FCCA) for Expedited Review and Cancellation Of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs." (BellSouth's Motion to Dismiss)

On July 19, 2002, Florida Digital Network, Inc. (FDN) and the FCCA filed separate protests of Order No. PSC-02-0875-PAA-TP, each requesting an administrative hearing be convened in Docket No. 020119-TP.

On July 22, 2002, the FCCA filed a Response to BellSouth's Motion to Dismiss. (FCCA's Response)

This recommendation addresses BellSouth's June filing, the FCCA's Petition, BellSouth's Motion to Dismiss, and the FCCA's Response to BellSouth's Motion to Dismiss.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should BellSouth's Motion to Dismiss FCCA's Petition for Expedited Review and Cancellation of BellSouth's Key Customer Tariff be granted?

RECOMMENDATION: No. BellSouth's Motion to Dismiss should be denied. **(BANKS, DODSON)**

STAFF ANALYSIS: As stated above, on June 25, 2002, the FCCA filed a Petition for Expedited Review and Cancellation of BellSouth's Key Customer Promotional Tariffs. On July 15, 2002, BellSouth filed a timely Motion to Dismiss, or in the Alternative, Response to Petition of FCCA for Expedited Review and Cancellation of BellSouth's Key Customer Promotional Tariffs. Subsequently, on July 22, 2002, the FCCA timely filed a Response in Opposition to BellSouth's Motion to Dismiss Complaint.

FCCA's Petition

In its Petition, FCCA states that BellSouth has used its promotional pricing to exert its dominant market status and to selectively eliminate its business market competitors. (FCCA's Petition at p. 2) The FCCA asserts that this promotional pricing practice has caused substantial and irreparable harm to Florida's Alternative Local Exchange Companies (ALECs). FCCA states that BellSouth's 2002 Key Customer promotional program, which became effective June 26, 2002, will remain in effect until December 31, 2002. FCCA explains that the 2002 Key Customer promotion offers discounts of up to 20% off total billed revenue, as well as a discount of up to 100% off the line hunting service and a waiver of line connection charges. FCCA contends that Sections 364.08(2), 364.051(5)(b) and (5)(c), Florida Statutes, require a telecommunications company to offer services to customers at rates above its incremental costs. The FCCA argues that BellSouth has not made such a showing. (FCCA's Petition at pp. 2-3)

In support of its Petition, FCCA states that BellSouth targets markets and promotes the Key Customer program only to business customers who have taken some action to initiate a change of carrier from BellSouth to an ALEC. (FCCA's Petition at p. 3) FCCA further asserts that BellSouth's marketing of its Key Customer tariff only to those wire centers where ALEC competitors have shown some interest in the market is anti-competitive. FCCA claims that

Section 364.3381(3), Florida Statutes, provides the Commission with jurisdiction over predatory pricing and other anti-competitive behavior. (FCCA's Petition at pp. 3-4)

FCCA emphasizes that BellSouth's June 2002 tariff filing is the third in a series of "key customer" programs which have been designed to insulate customers who would otherwise have a choice from meaningful competition. FCCA explains that the 2002 Key Customer program requires a subscriber to enter into either a 24 or 36 month contract with BellSouth. (FCCA's Petition at p. 4) FCCA contends that the long duration of the Key Customer contract, coupled with the harsh penalties associated with breaking the contract, produces a chilling effect on a subscriber's ability to choose competitors of BellSouth. (FCCA's Petition at p. 4,5) Consequently, FCCA requests that the Commission cancel or, in the alternative, suspend or postpone BellSouth's 2002 Key Customer tariff.

BellSouth's Motion to Dismiss

BellSouth states that less than six months ago, FDN filed a Petition attacking a prior BellSouth Key Customer tariff on grounds that are substantially similar to the grounds upon which the FCCA attacks the Key Customer tariff. (BellSouth's Motion to Dismiss at p. 1) BellSouth indicates that the Commission addressed FDN's Petition in Docket No. 020119-TP. BellSouth asserts that at the June 18, 2002, Agenda Conference, the Commission voted not to cancel, suspend, postpone or otherwise modify the Key Customer tariff. This decision was memorialized in PAA Order No. PSC-02-0875-PAA-TP, issued June 28, 2002. (BellSouth's Motion to Dismiss at p. 2) BellSouth states that the current Key Customer tariff, which has already gone into effect, is being attacked by FCCA on the same grounds that FDN attacked the prior Key Customer tariff. (BellSouth's Motion to Dismiss at p. 3) BellSouth contends that FCCA alleges that the Key Customer tariff is anti-competitive. BellSouth explains that courts have held that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."[1] Further, BellSouth asserts that the prices BellSouth offers under the Key Customer tariff are not predatory, and any harm that the FCCA's

[1] Arthur S. Langenderfer, Inc.S.E. Johnson Co., 729 F.2d 1050 (6th Cir.), cert. denied 469 U.S. 1036 (1984)(emphasis added).

members suffer would be simply due to the natural effect of competition. (BellSouth's Motion to Dismiss at p. 5)

Therefore, BellSouth states that the Commission should dismiss FCCA's Petition in its entirety. In the alternative, BellSouth asserts that the Commission should deny FCCA's request for expedited treatment of its Petition and FCCA's request for the cancellation, suspension, postponement, and/or other modification of any of BellSouth's tariffs, and should deny all remaining claims for relief set forth in FCCA's Petition. (BellSouth's Motion to Dismiss at p. 15)

FCCA's Response

In it Response to BellSouth's Motion to Dismiss, FCCA states that the courts have established the standard of review for a motion to dismiss. FCCA asserts that courts have held:

> [t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action...[T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. . . Significantly, all material factual allegations of the complaint must be taken as true.[2] (FCCA's Response at p. 2)

FCCA contends that under the motion to dismiss review standard, all of FCCA's allegations must be taken as true. FCCA reiterates that BellSouth has not made a showing that the discounted rates of the subject promotion would be above its incremental costs; that BellSouth has chosen a configuration that makes it difficult to even relate the discounts to incremental costs, and that BellSouth does not market and promote Key Customer programs to all eligible business customers, but only those who have taken some action to initiate a change of carrier to an ALEC. (FCCA's Response at p. 2)

In support of its Response to BellSouth's Motion to Dismiss, FCCA agrees that the Commission determined that the rates of the prior Key Customer tariff exceeded incremental costs, and that the

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[2] Varnes v. Dawkins, 624 So. 2d 349, 350(Fla. 1st DCA 1993).

tariff is not unduly discriminatory by BellSouth's selective application of the discounts. (FCCA's Response at p. 3) However, FCCA states that on July 19, 2002, it filed a protest of PAA Order No. PSC-02-0875-PAA-TP, and requested a hearing in Docket No. 020119-TP. FCCA contends that the effect of the protest is to render the protested portion of the PAA a nullity and initiate a *de novo* proceeding. (FCCA's Response at p. 3) Further, FCCA asserts that BellSouth denies that its prices are "predatory." FCCA notes that there is no basis to support BellSouth's claim that ALECs were slow to respond to BellSouth's Key Customer tariff. FCCA explains that it has pleaded allegations, that if taken as true, would constitute grounds for relief and for expedited consideration. Therefore, FCCA asserts that the Commission must deny BellSouth's Motion to Dismiss. Moreover, FCCA states that a delay in consideration of its Petition would prevent the possibility of meaningful relief, and requests that the Commission also grant the request for expedited treatment. (FCCA's Response at pp. 3-4)

Analysis

As stated previously, under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes at 349, 350. In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

As mentioned above, FCCA claims that Sections 364.08(2), 364.051(5)(b) and (5)(c), Florida Statutes, require a telecommunications company to offer services to customers at rates above its incremental costs. FCCA argues that BellSouth has not made such a showing. FCCA asserts that BellSouth's marketing of its Key Customer tariff only in those wire centers where ALEC competitors have shown some interest in the market is anti-competitive and hence, violates Florida Statutes and Commission rules.

Staff believes that the FCCA has stated a cause of action upon which the Commission could grant relief. Although BellSouth makes an attempt to demonstrate that prices are not predatory and that its rates are compensatory and in compliance with the Commission rules and statutes, BellSouth neglects to show that the FCCA has not stated a cause of action upon which the Commission could grant relief. Staff agrees with FCCA that the decision in Docket No. 020119-TP is not dispositive of the instant case, although they may be factually similar. If the FCCA's allegations are viewed under the Varnes standard, the FCCA has stated a cause of action upon which the Commission could grant relief.

Taking FCCA's allegations of BellSouth's anti-competitive behavior, predatory pricing and non-compensatory rates as true, and viewing them in the light most favorable to the FCCA, staff believes that FCCA's Petition states a cause of action upon which the Commission could grant relief. Therefore, staff is recommending that BellSouth's Motion to Dismiss should be denied.

ISSUE 2: If the Commission approves staff's recommendation in Issue 1, should BellSouth's 2002 Key Customer Program/June filing (T-020595) be suspended and set for hearing?

RECOMMENDATION: Yes. BellSouth's 2002 Key Customer Program/June filing (T-020595) should be suspended and set for hearing. Additionally, this docket should be consolidated with Docket No. 020119-TP for purposes of hearing. (**BARRETT, PLATT, BANKS**)

STAFF ANALYSIS: The argument set forth in this recommendation turns on the issue of whether staff can determine that elements and restrictions in BellSouth's 2002 Key Customer Program/June filing meet certain criteria of Section 364.051, Florida Statutes, and whether the tariff should be suspended. The elements and restrictions in this filing are set forth in the tariff itself, and are also separately attached to BellSouth's Motion to Dismiss. (See Attachment C of BellSouth's Motion to Dismiss)

Staff believes that the offering of services under the June filing encompasses a blending of "basic" and "nonbasic" services.

Of particular interest to staff is a portion of Section 364.051, Florida Statutes. In relevant part, Section 364.051(5)(a), Florida Statutes, provides:

364.051 Price regulation.--

. . .

> **(5) NONBASIC SERVICES.--Price regulation of nonbasic services shall consist of the following:**
>
> (a) . . . [T]he local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

After a general overview of the tariff, a brief synopsis of the parties' arguments will be presented, and then staff will consider whether there are elements or restrictions in BellSouth's June filing that appear to be unduly discriminatory, and would warrant suspension of the tariff. Staff notes, however, that the bulk of the argument in the FCCA's Response is legal in nature, and is analyzed in Issue 1.

<u>General Overview</u>

Commission records indicate that on June 11, 2002, BellSouth filed a tariff package entitled the 2002 Key Customer Program, with an effective date of June 26, 2002. The promotional tariff at issue replaces a somewhat similar tariff of the same name that terminated on June 25, 2002. BellSouth's June filing is briefly summarized below:

<u>The 2002 Key Customer Program/June filing offers</u>:

- A percentage discount of 10% or 20% off of the customer's monthly total billed revenue[3], depending upon the length of contract signed. [The percentages are 10% for a 24 month contract, and 20% for a 36 month contract.]

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[3]BellSouth monthly total billed revenue (TBR) consists of total recurring, non-recurring, and usage charges subject to certain exclusions for nonregulated services, taxes, late payment charges, or access revenues.

- A percentage discount of 50% or 100% off of the monthly hunting service fees, depending upon the length of contract signed. [The percentages are 50% for a 24 month contract, and 100% for a 36 month contract.]

- New customers who participate in this promotion will receive a bill credit equal to the line connection charges associated with the service order.

Elements of the 2002 Key Customer Program/June filing

- Program is available to new and existing BellSouth business customers that are served from selected wire centers, and who have monthly revenues in the range of $75.00-$3,000.00 per month.

- The promotion began on June 26, 2002, and ends on December 31, 2002.

- Subscriber must sign a 24 or 36 month agreement to receive the benefits of the program.

- Subscribers with multiple locations that are CLUB™[4] billed may have all locations participate as long as one is in an eligible location and one location meets the revenue criteria.

- Subscribers with Centrex™, MultiServ™, or ESSX™ services and Secondary Location Addresses (SLAs) not meeting the revenue level specified in the tariff may have all locations participate as long as the billing is under the same account and at least one location is in a specified wire center.

- If a subscriber enrolls while being served in a "hot" wire center and subsequently moves to a location that is not being served by a "hot" wire center, the term agreement and discounts continue throughout the term specified.

[4] CLUB™ is a BellSouth acronym for Customized Large User Bill.

Restrictions of the 2002 Key Customer Program/June filing

- BellSouth customers with aggregate annual billings exceeding $36,000 per state at the time of enrollment are not eligible to participate in this program.

- Customers with existing Volume and Term Agreement Contract Service Arrangements are not eligible to participate in this program.

- Customers with Analog Private Line or Integrated Services Digital Network Primary Rate Interface (ISDN PRI) services are eligible to participate in this program, though the revenue from these services will not be included in the qualifying revenue for this promotion or entitled to rewards.

- In the event that the subscriber terminates the contract, the subscriber must pay to BellSouth a termination charge based upon a calculation that considers the specific TBR of the subscriber at the time of enrollment, plus the time (in months) remaining on the contract. The termination penalty is calculated by multiplying the number of months remaining on the contract by $25.00 or $40.00, which is set according to the subscriber's TBR.

Prior to the tariff's effective date, staff participated in two teleconferences with BellSouth representatives to discuss some concerns about this filing. BellSouth submitted one replacement tariff page to clarify certain text, and provided documents responsive to other staff requests, though none of the elements or restrictions BellSouth established for this tariff were modified. The tariff was processed administratively and became effective on June 26, 2002.[5]

Arguments

The June 25, 2002 pleading from the FCCA petitions this Commission "to immediately review and cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff and any like tariffs filed by BellSouth Telecommunications, Inc." (FCCA's

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[5]Attachment B of BellSouth's Motion to Dismiss is a copy of the tariff filing.

Petition at p. 1) The FCCA contends "the substantial interests [of its members] are affected significantly by BellSouth's anticompetitive behavior." (FCCA's Petition at p. 2)

The FCCA asserts that statutory requirements mandate that telecommunications companies offer services at rates above incremental costs, and as of the filing date of its Petition, contends that BellSouth has made no showing that demonstrates that its discounted rates will cover the incremental costs:

> [B]y applying the [tariffed] discounts to total revenues and incorporating the hunting feature at discounts as much as 100%, BellSouth has made it difficult for affected parties or the Commission to even relate the discounts to incremental costs; the impacts will vary depending upon individual customers' usage patterns. (FCCA's Petition at p.3)

Additionally, the FCCA's petition states that BellSouth's promotional pricing programs are offered exclusively to current and potential ALEC business customers, rather than to all eligible business customers. (FCCA's Petition at p. 2) In doing so, the petitioner believes that BellSouth uses its "dominant market status to selectively eliminate its business market competitors." (FCCA's Petition at pp. 2, 3) FCCA's Petition also alleges that BellSouth's promotional tariffs are continuous in nature.

In summary, the FCCA believes that "BellSouth's continuous program of discounts, its failure to demonstrate compensatory rates, and its selection of a pricing approach that obscures the impact of the discounts, constitute a prima facie indication of anticompetitive intent." (FCCA's Petition at p. 4)

In BellSouth's response, it states that "there is no need for the Commission to re-plow the same ground that it plowed less than a month ago," an obvious reference to the Commission's recent action in Docket No. 020119-TP. (BellSouth's Motion to Dismiss at p. 15) BellSouth believes the Commission should:

> . . . dismiss the FCCA's Petition in its entirety. In the alternative, the Commission should summarily deny both the FCCA's request for expedited treatment of its Petition and the FCCA's request for cancellation, suspension, postponement, and/or other modification of

> any of BellSouth's tariffs, and it should deny all remaining claims for relief set forth in the FCCA's Petition. (BellSouth's Motion to Dismiss at p. 1)

BellSouth contends that the FCCA's Petition is "substantially similar" to the FDN Petition that was evaluated in Docket No. 020119-TP:

> The Commission convened Docket No. 020119-TP to address FDN's Petition, and several parties, including the FCCA and some of its members, intervened in that docket . . . After investigating BellSouth's prior Key Customer tariff [January filing] for nearly four months, the Commission addressed FDN's Petition during its June 18, 2002 Agenda Conference. The Commission heard extensive comments, . . . [then] unanimously voted not to cancel, suspend, postpone, or otherwise modify the prior Key Customer tariff. (BellSouth's Motion to Dismiss at. pp. 2-3)

Regarding the FCCA's contention about rates, BellSouth denies this allegation on the basis that the rates offered under the June filing have a lower discount rate, and thus yield a higher rate, than the rates offered under the previous Key Customer promotion [the January filing]. (BellSouth's Motion to Dismiss at p. 10) BellSouth asserts "the Commission has determined that the rates offered under the prior Key Customer tariff [January filing] exceed incremental cost."

In reference to the FCCA's competitive harm allegations, BellSouth cites to data gleaned from the Commission's December, 2001 report entitled "Competition in Telecommunications Markets in Florida.[6]" (2001 Comp Report) BellSouth believes the 2001 Comp Report demonstrates that competitive line growth is occurring in Florida despite BellSouth's promotional endeavors. (BellSouth's Motion to Dismiss at p. 5) BellSouth contends the 2001 Comp Report presents facts which "flatly refute the FCCA's allegations that BellSouth's current Key Customer promotion will cause irreparable harm to competition in Florida." (Id.)

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[6]The Commission prepares this report on an annual basis to satisfy the statutory requirements of Section 364.386, Florida Statutes, which requires the Commission to provide a report on the status of competition in the telecommunications industry to designated members of the Legislature.

Staff acknowledges the points raised in the FCCA's petition, and, as BellSouth does, we note the points therein are similar to those contained in the FDN petition filed on February 14, 2002, in Docket No. 020119-TP. As noted in the Case Background, the Commission issued Order No. PSC-02-0875-PAA-TP in Docket No. 020119-TP, on June 28, 2002. The FCCA's Petition centered on three main points - targeting, pricing concerns, and the impact of repetitive promotions. Staff discusses each below, in the context of the Commission's decision in Order No. PSC-02-0875-PAA-TP.

Staff notes that targeting was an allegation raised by FDN, in Docket No. 020119-TP. Targeting is addressed in Section 364.051(5)(a), Florida Statutes, which states in relevant part:

> **364.051 Price regulation.--**
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> . . .
>
> (5) NONBASIC SERVICES.- Price regulation of nonbasic services shall consist of the following:
>
> > (a) . . . Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts.
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> . . .

In Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TL, the Commission found that nothing in Section 364.051(5)(a), Florida Statutes, prohibits or restricts a LEC from targeting specific geographic markets and offering volume and term discounts. (Order No. PSC-02-0875-PAA-TP at p.7) BellSouth's Motion

to Dismiss also cites to this text in responding to this segment of the FCCA's Petition. (BellSouth's Motion to Dismiss at p. 11)

The FCCA's Petition identified pricing concerns. (FCCA Petition at pp. 2-3) Staff notes that in Docket No. 020119-TP, FDN alleged that the post-discount rates were not compensatory. In Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TL, the Commission found that:

> [B]ased on our analysis of BellSouth's responses to staff's discovery, we can determine that the percentage of contracts which are potentially non-compensatory is very small. Hence, we find that the rates for services purchased under BellSouth's 2002 Key Customer Program [January filing] are compensatory. (Order No. PSC-02-0875-PAA-TP at p.13)

BellSouth's response on this topic was previously noted.

Last, in Docket No. 020119-TP, the Commission acknowledged that "it is not uncommon for BellSouth to begin a new promotion upon, or near, the termination date for a given program." (Order No. PSC-02-0875-PAA-TP at p. 2) BellSouth believes that the FCCA is presenting a similar assertion that the Commission has previously evaluated. (BellSouth's Motion to Dismiss at p. 12) While staff agrees in general with BellSouth's assertions, staff does, however, emphasize that the tariff at issue here does contain different terms and conditions from the January filing.

Staff's review of the tariff's elements and restrictions

Staff observes that the statutory provisions of Section 364.051(5)(a), Florida Statutes, presume that tariffs are "valid" as filed. Consequently, staff believes that the Commission must determine that the tariff will cause significant harm that cannot be adequately redressed if the tariff is ultimately determined to be invalid, in order to require that it be suspended, one form of the relief requested by the FCCA's Petition. It is clear to staff that a statutory violation would provide adequate rationale to cancel or suspend a tariff. We present this memorandum to consider whether there are elements or restrictions in BellSouth's June filing that appear to be unduly discriminatory, anticompetitive, or otherwise unlawful such that suspension is warranted pending the outcome of a hearing.

A) <u>Are certain elements of the BellSouth 2002 Key Customer Program/June filing unduly discriminatory</u>?

Staff believes that BellSouth's 2002 Key Customer Program/June filing raises certain questions regarding the applicability of the "hot" wire center criteria which will be addressed as follows: the CLUB™ billing issue, the SLA revenue issue, and what staff is calling the "move issue." Staff will address each individually.

As provided in the June filing, subscribers with multiple locations that are CLUB™ billed may enroll in this program and receive discounts for all locations, as long as one location is in an eligible location (a "hot wire center") and one location meets the revenue criteria. The wire centers and revenue criteria are set forth in the tariff. (See Tariff No. T-020595)

As explained by BellSouth representatives in the first of two teleconferences, CLUB™ billing is by-and-large a convenience extended to larger business accounts that may have multiple locations [e.g., satellite, affiliate, or branch offices]. The principle advantage of CLUB™ billing is that numerous locations may be consolidated on a single bill. However, staff cannot determine from the text of the tariff whether the serving wire center of the location that meets the TBR criteria must be a "hot" wire center. When asked, BellSouth representatives indicated that the serving wire center of the location that meets the TBR criteria need not be a "hot" wire center. Staff believes this information is critical, considering that the June filing is portrayed as only being offered in select ("hot") wire centers - irrespective of whether CLUB™ billing is in place or not.

To illustrate CLUB™ billing, consider a hypothetical example of a business account that has a headquarters operation and four satellite offices. Assuming this business account is CLUB™ billed, BellSouth would only issue a single bill for all of the separate entities (headquarters and the four locations). Furthermore, assume that only the headquarters facility is receiving services from a "hot" wire center, and only the headquarters facility meets the revenue level of the tariff. By staff's interpretation of the June filing, the CLUB™ billing arrangement entitles BellSouth to extend the discounts of the June filing to all locations, notwithstanding that each of the four locations would not otherwise be eligible for participation in the 2002 Key Customer Program.

Albeit a hypothetical example, staff contends that this demonstrates that the CLUB™ billing element of the June filing may "unreasonably discriminate among similarly situated customers," in violation of Sections 364.051(5)(a), and 364.08(1), Florida Statutes. In addition, the potential exists that a CLUB™ billed satellite office may be in a location that does not meet the criteria established under Section 364.051(5)(a), Florida Statutes, and thus, violate the statute.

Alternatively, if only the headquarters facility is served from a "hot" wire center, and another location meets the revenue criteria of the tariff, staff believes that the CLUB™ billing arrangement would entitle BellSouth to extend the discounts of the June filing to all locations, though not all locations are served from a "hot" wire center. Staff believes this could result in discriminatory treatment.

Based upon BellSouth's description of CLUB™ billing, staff regards this as an optional arrangement extended to larger business accounts that may have multiple locations. As such, staff does not believe that a subscriber's participation (or nonparticipation) in a CLUB™ billing arrangement should affect eligibility for a promotional offering. Staff believes that all business entities served from "hot" wire centers that otherwise meet the eligibility criteria of the June filing should be considered "similarly situated." In theory, a CLUB™ billing arrangement may extend the benefits offered in the June filing to entities that are not "similarly situated," which in staff's view, is prohibited by statute. Staff concludes that the CLUB™ billing treatment is unduly discriminatory as applied in this tariff filing.

In addition, staff believes that BellSouth's handling of SLAs under the 2002 Key Customer Program/June filing is unduly discriminatory. As provided in the tariff, subscribers with Centrex™, MultiServ™, or ESSX™ services with SLAs not meeting the revenue criteria may have all locations participate as long as they are billed under the same account and at least one location is in a specified wire center. In practice, staff believes this is substantially similar to the CLUB™ billing issue, inasmuch as the subscriber's billing arrangement affects eligibility for the promotional offering. Therefore, for the same reasons cited under the CLUB™ billing issue, staff believes that this practice also may "unreasonably discriminate among similarly situated customers,"

which would be a violation of Sections 364.051(5)(a), and 364.08(1), Florida Statutes.

Finally, a clause in the June filing allows a subscriber being served from a "hot" wire center that subsequently moves to a location that is not being served by a "hot" wire center to continue receiving the rewards of this program throughout the term specified. Staff observes that BellSouth's literature confirms that the June filing is clearly targeted to business customers located in specific wire centers.

Via teleconference, a BellSouth representative stated that there was a competitive presence in all exchanges in Florida, and thus inferred that in the event of a move, such a customer would still be "similarly situated" in a competitive environment. Staff does not agree; we believe that all business entities served from those "hot" wire centers that otherwise meet the eligibility criteria of the June filing should be considered to be "similarly situated." Staff believes Section 364.08(1), Florida Statutes, is controlling. In relevant part, Section 364.08(1), Florida Statutes, provides:

> **364.08 Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.--**
>
> . . .
>
> (1) . . . A telecommunications company may not . . . extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.
>
> . . .

Staff believes that by allowing the reward of this program to essentially "follow" the subscriber throughout the term of their contract, BellSouth is extending the benefits offered in the June filing to entities that are no longer "under like circumstances."

In theory, staff believes that because the ("hot") wire center was a qualifying factor to even participate in the program, a subscriber that subsequently moves to a location that is not being

served by one of the specified wire centers should not continue receiving the rewards of this program throughout the term specified. Staff believes BellSouth should cease providing the rewards of the June filing in the event an enrolled subscriber moves to a location that is not being served by a "hot" wire center, the contract should be terminated, and the customer should not be subject to the ordinary termination clauses. In the first of two teleconferences with BellSouth representatives, BellSouth speculated that in practice, this scenario would occur infrequently. Nevertheless, the tariff provision potentially creates a statutory violation.

B) Is the "termination liability" restriction of the BellSouth 2002 Key Customer Program/June filing unduly discriminatory or unlawful?

As noted, the termination language of the June filing is presented as a restriction. The FCCA's Petition at page 4 mentions the termination liability language of the June filing, though staff does not believe the Petition correctly describes the terms. According to staff's interpretation of the tariff, in the event that the subscriber terminates the contract, the subscriber must pay to BellSouth a termination charge based upon a calculation. The calculation considers the specific TBR of the subscriber at the time of enrollment, plus the time (in months) remaining on the contract. The termination penalty is calculated by multiplying the number of months remaining on the contract by $25.00 or $40.00, which is set according to the subscriber's TBR. Staff believes, however, that this particular termination liability language is unduly discriminatory, although we acknowledge termination liabilities are commonplace in many types of contracts. Staff's conclusion is based upon (1) direct comparisons between the size of the termination liability under the (just-expired) January filing and the June filing, and (2) the relative size of the "new" termination liability as compared to TBR for small, medium, and large subscribers.

In its January filing (Tariff No. T-020035), BellSouth's termination language was not actually provided on the tariff pages; it was included in an attachment to the cover letter that accompanied the tariff filing. In relevant part, the attachment, an executive summary, stated the following:

- In the event the Subscriber terminates the contract, the subscriber must pay back all the discounts [received]. This reimbursement for the base and hunting offer is to pay back all monetary discounts received as a result of being on this program. This payback will appear on the subscriber's final bill as a charge in the Other Charges & Credits section.

- In addition to the reimbursement for the base and hunting discounts, the subscriber will also incur a charge for the waived non-recurring charge (line connection charges) and all other costs directly related to the subscriber's premature termination.

To contrast, in its June filing (Tariff No. T-020595), BellSouth included in its tariff pages[7] the following termination liability language:

- In the event the Subscriber terminates the election agreement, the Subscriber must pay BellSouth a termination charge as provided below for the number of months remaining on the agreed upon term. In addition, the Subscriber shall reimburse all rewards for line connection charges. This termination charge will appear on the Subscriber's final bill as a charge in the OC&C section.

  Monthly TBR (at the time of enrollment)
  $75-$149.99 $25.00*
  $150-$3,000 $40.00*

  *Set charge to be multiplied by number of months remaining on term after discount.

Staff acknowledges that in entering into a contract, in all likelihood the customer is making a tradeoff -- lower rates in return for a commitment period. Staff believes that such tradeoffs are a common business practice, but nonetheless concludes that the

[7] Effective with this filing and on a prospective basis, BellSouth states that its tariff pages will include the same information that was previously included in an executive summary.

termination liability language in BellSouth's June filing appears unduly discriminatory, for the reasons set forth below.

In discussions with BellSouth representatives (via teleconferences), BellSouth asserts that the "new" termination liability language is similar to clauses offered by its competitors. BellSouth believes its calculation will approximate a minimum amount of forgone profit for the term of each respective agreement. Staff notes that BellSouth did submit examples of termination liabilities offered by ALEC competitors to support its contention, though no supportive documents were offered to confirm that the termination liability approximates "forgone profit." BellSouth also submitted examples in response to the FCCA's petition.

Staff observes that BellSouth's "new" termination liability is substantially different than its predecessor. In general terms, under the "old" termination liability language, a customer was obligated to reimburse BellSouth for the *discounts it received*. Under the "new" termination liability language, a customer is obligated to pay BellSouth according to the *months remaining* on the contract. This change in approach means that terminating later in the contract period is now much less onerous than terminating earlier, while previously the reverse was true. The impact of this difference for end use customers is demonstrated in the Graphs 2-1 and 2-2, which compare the "old" and "new" termination liability for hypothetical customers with 36 month term commitments[8]. The values represented graphically are based upon staff's calculation of the "old" and the "new" termination liabilities[9] across all TBR levels for customers eligible to participate in this promotion. In addition, the termination liabilities are calculated under three scenarios in which the customer terminates the contract after 9 months, 18 months, and 27 months.

Graph 2-1 demonstrates that under the "old" termination liability plan, a direct proportional relationship between TBR and

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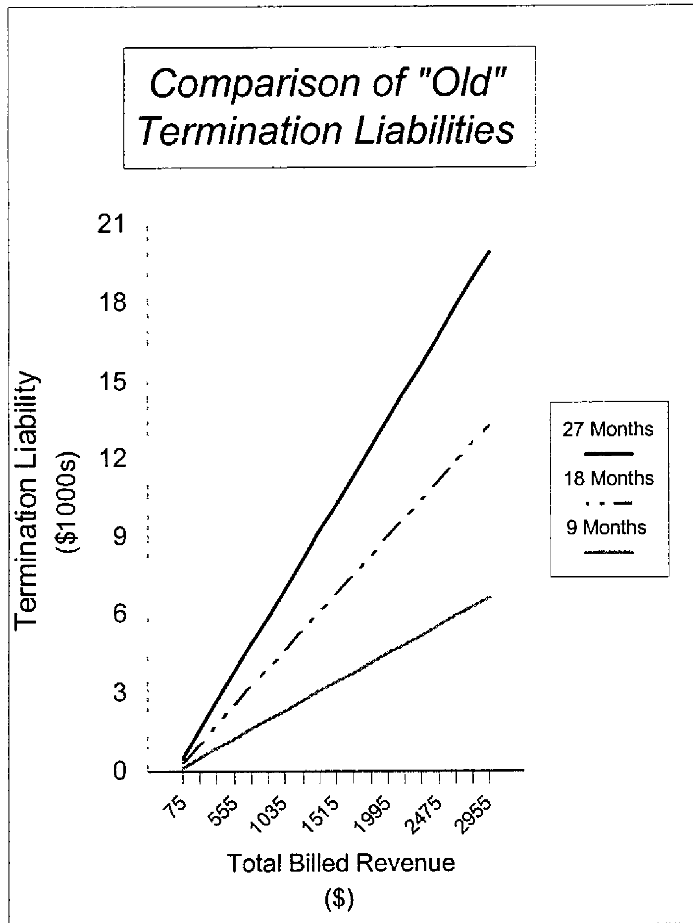
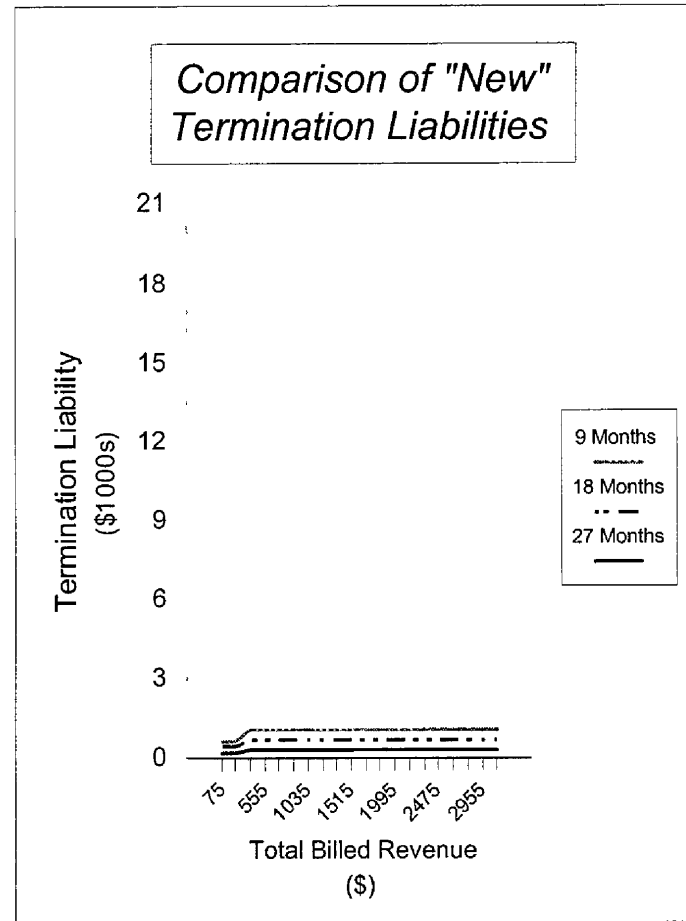
[8]Contracts with durations of 36 months were offered under the "old" tariff as well as in the "new" one. For purposes of this analysis, TBR values range from $75.00 to $3,000.00.

[9]The "old" termination liability calculation is based upon the language contained in the January filing; the "new" termination liability calculation is based upon the language in the June filing.



Graph 2-1: Comparison of "old" termination liabilities.



Graph 2-2: Comparison of "new" termination liabilities.

the termination liability amount is maintained. The proportion (termination liability amount divided by TBR) is identical for all TBR levels, which range from $75.00 to $3,000.00 per month. For example, as TBR increases, so too does the termination liability - but at a constant rate. As Graph 2-1 indicates, under the "old" termination liability plan, the relationship between the termination liability and TBR is uniform for all eligible customers. Staff believes that since the proportional effect of the termination liability was uniform across all TBR levels, the "old" termination liability plan was no more (or less) burdensome for a hypothetical low, medium, or high volume customer.

However, Graph 2-2 indicates that under the "new" termination liability plan, the direct proportional relationship is not maintained. The proportion (termination liability amount divided by TBR) varies for the TBR levels between $75.00 and $3,000.00 per month, and can be significantly more burdensome for low volume subscribers who terminate early in the contract period. Though we acknowledge the "new" termination liability plan can be significantly less burdensome for the higher volume customers, staff notes that the June filing targets customers with TBR levels as low as $75.00 per month and as high as $3,000.00 per month.

Staff is concerned about the disproportionate size of the "new" termination liability when viewed across the various TBR levels. Under staff's view, the relative benefit from the promotion and the relative penalty for early termination should be directly related. Since subscribers with TBR in the range of $75.00 to $3,000.00 per month receive the same percentage discount (i.e., benefit), staff believes it would be reasonable to expect that the termination liability (i.e., penalty) would be proportional to TBR. In addition, staff previously noted BellSouth's "forgone profit" rationale as its basis for the "new" termination liability provision. Staff finds it difficult to imagine how "forgone profit" could be relatively insensitive to TBR. However, as is apparent in Graph 2-2, the "new" termination liability does not vary across a wide range of TBR levels. Therefore, staff believes that this disproportionate effect across the various TBR levels shown in Graphs 2-1 and 2-2 suggest that the "new" termination liability is discriminatory. Staff points out that the termination liability under the "old" plan was proportional to TBR and nondiscriminatory.

In discussions with BellSouth, its representatives state that the "new" termination liability language is similar to clauses offered by its competitors, even offering several examples of similar language from ALEC agreements. Staff believes that if ALECs developed and are using similar termination language, such clauses would be offered to incent higher volume customers to consider selecting an alternative service provider during this competitive transition. The "new" language produced comparatively small termination liabilities for the higher volume customers - the segment of customers that staff believes ALECs would most likely target. If so, staff believes that such clauses could provide an incentive for a higher volume customer to try the services of an ALEC, thus fostering competitive growth for ALECs, especially in the higher end of the TBR range cited in the June filing.

Staff notes that Section 364.01(4)(d), Florida Statutes, states that the Commission should allow new entrants [e.g., ALECs] to be subject to "a lesser level of regulatory oversight than the local exchange telecommunications companies." Specifically, in relevant part, Section 364.01(4), Florida Statutes, provides:

> **364.01 Powers of commission, legislative intent.--**
>
> . . .
>
> (4) The commission shall exercise its exclusive jurisdiction in order to:
>
> . . .
>
> > (d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a <u>transitional period</u> in which new entrants are subject to a lesser level of regulatory oversight than the local exchange telecommunications companies. (Emphasis added)
>
> . . .

Staff believes Florida is in the transitional period and presents this information to counter BellSouth's assertion that it must be allowed to offer similar termination liability language in its tariff (the June filing) as is offered by its competitors.

Staff infers from Section 364.01(4)(d), Florida Statutes, that the level of regulatory oversight for ILECs and ALECs may differ in order to promote competition. On this basis, staff believes that ILECs (such as BellSouth) should be subject to *more* regulatory oversight than ALECs while competitive markets develop. Staff believes the Commission should continue in its Legislative mandate to "promote competition." The staff is acutely aware that ALECs as a whole are enduring difficulties in today's market. Staff believes that even though effective competition may be present in select areas, specifically "hot" wire centers, on an overall basis, competitive markets are still developing and ALECs should remain "subject to a lesser level of regulatory oversight than the local exchange telecommunications companies," pursuant to Section 364.01(4)(d), Florida Statutes. Therefore, staff believes that the incentives that promote competitive development need to remain until such markets are more mature.

In summary, staff believes that BellSouth's "new" termination liability may contradict the above-mentioned statute. BellSouth contends that its "new" termination liability language is similar to clauses offered by its competitors, however, staff believes that BellSouth's reasoning is not necessarily sufficient.

In this instance, staff believes that it is within the Commission's authority to suspend BellSouth's tariff filing pending the outcome of a hearing. Staff relies upon the rationale previously accepted by the Commission in Docket No. 990043-TP[10]. Therein, the Commission voted on January 19, 1999, to suspend a BellSouth tariff filing, but the tariff was subsequently withdrawn. As a result, no order from the Commission's vote was issued. Nevertheless, staff believes that the rationale regarding the Commission's tariff suspension authority advocated in that case is sound and should be applied in this instance to suspend the tariff.

Specifically, under the Arrow rationale, the Commission should suspend a tariff only when:

> a petition to invalidate the tariff demonstrates that the alleged anticompetitive or discriminatory effect of the tariff will cause significant harm that cannot be

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[10]Petition to review and to cancel BellSouth Telecommunications, Inc.'s promotional tariff (T-98-1783) by Arrow Communications, Inc. (Arrow)

> 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.

January 28, 1999, Staff Recommendation in Docket No. 990043-TP at p. 3. As further set forth in that case, irreparable harm may be demonstrated when:

> 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."

Id. at p. 6. The scope of irreparable harm was further outlined as follows:

> 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 (UNEs). 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.

Id. at p. 7.

Based on the arguments addressed herein, staff believes that the 2002 Key Customer Tariff/June filing is potentially anticompetitive to such an extent that, if the tariff were to remain in effect pending resolution of this Docket, irreparable harm as elucidated in the Arrow case may be done to the ALECs' ability to compete, which in the current state of the market is of particular, heightened concern. If the tariff is not suspended, BellSouth will be able to lock customers into long-term contracts with early termination penalties, thereby limiting the potential customer base for ALECs. Also, while it appears that ALECs could

provide this same tariff offering through resale at the applicable resale discount rate, it would likely not be economically attractive for ALECs that are providing service via UNEs. As previously noted, the Arrow case emphasized that:

> 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.

Id. at p. 7.

Furthermore, because staff believes that portions of the tariff may be construed to be in violation of Florida law, an argument can also be made that suspension pending further review at hearing will prevent further, ongoing violation of the Florida Statutes. Clearly, the Commission has authority to cancel a tariff that is in violation of its statutes. Impliedly, the Commission also has authority to suspend a tariff that is in violation of its statutes.

If, however, the Commission is not inclined to pursue suspension of the tariff, the apparent violations of the Florida Statutes identified in staff's analysis would also provide a basis for the Commission to cancel the tariff. Staff notes that if the Commission chooses this approach, such action should be taken by Proposed Agency Action.

Finally, staff recommends that whether the Commission decides to suspend or cancel the tariff, staff believes that this Docket should be consolidated with Docket No. 020119-TP for purposes of hearing, because the matters at issue are substantially similar and consolidation will promote administrative efficiency.

Conclusion

For the reasons set forth in the preceding analysis, staff recommends that BellSouth's 2002 Key Customer Program/June filing (T-020595) should be suspended and set for hearing. Additionally,

staff recommends that this docket should be consolidated with Docket No. 020119-TP for purposes of hearing.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the Commission approves staff's recommendation on Issues 1 and 2, this docket should remain open pending further proceedings. However, if the Commission denies staff's recommendation on Issue 1, this docket should be closed, since no further action would be required. **(BANKS)**

STAFF ANALYSIS: If the Commission approves staff's recommendation on Issues 1 and 2, this docket should remain open pending further proceedings. However, if the Commission denies staff's recommendation on Issue 1, this docket should be closed, since no further action would be required.