BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.	DOCKET NO. 020119-TP
In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association.	**DOCKET NO. 020578-TP**
In re: Petition for expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s Key Customer tariff filed 12/16/02, by Florida Digital Network, Inc.	DOCKET NO. 021252-TP ORDER NO. PSC-03-0726-FOF-TP ISSUED: June 19, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

FINAL ORDER ON BELLSOUTH'S KEY CUSTOMER TARIFFS

APPEARANCES:

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BY THE COMMISSION:

I. CASE BACKGROUND

On January 15, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed its 2002 Key Customer promotional tariff, Tariff No. T-020035, which became effective on January 31, 2002, and expired on June 25, 2002 (the January filing). On February 14, 2002, Florida Digital Network, Inc. (FDN) filed a 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 (FDN Petition). FDN's Petition triggered the establishment of Docket No. 020119-TP.

On June 11, 2002, BellSouth filed a second promotional tariff, Tariff No. T-020595, which became effective on June 26, 2002, and expired on December 31, 2002 (the June filing). As evident by the respective effective dates, the June filing replaced the expired program of the same name, the January filing.

On June 25, 2002, the Florida Competitive Carriers Association (FCCA) filed a Petition to Intervene, and a separate filing requesting an Expedited Review and Cancellation Of BellSouth's Key Customer Promotional Tariffs (FCCA's Petition). The FCCA's Petition triggered the establishment of Docket No. 020578-TP. By Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing.

On August 29, 2002, an issue identification meeting was held for Docket Nos. 020119-TP and 020578-TP. All of the issues were agreed upon by the parties, with the exception of FCCA's Proposed Issue 3F. The Prehearing Officer directed parties to file briefs on whether Proposed Issue 3F should be included as an issue; a subsequent ruling by the Prehearing Officer disallowed the issue entirely.

On December 16, 2002, BellSouth filed Tariff No. 021241 to extend the effective date of the June filing (the extension tariff). The extension tariff became effective on December 31, 2002, and expires on July 1, 2003.

On December 20, 2002, FDN filed a Petition requesting an Expedited Review and Cancellation Of BellSouth's Key Customer Tariff filed on December 16, 2002. FDN's Petition triggered the establishment of Docket No. 021252-TP, though it was consolidated with Docket Nos. 020119-TP and 020578-TP for hearing purposes.

Throughout the course of this proceeding, individual Alternative Local Exchange Companies (ALECs), as well as the Florida Competitive Carriers Association, were granted intervention. At various times thereafter, these parties withdrew from these dockets; FDN remained as the sole ALEC participant.

The administrative hearing on the consolidated dockets in this proceeding was held on February 19-20, 2003.

This Order addresses the allegations raised by FDN in all dockets of this proceeding. We note, however, that the arrangement of the issues has been adjusted for ease of understanding. Additionally, the analysis, and findings are presented in a consolidated format for purposes of efficiency, where necessary, to address interrelated points.

We are vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

II. OVERVIEW

This Order addresses the allegations raised by FDN in objection to specific BellSouth promotional tariff filings. Collectively, these dockets pertain to three tariff filings:

Tariff and (Docket Number)	**Effective Date**	**Expiration Date**
T-020035 (020119-TP)	January 31,2002	June 25, 2002
T-020595 (020578-TP)	June 26, 2002	December 31, 2002
T-021241 (021252-TP)	December 31, 2002	July 1, 2003

These BellSouth promotional tariffs offer incentives to business customers that meet certain criteria and reside in select wire centers ("hot wire centers"). The main criterion to qualify for the incentives is having total monthly billed revenue between $75.00-$3,000.00. Customers that participate in these promotions receive various percentage discounts that range from 10%-25% off of their bill, depending upon the tariff and the term commitment. The BellSouth tariffs also waive connection fees and also offer line hunting at no charge.

In its pleadings, FDN alleges that the BellSouth promotional tariffs addressed in this proceeding:

- are "unfair, anticompetitive, or discriminatory," and thus, non-compliant with specific Florida Statutes;
- have oppressive contract terms and conditions;
- unlawfully target, and then "lock up" specific customers.

Additionally, FDN alleges that BellSouth's marketing practices are suspect as well, and should be evaluated.

The issues considered in this proceeding address those allegations, and to a limited degree, evaluate the marketing practices associated with BellSouth promotional tariffs.

In the nature of this proceeding, we have concluded the following:

- The Florida Statutes provide sufficient guidance to evaluate promotional tariff filings, including the BellSouth promotional tariffs addressed in this proceeding;
- The BellSouth promotional tariffs addressed in this proceeding comply with the Florida Statutes. These tariffs are available for resale;
- No additional marketing restrictions are necessary for BellSouth beyond the voluntary measures in place system-wide. Federal regulations address the sharing of information between wholesale and retail entities.

III. JURISDICTION

There is no dispute between the parties that we have the authority to review promotional tariff offerings, which are at issue here. FDN indicates that we have authority to determine whether BellSouth's promotional tariffs comport with Chapter 364, Florida Statutes. BellSouth states that we have jurisdiction to review tariff filings for compliance with Florida Law. Chapter 364, Florida Statutes, grants the Commission exclusive authority in regulating telecommunications companies. Specifically, Section 364.01(2), Florida Statutes, provides that:

> It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies. . .

The central issue in this case is whether BellSouth's promotional tariffs are anticompetitive and discriminatory as defined under Chapter 364, Florida Statutes. Pursuant to Section 364.01, Florida Statutes, we have authority to regulate telecommunications companies regarding all matters set forth in Chapter 364, Florida Statutes, including matters which may be anticompetitive or discriminatory in nature. As such, we have jurisdiction to review BellSouth's promotional tariff filings at issue here under our regulatory authority.

IV. INTERPRETATION OF SECTION 364.01, FLORIDA STATUTES

It is evident the parties agree that Section 364.01, Florida Statutes, gives us the authority to promote competition. However, the parties differ as to the degree and the manner in which we should promote competition. FDN states that no one could logically conclude that BellSouth's promotional offerings are in compliance with Section 364.01, Florida Statutes, asserting that they are anticompetitive and discriminatory. FDN claims that BellSouth's promotional tariffs are antithetical to the intent of Section 364.01, Florida Statutes. BellSouth states that Section 364.01, Florida Statutes, gives us guidance as to how we are to exercise our existing jurisdiction. Further, BellSouth asserts that Section 364.01, Florida Statutes, provides several ways that we are authorized to promote competition.

We agree with the parties that Section 364.01, Florida Statutes, gives us general authority to promote competition. We believe that the interpretation of Section 364.01, Florida Statutes, should be guided by the Legislature's stated intent set forth in that section. As stated previously, the Florida Legislature granted this Commission exclusive authority to regulate telecommunications companies. We believe that this authority provides us with the basis upon which we may regulate BellSouth's promotional tariffs at issue herein. As such, we interpret Section 364.01, Florida Statutes, as providing us with the authority to promote competition by preventing any conduct or practice which contravenes the goal of promoting competition as set forth in Section 364.01, Florida Statutes.

V. GEOGRAPHIC TARGETING

A. Criteria

Our consideration herein addresses the question of what criteria, if any, should be established to determine whether geographic targeting in a BellSouth promotional tariff is unfair, anti-competitive or discriminatory.

FDN witness Gallagher addresses this issue in his direct testimony by pointing to BellSouth's market share, stating that this Commission cannot ignore the fact that BellSouth still enjoys

monopoly status in the incumbent market territory. Further, witness Gallagher asserts that this Commission should not allow BellSouth, a dominant market provider, to dictate market products when the competition in Florida is still in a vulnerable infancy.

BellSouth witness Ruscilli responds that Section 364.051(5)(a)(2), Florida Statutes, makes clear that a local exchange company is not precluded from meeting offerings by any competitive provider of the same, or functionally equivalent, non-basic services in a specific geographic market.

Section 364.051(5)(a)(2), Florida Statutes, provides, in part, that:

> . . . 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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anti-competitive act or practice, nor unreasonably discriminate among similarly situated customers.

We believe that the above section of the Florida Statutes allows BellSouth to meet competitor's offerings in a specific market or to a specific customer as long as it does not engage in any anti-competitive act or practice, or unreasonably discriminate among similarly situated customers.

We believe that no additional criteria should be established to evaluate whether geographic targeting in a BellSouth promotional tariff is unfair, anti-competitive or discriminatory. Other than the limitation set forth in the last sentence of Section 364.051(5)(a)(2), Florida Statutes, the statute does not provide any restrictions on geographic targeting. Therefore, we find that no criteria shall be established, other than that included in Section 364.051(5)(a)(2), Florida Statutes, to determine whether

geographic targeting in a BellSouth promotional tariff is unfair, anti-competitive or discriminatory.

B. "Meeting Offerings"

Our consideration herein addresses the phrase "meeting offerings by any competitive provider" contained in Section 364.051(5)(a)(2), Florida Statutes.

FDN does not address the interpretation of the phrase "meeting offerings" in its direct or rebuttal testimony. However, in its brief, FDN did provide its opinion of what "meeting offerings" should entail by stating:

> First, the ILECs permission is limited to "meeting" competitor offerings for the same or equivalent non-basic service. The statute does not say that the ILEC is permitted to "beat" competitor offerings, but to "meet" them, which, in the ordinary sense would mean to "match" those offerings. The competitor offerings the ILEC meets must be for the same or equivalent non-basic service; hence, if a competitor could not provide a service in a market or to a customer, there is no offering the ILEC is permitted to meet. Next, the ILEC offerings are permitted to meet the offering of any competitive provider in a specific geographic market or to a specific customer. So, if a competitor makes an offering in one specific market or to one specific customer but not in or to another, the ILEC is permitted only to meet the offering in the market or to the customer, which the competitor does.

FDN believes that BellSouth has not met its burden of proving its 2002 Key Customer programs comply with Section 364.051(5)(a)(2), Florida Statutes, because BellSouth's witnesses could not state which competitor offerings were being met in which "hot" wire centers.

BellSouth witness Ruscilli provided an interpretation of the term "meeting offerings" in his direct testimony, stating:

> The phrase "meeting offerings by any competitive provider" should be interpreted to mean that, where competition exists, BellSouth is allowed to adjust its prices in order to compete effectively.

BellSouth witness Taylor addresses the phrase "meeting offerings" in his direct testimony, wherein he states:

> From an economic perspective, the reference to "meeting offerings by any competitive provider" should be interpreted as the ability of the regulated local exchange carrier (here, BellSouth) to respond to the offering of any substitute service by any competitor operating within the same market and competing for the same set of customers. A substitute need not be an identical service, in terms of either its price or non-price characteristics. Rather, all that matters is that if a customer for a specific BellSouth service is likely to be lured away by a competitor offering a "functionally equivalent" substitute, such as by the offer of a more favorable price or other terms and conditions, then regardless of any of the other rules that may apply, BellSouth should have the ability with that market to attempt to retain or win back that customer by suitably altering or redesigning the terms and conditions under which it offers its own service. Doing so precludes BellSouth neither from repackaging or redesigning the service itself nor from offering the original service at a different price or under contract.

We believe that the phrase "meeting offerings by any competitive provider" implies that BellSouth should have the ability to respond to offerings made by competitors in BellSouth wire centers. Restricting BellSouth from meeting offerings would limit the choices of the consumer in the marketplace. We do not agree with FDN that "meeting competitive offerings" should be interpreted as not allowing BellSouth to "beat" competitor offerings. A BellSouth response to a competitor's offering may not necessarily "beat" the offering by dollars, but may "beat" the competitor's offering through perceived value. We believe that we should not limit market creativity by either BellSouth, or an ALEC.

We agree with BellSouth witness Taylor that a BellSouth competitive offering need not be an identical service, in terms of either its price or non-price characteristics. BellSouth could introduce a bundle of services which may be more attractive than offerings of competitors and be priced higher or lower than a competitor's offering. Therefore, we find that the phrase "meeting offerings by any competitive provider" implies that BellSouth should have the ability to respond to offerings made by competitors in any of its wire centers.

C. "Specific Geographic Market"

Our consideration herein addresses the phrase "specific geographic market" contained in Section 364.051(5)(a)(2), Florida Statutes.

FDN agrees with BellSouth's definition of "specific geographic market" contained in BellSouth's prehearing statement which states:

> The meaning of the phrase "specific geographic market" is dependent on what the competition is doing. It can mean a wire center, a subset of a wire center, a grouping of wire centers, or it could mean something else depending on how competitors elect to compete.

In its post hearing brief, FDN states that it does not take issue with the definition of "specific market" just how BellSouth has erroneously and unlawfully applied that definition.

In its brief, BellSouth included essentially the same language:

> This language depends on what the competition is doing. It can mean a different wire center, a subset of a wire center, a grouping of wire centers, or something else.

Because both parties in this case agree to the definition of "specific market" contained in BellSouth's prehearing statement, we have no objection to using that definition for purposes of this proceeding.

Therefore, for purposes of this proceeding, we find that the phrase "specific geographic market" can mean a wire center, a subset of a wire center, a grouping of wire centers, or it could mean something else depending on how competitors elect to compete.

D. "Similarly situated"

Our consideration herein addresses the interpretation of the phrase "similarly situated" contained in Section 364.051(5)(a)(2), Florida Statutes.

FDN does not address the interpretation of the phrase "similarly situated" or "substantially similar" in its direct or rebuttal testimony. In its brief, FDN included a position on this issue which was more of an argument regarding discrimination among similarly situated customers than an interpretation of the phrase "similarly situated" or "substantially similar." FDN argues in its brief that:

> The question of undue or unreasonable discrimination has historically hinged on cost differences inherent in serving customers in the same class or different classes. When BellSouth retail rates were set prior to the advent of price cap regulation, the Commission established rate structure and rate classifications/groupings based on cost differences so as to avoid discrimination among similarly situated customers. Here, BellSouth has not alleged that any cost differences among customers arise by virtue of a competitor's presence in a hot wire center. Rather, in reliance on "the competitive necessity doctrine," BellSouth alleges that discriminatory pricing to meet competitor offerings is reasonable and permissible in certain circumstances. However, as FDN has argued [above], BellSouth has not fulfilled all of the criteria of the competitive necessity doctrine because BellSouth has not shown that the customers discriminated against have benefitted from the discrimination through rates lower than what they would have been otherwise.

BellSouth witness Taylor provided an interpretation of the term "similarly situated" in his direct testimony:

> From an economic standpoint, the proper interpretation should be that "similarly situated" or "substantially similar" customers are those whose objective circumstances with respect to a specific service are similar. For example, customers with similar willingness to pay (or price elasticity of demand) for a service, or facing similar competitive alternatives in the same geographic market, could be considered similarly situated. Differential pricing (i.e., price discrimination in the economic sense) should not be permitted for similarly-situated or substantially similar customers. In the context of BellSouth's Key Customer promotional offering, similarly situated customers are those for whom BellSouth faces competition from rivals offering substitute services. Those customers are, however, not similarly situated to BellSouth's other customers who do not have the same competitive options.

Many of the parties' arguments on this issue include testimony on whether BellSouth customers who are similarly situated are discriminated against. However, the question to be addressed is the discrimination of similarly situated customers. Therefore, we limit our analysis and finding here to the interpretation of the phrase "similarly situated."

In a 1994 complaint (Raymond DiSalvo against BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company.), we stated that the term similarly situated means "similar treatment in similar circumstances." Specifically, by Order No. PSC-95-1153-FOF-TL, issued September 18, 1995, in Docket No. 941261-TL, this Commission stated:

> The statute requires that all subscribers who are similarly situated be afforded the same treatment. To do otherwise would constitute an "undue or unreasonable prejudice." The statute generally requires similar treatment in similar circumstances.

Order No. PSC-95-1153-FOF-TL, at p.3

We believe that BellSouth customers in different wire centers face different levels of competition. The large metropolitan areas

in BellSouth's territory have wire centers where vigorous competition is present. Some rural areas in BellSouth territory have very little or no competition. It is apparent that competitive carriers aim their marketing efforts at the large metropolitan areas where business customers are most prevalent.

We agree with BellSouth witness Taylor that "similarly situated customers are those for whom BellSouth faces competition from rivals offering substitute services." We believe that BellSouth customers in wire centers with little or no competition would not be similarly situated to BellSouth customers in "hot" wire centers where competition is vigorous. The same competitive circumstances would not apply.

We believe that our interpretation of similarly situated in Order No. PSC-95-1153-FOF-TL should also apply to this case. Therefore, we find that for purposes of this docket, "similarly situated" or "substantially similar" shall be interpreted as customers facing similar competitive alternatives in a "specific geographic market" as defined in Section IV.D of this Order.

E. Geographic Targeting of Tariffs

Our consideration herein addresses geographic targeting of BellSouth's January and June Key customer offerings. The January and June Key customer offerings have only minor changes regarding geographic targeting. Wire center eligibility for the January Key customer offering was based on line loss reports by wire center, along with the input of BellSouth Competitive Assessment Managers.

When the June Key Customer offering was being planned in April or May of 2002, BellSouth ranked each wire center in its nine-state region using a model that includes the level of competitive activity as a key factor. Florida wire centers that were ranked among the top 30% of BellSouth's region-wide wire centers throughout BellSouth's region were designated as "hot" under the June Key Customer offering. In addition, any wire centers that were designated as "hot" under the January Key Customer offering and that had not yet been 30% penetrated by contracts were also designated as "hot" under the June Key Customer offering.

We find that the differences noted between the January and June Key customer offerings do not constitute a change in the determination of whether these tariffs are unfair, anti-competitive, or discriminatory regarding geographic targeting. We find that BellSouth customers that are not in "hot" wire centers are not being discriminated against those customers eligible for the Key Customer offering. Section 364.051(5)(b)(2), Florida Statutes, states that local exchange companies cannot unreasonably discriminate among similarly situated customers. We find that customers in non-"hot" wire centers are not "similarly situated" to customers in "hot" wire centers where customers are exposed to more competition; therefore they are not being discriminated against.

We agree with BellSouth witness Pitofsky that it would be unwise to adopt a rule requiring that if a provider discounts to some customers it must discount to all. That type of action may produce results which would harm rather than help competition. As brought out through questioning of witness Pitofsky at hearing, if we were to adopt a policy of requiring discounts to be applied to all wire centers, it may have the effect of perpetuating one dominant carrier in the wire centers where the offerings are not now available. If competitors cannot come in when the dominant provider is charging higher prices, they probably are not going to come in and compete in those wire centers at a lower price.

We find that BellSouth shall be allowed to target wire centers where BellSouth believes competitive activity is high, and shall not be required to offer promotional discounts in all its wire centers. Section 364.051(5)(a)(2), Florida Statutes, provides that a LEC shall not "unreasonably discriminate among similarly situated customers." We also find that customers in "hot" wire centers where competition exists are not similarly situated with customers in other BellSouth wire centers where competition is limited or non-existent. Accordingly, BellSouth customers in non-"hot" wire centers are not being discriminated against because the Key Customer offering is not available to them. Therefore, based on Section 364.051(5)(a)(2), Florida Statutes, we find that the BellSouth January and June Key Customer tariff filings are not unfair, anti-competitive, or discriminatory pursuant to this issue.

VI. PRICING

As noted previously, our consideration herein evaluates whether specific criteria should be established to determine if the pricing of a BellSouth promotional tariff offering is unfair, anticompetitive, or discriminatory.

At the outset, we note that the terms "unfair, anticompetitive, or discriminatory" are rooted in the Florida Statutes. The terms "fair" (or like words derived from the word "fair") and "anticompetitive" are mentioned numerous times throughout, beginning in Section 364.01, Florida Statutes: Section 364.01, Florida Statutes states in part:

> **364.01 Powers of commission, legislative intent.--**[1]
>
> . . .
>
> (4) The commission shall exercise its exclusive jurisdiction in order to:
>
> . . .
>
> (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

The term "discriminate" (or like words that are derived from the word "discriminate") appears in Section 364.051, Florida Statutes, which reads in part that:

> **364.051 Price regulation.--**[2]
>
> . . .
>
> (5)(a) NON-BASIC SERVICES.--Price regulation of non-basic services shall consist of the following:
>
> . . .

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[1] **History.**--ss. 1-4, ch. 6186, 1911; ss. 1-6, ch. 6187, 1911; s. 1, ch. 6525, 1913; RGS 4393; CGL 6357; s. 1, ch. 63-279; s. 1, ch. 65-52; s. 1, ch. 67-541; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 1, 32, ch. 80-36; s. 2, ch. 81-318; s. 25, ch. 83-218; ss. 6, 7, ch. 89-163; ss. 1, 48, 49, ch. 90-244; s. 4, ch. 91-429; s. 5, ch. 95-403.

[2] **History.**--s. 9, ch. 95-403; s. 8, ch. 98-277; s. 3, ch. 2000-334.

> However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers. (emphasis added)

BellSouth witness Ruscilli states that the true meaning of the word *discrimination* is important to our consideration. He asserts:

> The term *discrimination* merely denotes the offering of different services to different customers under different rates, terms, and conditions . . . [He stresses that] BellSouth is only prohibited from "unreasonably discriminat[ing]" among similarly situated customers.

The witness contends that the Key Customer offerings at issue in this proceeding do not rise to that level because (1) the tariffs are offered to all similarly situated customers, and (2) the tariffs are available for resale to competitors.

We note that FDN repeatedly argues that BellSouth's tariffed discount offerings should be universally available across the entire business class. Otherwise, the business class becomes divided between the "haves" and the "have nots," according to FDN witness Gallagher. The FDN witness claims that the result of not offering the Key Customer tariff universally means that

> . . . a customer in the business class not served by a hot wire center pays a higher rate for both basic and non-basic services than the same customer in the same business class that is served by a hot wire center.

FDN believes BellSouth's immense market power enables it to act in an anticompetitive manner whereby BellSouth can raise rates in areas where it does not face competition, the "non-hot wire centers," and that the revenue from this source would more than make up for the discounts offered under the Key Customer tariff promotions. The witness believes that we should be especially mindful of:

1) The "geographic" aspects of this case; and

2) The effective discount levels (up to 40% off with hunting) that BellSouth offers with the subject tariffs of this proceeding.

FDN believes we should protect ALECs, including FDN, from the anticompetitive conduct of a provider with BellSouth's market power. Florida's competitive market, according to the FDN witness, is still in a "vulnerable infancy," which he asserts justifies our monitoring the following:

1) the size of the BellSouth's tariffed discounts;
2) the availability of BellSouth's tariffed discounts;
3) the manner in which the discounts are offered;
4) how BellSouth has structured the eligibility of the offers; and
5) how BellSouth has marketed its promotional offers.

FDN recommends that tariff restrictions be implemented for BellSouth in its franchised areas of Florida until such time that ALECs have achieved "meaningful" market share in these areas. FDN's recommended restrictions are:

1) BellSouth should be barred from offering direct or indirect discounts of more than ten percent (10%) off total billed basic and non-basic telecommunications services, including hunting and all features.

2) Any and all such discounts should be offered to all members of a customer class.

We, however, do not agree with FDN that the enumerated restrictions are necessary, or appropriate. Rather, we tend to agree with BellSouth witness Pitofsky, who believes the "discount programs made available to customers in Florida by BellSouth are proconsumer and procompetitive."

FDN and BellSouth both cite to the evidence presented in the Telecommunications Markets in Florida, Annual Report on Competition as of June 30, 2002, a publication by us that documents the growth in the competitive telecommunications industry in Florida. The 2002 Competition report shows that:

- In 2002, competitors have obtained a thirteen percent (13%) overall market share, up from an eight percent (8%) figure in 2001.

- Also, ALECs have made impressive gains in the business market,[3] increasing their share to twenty-six percent (26%) of business access lines; last year's figure was sixteen percent (16%).

We note, as BellSouth does, that this growth has occurred while the Key Customer tariff promotions were (are) in effect. BellSouth's witness Garcia states:

> . . . Key Customer offers are a direct result of the competition that has been and continues to take place in Florida in the small business market. And even with the Key Customer [tariffs] in place, other carriers have offered and continue to offer customers lower rates and have experienced line growth.

We believe and the evidence suggests that the Petitioner in this case, FDN, has participated in this expansion.

A specific aspect of our consideration herein is whether any criteria should be established to determine if the pricing of a BellSouth promotional tariff offering is unfair, anticompetitive, or discriminatory pursuant to the cost standards in Sections 364.051(5) and 364.3381, Florida Statutes. We believe the relevant parts of Section 364.051(5), Florida Statutes, are (b) and (c), as follows:

> (5) NON-BASIC SERVICES.--Price regulation of non-basic services shall consist of the following:
>
> . . .
>
> (b) . . . The cost standard for determining cross-subsidization is whether the total revenue from a non-basic service is less than the total long-run incremental cost of the service . . .

[3] We note that the Key Customer tariffs of this proceeding are specifically designed for the business market.

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

Additionally Section 364.3381, Florida Statutes, is referenced, and we believe the only relevant portion of this Section that addresses a cost standard is a small portion of Section 364.3381(2), Florida Statutes[4], which is as follows:

> (2) . . . The cost standard for determining cross-subsidization is whether the total revenue from a non-basic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and non-volume sensitive costs.

Of these three referenced Sections, we note that Sections 364.051(5)(b) and 364.3381(2), Florida Statutes, focus on cross-subsidization. However, we find that Section 364.051(5)(c), Florida Statutes, is most crucial since it is unlikely that non-basic service is being cross-subsidized. Though prohibited by statute, we do not believe that the Petitioner makes a specific allegation that cross-subsidization is occurring, or evident. Moreover, we agree with BellSouth witness Taylor that universal service concerns have likely created a subsidy flow from non-basic services to basic services, not the reverse.

Section 364.051(5)(c), Florida Statutes, examines direct costs, and we believe an examination of direct cost is needed to make a determination of whether the post-discounted rates offered in a Key Customer contract remain "compensatory" for BellSouth. If a determination revealed that the such rates were "non-

[4] History.--ss. 38, 49, ch. 90-244; s. 4, ch. 91-429; s. 26, ch. 95-403.

compensatory," such a finding would sway us to conclude that the tariff offerings are unfair, anticompetitive, or discriminatory.

As presented earlier, the January tariff offered a larger maximum discount for the end use subscriber than the June (or the subsequent extension tariff) filing. All other things being equal, we believe a lesser discount (e.g., the June or subsequent tariff) would yield a higher margin than a contract with a higher maximum discount (such as the January filing). Therefore, we conclude that if a contract signed under the January tariff is "compensatory" at a twenty-five percent (25%) discount, an identically configured contract signed under a June or subsequent tariff filing would be "compensatory" at a twenty percent (20%) discount. BellSouth's witness Shell essentially states this as well, relying on the extensive analysis BellSouth performed in support of the January filing.

Via discovery, a selection of actual contracts signed under the January tariff offering were obtained. These contracts identified the quantities and services of each customer. We also obtained the results of the BellSouth cost study to which witnesses Shell and Bigelow refer.[5] The proprietary cost study listed by name and USOC the cost/price information and margin information for each of the 208 services that BellSouth analyzed. Witness Shell describes the contents of this spreadsheet in his direct testimony. Our staff used this data as a starting point to fully evaluate the contracts within their possession. With this cost/price information, our staff conducted their own analysis of the actual contracts obtained via discovery. The intent was to evaluate conclusively whether the post-discount contracts were in compliance with Section 364.051(5)(c), Florida Statutes (i.e., to determine if any post-discount contracts were being offered by BellSouth below their direct cost).

Because Section 364.051(5)(c), Florida Statutes, begins with the phrase "[t]he price charged to a consumer for a non-basic service . . . ." (emphasis added), various possible interpretations emerge in determining what constitutes a "non-basic service." We believe the margin analysis to satisfy the above-referenced statute

[5] FPSC Staff obtained this cost study on March 27, 2002; BellSouth witness Shell attached the identical study (f/k/a Exhibit WBS-2) to his direct testimony on October 23, 2002.

can be done by evaluating either a "component," a "service" (which could be made up of one or more components), or a "contract" (which could be the made up of one or more services). We believe an argument could be made that "a non-basic service" could be any of these, though, for the purposes of a margin analysis, we believe an aggregate perspective (i.e., the "contract" interpretation) is warranted.

We believe the aggregate perspective, in fact, is bolstered by the Petitioner's argument. FDN does not assert that particular BellSouth services are non-compliant, but rather that BellSouth's post-discount contracts are non-compliant. Although BellSouth analyzed individual USOCs that account for over ninety-nine percent (99.9%) of the revenue limits for the targeted customers[6], we believe the aggregate, or "per-contract," interpretation is the most appropriate to evaluate compliance with Section 364.051(5)(c), Florida Statutes, since the collective margins of all services within an individual contract (positive or negative) are a logical indicator of whether a post-discount contract is compliant, or not.

Based on our analysis, we did not find that any post-discount contracts were being offered below the direct cost. We note that the contracts were provided while the January filing was in effect, and contain the highest maximum discount of the three Key Customer tariff offerings in this proceeding. We therefore conclude that the January contracts which were reviewed are "compensatory." Furthermore, all things being equal, any similar contracts (from the June or the subsequent Key Customer tariff) would be "compensatory" as well, since the maximum discount level is lower, yielding a higher net margin compared to the January filing.

Conclusion

We find that the existing criteria set forth in the Florida Statutes are sufficient to determine whether the pricing of a promotional tariff offering is appropriate. Furthermore, based upon the evidence in the record of this proceeding, we find the Key Customer tariff offerings of this proceeding are not unfair, anticompetitive, or discriminatory under this criteria.

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[6] BellSouth studied customer billed revenue limits which ranged from $100/month (minimum) to $3,000/month (maximum).

VII. TERMINATION LIABILITY

The broad topic under review in this Section is termination liabilities. We are tasked with deciding whether any criteria should be established to determine whether the termination liability terms and conditions of the BellSouth promotional tariff offerings are unfair, anticompetitive, or discriminatory. Because the words "unfair, anticompetitive, or discriminatory" are rooted in the Florida Statutes, the true evaluation of the issues herein must focus on compliance with the Florida Statutes.

FDN approaches these issues as an extension of its arguments about market share and the alleged anticompetitive intent of a dominant provider. FDN broached the topics of market share, price/cost, and class-wide eligibility, and witness Gallagher believes these considerations should be given some weight in this issue as well. Although FDN presents an alternative solution in its brief, our analysis focuses on FDN's principal recommendation.

FDN witness Gallagher infers that termination liabilities have an impact in the marketplace, and discounts the notion that BellSouth and ALECs should have the same termination liabilities in the marketplace. He does not specifically object to the termination liability provisions of BellSouth's Key Customer tariffs at issue in this proceeding. Yet FDN specifically recommends that we impose a restriction on BellSouth to limit any applicable termination liability such that the dollar amount would not exceed BellSouth's retail line installation rates.

BellSouth takes the position that the respective termination liability clauses in its Key Customer tariff filings are in compliance with the applicable Florida Statutes. BellSouth devotes the bulk of its argument explaining that:

1) Termination liability clauses are common in all sorts of contracts, and are appropriate for its promotional tariffs;

2) Competitors offer contracts with disparate termination liability clauses - some even require "full buy-outs." BellSouth's Key Customer termination liability clauses are far

less onerous than some ALEC termination liability clauses.

3) BellSouth Key Customer contracts include the applicable termination liability language; customers are aware of, and accept this as a trade-off for receiving the applicable discounts.

4) The termination liability clauses in its Key Customer tariff offerings are lawful in every respect.

5) The Commission should not consider any restrictions, limitations, or additional criteria for BellSouth with respect to its termination liability clauses. Such considerations are not warranted, or reasonable.

As such, BellSouth believes that we need not develop any additional criteria with respect to termination liability clauses.

We believe the aspects that were developed during discussions at the hearing are very relevant to the issues. Under cross-examination, witness Gallagher testified that he was unaware that a BellSouth customer under a Key Customer contract could, in fact, move a portion of his lines to a competitor, and not face a termination liability for the lines that moved. Cross-examination of BellSouth witness Casey confirmed this from BellSouth's perspective. During cross-examination, FDN witness Gallagher presented testimony indicating that impliedly termination liability applies to split-service also for the January and June key customer contracts.

Under cross-examination from our staff, witness Casey was asked a series of questions regarding when BellSouth would apply its termination liability. Specifically, the witness was asked if whether a breach would have occurred if a customer's total billed revenue fell below the minimum threshold for participation in the June Key Customer. The questions were framed to describe a "split-service" scenario. Using a hypothetical five (5) line customer

that signed a Key Customer contract with BellSouth, the witness was asked what would happen if that customer accepted an offer from a competitor for four (4) of those lines while still under the term of its Key Customer contract.[7] In summary fashion, the answers to those questions revealed the following:

- The Key Customer contract only obligates the customer to maintain *some level of* local service with BellSouth for the agreed-upon term. The Key Customer contract does not obligate the customer to maintain *all* local service with BellSouth for the agreed-upon term;

- The Key Customer discounts would only apply to TBR that equaled or surpassed the minimum threshold. No Key Customer discounts would be applied if TBR is below the minimum threshold;

- A breach of contract would occur if the customer left BellSouth altogether. Such a breach would trigger the termination liability for a Key Customer contract. However, during the term of a Key Customer contract, no breach will occur as long as some level of local service is maintained with BellSouth.

We believe these revelations about the applicability of termination liabilities are significant because BellSouth's Key Customer tariffs and enrollment forms at issue in this proceeding do not disclose the information about "split-service." To demonstrate this, FDN's witness testifies about an actual sales call in which FDN had to "walk away" from a customer in Miami that wanted service from FDN. FDN witness Gallagher states that ". . . there was no way we could get the customer out of that particular [BellSouth] deal." Since the witness does not offer any specific information, we could not determine whether the customer was under a January, June, or some other offer from BellSouth.

In our view, "split-service" essentially undermines FDN's argument since customers are not truly "locked up" as FDN alleges.

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[7]FPSC Staff made the assumption that a five (5) line customer would exceed the minimum threshold TBR for participation in the Key Customer promotion, but that the TBR from a single line customer would not.

We believe FDN's claims of anti-competitive intent are addressed since a BellSouth Key customer is not impeded from entertaining a competitive offer - though the customer must accept that a "split-service" arrangement will be necessary for the remainder of the term commitment with BellSouth. We believe a "split-service" arrangement could have been workable in the Miami example described above, if FDN had the knowledge that was disclosed by BellSouth witness Casey in the above-referenced cross-examination. We are less concerned about whether or not the Miami customer was under a Key Customer contract or not; the more significant concern for us is whether competitors and customers are aware of the specific applicability of BellSouth's termination liability clauses. We can only speculate on how many other potential deals were scratched based on this non-disclosure from BellSouth. The record contains no other information in this regard.

We believe the scope of this issue (which covers all of the Key Customer tariffs addressed in this proceeding) incorporates "split-service." Based on the tariff and enrollment contract language from all of the Key Customer tariffs at issue in this proceeding, our staff - and apparently FDN - had incorrectly assumed that termination liabilities would apply if *any* local service lines under a Key Customer contract were ported out (i.e., served by a competitor). BellSouth's witness Casey in no way limits his assertions on "split-service" to one particular tariff or the other; we believe if that was the case, the witness would have clearly made that distinction, and he did not. Moreover, such a conclusion follows from witness Casey's testimony that discount-eligible services may be added or deleted over the life of a January Key Customer contract, and that BellSouth cannot predict the total benefits the customer will receive over the life of a June (or subsequent) Key Customer contract. We believe the "split-service" frame of reference does, therefore, apply to all of the Key Customer tariffs at issue in this proceeding. This option significantly mitigates the practical effect of a termination liability, regardless of how structured.

Conclusion

We do not believe that any particular aspect of BellSouth's Key Customer termination liability clauses is contrary to the Florida Statutes. With "split-service," consumers can evaluate

competitive offers for a portion of their service if they so choose, and the impact of any termination liability charge becomes a moot issue. We do not believe any specific criteria should be established outside of the existing guidance from the Florida Statutes to determine whether the termination liability terms and conditions of a BellSouth promotional tariff are unfair, anticompetitive, or discriminatory.

We find, however, that BellSouth shall revise the applicable portion of its current Key Customer tariff, Tariff No. T-021241, to clearly disclose that the termination liability does not apply in a "split-service" scenario. The corresponding revision shall be made to the standard contract used to enroll subscribers. In addition, all future BellSouth promotional tariffs that are based on total billed revenue shall clearly disclose that the termination liability does not apply in a "split-service" scenario.

VIII. DURATION OF TARIFF

A. Criteria for Duration

Our conclusion herein examines the question as to what criteria, if any, should be established to determine whether the duration of a BellSouth promotional tariff offering is unfair, anti-competitive, or discriminatory. Also, this issue explores whether the Key customer offering is unfair, anti-competitive, or discriminatory regarding the term, length and succession of the promotional offerings under the criteria, if any, established considering the duration of the tariff.

Section 364.051(5)(a)(2), Florida Statutes, provides, in part, that:

> . . . 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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anti-

> competitive act or practice, nor unreasonably discriminate among similarly situated customers.

The above section of the Florida Statutes allows BellSouth to offer volume and term discounts through individual contracts. However, it does not place any limits on the duration of those contracts. Pursuant to this section, the local exchange company is allowed to meet competitive offerings as long as it doesn't engage in any anti-competitive act or practice, or unreasonably discriminate among similarly situated customers.

We believe that no additional criteria should be established for determining whether the duration of a BellSouth promotional tariff offering is unfair, anti-competitive, or discriminatory. Requiring a fixed length of time for a Key Customer offering would limit BellSouth's marketing and ability to compete. We opine that BellSouth needs the flexibility to respond to competitive offerings in the marketplace. If competitors are offering two - three - four - or five - year contracts, BellSouth should be allowed the flexibility to meet those offerings as provided in the above statute.

We find that no additional criteria, other than that included in Section 364.051(5)(a)(2), Florida Statutes, shall be established to determine whether the duration of a BellSouth promotional tariff offering is unfair, anti-competitive, or discriminatory.

B. Limitations on the Duration of the Tariff

As mentioned above, FDN believes that we should impose three limitations on the duration of a BellSouth promotional tariff. The following is our analysis of each of the proposed limitations.

1) The tariff offering to customers should be no longer than 120 days.

FDN witness Gallagher believes that the sign-up window for the discounts should be no greater than 120 days, contending that this would mitigate anti-competitive impacts of the promotional offerings.

BellSouth witness Taylor believes that BellSouth needs to be free to meet competitive offerings, and in order to accomplish this, it must have the same flexibility as competitors to choose the frequency and duration of its promotions. He believes that the more flexibility BellSouth has to propose promotional tariffs, the more vigorous competition will be in Florida and the better off Florida consumers will be.

BellSouth is presently using a six-month sign-up window to offer its Key Customer programs. FDN would like to see that window reduced to 120 days.

We agree with BellSouth witness Taylor that BellSouth should have the same flexibility as competitors do to choose the frequency of its promotions. We believe that limiting BellSouth to offering its promotional tariffs for 120 days would not only limit customer choice, but restrict BellSouth's right to meet competitive offerings outlined in Section 364.051, Florida Statutes. Therefore, we find that a restriction of 120 days for BellSouth to offer these promotions to consumers shall not be imposed.

2) The length of the contract should be no longer than one year.

FDN recommends that BellSouth be limited to a one year contract duration for its promotions. Witness Gallagher explains his reasoning by stating:

> Aside from serving as a means for the Commission to cushion any problems that develop in the competitive marketplace as a result of the promotions, this would also restore some measure of equity to the situation of so many customers not receiving promotional prices because BellSouth has not offered across-the-board decreases.

BellSouth witness Ruscilli believes that the duration of promotions should be dictated by market forces and by customers - not by ALECs. BellSouth witness Pitofsky believes that there is no reason to regulate the duration of BellSouth's promotions in response to competition. He goes on to state:

> . . . the duration of those programs, eighteen months and thirty-six months, are not so long as to inhibit competition. With respect to duration, there is no lack of authority that exclusive dealing contracts terminable in less than a year are presumptively lawful. Contracts of longer length might be reviewed under a rule of reason but are not likely to be successfully challenged, especially in circumstances like those that pertain here - where competitors are offering discount programs of even longer duration, up to five years in some instances.

We believe a Florida Supreme Court decision (In the matter of The Florida Bar, 349 So. 2d 630 Fla. 1977) regarding the right to contract and the concept of an impairment of contract cited in DOAH's final Order (Case Nos. 99-5368RP, and 99-5369RP) in the "Fresh Look" case is also pertinent to this docket. The decision states, in part:

> The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects is an element of civil liberty possessed by all persons who are sui juris. . . . It is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law. . . . It follows, therefore, that neither the federal nor state governments may impose any arbitrary or unreasonable restraint on the freedom of contract. . . . That freedom, however, is not an absolute, but a qualified right and is therefore, subject to a reasonable restraint in the interest of the public welfare. . . . Freedom of contract is the federal rule; restraint is the exception, and when it is exercised to place limitation upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances. (Internal citations omitted). (DOAH 99-5368RP ¶85-88)

We find that restrictions on the duration of BellSouth promotional contracts shall not be imposed. The record shows that both BellSouth and ALECs enter into long-term promotional contracts with clients. We agree with BellSouth witness Taylor that long-

term contracts, by themselves, do not reduce the competitive rivalry in a market; they just add an option that many customers value, volume and term commitments in exchange for lower prices. BellSouth witness Ruscilli puts it simply. The longer the term of the contract, the greater discount you receive. We believe that placing a maximum one-year term on the duration of BellSouth promotional contracts will reduce consumer choice and may produce less, rather than more, competition in the State of Florida.

3) Once the contract has expired, there should be a waiting period of one year before the customer can participate in another BellSouth tariff offering.

FDN witness Gallagher believes that once a BellSouth promotional contract expires, there should be a waiting period of one year before BellSouth could offer another promotional contract to that customer. He believes that this would cushion any problems that develop in the competitive marketplace as a result of the promotions, and restore some measure of equity.

BellSouth witness Ruscilli believes that BellSouth should not be restricted from offering successive promotional offerings. He believes that when the term of the promotional contract expires, the customer is free to evaluate all of the competitive alternatives that are available at that time and decide which one of those competitive alternatives to accept, and that restricting successive promotional offerings would hinder BellSouth's ability to compete with the competitive offerings being introduced by ALECs.

BellSouth witness Taylor believes that it is not unusual or anti-competitive to run successive promotional campaigns which may produce one long and continuous promotion. Witness Taylor believes that if cooling-off periods are mandated, customers would be denied the benefit of competition, and this could leave BellSouth's competitors with significant competitive advantages.

We agree with BellSouth witness Ruscilli that the customer should be free to evaluate all of the competitive alternatives that are available at the time a promotional contract expires, and should have the opportunity to decide which one of those competitive alternatives meets his needs. We find that imposing a

waiting period of one year before the customer can participate in another BellSouth tariff offering will reduce consumer choice and may produce less, rather than more, competition in the State of Florida, and would impede BellSouth's ability to contract without identifying any pervasive social policy basis for the impediment.

Conclusion

The January and June Key customer offerings have only minor changes regarding the duration of the promotions. The January Key Customer offering includes the option of an 18- or 36-month term length, and the June Key Customer offering includes the option of a 24 or 36-month term length. We believe that the differences between the January and June Key customer offerings are minor and do not affect our opinion as to whether these tariffs are unfair, anti-competitive, or discriminatory regarding duration of contracts.

Based on the above analysis, we believe that the January and June BellSouth Key Customer tariff filings are not unfair, anti-competitive, or discriminatory regarding the term, length, and succession of the promotional offering. We believe that these offerings are responses to the competition being experienced in the State of Florida.

IX. BILLING CONDITIONS

Our consideration herein evaluates whether specific criteria should be established to determine whether the billing conditions or restrictions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory. Our consideration of this issue explores the specific billing conditions of the Key Customer tariff filings at issue in this proceeding. Our principal concern was to evaluate whether any billing condition or restriction contained in the tariffs would in some way violate a Florida Statute (e.g., be "unfair, anticompetitive, or discriminatory"). We point out that two acronyms are used throughout this issue, Customized Large User Bill ("CLUB") and secondary location address ("SLA").

BellSouth witness Ruscilli explains that CLUB billing is an optional service whereby customers with multiple locations can

receive one bill for all locations. Because the "hot" wire centers listed in the Key Customer tariffs cover most of BellSouth's service area, the witness contends that there are not many CLUB billed customers with locations outside of these wire centers.

BellSouth witness Ruscilli explains "SLAs" are used when it is necessary for a particular location or building to be served by a different wire center than the other locations or buildings. The witness states that subscribers with SLAs can participate in the Key Customer program "as long as it [the SLA] is billed under the same account and at least one location is located in an eligible wire center." As with the CLUB option, the witness asserts that few customers have SLAs which are outside of the listed wire centers for the Key Customer tariffs at issue in this proceeding.

FDN witness Gallagher believes that discrimination should be the primary concern of the Commission and is largely the result of the geographic targeting.[8] FDN's witness Gallagher believes that the ". . . way BellSouth has structured its [Key Customer] promotions is discriminatory, anticompetitive, or both." Although the witness does not use the terms "CLUB billing or SLAs," we believe his testimony describes these billing conditions. The witness believes that in order for a BellSouth promotional offering to meet the requirements of the Florida Statutes, the ". . . permitted discounts must be narrowly designed to meet competitors' offerings in specific geographies." Otherwise, BellSouth could possibly be in violation of Section 364.051(5)(a), Florida Statutes, which states, in part:

> (5)(a) NON-BASIC SERVICES.--Price regulation of non-basic services shall consist of the following:
>
> . . .
>
> However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.
>
> . . .

[8] We note that "geographic targeting" was previously addressed.

We believe FDN's view is very narrow and a narrow interpretation would restrict, or at least limit, BellSouth in offering the Key Customer discounts to customer locations that are outside of the listed "hot" wire centers. Witness Gallagher states that "the Commission should not permit BellSouth . . . to apply [Key Customer discounts] to different locations of the same business entity regardless of geography . . . unless competitors can also make the same multi-location offer." We observe, however, that the witness does not offer evidence that BellSouth or something else impedes FDN from making a similar multi-location offer.

We are concerned that, in practice, BellSouth's CLUB billing, SLA arrangements, and the "move" provisions could extend the Key Customer discounts to customers with one or more locations outside of the listed "hot" wire centers. We point out that each Key Customer tariff listed specific wire centers (i.e., the "hot" wire centers) for which the program applied. Our concern is that in extending these benefits beyond the listed wire centers, BellSouth could be "discriminating" against like, yet ineligible, businesses in the "non-hot wire centers." We note, however, that in Section 364.051(5)(a), Florida Statutes, the word "discriminate" is preceded by an important adjective, and that is "unreasonably." Thus, we believe our consideration must go beyond a simple decision about whether BellSouth's CLUB billing, SLA arrangements, and the "move" provisions merely "discriminate," but rather whether such provisions "unreasonably discriminate."

Though BellSouth admits that its CLUB billing, SLA arrangements, and the "move" provisions may extend the benefits outside of the "hot" wire centers, witness Ruscilli maintains that these provisions are reasonable and "customer friendly" provisions. The witness believes that BellSouth's disclosure of these provisions in its tariff prevents any statutory or tariff violation. Furthermore, witness Ruscilli states that the frequency of CLUB billing, SLA arrangements, and the "move" provisions being invoked is rather low. FDN makes no specific case to challenge these assertions, or that such provisions "unreasonably discriminate" against competitors. Without specific evidence to the contrary, we have no reason to disagree with these assertions, particularly in light of witness Ruscilli's testimony that the

majority of the BellSouth wire centers in Florida are Key Customer wire centers. Additionally, we would note that FDN did not specifically demonstrate how it was impaired in making a multi-location offer similar to BellSouth's CLUB billing arrangement.

As such, we reject FDN's (narrow) interpretation that the discrimination resulting from BellSouth's billing practices meets the threshold of being "unreasonably discriminatory," in violation of Section 364.051(5)(a), Florida Statutes. We do not believe the "discrimination" at issue here rises to the level of being "unreasonable."

In short, we believe that in order for us to consider establishing criteria to evaluate how the billing conditions or restrictions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory, the burden would be on the Petitioner to demonstrate that such is necessary. Though FDN witness Gallagher argues extensively about geographic targeting and other allegations of discrimination, he provides little argument that is specific to BellSouth's billing conditions and restrictions.

Conclusion

We find that no additional criteria is warranted or necessary for billing conditions. Further, the BellSouth Key Customer billing conditions or restrictions of the BellSouth promotional tariff offerings are not unfair, anticompetitive, or discriminatory pursuant to Section 364.01, Florida Statutes.

X. MISCELLANEOUS TERMS AND CONDITIONS

This aspect of our consideration was structured to address any argument that may not fit under the other issues of this proceeding. Neither FDN nor BellSouth present unique evidence for consideration.

Conclusion

We find that there are no other criteria against which to evaluate whether the terms of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory.

XI. RESALE

A. Terms and Conditions

We believe that BellSouth's promotional tariff offerings should be made available for ALEC resale in accordance with the terms and conditions required by federal law. Section 251(c)(4), the resale provision in the Telecommunications Act of 1996, provides adequate evidence, as do paragraphs 948 and 950 of the Federal Communications Commission (FCC) Order FCC 96-325. Neither party challenged the applicability of these federal guidelines.

We believe that BellSouth's long-term promotional tariff offerings are required to be made available for ALEC resale in accordance with the terms and conditions required by state and federal law. Based on the evidence presented in the record, we believe the BellSouth Key Customer tariff offerings at issue in this proceeding are made available for resale in accordance with state and federal requirements.

BellSouth's promotional tariff offerings should be, and, are made available for ALEC resale in accordance with the terms and conditions required by state and federal law. Pursuant to law, incumbent LECs must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to noncarrier subscribers. Also, promotions of more than 90 days must be available for resale at the promotional rate minus the wholesale discount. Further, the incumbent LECs must not prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service.

Conclusion

According to the evidence in the record, we find that BellSouth has met the resale terms and conditions required by state and federal law.

B. Competitive Impact of Resale

Our consideration herein evaluates the competitive impact, if any, of the resale of BellSouth promotional tariff offerings. We observe that this is somewhat of a "policy" issue, whereas prior

issues were more oriented to evaluating the specific Key Customer tariffs of this proceeding.

FDN witness Gallagher asserts that as long as we permit BellSouth to continue providing discounts like the Key Customer programs, ALECs have a choice of becoming nonviable by trying to beat BellSouth's promotional prices or becoming nonviable by reselling those discounts. Witness Gallagher contends that the resale "option" is not a vehicle for ALECs to mitigate the effects of BellSouth's anticompetitive practices; rather, like the promotions themselves, it is a plan for dissembling facilities-based competition.

According to witness Gallagher, any opportunity ALECs have to resell BellSouth promotional prices is an empty consolation. Witness Gallagher contends that resale does not serve to avoid the harm ALECs suffer from BellSouth promotions, nor does it remedy BellSouth's conduct. Further, witness Gallagher asserts 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 inadequate margins; margins that do not change when reselling a promotion.

BellSouth witness Garcia argues that competition has steadily continued throughout the time that BellSouth has offered the Key Customer promotions. He notes that FDN announced in October 2002 that it had achieved 100,000 lines in just 3.5 years of being in business, which includes a time period during which the Key Customer contracts were available. Also, witness Garcia notes that the number of calls that BellSouth received in the call centers asking about competitive offers did not decline at all during the time the Key Customer promotion was being offered.

BellSouth witness Garcia asserts that BellSouth's Key Customer offerings are a direct result of the competition that has been, and continues to, take place in Florida in the small business market. Even with the Key Customer Program in place, other carriers have offered, and continue to offer, customers lower rates and have experienced line growth. Further, BellSouth witness Massey asserts that in the areas in which competitors choose to compete, the competitors are gaining significant numbers of small business access lines, and are far from being "eliminated." Further, witness Massey contends that from January 2000 to September 2002,

the percentage of small business lines that are served by BellSouth has fallen from an overstated estimate of 90.0 percent at the end of 1999 to an overstated estimate of 71.5 percent in September 2002. According to witness Massey, BellSouth's market share is declining 0.3 to 0.4 percentage points every month, which equates to roughly 3.6 to 4.8 percentage points annually. Thus, witness Massey argues that these figures clearly demonstrate that customers are able to migrate freely.

We note the argument offered by FDN that the competitive impact of reselling BellSouth promotional tariff offerings is negative. FDN witness Gallagher argues that the resale of promotions leads to the erosion/abandonment of facilities-based infrastructure and that resale is an unfinanciable, non-viable business option. FDN witness Gallagher also points out that no Florida ALEC has resold services to an end user with a BellSouth Key Customer Contract.

On the one hand, witness Gallagher seems to suggest that resale will have the undesirable result of undermining facilities-based competition, while on the other hand, he admits that resale is not particularly attractive. Quite simply, we cannot reconcile FDN's arguments. Since BellSouth's promotional tariff offerings are available for resale, we do not believe ALECs are adversely affected. Rather, we agree with, and are persuaded by, BellSouth's argument that utilizing resale to serve some customers does not mean that FDN has to change its overall strategy of serving customers using its own facilities. We believe the resale price the competitor pays BellSouth for any service will always be less than the price BellSouth charges its retail customers for the same service, and as such, competitors suffer no disadvantage.

Conclusion

We find that reselling BellSouth's promotional tariff offerings provides ALECs with another means of competing with BellSouth and is not detrimental to the development of viable competition.

XII. MARKETING

A. Restrictions on Marketing

In this consideration, we explore whether any waiting period or other restrictions should be placed on BellSouth in the context of marketing promotional tariffs. The concept of "win-back" can be divided into two distinct types of marketing: marketing intended either to (1) regain a customer, or (2) retain a customer. Regaining a customer applies to the marketing situations where a customer has already switched to and is receiving service from another provider. Retention marketing, by contrast, refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider.

We believe a win-back promotion such as the Key Customer offering is not, in and of itself, detrimental. In fact, win-back promotions can be very beneficial to Florida consumers by giving them a choice of providers with varied services at competitive prices. The FCC addressed win-back promotions in its Order FCC 99-223, released September 3, 1999, which states:

> Win-back facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs. (¶ 68)
>
> Some commenters argue that ILECs should be restricted from engaging in win-back campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's

> business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. (¶ 69)
>
> Because win-back campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.(¶ 70)

We note that BellSouth has voluntarily initiated a 10-day waiting period after a customer leaves BellSouth for an ALEC before any type of winback activity is implemented. FDN is recommending a 30-day waiting period after a customer leaves BellSouth before BellSouth is allowed to initiate any winback activity. During cross-examination FDN witness Gallagher was asked to explain why FDN needed an additional 20 days prior to BellSouth initiating any winback activity. Witness Gallagher replied:

> . . . ten days isn't really enough to get to know the customer. There could be some post-cut over hiccup that happened; the customer might still be blaming us for that, whether it was our fault or not. It's just, just a time to get to know the customer and try to establish some goodwill. That's really all that is.

Our staff's initial recommendation in this proceeding recommended a 30-day waiting period. The primary concern addressed in that recommendation was that there were potential double billing issues which could occur. However, at the June 18, 2002, Agenda conference, FDN witness Gallagher stated that this was not a problem. BellSouth responded to our concern on double billing in its brief, noting:

> Mr. Gallagher explained 'with FDN, the way we do our [billing for] facilities-based [services], we don't have a problem with double billing.'

We disagree with FDN witness Gallagher that a 10-day waiting period is not enough. We believe that since FDN has no double billing issues, we should acknowledge BellSouth's voluntary 10-day waiting period before BellSouth can initiate any winback activity. We also believe that we should affirm our finding contained in

Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, prohibiting BellSouth from including any marketing information in its final bill sent to customers who have switched providers. That finding by us was not protested.

FDN would also like to have BellSouth initiate a 30-day waiting period on BellSouth when an ALEC exits a market, where BellSouth could not offer discounts to those customers until 30 days after the date that those customers are subject to disconnection or rolling over to BellSouth as a default carrier. During cross-examination, when asked about FDN's proposal, FDN witness Gallagher explained:

> . . . that stems directly from the Network Plus issue where Network Plus was going out of business and they sent their customers a notice that was somewhat scary for the customers that said, you will be out of phone service in a certain number of weeks, you know. And so these people pick up the phone and call BellSouth and were just enrolled in mass in the Key Customer, we believe.
>
> When a customer provider is exiting the market -- I don't think it would -- I think that, that there should be some sort of cooling off period so that -- the monopoly is going to get most of the people when a customer is exiting. Everybody is going to run for the exits and they're going to run for BellSouth.

We believe that no waiting period should be established on BellSouth marketing when an ALEC is exiting the market and the exiting ALEC customer is seeking a provider. We believe the consumer is at a critical point when he learns his telephone provider is exiting the market and he needs to find another provider. The customer should be allowed to examine all options available to him to determine the best possible choice and to ensure a smooth, seamless transition to his new provider. We believe that limiting customer choices would not be appropriate.

FDN believes that BellSouth's marketing of the Key Customer offerings is focused on ALEC customers, not all eligible customers such as existing BellSouth customers, and that BellSouth does not use similar means, materials and methods of marketing for all

eligible customers. BellSouth witness Garcia stated that BellSouth takes reasonable steps to inform all types of customers of these offerings, sending direct mail to thousands of potentially eligible customers - both former and existing BellSouth customers - to notify them of these offerings.

After a review of BellSouth marketing ads for the Key Customer offerings, and a review of exhibits showing direct mail information, we believe that BellSouth has shown that the Key Customer program is offered to both new and existing BellSouth customers, and no restrictions on the means, materials, and methods of marketing are necessary at this time.

In its brief, BellSouth suggests that we may want to initiate a generic proceeding to consider marketing practices in the entire industry, similar to a proceeding underway at the Georgia Public Service Commission (GPSC). BellSouth stated:

> To the extent the Commission is interested in examining restrictions at all, the proper course would be to initiate a generic proceeding to consider marketing practices in the entire industry with any waiting periods applicable to all carriers. (See e.g., Docket No. 14232-U; Code of Conduct for Winback Activities) (On March 24, 2003 the Georgia Public Service Commission adopted a seven-day waiting period restricting winback activities; the waiting period applies equally to all carriers and does not apply to inbound customer calls).

The GPSC ordered that the industry come up with a proposed marketing code of conduct, which includes winback activities. The ILECs, ALECs, and other interested parties worked together on the code of conduct, which was adopted by the GPSC on March 18, 2003, and became effective twenty days after adoption. The Florida Telecommunications Competitive Interests Forum also has a marketing code of conduct as a possible item for discussion. However, the item has been tabled pending the decisions in this proceeding. Although we believe that a marketing code of conduct may be beneficial to all parties, we are not persuaded that we should proceed to develop one at this time through this proceeding.

Conclusion

We acknowledge BellSouth's voluntary 10-day waiting period after a customer leaves BellSouth for an ALEC before any type of winback activity is implemented. We find also that no waiting period shall be established on BellSouth marketing when an ALEC is exiting the market and the exiting ALEC customer is seeking a provider. Also, we affirm our finding contained in Order No. PSC-02-0875-PAA-TP, prohibiting BellSouth from including any marketing information in its final bill sent to customers who have switched providers.

In addition, we find that BellSouth has shown that the Key Customer program is offered to both new and existing BellSouth customers, and no restrictions on the means, materials and methods of marketing are necessary at this time. We further believe that in another forum, we may wish to explore the idea of a Florida marketing code of conduct which could be developed by industry consensus and submitted to us for consideration.

B. Sharing of Information

This aspect of our consideration addresses the sharing of customer proprietary network information (CPNI) and wholesale information between BellSouth's retail and wholesale divisions. The FCC describes CPNI as the following:

> CPNI includes, among other things, to whom, where, and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.

FCC Order 99-233, at ¶ 1.

According to BellSouth witness Ruscilli, wholesale information is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers.

Retention marketing refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider. We believe that not all

instances of retention marketing should be restricted, just those in which wholesale information obtained from its wholesale division may be shared with BellSouth's retail division. We believe that retention marketing is acceptable if the information regarding the customer potentially leaving BellSouth is obtained through independent retail means. The FCC has also addressed retention marketing in many orders. In FCC Order 99-223, the FCC stated:

> Several petitioners ask the Commission to reconsider Section 64.2005(b)(3) to permit use of CPNI for the retention of soon-to-be former customers without customer approval. On the other hand, other petitioners request that the Commission expressly prohibit ILECs from engaging in retention marketing. These petitioners claim that ILECs are using information derived solely from their status as providing carrier-to-carrier services to their competitors in an anti-competitive manner. Petitioners argue that the use of another carrier's order, including a carrier or customer request to lift a PIC freeze, is clearly and separately forbidden by sections 222(b) and 201(b). (¶ 75)
>
> We conclude that section 222 does not allow carriers to use CPNI to retain soon-to-be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service. We conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly. Congress expressly protected carrier information in section 222(a) by creating a duty to protect the confidentiality of proprietary information of other carriers, including resellers. Section 222(b) restricts the use of such proprietary information and contains an outright prohibition against the use of such information for a carrier's own marketing efforts. As stated in the *CPNI Order*, Congress' goals of promoting competition and preserving customer privacy are furthered by protecting competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain

> access to such information through their provision of wholesale services. (¶ 76)

The FCC made it clear that there is no prohibition against an ILEC initiating retention marketing as long as the information regarding a customer switch is obtained through independent retail means. FCC Order 99-223 states:

> We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the "wholesale" and the "retail" services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a "retention" campaign under the implied consent conferred by section 222(c)(1). (¶ 78)

However, the FCC went on to state that:

> ..[w]here a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b). We concede that in the short term this prohibition falls squarely on the shoulders of the BOCs and other ILECs as a practical matter. As competition grows, and the number of facilities-based local exchange providers increases, other entities will be restricted from this practice as well. (¶ 77)

The FCC also addressed retention marketing and the use of CPNI and wholesale information recently in FCC Order 03-42, issued March 17, 2003, stating:

> We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier

> change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations. (¶ 27)
>
> We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules. (¶ 28)

Conclusion

We have examined BellSouth's policies concerning CPNI and use of wholesale information, and are satisfied that BellSouth has the appropriate policies in place. However, we affirm our finding contained in Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, prohibiting BellSouth's wholesale division from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. That finding by us was not protested.

We find that it is unnecessary to impose further restrictions on in-bound calls to BellSouth, addressing instances when a customer calls in to lift a carrier freeze or request to move or remove DSL. We find that the FCC has sufficiently addressed retention marketing when a customer calls in to lift a carrier freeze. We also believe that the FDN and BellSouth interconnection agreement sufficiently covers retention marketing in the context of in-bound calls concerning DSL.

XIII. TREATMENT OF CUSTOMERS

FDN and BellSouth only offer minimal argument specific what should happen if the tariffs are found to violate Florida Statutes.

FDN states that the harm to them and their customers prospectively is that BellSouth's termination liability will very soon have a devastating effect on facilities-based competition." Witness Gallagher also states that if the BellSouth promotions continue, more people will be locked into contracts, and that will stagnate ALEC growth.

BellSouth states that it offered and continues to offer, the Key Customer Promotional tariffs in a manner consistent with Florida law . BellSouth further states that this Commission allowed the then-current Key Customer tariff to remain in effect pending the hearing in this case, and also allowed BellSouth's December 2002 Key Customer promotional tariff to become effective. (See Order Nos. PSC-02-1248-FOF-TP and PSC-03-0148-PAA-TP). Because we allowed those tariffs to remain effective and available to customers, BellSouth contends that any changes to promotional tariffs should apply on a prospective basis and all current customers receiving the benefits of the expired Key Customer tariff should be permitted to continue to enjoy the benefits for which they bargained.

Conclusion

Because we find that BellSouth Key Customer tariffs are lawful, the customers who have already contracted for service under the promotional tariffs are not affected.

We believe that our decisions are consistent with the terms of Section 251 of the Act, the provisions of the FCC rules, applicable court orders, and provisions of Chapter 364, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Key Customer Tariffs No. T-020035, T-020595, and T-021241 are not unfair, anticompetitive or discriminatory in violation of Florida Statutes. It is further

ORDERED that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that upon the expiration of the time to file a motion for reconsideration or an appeal, these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 19th Day of June, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.