



ORIGINAL

November 6, 2002

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

via Overnight Mail

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

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

Dear Ms. Bayó,

Please find enclosed for filing in the above dockets an original and twenty (20) copies of the substitute for Exhibit No. _____ (MPG-1). The original Exhibit No. _____ (MPG-1) was filed on October 23, 2002, with the pre-filed testimony of Mr. Michael P. Gallagher. The attached substitute exhibits revises and corrects the original exhibit and should replace the original filed October 23, 2002. A copy of this letter and the attachment has been sent to all of the parties and staff.

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

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

AUS
CAF
CMP
COM
CTR
ECR
GCL
OPC
MMS
SEC
OTH

DOCUMENT NUMBER - DATE
12251 NOV -78
FPSC-COMMISSION CLERK

LOCAL . LONG DISTANCE INTERNET

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 an }
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 the Florida }
Competitive Carrier's Association }
_____ }

Docket No. 020578-TP

EXHIBIT MPG-1

FILED WITH THE DIRECT TESTIMONY OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.

DOCUMENT NUMBER-DATE
12251 NOV-78
FPSC-COMMISSION CLERK

Retail
ALLAPATTAH - MIAMFLAL (RG12) - ZONE 1

BellSouth Tariff-Customer

Business lines x 3 lines	\$110.85	
Hunting x 3 lines	\$30.00	
Total MRC:	<u>\$140.85</u>	Per line: <u>\$46.95</u>
Total NRC:	<u>\$80.00</u>	

FDN Tariff-Customer**

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$22.50	
Total MRC:	<u>\$111.18</u>	Per line: <u>\$37.06</u>
Total NRC:	<u>\$150.00</u>	

BellSouth Key Customer***

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$0.00	
Total MRC:	<u>\$88.68</u>	Per line: <u>\$29.56</u>
Total NRC:	<u>\$0.00</u>	

*Customer terminates agreement after 30 months. Assumes BellSouth charges \$25.00 per line/per month remaining on the contract.

**Customer signs a 36 month commitment with Florida Digital Network.

***Customer signs a 36 month commitment with BellSouth.

Wholesale

ALLAPATTAH - MIAMFLAL (RG12) - ZONE 1

FDN Resale-Standard

Business lines x 3 lines	\$92.22		
Hunting x 3 lines	\$24.96		
Total MRC:	<u>\$117.17</u>	Per line:	<u>\$39.06</u>

FDN Resale-Key Customer*

Business lines x 3 lines	\$73.77		
Hunting x 3 lines	\$0.00		
Total MRC:	<u>\$73.77</u>	Per line:	<u>\$24.59</u>

FDN UNE-P-Zone 1**

Business lines x 3 lines	\$56.13		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$62.64</u>	Per line:	<u>\$20.88</u>

*Customer signs a 36 month commitment, FDN is liable for termination liability to BellSouth.

**SL1 Loop. Assumes 380 minutes of outbound local calls on the BellSouth network and 190 minutes of outbound local calls via multiple networks. ADUF/ODUF/CABS charges are not being calculated.

**SL1 Loop. Assumes 305 minutes of inbound local calls on the BellSouth network and 152 minutes of inbound local calls via multiple networks. ADUF/ODUF/CABS charges are not being calculated.

ALLAPATTAH - MIAMFLAL (RG12) - ZONE 2

FDN UNE-P-Zone 2***

Business lines x 3 lines	\$66.15		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$72.66</u>	Per line:	<u>\$24.22</u>

***PSC proposed SL1 Loop. Assumes 380 minutes of outbound local calls on the BellSouth network and 190 minutes of outbound local calls via multiple networks. ADUF/ODUF/CABS charges are not being calculated.

***PSC proposed SL1 Loop. Assumes 305 minutes of inbound local calls on the BellSouth network and 152 minutes of inbound local calls via multiple networks. ADUF/ODUF/CABS charges are not being calculated.

Retail
HAVERHILL - WPBHFLHH (RG 9) - ZONE 2

BellSouth Tariff-Customer

Business lines x 3 lines	\$110.85	
Hunting x 3 lines	\$30.00	
Total MRC:	<u>\$140.85</u>	Per line: <u>\$46.95</u>
Total NRC:	<u>\$80.00</u>	

FDN Tariff-Customer**

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$22.50	
Total MRC:	<u>\$111.18</u>	Per line: <u>\$37.06</u>
Total NRC:	<u>\$150.00</u>	

BellSouth Key Customer***

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$0.00	
Total MRC:	<u>\$88.68</u>	Per line: <u>\$29.56</u>
Total NRC:	<u>\$0.00</u>	

*Customer terminates agreement after 30 months.

**Customer signs a 36 month commitment with Florida Digital Network.

***Customer signs a 36 month commitment with BellSouth.

Wholesale

HAVERHILL - WPBHFLHH (RG 9) - ZONE 2

FDN Resale-Standard

Business lines x 3 lines	\$92.22		
Hunting x 3 lines	\$24.96		
Total MRC:	<u>\$117.17</u>	Per line:	<u>\$39.06</u>

FDN Resale-Key Customer

Business lines x 3 lines	\$73.77		
Hunting x 3 lines	\$0.00		
Total MRC:	<u>\$73.77</u>	Per line:	<u>\$24.59</u>

FDN UNE-P-Zone 2**

Business lines x 3 lines	\$68.64		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$75.15</u>	Per line:	<u>\$25.05</u>

*Customer signs a 36 month commitment, FDN is liable for termination liability to BellSouth.

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HAVERHILL - WPBHFLHH (RG 9) - ZONE 2

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Business lines x 3 lines	\$66.15		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$72.66</u>	Per line:	<u>\$24.22</u>

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Retail
PORT ST. LUCIE MAIN - PTSFLMA (RG6) - ZONE 2

BellSouth Tariff-Customer

Business lines x 3 lines	\$98.85	
Hunting x 3 lines	\$30.00	
Total MRC:	<u>\$128.85</u>	Per line: <u>\$42.95</u>
Total NRC:	<u>\$80.00</u>	

FDN Tariff-Customer**

Business lines x 3 lines	\$79.08	
Hunting x 3 lines	\$22.50	
Total MRC:	<u>\$101.58</u>	Per line: <u>\$33.86</u>
Total NRC:	<u>\$150.00</u>	

BellSouth Key Customer***

Business lines x 3 lines	\$79.08	
Hunting x 3 lines	\$0.00	
Total MRC:	<u>\$79.08</u>	Per line: <u>\$26.36</u>
Total NRC:	<u>\$0.00</u>	

*Customer terminates agreement after 30 months

**Customer signs a 36 month commitment with Florida Digital Network

***Customer signs a 36 month commitment with BellSouth.

Wholesale

PORT ST. LUCIE MAIN - PTSLFLMA (RG6) - ZONE 2

FDN Resale-Standard

Business lines x 3 lines	\$82.23		
Hunting x 3 lines	\$24.96		
Total MRC:	<u>\$107.19</u>	Per line:	<u>\$35.73</u>

FDN Resale-Key Customer

Business lines x 3 lines	\$65.79		
Hunting x 3 lines	\$0.00		
Total MRC:	<u>\$65.79</u>	Per line:	<u>\$21.93</u>

FDN UNE-P-Zone 2**

Business lines x 3 lines	\$68.64		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$75.15</u>	Per line:	<u>\$25.05</u>

*Customer signs a 36 month commitment, FDN is liable for termination liability to BellSouth

**SL1 Loop. Assumes 380 minutes of outbound local calls on the BellSouth network and 190 minutes of outbound local calls via multiple networks. ADUF/ODUF/CABS charges are not being calculated.

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PORT ST. LUCIE MAIN - PTSLFLMA (RG6) - ZONE 3

FDN UNE-P-Zone 3***

Business lines x 3 lines	\$101.46		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$107.97</u>	Per line:	<u>\$35.99</u>

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Retail
MAGNOLIA - ORLDFLMA (RG11) - ZONE 1

BellSouth Tariff-Customer

Business lines x 3 lines	\$110.85	
Hunting x 3 lines	\$30.00	
Total MRC:	<u>\$140.85</u>	Per line: <u>\$46.95</u>
Total NRC:	<u>\$80.00</u>	

FDN Tariff-Customer**

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$22.50	
Total MRC:	<u>\$111.18</u>	Per line: <u>\$37.06</u>
Total NRC:	<u>\$150.00</u>	

BellSouth Key Customer***

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$0.00	
Total MRC:	<u>\$88.68</u>	Per line: <u>\$29.56</u>
Total NRC:	<u>\$0.00</u>	

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Wholesale

MAGNOLIA - ORLDFLMA (RG11) - ZONE 1

FDN Resale-Standard

Business lines x 3 lines	\$92.22		
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Total MRC:	<u>\$117.17</u>	Per line:	<u>\$39.06</u>

FDN Resale-Key Customer

Business lines x 3 lines	\$73.77		
Hunting x 3 lines	\$0.00		
Total MRC:	<u>\$73.77</u>	Per line:	<u>\$24.59</u>

FDN UNE-P-Zone 1**

Business lines x 3 lines	\$56.13		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$62.64</u>	Per line:	<u>\$20.88</u>

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MAGNOLIA - ORLDFLMA (RG11) - ZONE 1

FDN UNE-P-Zone 1**

Business lines x 3 lines	\$52.62		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$59.13</u>	Per line:	<u>\$19.71</u>

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Retail
TAMARAC - PMBHFLTA (RG12) - ZONE 2

BellSouth Tariff-Customer

Business lines x 3 lines	\$110.85	
Hunting x 3 lines	\$30.00	
Total MRC:	<u>\$140.85</u>	Per line: <u>\$46.95</u>
Total NRC:	<u>\$80.00</u>	

FDN Tariff-Customer**

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$22.50	
Total MRC:	<u>\$111.18</u>	Per line: <u>\$37.06</u>
Total NRC:	<u>\$150.00</u>	

BellSouth Key Customer***

Business lines x 3 lines	\$88.68	
Hunting x 3 lines	\$0.00	
Total MRC:	<u>\$88.68</u>	Per line: <u>\$29.56</u>
Total NRC:	<u>\$80.00</u>	

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FDN Resale-Standard

Business lines x 3 lines	\$92.22		
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Total MRC:	<u>\$117.17</u>	Per line:	<u>\$39.06</u>

FDN Resale-Key Customer

Business lines x 3 lines	\$73.77		
Hunting x 3 lines	\$0.00		
Total MRC:	<u>\$73.77</u>	Per line:	<u>\$24.59</u>

FDN UNE-P-Zone 2**

Business lines x 3 lines	\$68.64		
Hunting x 3 lines	\$6.51		
Total MRC:	<u>\$75.15</u>	Per line:	<u>\$25.05</u>

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TAMARAC - PMBHFLTA (RG12) - ZONE 1

FDN UNE-P-Zone 1***

Business lines x 3 lines	\$52.62		
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 6 day of November, 2002.

BellSouth Telecommunications, Inc.
Nancy White/James Meza/Patrick Turner
C/O Ms. Nancy H. Sims
150 S. Monroe Street
Suite 400
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nancy.sims@bellsouth.com

Ms. Felicia Banks
Florida Public Service Commission
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Tallahassee, FL 32399-0850
fbanks@psc.state.fl.us

ACCESS Integrated Networks, Inc.
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rodney.page@accesscomm.com

Time Warner Telecom of Florida LP
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Florida Competitive Carriers Assoc.
C/O McWhirter Law Firm
Joseph McGlothlin/Vicki Kaufman/Perry
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glunsford@uslec.com

XO Florida, Inc.
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Nashville, TN 37201-2315
dshaffer@xo.com

M Power Communications Corp
Mr. Rick Heatter
175 Sully's Trail, Suite 300
Pittsford, NY 14534-4558
rheatter@mpowercom.com

A handwritten signature in black ink, appearing to read "Matthew Feil". The signature is fluid and cursive, with a large loop at the end.

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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

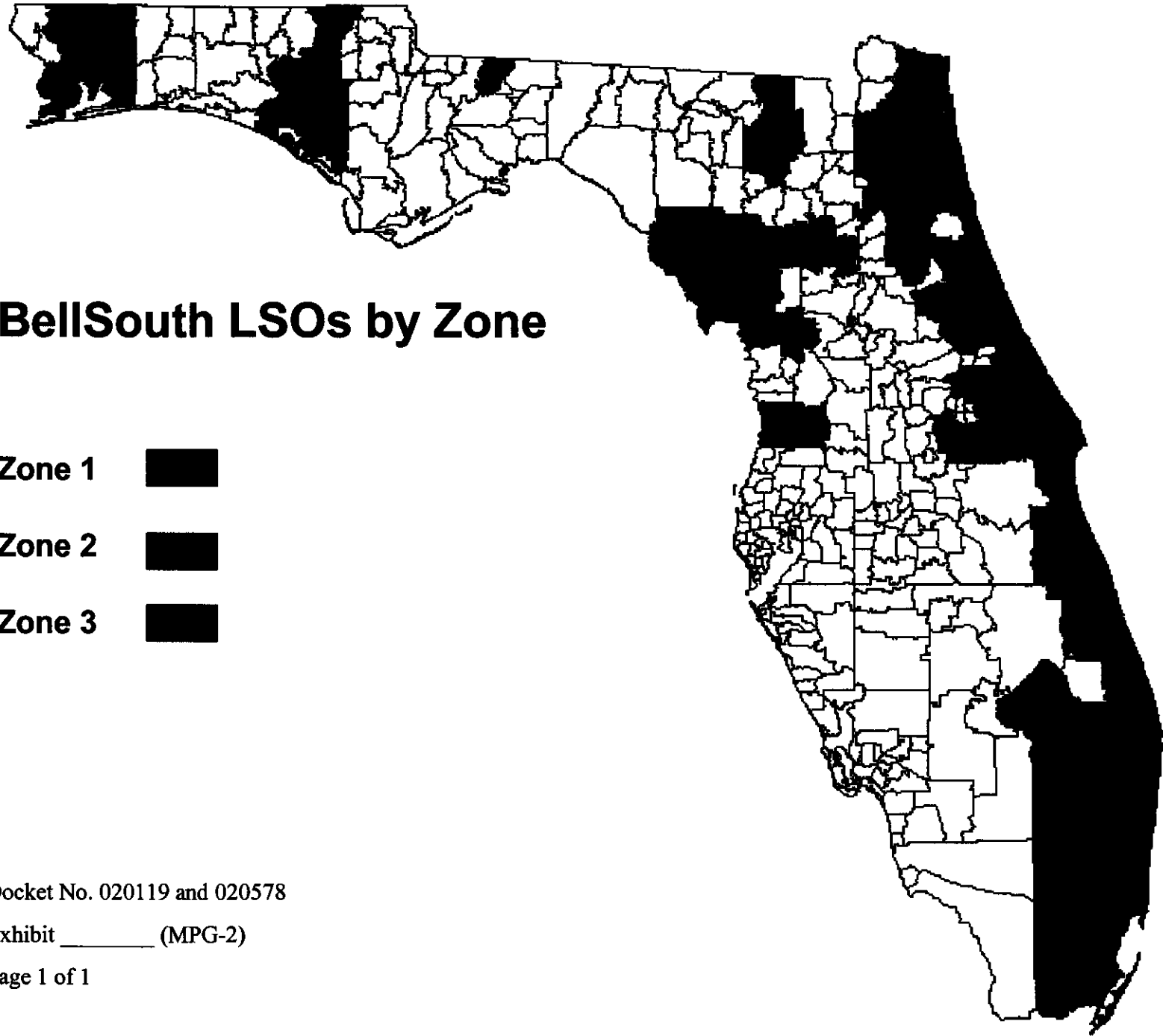
In Re: Petition for Expedited Review }
and Cancellation of BellSouth }
Telecommunications, Inc.'s Key Customer } Docket No. 020119-TP
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In Re: Petition for Expedited Review }
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Promotional Tariffs by the Florida }
Competitive Carrier's Association }
_____ }

EXHIBIT MPG-2

FILED WITH THE DIRECT TESTIMONY OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.



BellSouth LSOs by Zone

Zone 1 

Zone 2 

Zone 3 

Docket No. 020119 and 020578

Exhibit _____ (MPG-2)

Page 1 of 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Expedited Review }
and Cancellation of BellSouth }
Telecommunications, Inc.'s Key Customer } Docket No. 020119-TP
Promotional Tariffs and For an }
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Promotional Tariffs by the Florida }
Competitive Carrier's Association }
_____ }

EXHIBIT MPG-3

FILED WITH THE DIRECT TESTIMONY OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of Southwestern Bell Telephone
Company's Tariff Filing to Initiate a Business MCA
Promotion

)
) Case No. TT-2002-108
) Tariff No. 200200051

In the Matter of Southwestern Bell Telephone
Company's Proposed Revisions to PSC Mo. No. 35
(General Exchange Tariff) Regarding CompleteLink

)
) Case No. TT-2002-130
) Tariff No. 200200151

REPORT AND ORDER

Issue Date: December 18, 2001

Effective Date: December 28, 2001

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Initiate a Business MCA Promotion

))
) **Case No. TT-2002-108**
) Tariff No. 200200051

In the Matter of Southwestern Bell Telephone Company's Proposed Revisions to PSC Mo. No. 35 (General Exchange Tariff) Regarding CompleteLink

))
) **Case No. TT-2002-130**
) Tariff No. 200200151

APPEARANCES

Paul G. Lane, General Counsel
Mimi B. McDonald, Attorney at Law
Southwestern Bell Telephone Company
One Bell Center, Room 3510
St. Louis, Missouri 63101

For: Southwestern Bell Telephone Company.

Craig S. Johnson, Attorney at Law
Andereck, Evans, Milne, Peace & Johnson
700 East Capitol
P.O. Box 1438
Jefferson City, Missouri 65102

For: MoKan Dial, Inc. and Choctaw Telephone Company

Carl J. Lumley, Attorney at Law
Leland B. Curtis, Attorney at Law
Curtis, Oetting, Heinz, Garret & Soule
130 South Bemiston, Suite 200
Clayton, Missouri 63105

For: NuVox Communications of Missouri, Inc. and AT&T Communications of the Southwest, Inc.

David J. Stueven, Attorney at Law
IP Communications
6405 Metcalf, Suite 120
Overland Park, Kansas 66202

For: IP Communications Corporation

Carol Keith, Attorney at Law
16090 Swingley Ridge Road, Suite 500
Chesterfield, Missouri 63006

For: NuVox Communications of Missouri, Inc.

Michael Dandino, Senior Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

For: The Office of the Public Counsel and the Public.

Marc D. Poston, Senior Counsel
P.O. Box 360
Jefferson City, Missouri 65102

For: The Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

Southwestern Bell Telephone Company has submitted a tariff that would implement a discount for its Business MCA service based on the customer's execution of a one-, three- or five-year term agreement. In a separate tariff, Southwestern Bell would establish a CompleteLink service offer that would grant discounts to customers who agreed to term and volume commitments. The Commission suspended both tariffs and now finds that the proposed tariffs would harm competition in the local exchange services market. For that reason, Southwestern Bell's tariffs are rejected.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On August 21, 2001, acting on its own motion, the Commission issued an order in Case Number TT-2002-108 that suspended a tariff filed by Southwestern Bell Telephone Company.

Southwestern Bell's tariff would implement a promotion that would discount optional Metropolitan Calling Area (MCA) service rates pursuant to term contracts signed by business customers. In its order suspending Southwestern Bell's tariff, the Commission expressed its concern that the proposal to offer rate discounts in long-term contracts might adversely affect competition. So that it would have sufficient time to study the effect of the proposed tariff, the Commission suspended Southwestern Bell's tariff for a period of 120 days, from August 22 to December 20. On December 13, the Commission issued an order further suspending the tariff until December 31, so that this Report and Order could be given a ten-day effective date.

In its order suspending Southwestern Bell's tariff, the Commission directed its records department to send notice of the tariff suspension to all telecommunications companies certificated to do business in Missouri. The Commission also directed that any proper person or entity desiring to intervene should submit an application to intervene no later than September 10. The Commission received timely applications to intervene from Choctaw

Telephone Company and MoKan Dial, Inc., NuVox Communications of Missouri, Inc., and AT&T Communications of the Southwest, Inc. On September 19, the Commission issued an order granting each of those applications to intervene.

On September 4, NuVox Communications of Missouri, Inc. filed a motion asking the Commission to suspend or reject a tariff filed by Southwestern Bell. NuVox's motion was assigned case number TT-2002-130. The tariff that NuVox asked the Commission to suspend or reject would modify Southwestern Bell's general exchange tariff to introduce what Southwestern Bell calls CompleteLink service.

Southwestern Bell, AT&T, and Staff filed responses to NuVox motion to suspend on September 12. Southwestern Bell opposed the motion to suspend. AT&T and Staff supported the proposed suspension and both filed motions asking the Commission to consolidate case numbers TT-2002-108 and TT-2002-130, as the issues regarding the two tariffs are similar.

On September 20, the Commission issued an order that suspended Southwestern Bell's CompleteLink tariff until January 22, 2002. In the same order, the Commission directed its records department to provide notice of the tariff suspension to all telecommunications companies certificated to do business in Missouri and directed any proper person or entity wishing to intervene to file an application to intervene no later than October 10.

On September 28, the Commission issued an order that consolidated case numbers TT-2002-108 and TT-2002-130. In the same order, the Commission adopted a procedural schedule for the consolidated cases. All parties in either case were made parties in the consolidated case. Subsequently, on October 25, IP Communications Corporation, which had timely applied for intervention in TT-2002-130, was made a party to the consolidated case.

The parties submitted prefiled direct, rebuttal and surrebuttal testimony and the consolidated case proceeded to hearing on November 5 and November 7. Southwestern Bell, Staff, Public

Counsel, and AT&T and NuVox filed initial briefs and proposed findings of fact and conclusions of law on November 21.[1] The same parties filed reply briefs on November 28.

The Two Tariffs

The Commission has suspended two tariffs filed by Southwestern Bell. Under the first tariff, referred to as the Business MCA Promotion,[2] business customers are eligible to receive a discount on each of the optional MCA services that they subscribe to in return for a one-, three-, or five-year term commitment for their local access line and optional MCA services. The tariff provides that customers will receive an eighteen percent discount on a one-year contract, a twenty-two percent discount on a three-year contract, or a twenty-five percent discount on a five-year contract. Southwestern Bell's Business MCA promotion is available to all business customers in the optional MCA areas.

If a Southwestern Bell business customer signs a term commitment under the Business MCA promotion and then disconnects any portion of its contracted service prior to the expiration of the term commitment, that customer will be required to pay an early termination fee. The tariff provides that the early termination fee will be fifty percent of the monthly rate for the service that was disconnected, multiplied by the number of months remaining on the contract.

Southwestern Bell's Business MCA promotion is optional. No customer will be required to enter in to a term commitment. A business customer may choose to purchase MCA service at a standard month-to-month retail price with no term commitment, no term discount, and no risk of imposition of an early termination fee.

The second suspended tariff is referred to as the CompleteLink service offer. CompleteLink is an optional term and volume discount plan by which a business customer receives discounts on the multiple services that a customer purchases from Southwestern Bell. For example, a customer might receive a discount on its local access, local usage, toll usage, toll-free usage and various vertical features that it might purchase, such as call waiting, call forwarding, and other custom calling features. The CompleteLink plan does not require the

customer to purchase any set number of products or services.

Under the CompleteLink plan, a business customer would receive monthly discounts on the products and services it purchases from Southwestern Bell, based on the customer's Minimum Annual Revenue Commitment, referred to as the Customer's MARC. The customer's MARC is the sum total of the customer's annual billed charges, before any discount is applied, for regulated services provided by Southwestern Bell in its five state region, consisting of Missouri, Arkansas, Kansas, Oklahoma, and Texas. The business customer may subscribe to CompleteLink by agreeing to a one-, three-, or five-year service agreement.

The CompleteLink customer that chooses a longer length of service agreement will receive a greater percentage discount. For example, if a customer has a MARC of \$12,000 and signs a one-year service agreement, the customer would receive a 6.5 percent discount. If that same customer signs a five-year service agreement, the customer would receive a 9 percent discount. Similarly, a customer with a higher MARC will receive a greater percentage discount. For example, a customer with a \$12,000 MARC and a one-year service agreement would receive a 6.5 percent discount, but a customer with a \$150,000 MARC and a one-year service agreement would receive a 10 percent discount.

CompleteLink customers who fail to meet their MARC will be billed the difference between their MARC and the annual revenue billed. Customers terminating a CompleteLink service agreement prior to the expiration of the service agreement would be subject to an early termination fee equal to 50 percent of the MARC multiplied by the number of years, or portions of a year, remaining in the customer's service agreement. For example, if a customer has a MARC of \$7,000 and agrees to a three-year service agreement, but cancels after two years, the termination charge would be \$3,500. The CompleteLink tariff does contain a provision that allows a customer to cancel the agreement within 90 days of execution without incurring an early termination fee.

CompleteLink is available to all business customers, but business customers who have received a written competitive offer, and are considering taking that offer, but decide to stay with Southwestern Bell, will receive an additional four percent discount. That provision is

referred to as a "save" or "retention" provision. A business customer who has left Southwestern Bell and is returning to Southwestern Bell by committing to a CompleteLink agreement will receive an additional eight percent discount. That provision of the tariff is referred to as a "winback" provision.

Competitive Position of Southwestern Bell

Southwestern Bell is an incumbent local exchange carrier (ILEC) as that term is defined in Section 251(h) of the Telecommunications Act of 1996. [3] That means that before the passage of the Telecommunications Act of 1996, Southwestern Bell was a regulated monopoly provider of local exchange service within its exchanges. In other words, before the advent of competition, all local service customers within Southwestern Bell's exchanges were customers of Southwestern Bell.

The Telecommunications Act of 1996 permitted the creation of competitive local exchange carriers (CLECs). CLECs are telecommunications carriers that have decided to go into the exchange of an ILEC to compete to provide local telephone services. Currently there are 66 CLECs competing with Southwestern Bell in its Missouri exchanges. At least one CLEC is operating, and serving customers in each of Southwestern Bell's 160 Missouri exchanges. Furthermore, at least 22 percent of the business market in Southwestern Bell's exchanges is controlled by a CLEC.

Southwestern Bell suggests that the current level of competition in its exchanges justifies its attempts to maintain, or increase its market share using term agreements, and retain and winback provisions, as promotional tools. However, Southwestern Bell is still in a position to dominate its CLEC rivals. While the CLECs collectively may control 22 percent of the business market in Southwestern Bell's exchanges, that 22 percent is spread out among 66 different CLECs. No CLEC has the resources to attempt to duplicate Southwestern Bell's telecommunications network. As a result, CLEC competitors must rely on their ability to utilize

all or a portion of Southwestern Bell's network in order to provide services to their own customers.

Walt Cecil, a regulatory economist for the Staff of the Commission, testified that because of its powerful position in the local telephone market, Southwestern Bell "is in a position to threaten competitors' market shares and continued existence, while the competitors are not yet in a position to threaten SWBT's (Southwestern Bell's) existence in its own exchanges."^[4] Mr. Cecil goes on to testify that "SWBT is different than its competitors and therefore should be subject to more stringent regulatory oversights until those differences become less substantial."^[5] The Commission agrees with Mr. Cecil's statement. If effective competition in the local telecommunications market is to survive and prosper in Southwestern Bell's exchanges, Southwestern Bell must be subject to heightened regulatory oversight.

Effect of Term Agreements on Competition

Both the Business MCA Promotion and the CompleteLink tariff provide that customers who want to obtain discounted rates must agree to remain as customers of Southwestern Bell for periods of one, three, or five years. The requirement that the customer remain with Southwestern Bell throughout the length of the term agreement is enforced by the requirement that a customer leaving Southwestern Bell before the expiration of its term agreement pay a substantial early termination fee.

There is nothing inherently improper about the imposition of an early termination fee. As Southwestern Bell points out, many tariffs of its competitors - tariffs that have been approved by the Commission - contain similar early termination fees. Similarly, there is no indication that the amount of the fee that would be imposed by Southwestern Bell is unusual or excessive. Again, the early termination fees charged by some of Southwestern Bell's competitors may be higher than those that Southwestern Bell plans to impose. Nevertheless, there can be no doubt that the early termination fees would achieve their desired goal of

providing a strong incentive for a business customer not to switch its service to a competing provider during the term of the service agreement. Any CLEC attempting to persuade a customer to leave Southwestern Bell while subject to a term agreement would not only have to offer a better rate but would also have to find a way to convince the customer to pay a large upfront penalty for leaving Southwestern Bell.

In addressing the possible impact of long-term service agreements, Walt Cecil, witness for the Staff, stated that:

[i]n general, multi-year contracts artificially reduce the pool of potential CLEC customers and forestall the intended effects of the Act. By reducing the pool of potential customers, CLEC growth plans and investment recovery, essentially the opportunities to grow and to successfully compete are constrained.[6]

Cecil then went on to say that "Long term contracts offer lower prices and are more attractive to end-users. If end-users choose these lower priced, long-term relationships, the competitive environment in the long run is at risk of collapsing." [7] The Commission agrees with and accepts the expert opinion of Mr. Cecil.

Effect of Save and Winback Provisions

In addition to its provisions for term agreements, Southwestern Bell's CompleteLink tariff contains provisions that would give an additional four percent discount to customers who turn down a service offer from a CLEC to stay with Southwestern Bell. Furthermore, the tariff would reward customers who return to Southwestern Bell after having purchased services from a CLEC by giving them an additional eight percent discount. These tariff terms are referred to as "save" and "winback" provisions.

Southwestern Bell's save and winback provisions would have much the same impact on the health of competition in the local service market as would term agreements. But, in addition to the anticompetitive effects resulting from the use of term agreements by a dominant ILEC, save and

winback provisions can cause further damage to the emerging competitive market. Such provisions are targeted directly at the customer base of the CLECs. If Southwestern Bell takes back many of those customers with save and winback provisions, and then locks them up with long-term contracts, CLECs might be left without a customer base to which they can market. Edward J. Cadieux, witness for NuVox Communications of Missouri, Inc., one of the CLECs currently attempting to compete against Southwestern Bell, testified that the combination of term discounts and save and winback provisions might freeze competition at its currently inadequate level. If the CLECs are frozen out of the competitive market, they would then be forced to abandon their attempt to compete in Missouri, leaving only Southwestern Bell as a viable local service provider. Until the CLECs are in a strong enough position to effectively compete with Southwestern Bell, the use of save and winback provisions by Southwestern Bell is anticompetitive. X

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Southwestern Bell is a "Telecommunications Company" as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That same section authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days, plus an additional six months if the hearing regarding such suspension cannot be concluded within 120 days.

In 1996 the Missouri General Assembly passed legislation aimed at promoting competition in Missouri's telecommunications industry. Section 392.185, RSMo 2000, which establishes the purpose of that legislation, states that:

The provisions of this chapter shall be construed to: (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri; (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."

Therefore, the Public Service Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition.

Section 392.200.2, RSMo 2000, provides in pertinent part as follows:

No telecommunications company shall directly or indirectly or by a special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. *Promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. ... (emphasis added)*

This statute means that the Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.

Section 392.200.3, RSMo 2000, provides as follows:

No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

This statute has been interpreted to "forbid discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions." [8] Rate differences are permitted only

if there is any "reasonable and fair difference in condition which equitably and logically justifies a different rate." [9]

The Commission has previously found, as a matter of fact, that Southwestern Bell's proposed promotional tariffs will be detrimental to the health and development of competition in Missouri's local exchange market. Those tariffs are therefore unjust and unreasonable. In keeping with the Commission's obligation under Section 393.200, RSMo 2000, the Commission must reject Southwestern Bell's tariffs.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. **Should the Missouri Public Service Commission approve Southwestern Bell Telephone Company's Business Metropolitan Calling Area Service Promotion, which would discount Optional Metropolitan Call Area service rates pursuant to term contracts signed by business customers?**
2. **Should the Missouri Public Service Commission approve Southwestern Bell Telephone Company's CompleteLink Tariff, which contains term commitments and retention and winback provisions?**

Southwestern Bell argues that its tariffs should not be rejected for six reasons. The Commission is not persuaded by any of Southwestern Bell's arguments. Southwestern Bell's first argument is that its Business MCA promotion and CompleteLink service offers are optional. In other words, no business customer will be obliged to sign up for these offers. The optional nature of Southwestern Bell's promotional offers would be relevant only if the Commission were concerned about the fairness of these offers as they impact individual customers. The Commission does not doubt that these offers could be of short-term benefit to

individual business customers. Certainly, business customers are sophisticated enough to do the necessary cost-benefit analysis to determine whether they will benefit from the proposed promotions. The Commission's concern is not with protecting the individual business customer. Rather, it is concerned about protecting the viability of the overall market for local exchange telecommunications services.

Indeed the problem may be that these promotions will be such a good deal for individual business customers that Southwestern Bell will be able to claim, and lock up for an extended period, so many customers that its competitors will be weakened, or even driven out of the market entirely. If that happens, competition will have failed and business customers will ultimately lose the benefits of competition.

Southwestern Bell's second argument is that its Business MCA promotion and CompleteLink service offer benefit customers through increased options and lower prices. Again, while the offers will benefit individual customers, at least in the short term, the Commission has found that Southwestern Bell's offers are a threat to the long-term health of the competitive market for local phone service. Ultimately, if the market fails, customers will be left with no choice except Southwestern Bell.

Third, Southwestern Bell argues that its Business MCA promotion and CompleteLink service offers are being made in response to the demands of its customers. Southwestern Bell asserts that its customers want: (a) to receive telecommunications services at lower prices; (b) service offerings that recognize the full volume of services that they are purchasing from SWBT; (c) term commitments that allow them to project the costs of their telecommunications needs; and (d) to purchase Southwestern Bell's CompleteLink service offer, which is available in the four other SBC Southwestern Bell states and the five SBC Ameritech states. The Commission does not doubt that there will be customer demand for the promotional offers that Southwestern Bell would like to make available. All businesses are interested in their bottom line, not necessarily with the health of competition. But the Commission has a duty to look beyond the bottom line. The Commission is obligated to protect the viability of the competitive market in order to protect Missouri's telecommunications customers from the threat of

monopoly power in a future without viable competition in the local telecommunications market.

Southwestern Bell's fourth argument is that it is offering its Business MCA promotion and CompleteLink service offer in response to the competitive market and that its proposed offerings will increase rather than harm competition. Southwestern Bell argues that this Commission and the Federal Communications Commission have recently found that Southwestern Bell has opened its local market in Missouri to competition when they approved Southwestern Bell's application to provide interLATA long distance service in Missouri. Southwestern Bell also points to the fact that ever larger numbers of CLECs are offering competitive services in its exchanges, testimony indicated that approximately 22 percent of the business market is now controlled by CLECs.

While this Commission and the FCC have found that Southwestern Bell satisfied the fourteen-point checklist found in Section 271 of the Telecommunication Act of 1996,^[10] that finding only indicates that the local telecommunications market in Missouri is open to competition. It does not mean that the competitive market is mature enough to withstand the pressures that would be placed on it by the promotions proposed by Southwestern Bell. Unless the Commission acts to protect competition, the local exchange market may be open to competition but have no surviving competitors.

Southwestern Bell's fifth argument is that its Business MCA promotion and CompleteLink service offer are consistent with previous decisions of this Commission. Southwestern Bell presented evidence at the hearing of seventeen tariffs offering term discounts by seven of Southwestern Bell's competitors, fourteen tariffs offering volume discounts by eight of Southwestern Bell's competitors, and seventeen tariffs from ten of Southwestern Bell's competitors that contain save or winback provisions. Southwestern Bell also points out that the Commission has previously approved term, volume, save, or winback provisions in other

tariffs that it has submitted.

Southwestern Bell is correct when it contends that the Commission has previously approved, or allowed to go into effect, tariffs that contain provisions similar, or nearly identical to the provisions that it is rejecting in this order. However, the Commission is not bound to comply with its previous decisions. As an administrative agency the Commission is not bound by *stare decisis*, [11] and the failure of the Commission to explain why it is not taking the same position in one case that it took in a previous case is not a basis for overturning the Commission's action. [12] Furthermore, only these two tariffs are currently before the Commission. In finding that these two particular tariffs will harm competition, the Commission is not attempting to establish a rule with application beyond the facts of these cases. If other tariffs are brought to the attention of the Commission, the Commission will deal with those tariffs on their own merits. Similarly, the Commission will examine on their own merits tariffs submitted by CLECs that may contain term or volume discounts, or save or winback provisions.

The Commission makes no binding decision in this report and order beyond its rejection of the two tariffs currently before it. However, the Commission is currently considering another tariff filed by Southwestern Bell, as well as tariffs filed by various CLECs that also contain term agreements. While it does not wish to prejudge those cases, for the guidance of the telecommunications industry, the Commission will set forth its views regarding term agreements. The Commission believes that term agreements exceeding one year in length are an unacceptable threat to the health of competition. Term agreements that do not exceed one year in length may be acceptable.

Finally, Southwestern Bell argues that there is no statutory authority that would allow the Commission to reject its tariffs, or to treat its tariffs differently than those of its competitors. In

its conclusions of law the Commission has found to the contrary. The Commission believes that sound public policy requires that it take the steps necessary to preserve the existence of the competitive market for local exchange telecommunications services.

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that Southwestern Bell's tariff to add a Business MCA promotion and its tariff to introduce its CompleteLink service offer are unjust and unreasonable and should be rejected.

IT IS THEREFORE ORDERED:

1. That the proposed tariff sheet submitted on July 20, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200051, is rejected. The tariff sheet rejected is:

P.S.C. Mo. – No. 24
Local Exchange Tariff
Original Sheet 1.0302

2. That the proposed tariff sheets submitted on August 23, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200151, are rejected. The tariff sheets rejected are:

P.S.C. Mo. – No. 35
General Exchange Tariff
Section 54
Original Sheet 1 through Original Sheet 5

3. That this Report and Order shall become effective on December 28, 2001.

BY THE COMMISSION

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge

(SEAL)

Simmons, Ch., and Lumpe, C., concur;
Gaw, C., concurs, with concurring opinion attached;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.
Forbis, C., not participating.

Dated at Jefferson City, Missouri,
on this 18th day of December, 2001.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Southwestern Bell Telephone)
Company's Tariff Filing to Initiate a Business MCA)) Case No. TT-2002-108
Promotion))

In the Matter of Southwestern Bell Telephone)
Company's Proposed Revisions to PSC Mo. No. 35)) Case No. TT-2002-130
(General Exchange Tariff) Regarding CompleteLink)

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I join in the decision of the majority but write separately to state that I agree that save and winback provisions, when used in conjunction with term agreements exceeding one year in length, are a threat to competition. However, I express no opinion today as to whether save and winback provisions, when not associated with term agreements exceeding one year, should be allowed.

Respectfully submitted,

Steve Gaw, Commissioner

Dated at Jefferson City, Missouri,
on this 18th day of December, 2001.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Southwestern Bell Telephone)
Company's Tariff Filing to Initiate a Business MCA) Case No. TT-2002-108
Promotion) Tariff No. 200200051

In the Matter of Southwestern Bell Telephone)
Company's Proposed Revisions to PSC Mo. No. 35) Case No. TT-2002-130
(General Exchange Tariff) Regarding CompleteLink) Tariff No. 200200151

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully disagree with the majority's decision. The Commission has rejected two tariffs filed by Southwestern Bell Telephone Company that would offer reduced rates and other benefits to customers. The Commission indicates that it has taken this step because it fears that the tariffs will threaten competition in the basic local service market.

Without question, Southwestern Bell wants to offer these promotions so that it can improve its position in the competitive basic local service market. That is what competitor's do in a competitive market. It is equally understandable that Southwestern Bell's competitors, including those that appeared in this case, would like to prevent Southwestern Bell from improving its competitive position, while at the same time improving their own position. Again, that is what competitors do in a competitive market. There is, however, no sufficient evidence in the record for the Commission to conclude that it must step into the competitive market to

protect certain competitors by rejecting Southwestern Bell's promotional tariffs.

The types of promotions that Southwestern Bell is attempting to offer are not new. The evidence established numerous instances in which the Commission has approved term agreements, "save" provisions, and "winback" provisions as well as early-termination-fee provisions that are substantially similar to the provisions in the tariffs at issue. Those provisions have been offered by Southwestern Bell, as well as by its competitors. Yet there was no evidence presented that would indicate that these provisions have harmed the state of competition. Instead, the evidence indicates that the market continues to become more competitive.

The number of competitive local exchange carriers competing in that portion of the local market served by Southwestern Bell has increased from 47 in June of 2000, to 66 at the time of the hearing. CLEC's serve customers in every one of Southwestern Bell's exchanges and serve a minimum of 22 percent of the lucrative business market. Far from being stifled, competition in the basic local service market has continued to grow, and there is no reason to believe that the promotions proposed by Southwestern Bell will stifle competition in the future.

When competition was introduced to the basic local service market in 1996 there was an expectation that competition would provide an incentive for incumbent local exchange carriers, such as Southwestern Bell, to improve the service they offer their customers by offering more options and lower prices. Missourians have seen the fruits of that competition through promotional offers such as those that Southwestern Bell has been offering in the state and would like to continue to make available to its customers.

The proposed offers would be available for resale to CLECs at the resale discount. The result would be continued growth of competition with customers of both ILECs and CLECs having more options and lower prices. Furthermore, facilities-based CLECs have been free to offer similar services. If Southwestern Bell's proposed tariff were approved there would be an incentive for CLECs to respond in kind. Competing services are one of the benefits of a

competitive environment which would flow from the Commission's approval of Southwestern Bell's Business MCA promotion and Complete Link service offer.

The majority states that the use of the proposed tariffs by Southwestern Bell would be detrimental to the health and development of competition in Missouri's local exchange market. Yet, there are no findings of fact from the record that support that conclusion. In fact, there is no explanation of why those tariffs "are . . . unjust and unreasonable" in today's market which admittedly is more competitive than the market that existed when similar tariffs were previously found to be just and reasonable. Today's decision unnecessarily denies Missouri consumers many of the benefits of competition.

I respectfully dissent.

Respectfully submitted,

Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 18th day of December, 2001

[1] At their request, Choctaw Telephone Company and MoKan Dial, Inc. were excused from participation in the hearing and have not filed briefs.

[2] MCA is an acronym for Metropolitan Calling Area. The MCA service is available in several of Missouri's larger cities and permits a customer to make discounted calls across exchange boundaries within the metropolitan area.

[3] 47 U.S.C. 251(h).

[4] Cecil Rebuttal, exhibit 6, at 3

[5] Cecil Rebuttal, exhibit 6, at 3

[6] Cecil Rebuttal, exhibit 6, at 5.

[7] Cecil Rebuttal, exhibit 6, at 6.

[8] *State ex rel. DePaul Hospital v. PSC*, 464 S.W.2d 737, 738 (Mo. App. 1970)

[9] *Id.* at 740

[10] 47 U.S.C. 271(c)(2)(B)

[11] *State ex rel. GTE North v. PSC* 835 S.W.2d 356 (Mo. App. W.D. 1992)

[12] *id.*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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

EXHIBIT MPG-4

FILED WITH THE DIRECT TESTIMONY OF
MICHAEL P. GALLAGHER

FILED ON BEHALF OF
FLORIDA DIGITAL NETWORK, INC.

Public Utility Commission of Texas Rules and Laws



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**Rulemaking to Amend R. § 26.226 to Address Winback/Retention Offers by Chapter 58 Electing Companies
Project #25784**

List of Questions

1. As to (c) (2) (B), might the appropriate time period be 7, 10, 15, 60 or some other number of days? Please provide a rationale for such time period.
2. As to (c) (2) (C), might the appropriate discount level instead be 10% or some other level? Please provide a rationale for such level of discount. And might the appropriate time period instead be 30, 90, or some other number of days? Please provide a rationale for such time period.
3. Is (c) (2) (D) administratively practical and enforceable? If not, please propose alternative language that places any appropriate restrictions on retention offers.

Last Updated: 05/06/02

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§26.226. Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies.

- (a) **Application.** This section applies to any electing company as the term is defined in the Public Utility Regulatory Act (PURA) §58.002. Other sections applicable to an electing company, include, but are not limited to §26.211 of this title (relating to Rate-Setting for Services Subject to Significant Competitive Challenges), §26.224 of this title (relating to Requirements Applicable to Basic Network Services for Chapter 58 Electing Companies), §26.225 of this title (relating to Requirements Applicable to Nonbasic Services for Chapter 58 Electing Companies) and §26.227 of this title (relating to Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies).
- (b) **Purpose.** The purpose of this section is to establish requirements for Chapter 58 electing incumbent local exchange companies (ILECs) to exercise pricing flexibility.
- (c) **Pricing flexibility.** An electing ILEC shall exercise pricing flexibility in accordance with this section and §26.227 of this title.
- (1) Pricing flexibility includes:
- (A) customer specific contracts;
 - (B) packaging of services;
 - (C) volume, term, and discount pricing;
 - (D) zone density pricing, with a zone to be defined as an exchange; and
 - (E) other promotional pricing.
- (2) A discount or other form of pricing flexibility for a basic or nonbasic service may not be preferential, prejudicial, discriminatory, predatory or anticompetitive.
- (A) A discount or other form of pricing flexibility for a basic or nonbasic service, including packaging of regulated and unregulated services, is presumed not to be discriminatory if it is made available on a system wide basis.
 - (B) A discount or other form of pricing flexibility for a basic or nonbasic service, including packaging of regulated and unregulated services, is presumed to be anti-competitive if the eligibility of such discount is limited to a former customer and the discount is offered to a former customer within 30 days after that customer switches to and is receiving service from a CLEC.
 - (C) A discount or other form of pricing flexibility, including packaging of regulated and unregulated services, where eligibility of such discount is limited to a former customer, is presumed to be anti-competitive if such discount or pricing flexibility consists of a discount for more than 25% of the recurring charges exceeding 60 days.
 - (D) A discount or other form of pricing flexibility, including packaging of regulated and unregulated services, is presumed to be anti-competitive if the eligibility for such discount is only for a customer who is
 - (i) considering changing some or all of their services to a competitor of the electing ILEC or an affiliate of the electing ILEC; and/or
 - (ii) has been contacted by a competitor of the electing ILEC or by an affiliate of the electing ILEC.
- (3) This section does not prohibit a volume discount or other discount based on a reasonable business purpose.
- (4) Notwithstanding PURA §58.052(b) or PURA, Chapter 60, Subchapter F, an electing company may exercise pricing flexibility for basic network services, including the packaging of basic network services with any other regulated or unregulated service or any service of an affiliate.
- (5) An electing company may flexibly price a package that includes a basic network service in any manner provided by paragraph (1) of this subsection.
- (6) An electing company may use pricing flexibility for a basic or nonbasic service.
- (d) **Pricing standards.** An electing company exercising pricing flexibility shall price its offerings pursuant to this subsection.

- (1) The electing ILEC shall set the price of a package of services containing basic network services and nonbasic services at any level at or above the lesser of:
 - (A) the sum of the long run incremental costs of any basic network services and nonbasic services contained in the package; or
 - (B) the sum of tariffed prices of any basic network services contained in the package and the long run incremental costs of nonbasic services contained in the package.
 - (2) A price that is set at or above the long run incremental cost of a service is presumed not to be a predatory price.
 - (3) The price of a package that combines regulated products or services with unregulated products or services shall, in addition to the requirements of paragraph (1) of this subsection, recover the cost to the electing company of acquiring and providing the unregulated products or services. In this section, unregulated products or services are products or services provided by an entity that is unaffiliated with the electing company.
 - (4) The price of a package that combines regulated products or services with the products or services of an affiliate shall, in addition to the requirements of paragraph (1) of this subsection, recover the cost to the electing company of acquiring and providing the affiliate products or services, which shall be greater than or equal to the cost to the affiliate of acquiring and/or providing the products or services. The cost to the electing company of acquiring or providing the affiliate's products or services shall be valued in a manner consistent with FCC requirements and with paragraph (5) of this subsection. A group of products or services that are jointly marketed by an electing company in conjunction with one or more of its affiliates shall be priced in a manner consistent with FCC requirements, if any, and with paragraph (5) of this subsection.
 - (5) Consistent with PURA §52.051(1)(C), an electing company shall not use revenues from regulated monopoly services to subsidize services subject to competition.
- (e) Requirements for customer-specific contracts. Consistent with PURA §58.003, an electing ILEC may enter into customer-specific contracts for certain basic network services and certain nonbasic services as provided in this subsection. Additionally, for services listed in PURA §52.057(a), an electing ILEC may enter into customer-specific contracts pursuant to §26.211 of this title only if such customer-specific contracts are not inconsistent with the requirements of PURA, Chapter 58.
- (1) An electing company serving fewer than five million access lines may offer customer-specific contracts in accordance with this subsection.
 - (A) An electing company serving fewer than five million access lines shall not offer customer-specific contracts until it notifies the commission of the company's binding commitment to make the following infrastructure improvements consistent with PURA §58.003(b):
 - (i) install Common Channel Signaling 7 capability in each central office; and
 - (ii) connect all of the company's serving central offices to their respective local access and transport area (LATA) tandem central offices with optical fiber or equivalent facilities.
 - (B) The commitments described by subparagraph (A) of this paragraph do not apply to exchanges of the company sold or transferred before, or for which contracts for sale or transfer are pending on, September 1, 2001. In the case of exchanges for which contracts for sale or transfer are pending as of March 1, 2001, where the purchaser withdrew or defaulted before September 1, 2001, the company shall have one year from the date of withdrawal or default to comply with the commitments.
 - (2) An electing company serving more than five million access lines may offer customer specific contracts in accordance with this subsection.
 - (A) Unless the other party to the contract is a federal, state, or local governmental entity, an electing company serving more than five million access lines may not offer in an exchange a service, or an appropriate subset of a service, listed in PURA §58.051(a)(1) - (4) or §58.151(1) - (4) in a manner that results in a customer-specific contract until the earlier of:
 - (i) September 1, 2003; or

- (ii) the date on which the commission finds that at least 40% of the total access lines for that service or appropriate subset of that service in that exchange are served by competitive alternative providers that are not affiliated with the electing company.
- (B) Pursuant to subparagraph (A)(ii) of this paragraph, the commission may find that the following subsets of services are served by an alternative provider that is not affiliated with an ILEC serving more than five million access lines:
- (i) flat residential rate local exchange telephone service;
 - (ii) residential primary directory listings;
 - (iii) residential tone dialing service;
 - (iv) lifeline and tel-assistance service;
 - (v) service connection for basic residential services;
 - (vi) flat business rate local exchange telephone service;
 - (vii) business primary directory listings;
 - (viii) business tone dialing service;
 - (ix) service connection for all business services;
 - (x) direct inward dialing for basic business services; and
 - (xi) receipt of a directory.
- (3) This subsection does not preclude an electing company from offering a customer-specific contract to the extent allowed by PURA as of August 31, 1999.
- (4) An electing company may not implement a customer-specific contracting program in such a way as to circumvent prohibitions contained in Chapter 58 and subsection (c)(2) of this section.

Bob Casey

From: Stewart, Roger [roger.stewart@puc.state.tx.us]
Sent: Friday, April 19, 2002 7:06 PM
To: 'bcasey@psc.state.fl.us'
Subject: TX PUC Proj 24948 winback investigation - TX PUC ok'd staff proposal to initiate rulemaking

Hi Bob,

Just a brief update: In an "open meeting" yesterday (Thurs Apr 18), the TX Commissioners gave Staff an informal go-ahead to proceed with a winback rulemaking: to be Project 25784.

(Another note: looks as if the TX rulemaking may focus on discount pricing - such as: no discounts on recurring charges > X% or for more than Y months, no discounts at all in the first 7 or 10 or 30 days, etc. -- rather than on winback activities - such as: no winback marketing efforts within X days after switch, etc.)

Have a good weekend! (Hope you already are by the time of this message!)

Roger

Roger Stewart
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TR's State NewsWire.....with TRINSIGHT® -- April 15, 2002**STATE REGULATION WATCH****TEXAS -- Staff concludes 'win-back' restrictions are necessary****INDIANA -- URC sets hearings on Ameritech structural-separation plan****ARIZONA -- ACC to hold public meetings on Qwest LD bid****WASHINGTON -- UTC to examine Qwest's provisioning parity****OREGON -- AG files 'slamming,' prepaid service settlements****COLORADO -- Page recommends adopting 'N11' rules****ILLINOIS -- Court: filed-rate doctrine bars lawsuit****NEW YORK -- Court dismisses '976' complaint against Verizon****STATE LEGISLATION****CALIFORNIA -- Committee to mull sharing bill****CALIFORNIA -- Bill adds 'junk faxers' to 'no-call' list****BUSINESS ACTIVITY****ARIZONA -- Report examines Internet voting****PEOPLE ON THE MOVE****CALIFORNIA -- Gov. Davis appoints Superior Court judges****TEXAS -- Staff concludes 'win-back' restrictions are necessary**

The Public Utility Commission staff plans to develop a "straw man" rule restricting price-cap-regulated incumbent local exchange carriers' "win-back" and retention promotions. Win-back programs attempt to persuade customers who have switched their local service to a CLEC (competitive local exchange carrier) to return to the incumbent.

The straw man rule could (1) prohibit incumbents from offering win-back promotions for the first 30 days after a customer converts local service to a competitor, (2) restrict the terms and discounts in incumbents' win-back promotions, and (3) restrict incumbents' retention offers, the staff said.

Some win-back and retention promotions "can have anti-competitive impacts," the staff said. The commission should "limit such impacts" until price-cap regulated incumbents "are no longer dominant carriers," the staff said.

The staff said that incumbents' rates for "many vertical features are above super-competitive levels," which is evidence that price-cap-regulated incumbents "continue to possess significant market power."

Last year, a group of competitors asked the PUC to ban price-cap-regulated incumbents' win-back tariffs. (9/7/01 a.m.) The commission denied the competitors' request but held a workshop to investigate the effect of incumbents' win-back and retention activities on competition to decide whether any rule changes were necessary. (Project 24597)

INDIANA -- URC sets hearings on Ameritech structural-separation plan

The Utility Regulatory Commission has scheduled April 15-16 hearings on a proposal to separate SBC Ameritech-Indiana's retail and wholesale operations.

Last year, the Association of Communications Enterprises, AT&T Corp., the Competitive Telecommunications Association, and McLeodUSA Telecommunications Services, Inc., asked the commission to divide Ameritech's operations. (5/11/01 a.m.) AT&T told TR that structural separation was necessary to "jump start" competition in the residential local services market. SBC Ameritech controls more than 98% of residential and small business lines and more than 95% of all lines, AT&T said.

ARIZONA -- ACC to hold public meetings on Qwest LD bid

The Corporation Commission is planning to hold public comments sessions on Qwest Corp.'s bid to enter the in-region interLATA (local access and transport area) services market under section 271 of the federal Telecommunications Act of 1996, an ACC staff member told TR. The comment sessions will likely take place in May in the state's major population centers, the staff member added.

WASHINGTON -- UTC to examine Qwest's provisioning parity

OPEN MEETING COVER SHEET

MEETING DATE: April 18, 2002
DATE DELIVERED: April 12, 2002
AGENDA ITEM NO. : 24
CAPTION: Project No. 24948 – Investigation of
Winback/Retention Offers by Chapter 58
Electing Companies
ACTION REQUESTED: Discussion and Possible Action on Staff
Recommendation

Distribution List:

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Public Utility Commission of Texas

Memorandum

TO: Commissioner Brett A. Perlman
Commissioner Rebecca Klein

FROM: Bih-Jau (BJ) Sheu – Telecommunications Division
Randy Klaus – Telecommunications Division
Tina Gabel – Policy Development Division
Roger Stewart – Legal Division

DATE: April 12, 2002

RE: Agenda Item No. 24, Project No. 24948 – Investigation of
Winback/Retention Offers by Chapter 58 Electing Companies

Summary

Staff proposes that the Commission conclude this investigation with a finding that certain winback/retention promotions by Chapter 58 electing companies can have anti-competitive impacts. Staff thus recommends amending SUBST. R. 26.226 to limit such impacts until such time that Chapter 58 ILECs are no longer dominant carriers. Staff's analysis leading to that recommendation is found below. Attached to this memorandum please find a procedural history and a summary of parties' positions (Attachment A).

Staff Recommendation

Staff again recommends against a blanket prohibition of winback and retention offerings, consistent with Staff's response to the rulemaking petition in Project No. 24597. Such a restriction would undoubtedly deprive customers of one of the intended benefits of competition. Insulating CLECs from that form of price competition would deny customers of price reductions that might otherwise occur when competitors woo each other's customers. Nevertheless, Staff agrees with CLEC commenters that winback/retention offers can be used to selectively target marginally competitive market segments to the detriment of competition, especially in the early stages. The market reality that prices of many vertical features are above super-competitive levels today is

evidence that Chapter 58 ILECs continue to possess significant market power. Staff further recognizes that dominant carriers are able to use narrowly-tailored winback/retention promotions to keep competition sufficiently weak so that prices generally can be maintained or raised above the competitive level without losing so many sales so rapidly that the price increase proves unprofitable and must be rescinded.

Staff also notes that PURA permits Chapter 58 companies pricing flexibility with the following caveat – such pricing flexibility may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive. PURA § 51.004(a). Given current market conditions and the State of Texas policy to “(1) promote diversity of telecommunications providers” and “(2) encourage a fully competitive telecommunications marketplace” (PURA § 51.001; *see also* § 58.001(5)), Staff believes that the intermediate and long-term benefits of encouraging and maintaining market viability and provider choice for customers in general can outweigh certain short-term benefits to certain individual customers. Staff therefore recommends that the Commission direct Staff to initiate a rulemaking amending SUBST. R. 26.226 regarding certain types of promotions until such time that Chapter 58 ILECs are no longer dominant carriers.

Staff envisions that a “straw man” rule language would impose certain time and term/discount restrictions on winback and retention promotions. The “straw man” rule language could include:

- A time restriction on winback promotions (e.g. a Chapter 58 ILEC must wait 30 days after a former customer has switched to a competitor to offer such promotions.)
- A limit on discounts and terms provided in winback promotions.
- Restrictions placed on retention offers.

As mentioned above, provided in attachment A are a procedural history and a summary of parties’ positions drawn from the oral and written comments before, at, and after the workshop.

Attachment A

Procedural History

On September 4, 2001, Southwest Competitive Telephone Association, IP Communications Corporation, XO Texas, Inc., Association of Communications Enterprises, Competitive Telecommunications Association, Sage Telecom, Inc., Z-Tel Communications, Inc, and Birch Telecom Of Texas, LLP (Petitioners) filed a petition (assigned to Project No. 24597) to amend P.U.C. SUBST. R. 26.226. Petitioners sought to amend SUBST. R. 26.226 relating to Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies by incorporating a blanket prohibition of winback and retention programs to curtail what they believed to be anticompetitive and discriminatory behavior.

On October 12, 2001, Southwestern Bell Telephone Company (SWBT) and Verizon Southwest (Verizon) filed comments opposing that petition. Time Warner Telecom of Texas, L.P., Ionex communications, Inc., KMC Telecom, Inc. and Talk America, Inc. filed comments supporting the petition.

On November 8, 2001, the Commission denied the petition in Project No. 24597 but directed Staff to hold a workshop to further investigate the issues raised by the Petition. In response to Staff questions issued in this project, a number of carriers and trade associations filed comments on November 30, 2001. Staff held a workshop on December 12, 2001. Parties filed post-workshop comments on January 18, 2002. In light of "new" comments from SWBT, Staff invited reply comments, which were filed on March 15, 2002.

Summary of Parties' Positions:

(Note: Comments regarding the alleged misuse of customer proprietary network information (CPNI) are omitted intentionally, because Project No. 22490 dealt specifically with that issue and resulted in Subst. R. 26.122(c)(3) regarding the use of CPNI in a retention or winback context)

CLEC commenters:

CLEC commenters contended that marketing practices by incumbent local exchange carriers (ILECs) directing special "winback" and "retention" promotions and practices constitute price discrimination. CLEC commenters opined that ILECs as former monopolists intend to squelch developing competition and withhold the benefits of competition from all but a few customers. CLEC commenters stated that ILECs are able to maintain high rates for a certain group of customers while limiting price reductions to only those customers that have sought competitive choice due to the ILEC's market dominance.

According to CLEC commenters, the foundations for this investigation are the competitive protections in PURA and the continued market dominance of ILECs in Texas. CLEC commenters stated that pricing flexibility is prohibited for Chapter 58 companies if the promotion is preferential, prejudicial, discriminatory, predatory, or anticompetitive, and that the Commission has repeated those restrictions in Subst. Rule 26.226. Furthermore, CLEC commenters urged the Commission to look at the reality of the market today and to recognize the substantial market share and market power enjoyed by the ILECs.

CLEC commenters defined winback and retention offers as ILEC offerings that contain favorable price or contractual terms to a CLEC's customer previously served by the ILEC in order to induce the customer to return to the ILEC. Such inducements are however, not offered to other similarly situated ILEC customers. CLEC commenters claimed that all special pricing promotions as part of winback/retention activities that meet the definition above are anticompetitive and/or discriminatory when offered by an entity with market power.

CLEC commenters emphasized that the Legislature, recognizing that competition remains in the early stages in Texas, tempered the availability of pricing flexibility with a requirement that such pricing flexibility not be exercised in a manner that is preferential, prejudicial, discriminatory, predatory, or anticompetitive.

CLEC commenters stated that, although the magnitude of the problem of winback/retention activities is hard to gauge, ILECs are able to deter entry by

demonstrating their ability to "chill" aggressive entry and expansion through a multitude of promotions to winback or retain their customers. Thus, unchecked anticompetitive behavior will have a chilling affect on the development of competition, even though the number of Texas relevant winback/retention offers may currently be low.

CLEC commenters contended that winback/retention promotions by ILECs with substantial market power are a form of "price discrimination" and will lead to concentration/preservation of market power, especially when offered only to CLEC customers and/or prospective CLEC customers. CLEC commenters averred that restricting offers only to CLEC consumers discriminated against those consumers who have not received service from a CLEC. Furthermore, it is such discrimination that constitutes the exact nature of the anticompetitive affect of the winback/retention promotions. By targeting CLEC customers, ILECs increase their existing market power while at the same time using existing market power to continue to obtain the higher and likely super-competitive rates from the remaining and overwhelming majority of consumers. CLEC commenters urged the Commission to prohibit such market power-driven winback/retention promotions, and to create an environment that will allow market development to discipline prices and force down monopoly rates that the winback/retention offers seek to perpetuate.

CLEC commenters argued that retention offers discriminate between existing customers with competitive choice and existing customers without competitive choices because competition generally develops in pockets, either in market segments or geographic areas. The anticompetitive winback/retention promotions by ILEC may stifle the CLECs' opportunities to expand to new segments and locations, thus delaying the development of competitive choice to new customer locations and classes. As a result, the price discipline that competition would otherwise provide has little chance to materialize. This is especially true of local exchange telephone services, where customer concentration drastically reduces the cost of deploying central office facilities and facilities over the last mile.

CLEC commenters disagreed that restricting winback eligibility to former customers is for a reasonable business purpose. CLEC commenters stated that the

industry is in transition and that former monopolists' use of market power to perpetuate the benefits of that power must be deemed illegitimate and discriminatory.

CLEC commenters opined that for the theory of "functionally availability" to exist, consumers would require perfect information, perfect service conversions, and negligible transaction costs. Moreover, for a winback/retention offer to be "functionally available" to all customers, there must be competitive choice effectively available to every customer of an ILEC. Otherwise, the issue of "functional availability" remains a hypothetical discussion.

CLEC commenters stated that "meeting competition" is not a term of economics but of rhetoric. The economic outcome of a winback/retention promotion is determined by the effect of market power on developing markets and the use of that market power to keep the benefits of competition from developing in a manner that would exist in the absence of market power. Moreover, ILECs have other venues to "meet competition" that are permissible and without resorting to practices that take advantage of their market power. For example, ILECs can offer system wide price reductions on those services that they deem to be under competitive pressure, provided that those reductions do not drop prices below the threshold of predatory pricing. CLEC commenters urged the Commission to encourage broad-based rate reductions and bring the benefits of competition to all customers.

CLEC commenters stated their belief that it is permissible to ban or limit winback/retention offers made by dominant carriers while not likewise banning or limiting such offers made by non-dominant carriers. CLEC commenters stated that the Commission is obligated pursuant to PURA § 58.152 to disallow any attempt to exercise pricing flexibility by dominant carriers that is preferential, prejudicial, discriminatory, predatory, or anticompetitive. Not only did PURA impose no similar statutory requirement for CLECs, but also, because CLECs have no market power, CLECs as "price takers" cannot manipulate the market to obtain inflated rates. The sole benefit for CLECs when initiating a winback offer is to regain the customer. However, with a dominant ILEC, there exists the secondary benefit of distorting the market by obtaining monopoly profits from its broader customer base. It is exactly this secondary benefit that causes the dominant ILEC's promotion to be anticompetitive and discriminatory.

CLEC commenters claimed that no forums other than a rule clarification/modification are available for addressing the oversight of potential market power abuse in the winback/retention activities. CLEC commenters stated that filing a complaint on a case-by-case basis in the tariff review process is extremely limited in the scope of each case and burdensome for an individual competitor to justify. CLEC commenters sought further definition within the Commission's rules to specifically define the anticompetitiveness of such promotional activity. CLEC commenters believe there is no other forum with a similar breadth of application and administrative efficiency to allow competitors to bring this issue before the commission.

CLEC commenters posited that there is no lesser remedy other than a ban of winback/retention promotions that will remove or mitigate the discriminatory or anticompetitive aspects of such offers. No time restriction or price restriction will prevent ILECs from utilizing market power to thwart the development of competition with one hand while perpetuating continued super-competitive rates with the other.

Filing separately from other CLECs, VarTec asserted that the commission should prohibit ILEC winback offers from the time the CLEC places the conversion order up to at least the first 30 days after the customer converts to a competitive provider. VarTec opined that this window of time will allow the competitive provider a more reasonable time to establish the consumer's service and resolve any initial service impairments. Furthermore, this extra time will allow the consumer a more meaningful opportunity to experience having service with a company other than the ILEC, giving them the ability to know the benefits of competition *first-hand*.

Finally, CLEC commenters suggested that a HHI (Herfindahl-Hirschman Index) of 1000 is evidence of lack of market power. However, said the CLEC commenters, the current HHI is in excess of 8,000, and the threshold HHI for a determination that winback/retention promotional activities are no longer anticompetitive should be 1,000, 2,500, or somewhere in between, but such a determination is not immediately relevant.

Chapter 58 ILECs:

SWBT countered that retention/winback programs are pro-competitive and pro-consumer so long as they are not predatory. SWBT argued that discounts specifically targeting certain customer groups are not unlawfully discriminatory, because those discounts have a "reasonable business purpose" – "meeting competition." SWBT said that CLEC commenters' requested relief would insulate CLECs from normal competitive pressures and would deny CLEC customers the benefits of competition. SWBT contended that the Commission should either disregard the retention/winback offers in other states, because those programs are neither offered in Texas nor governed by Texas law, or the Commission could observe that such offers are being demonstrated throughout the country as a reasoned response to competition. SWBT further stated that competition is significant, and that the Commission should disregard CLEC commenters' inflammatory allegations that local competition is in a fledgling state and that retention/winback offers are an abuse of market power.

SWBT defined a winback offer as "a promotional offer or discount that is available to former customers who voluntarily terminated their service and subscribed to another service provider."¹ SWBT also defined retention offer as "a promotional offer or discount that is available to existing customers who have an offer from another company available to them and are considering switching their service to another company."

SWBT argued that winback/retention activities can be anticompetitive only if they involve predatory pricing. SWBT also contended that winback/retention activities are not unlawfully discriminatory if they (a) do not draw "status-based distinctions among classes of protected entities that are arbitrary with respect to the policies that PURA is meant to advance," (b) are a direct response to competition, or (c) provide discounts that are "functionally available to all similarly situated customers."

SWBT averred that there is no "problem" with winback/retention activities now or in the foreseeable future. According to SWBT, winback and retention programs are fundamental tools for obtaining and retaining customers in a competitive market.

¹ Project 24948, Comments of SWBT in Response to Questions Posed by the Commission's Staff, p.1. November 30, 2001

Moreover, winback and retention activities result in price decreases and service value increases, consistent with the objectives of a competitive market. Customers would be denied the benefit of a competitive market—reduced price if any carrier is barred from making rationally responsive offers such as winback and retention offers.

SWBT claimed that if it is prohibited from making competitive winback or retention offers, then customers considering using or are already using an alternative provider will wrongly view SWBT's unresponsiveness as an indication that SWBT is not interested in providing service to them and/or is unable to viably compete for their business. Eliminating a service provider's ability to offer such competitive options would be contrary to customer expectations about how a competitive market works and harm the competitive market's ability to function as it should.

SWBT maintained that winback/retention promotions do not lead to "concentration of market power." Rather, having to respond to the offer of another competitor is substantial evidence that "market power" does not exist. Furthermore, the existence of winback/retention promotions shows that no provider controls the market price in a way that permits monopoly profits and there is no capacity constrain in the marketplace.

SWBT averred that winback offers do not discriminate between new-but-not former customers and new-but-former customers. The former group lacks experience and a past relationship with SWBT and may not have any experience with CLECs in Texas. In contrast, the latter group has had experience with both SWBT and at least one CLEC in Texas. Furthermore, to the extent that this different treatment can be characterized as "discrimination" because SWBT can only "win back" a former customer, then such "discrimination" is reasonable in view of the differences in customers' experiences and relationships with SWBT.

SWBT argued that retention is not discriminatory between existing customers with competitive choice and existing customers without competitive choices because all customers have competitive choice in Texas due to the proliferation of CLECs, satellite providers, wireless providers, and Internet telephony, and with ubiquitous CLEC market coverage available via SWBT's unbundled network element platform.

SWBT claimed that restricting winback eligibility to former customers is legitimate and not discriminatory because it is for a reasonable business purpose. Customers that have switched to another carrier demonstrate a relative lack of brand loyalty and tend to care more about price than about other product attributes such as particular brand names or quality characteristics. It is therefore a common business practice to appeal to their preferences by attempting to attract them via price offers. Other customers tend to care more about other service attributes, and it is a common and reasonable business practice to appeal to different customers on the basis of their different revealed preferences.

SWBT contended that under the federal Robinson-Patman Act, promotional incentives are not discriminatory if they are "functionally available" to all similarly situated customers. SWBT's winback/retention promotions are functionally available to all customers and not unlawfully discriminatory.

SWBT posited that meeting competition is a reasonable business purpose regardless of whether the offeror is a dominant carrier or allegedly has "market power."

SWBT argued that consumers would be left with fewer choices and competition would be inhibited if limitations were placed on dominant carriers only. SWBT claimed that straight-jacketing the allegedly "dominant" carrier might artificially increase CLEC profits and diminish CLECs' incentives to price their services competitively, to the detriment of competition and consumers.

SWBT asserted that no forum is necessary to address winback/retention promotions. Rather, the Commission should be concerned about "regulatory process abuse" by which one or more competitors tries to convince a regulator to unfairly and unlawfully shackle another competitor, solely for the purpose of minimizing the level of competition to the detriment of consumers and competition. SWBT argued that ILEC winback/retention should not be prohibited or limited; therefore there is no need to consider a trigger for review or termination of any prohibitions or limitation.

SWBT's hired economist Dr. Aron claimed that the appropriate basis to evaluate a winback/retention offer is by its anticipated effects on consumer welfare and economic efficiency. According to her, the remedy sought by CLEC commenters would create a price umbrella to protect the inefficient competitors from price competition to the

detriment of consumers. Dr. Aron also stated that market power is a red herring because it is relevant only in evaluating whether a producer or cartel of producers can increase and maintain its prices above a competitive level without losing so many customers as to make the behavior unprofitable. Dr. Aron further stated that SWBT is not pricing predatorily and does not undercut its rivals' prices. Dr. Aron concluded that there is no public benefit – in the long run or the short run – gained from limiting winback/retention offers.

Additionally, Verizon claimed a rule amendment to prohibit winback/retention would violate the federal Telecom Act of 1996 requirement that consumer safeguards be competitively neutral. Verizon posits that the Texas Legislature has already addressed consumer safeguards in PURA Chapter 60. Verizon also argued that market share is not synonymous with market power and ILECs do not possess market power. Verizon stated that market power is defined as the ability to increase and sustain prices significantly above competitive levels without losing so many customers that the increase in price is unprofitable. Verizon contended that ILEC price reductions through winback and retention offers constitute evidence that ILECs do not possess market power.