

Meredith E. Mays  
Regulatory Counsel

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(404) 335-0750

ORIGINAL

February 12, 2003

RECEIVED-FPSC  
03 FEB 12 PM 4:31  
COMMISSION  
CLERK

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

Re: Docket No. 021252-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. 020119-TP

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

Docket No.: 020578-TP

**Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc 's Key Customer Promotional Tariffs**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Florida Digital Network, Inc.'s Second Motion to Compel which we ask that you file in the captioned dockets.

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

Sincerely,

*Meredith E. Mays*  
Meredith E. Mays  
(CA)

Enclosure

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

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

01455 FEB 12 8

FPSC-COMMISSION CLERK

001318

AUS  
CAF  
CMP  
COM 5  
CTR  
ECR  
GCL  
OPC  
MMS  
SEC 1  
OTH

Nancy B. White

001319

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 021252-TP; 020119-TP and 020578-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx the 12<sup>th</sup> day of February 2003 to the following:

Felicia Banks  
Linda Dodson  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
Tel. No. (850) 413-6216  
[fbanks@psc.state.fl.us](mailto:fbanks@psc.state.fl.us)  
[ldodson@psc.state.fl.us](mailto:ldodson@psc.state.fl.us)

Matthew Feil (+)  
Florida Digital Network  
390 North Orange Avenue  
Suite 2000  
Orlando, FL 32801  
Tel. No. (407) 835-0460  
Fax. No. (407) 835-0309  
[mfeil@floridadigital.net](mailto:mfeil@floridadigital.net)

Kenneth A. Hoffman, Esq.  
Martin P. McDonnell, Esq.  
Marsha Rule  
Rutledge, Ecenia, Purnell & Hoffman  
215 S. Monroe St., Suite 420 (32301)  
P.O. Box 551  
Tallahassee, FL 32302-0551  
Tel. No. (850) 681-6788  
Fax. No. (850) 681-6515  
Atty. for US LEC  
[ken@reuphlaw.com](mailto:ken@reuphlaw.com)  
[marty@reuphlaw.com](mailto:marty@reuphlaw.com)

Dana Shaffer  
105 Molly Street, Suite 300  
Nashville, TN 37201  
Tel. No. (615) 777-7700  
Fax. No. (615) 345-1564  
Atty. for XO  
[dana.shaffer@xo.com](mailto:dana.shaffer@xo.com)

Karen Camechis, Esq.  
Pennington Law Firm  
P.O. Box 10095  
215 South Monroe Street  
Tallahassee, FL 32302-2095  
Tel. No. (850) 222-3533  
Fax. No. (850) 222-2126  
Atty. for Time Warner  
[Karen@penningtonlawfirm.com](mailto:Karen@penningtonlawfirm.com)

Carolyn Marek  
Time Warner  
233 Bramerton Court  
Franklin, TN 37069  
Tel. No. (615) 376-6404  
Fax. No. (615) 376-6405  
[Carolyn.Marek@twtelecom.com](mailto:Carolyn.Marek@twtelecom.com)

Floyd R. Self  
Messer, Caparelo & Self, P.A.  
215 South Monroe Street  
Suite 701  
P.O. Box 1876  
Tallahassee, FL 32302-1876  
Tel. No. (850) 222-0720  
[fself@lawfla.com](mailto:fself@lawfla.com)  
Represents ITC^DeltaCom

  
Meredith E. Mays (KA)

**(+) Signed Protective Agreement**

**001321**

ORIGINAL

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

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
---	-----------------------	----------------------

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 Florida Competitive Carriers Association	) ) ) ) )	Docket No. 020578-TP
---	-----------------------	----------------------

Filed: February 12, 2003

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
RESPONSE IN OPPOSITION TO FLORIDA DIGITAL NETWORK, INC.'S  
SECOND MOTION TO COMPEL**

**I. INTRODUCTION**

BellSouth Telecommunications, Inc. ("BellSouth") files this response in opposition to the Second Motion to Compel filed by Florida Digital Network, Inc. ("FDN"). Because FDN has failed to demonstrate any legitimate basis that justifies the production of the information it seeks, BellSouth respectfully requests that the Commission deny FDN's motion.

**II. DISCUSSION**

The Interrogatory that is the subject of this dispute is Interrogatory No. 34, which provides:

DOCUMENT NUMBER-DATE

01455 FEB 12 2003

FPSC-COMMISSION CLERK **901322**

Referring to the exhibit attached to Mr. Gallagher's prefiled rebuttal testimony and marked for identification as MPG-5, state by year the total revenue collected by BellSouth as a result of each of the rate changes that took place on or after January 2001 as shown in the exhibit.

As a preliminary matter, the promotional tariffs that are at issue in this case relate to offerings that began in 2002; however FDN seeks information "on or after January 2001." Thus, FDN's request is irrelevant on its face simply by examining the dates of the promotional tariffs at issue in this proceeding.

The promotional tariffs likewise bear no relationship to FDN's exhibit MPG-5. In fact, exhibit MPG-5 is misleading. Contrary to FDN's assertions, BellSouth has not changed prices six times over two years with an average increase every four months. Based on the price regulation statute, Chapter 364.051, there are two business line products, single line and multi-line 1FBs. In compliance with the price regulation statute, Chapter 364.051, single-line prices have changed by inflation minus 1%, twice in past 24 months; multi-line three times in 36 months, or once a year for each.

At the initiation of price regulation in 1995, BellSouth's multi-line 1FB prices were frozen until January 1, 2000. Single line 1FB prices were frozen until January 1, 2001. These prices had been set prior to price regulation. BellSouth's analysis of these prices shows that the value of a business line in Florida was higher than the prices that BellSouth had been permitted to charge. Consistent with applicable Florida statutes, gradual adjustments were appropriate.

To support its alleged need for the information sought in Interrogatory 34, FDN erroneously claims BellSouth has invoked the competitive necessity doctrine to defend "its practice of increasing rates for some customers while discounting rates to others." Motion to Compel, p. 3. This claim is wrong. Rate increases apply to all customers. Customers that

participate in BellSouth's Key customer offerings receive a discount; however, that discount is calculated based on applicable tariff rates. See BellSouth's Response to Staff's 8<sup>th</sup> Interrogatories, Item 56.

Contrary to FDN's contention, BellSouth's reference to the competitive necessity doctrine has no relation to rate increases. BellSouth's reference to the competitive necessity doctrine relates to BellSouth's ability "to price . . . service in such a way as to compete . . ." See *In re: American Telephone & Telegraph Co. Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density – Low Density) Filed With Transmittal No. 11891*, 55 F.C.C. 2d 224, 230 (1975) ("High-Low Decision"). In the High-Low Decision, the FCC explained that it did not "oppose a departure from nationwide price averaging on the part of existing carriers in response to direct competition where such a departure is justified." The FCC explained that its review focused on whether "any . . . price discrimination or preference is reasonable." *Id.* As Mr. Ruscilli explained, both the FCC and Chapter 364.051(5), allow companies to price services to meet competitive threats.

The FCC reiterated and clarified the competitive necessity doctrine in *In re: American Telephone & Telegraph Company, Long Lines Department Revisions of Tariff RCC No. 260 Private Line Services, Series 5000 (TELPAK)*, 61 F.C.C.2d 587 (1976) ("TELPAK decision"). In the TELPAK decision, the FCC explained that the second of the three criteria articulated in the High-Low decision was not necessarily required to make a showing of competitive necessity. 61 F.C.C. 2d at 655. Instead, the FCC stated "rates for any private line service can be established that would place the carrier in an appropriate competitive position. We reiterate that it is our objective to provide the carrier with pricing flexibility within a framework of accountability and full and fair competition." *Id.* at 656. The FCC held that "discrimination is

not unjust nor unreasonable if the like service which is priced to meet competition can satisfy the competitive necessity test, or is otherwise justified with relation to the cost of providing service, or on the basis of other policy consideration.” 61 F.C.C. 2d at 656. In reaching this conclusion, the FCC did not “stipulate that customers who are discriminated against do not receive rate increases at all” as FDN contends. *See* FDN’s Motion to Compel, p. 3. Instead, the FCC articulated a more flexible analysis, in which different prices can be justified by *either* competitive necessity *or* with relation to cost *or* for policy reasons. Neither the FCC’s pronouncements nor Mr. Ruscilli’s testimony demonstrate that the information FDN seeks relating to rate increases authorized by Florida law have any relevance to the promotional tariffs at issue here.

FDN also cites to the testimony of witness Robert Pitofsky as somehow justifying its motion. This reliance is misplaced. As Professor Pitofsky’s testimony makes clear, FDN’s argument that BellSouth should make promotional offerings available to all business customers simply ignores the reality of competition in Florida. FDN and other ALECs do not compete for all business customers. FDN and other ALECS select specific geographic areas in which to target their offerings and services. In response, BellSouth has responded with promotional offerings designed to meet this competition consistent with Florida law. *See* Chapter 364.051(5). Taking FDN’s logic to the extreme, however, BellSouth could argue that FDN is discriminating by selecting specific geographic areas in which to offer its services, and that FDN and other ALECs should be required to serve all small business customers in the state. Rather than attempt to impose requirements upon FDN, BellSouth has simply reacted to the competitive marketplace.

As Professor Pitofsky’s testimony states, “it likely would be uneconomic for sellers that face competition only for some customers to reduce prices to all customers.” The point of this




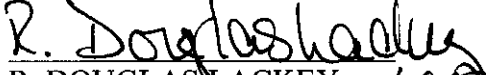
testimony is not that statutorily authorized rate increases somehow make economic promotional offerings that already cover costs and that meet competitive offers. Instead, Professor Pitofsky correctly points out that any successful business would not lower prices when unnecessary. Professor Pitofsky is not asserting that “across-the-board discounts at any level may be uneconomic” in a cost sense, rather he appropriately testifies that unnecessary discounts or sales result in less competition elsewhere (which is obviously the result that FDN desires). For example, if an Amoco gas station opens across the street from a Shell gas station, then naturally the two businesses may compete against each other on the basis of price. If an Amoco gas station is located in an area without a competing gas station, then simple logic dictates that such a gas station will not be subject to the same level of competitive pressure on price. If the latter Amoco is required to lower its prices merely because the Shell owner that has no interest in locating in that area says it should, then the Shell owner is the beneficiary at the Amoco owner’s expense. Such a requirement makes no business sense, but is exactly what FDN wants the Commission to do in this case.

### **III. CONCLUSION**

FDN’s claim that BellSouth’s statutorily authorized rate increases relate to the promotional offerings at issue in this case is simply wrong. Because the information sought in FDN’s Interrogatory No. 34 has no relevance to this proceeding, BellSouth respectfully requests that the Commission deny FDN’s Motion To Compel.

Respectfully submitted this 12th day of February 2003.

  
NANCY B. WHITE (CA)  
JAMES MEZA  
c/o Nancy Sims  
Suite 400  
150 South Monroe Street  
Tallahassee, FL 32301  
(305) 347-5558

  
R. DOUGLAS LACKEY (CA)  
MEREDITH E. MAYS  
Suite 4300, BellSouth Center  
675 W. Peachtree Street, N.E.  
Atlanta, GA 30375  
(404) 335-0761

COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, INC.

480069